A Protest Against Trial by Military Commission, or a Plea For Constitutional Government.

DISSENTING OPINION OF

JUDGE IRA E. ROBINSON

OF THE

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Every Patriotic Citizen of West Virginia Should Read With Care the Life of the State on Trial.

From the Famous Habeas Corpus Cases of Mays and Nance Recently Decided by the Supreme Court of Appeals.

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The majority opinion boldly asserts that the sacred guaranties of our State Constitution may be set aside and wholly disregarded on the plea of necessity. It had long been supposed that such a doctrine was forever condemned and foreclosed in this State. It was believed that the ringing denouncement against that doctrine in the opening sentences of our Constitution was sufficient to bar it from recognition by any citizen, official, or judge. The unmistakable words were supposed to be too clear ever to endanger our people by a disregard of their meaning. Hear them: "The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and depotism." Art. I., sec. 3.

How closely akin are these words to those that were uttered by the Supreme Court of the United States shortly prior to the adoption of our Constitution: "The Constitution of the United States is a law for rulers and people, equally in war and in 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 on 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." Ex parte Milligan, 4 Wall. 120.

A decision based on that which our people have so clearly condemned and inhibited from recognition in our State government, and which the highest tribunal in the land has so plainly declared to be pernicious and to have no place in our form of government, meets my emphatic dissent.

It is not difficult to comprehend why our State Constitution contains such a clear and unmistakable protest against the disregard of constitutional guaranties under the plea of necessity. During the decade immediately preceding the making and adoption of that instrument, this doctrine of necessity was a live issue before the American people. Indeed, just at the close of the Civil War, and immediately thereafter, the doctrine was one of the foremost issues of the times. Events brought it vividly before the nation. These who applied the doctrine during the war at its close for the summary trial and execution of non-combatants were met with the accusation of murder from both North and South. Even in one of the counties of this State a citizen was summarily deprived of his life under the plea of military rule and the doctrine that necessity suspended the Constitution. Instances of this character, as well as the many instances of imprisonment without civil trial, caused the question to come immediately before the statesmen of the times, and, by the debates upon it, to come directly before all the people. The people had become thoroughly familiar with the subject. Great men of the North, foremost among them the illustrious Garfield, had thundered against the doctrine. And at last, the great judicial tribunal of the nation had set its seal of condemnation upon it. Ex parte Milligan, supra. But even after this, and only two years prior to the assembling of our constitutional convention, the question came again before the country in the celebrated cases in North Carolina arising from the use of the militia of that State in the suppression of the Ku Klux Klan. Ex part Moore and others, 64 N. C. 802. These cases, because of the marked clash between the military power and the judiciary, again made the country to notice the question and to observe that the principle of necessity though denounced by the Supreme Court of the United States, was claimed for the purpose of ignoring the guaranties of a state constitution. And again, in the face of the most stubborn resistance from the executive and military arm of the government of North Carolina, the principle that the plea of necessity could deprive one of constitutional trial by jury was rejected, with marked em-

phasis, in an opinion by the eminent Chief Justice Pearson of that State.

So it was that when our constitutional convention assembled in 1872, the persistent claim that necessity could abrogate a constitutional provision naturally came to be considered. That convention saw, by the recent example in North Carolina, that notwithstanding the condemnation that this doctrine of necessity had received from the greatest and most cautious minds of the country, it was likely still to be claimed in state government. Hence, the strong men of that convention deemed it essential to make clear pronouncement against such a doctrine ever finding hold in West Virginia. They had become fully advised about the question by having been face to face with it. The people who approved and ratified the Constitution were advised by the same experience. They hated the doctrine that a Constitution might be set aside or declared inoperative at the will of an official created by that Constitution itself, as all lovers of constitutional government hate such a doctrine. Therefore, as a part of their compact of government, they adopted the forceful declaration against abrogating the guaranties of that compact, at any time, on the plea of necessity. Let us again bring that declaration to mind: "The provisions of the Constitution of the United States and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism." Can there be any mistake about the meaning of these words ? Were they put in the Constitution for mere sound? No, they were put there to bind—to be sacredly kept.

Martial law can not rightly be sanctioned in West Virginia in the face of this constitutional declaration. For as the majority opinion admits, martial law is a departure from the Constitution, a plain violation thereof, under the plea of necessity. It substitutes the law of a military commander for the law of the Constitution. It is the total abrogation of orderly presentment and trial by jury, so jealously guarded by the Constitution. Then, since martial law is such a plain departure from the Constitution that instrument itself brands martial law as subversive to good government and as tending to anarchy.

Having made this general declaration against martial rule, the makers of our Constitution went further. They provided that the privilege of the writ of habeas corpus

should not be suspended. This was a radical change from the Constitution of 1863, and was radically different from the Constitution of the United States. Our Constitution of 1863 had provided: "The privilege of the writ of habeas corpus shall not be suspended except when in time of invasion, insurrection or other public danger, the public safety may require it." The Constitution of the United States provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.' But in the making of our present Constitution, in dealing with the great writ of freedom, no exception was made. Again unmistakable, imperative words were used: "The privilege of the writ of habeas corpus shall not be suspended." Art. III., sec. 4. The people clearly meant something by the change. They evidently meant exactly what they said—that the great writ, which any citizen deprived of his liberty without due form of law may command, should in no case be suspended under a claim of necessity for military rule. Having so plainly declared in general terms against the doctrine of necessity in the former provision, as we have seen, they made this provision as to the privilege of the writ of habeas corpus to conform to that former declaration. They well knew that the exceptions contained in their former constitution, if retained, would lead to the temptation of encroachment on the guaranties of the constitution they were making. By providing that the privilege of the writ of habeas corpus should at all times be available, they were simply again providing against the claim that constitution guaranties may be suspended on the plea of necessity; for, as long as the writ of habeas corpus is available, constitutional guaranties can not be ignored. That which Blackstone said about the constitution of his country is equally applicable to ours: "Magna Charta only, in general terms, declared, that no man should be imprisoned contrary to law; the habeas corpus act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him." Book IV., 439. This great, effective writ, by the terms of our State Constitution, is always available to any citizen deprived of a constitutional guaranty. Since it is so available at all times, how can any departure from the Constitution be allowed? Indeed the provision that the privilege of the writ of habeas corpus shall not be suspended is itself virtually a prohibition against martial law, for the availability of the writ and

the recognition of martial law are totally inconsistent. "Suspension of the writ of habeas corpus is essentially a declaration of martial law." Messages and Papers of the Presidents, Vol. 10, page 465. "Promulgation and operation of martial law within the limits of the Union would necessarily be a virtual suspension of the habeas corpus writ for the time being." DeHart's Military Law, 18 "The declaration of martial law in the State has the effect of suspending it." Cooley, Principles of Constitutional Law, 301. "Practically, in England and the United States, the essence of martial law is the suspension of the privilege of the writ of habeas corpus, that is, the withdrawal of a particular person or a particular place or district of country from the authority of the civil tribunals." Halleck's International Law, Vol. 1, page 502. See also May's Constitutional History, ch. 11. The Great Lincoln so understood it. In his proclamation he merely suspended the writ of habeas corpus. Messages and Papers of the Presidents, Vol. 6. The founders of our state government really could have inhibited martial law by no stronger terms: "The privileges of the writ of habeas corpus shall not be suspended."

Not content with the two declarations against martial law which we have seen, the founders grew even more specific. They again said: "The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offence that is cognizable by the civil courts of the State." Art. III., sec. 12. There is no ambiguity in these words. He who runs may read. They directly strike at martial law; they directly inhibit martial law. For, the height of martial law is the supplanting of the civil courts by military courts. But this provision expressly ordains that military courts shall never take the place of the civil courts of the State for the trial of civil offenses. No military sentence for a civil offense can rightly stand in the face of these words. Nor can these words rightly be overlooked in order to uphold any such military sentence. To do so is to make the constitution a rope of sand.

The men of the Constitutional Convention of 1872 had all witnessed the suspension of the privilege of the writ of habeas corpus and the trial and sentence of citizens by military courts. They had learned that departure from the Constitution, though dictated by the best of motives was liable to abuse. Experience admonished them to guard against anything of the kind in the future of their

State. They no doubt believed that, by the three provisions which we have noticed, they had banished all claim for martial law in this State. Determination to do so was plainly dictated to them by the experiences through which they had passed. By those experiences they had come to know the truth of that which Hamilton had written long years before: "Every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence, which ought to be maintained in the breast of rulers toward the constitution of a country, and forms a precedent for other breaches, where the same plea of necessity does not exist at all, or is less urgent and palpable." The Federalist, No. 25.

Can these direct provisions of our Constitution be overcome by any implication that the people meant to retain martial law whenever an executive declared it necessary? Is there a presumption, as the majority opinion claims, against intent on the part of the people to abolish martial law? Can any such presumption prevail against the direct declarations which absolutely negative any such presumption? No, the principle of martial law can not be inherently connected with any constitutional government in which the constitution itself directly declares against the principle as our Constitution does.

It is said that the State must live. So must the citizen live and have liberty—the constitutional guaranties vouchsafed to him. The founders of our State government saw fit to exclude this claimed theory of implied or presumed right of self-defense in a State. They knew it to be absolutely unnecessary as to any State in the American Union under the Constitution of the United States. They knew that it was even more likely to lead to abuse than to good. They could well afford to disclaim it by positive prohibitions against its exercise; for the Constitution of the Union fully protected the State. Were they not consistent in denouncing and prohibiting a principle of self-defense wholly out of harmony with constitutional government and in relying on the safety vouched to the State by the general government of the Union of which it is a part? Was not the guaranty of the great general government sufficient for the continued life of the State? That guaranty speaks plainly: '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. IV., sec. 4. Does the State for its

preservation need methods so at variance with constitutional guaranties as is martial law when it may obtain the power of the Union to suppress even domestic violence? Can not the militia and the United States army pacify any section of the State, or the whole State, by methods strictly within the Constitution and Laws? It was so believed when the Federal government was formed. Federalist, No. 42. Referring to this guaranty by the general government, a renowned author and judge says: "This article, as has been truly said, becomes an immense acquisition of strength and additional force to the aid of any state government in case of internal rebellion or insurrection against lawful authority." Cooley Principles of Constitutional Law, 206. See also 1 Tucker's Blackstone, App. 367.

It is claimed that the power given by the Constitution to the Governor, as commander-in-chief of the military forces of the State, to call out the same to execute the laws, suppress insurrection and repel invasion," authorize a proclamation of martial law. Are these words to undo every other guaranty in the instrument? Can we overturn the many clear, direct, and explicit provisions, all tending to protect against substituting the will of one for the will of the people, by merest implication from the provision quoted? That provision gives the Governor power to use the militia to execute the laws as the Constitution and legislative acts made in pursuance thereof provide they shall be executed. It certainly gives him no authority to execute them otherwise. In the execution of the laws the Constitution itself must be executed as the superior law. The Governor may use the militia to suppress insurrection and repel invasion. But that use is only for the purpose of executing and upholding the laws. He can not use the militia in such a way as to oust the laws of the land. It is put into his hands to demand allegiance and obedience to the laws. It, therefore, can not be used by him for the trial of civil offenses according to his own will and law: for, so to use it would be to subvert the very purpose for which it is put into his hands. By the power of the militia he may, if the necessity exists, arrest and detain any citizen offending against the laws: but he can not imprison him at his will, because the Constitution guarantees to that offender trial by jury, the judgment of his peers. He may use military force where force in disobedience to the laws demand it: but military force against one violating the laws of the land can have no place in the trial and punishment of the offender. The necessity for military

force is at an end when the force of the offender in his violation of the law is overcome by his arrest and detention. There may be force used in apprehending the offender, and in bringing him to constitutional justice, but surely none can be applied in finding his guilt and fixing his punishment.

It is further claimed that the statute which says that the Governor may declare a state of war in towns, cities, districts, or counties where invasion, insurrection, rebellion or riot exists, is legislative authority for martial law Code 1906, ch. 18, sec. 92. The readiest answer to this argument is that a declaration of war is not a declaration of martial law. The mere presence of war does not set aside constitutional rights and the ordinary course of the laws. Civil courts often proceed in the midst of war Again, if the act could be construed to contemplate martial law, it would be plainly contrary to the provisions of the State Constitution which we have noticed and would be utterly invalid. Moreover, it is not within the power of a State legislature, even when not so directly forbidden as is ours, to authorize martial law. Martial law rests not on constitutional, congressional, or legislative warrant; it rests wholly on actual necessity. Nothing else can ever authorize it. And that necessity is reviewable by the courts. These views are ably supported by one of the most thoughtful and impartial students of the martial law that recent years has produced—himself Judge-Advocate-General of the United States Army—G. Norman Lieber. In his learned review on the subject published as a War Department Document, hereinafter to be specifically cited, he says: "It has also been asserted that the principle that the constitutional power to declare war includes the power to use the customary and necessary means effectively to carry it on lies at the foundation of martial law. I cannot agree to the proposition. It is positively repudiated by those who justify martial law on the ground of necessity alone, and the Supreme Court of the United States stands committed to no such theory. This is high authority, coming as it does from a military source. The Judge-Advocate-General rests not content with individual assertions; he resorts to the decisions and to sound reasons for his conclusions. He repudiates the view of the minority judges in the Milligan Case. He says further: "If the question were at the present time to arise whether the legislature of a State has the power to declare martial law, we would, in the first place, consul the Constitution of the United States, and there we would

find this prohibition:

'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"The Constitution of the United States affords protection, therefore, against the dangers of a declaration of martial law by the legislature of a State as well as against the danger of its declaration by Congress. The principle holds true both as to the United States and the States that the only justification of martial law is necessity.

"It is a wel-settled principle that when a person invested by law with a discretionary power his decision within the range of his discretion is conclusive on all, and therefore binding on the courts. This rule has been applied to the subject of martial law, and it has been contended that the officers who enforce it are acting within the range of their discretion, and are protected by the principle which makes them the judges of the necessity of the acts done in the exercise of a martial-law power. From my standpoint such an application of the principle is entirely wrong for the reason that if martial law is nothing more than the doctrine of necessity called out by the State's right of self-defence the officer can have no discretion in the matter. He will or he will not be able to justify according to his ability to prove the necessity for his act, he will find no toleration of the plea that the necessity for his act, and therefore its justification cannot be inquired into by the courts because he was acting within the sphere of his lawful discretion. The officer is not by any law vested with a discretion in this matter. Such a discretion and the doctrine of necessity can not exist together.

"But this necessity need not be absolute, as determined by events subsequent to the exercise of the power. The Supreme Court has, as we have already seen, laid down the rule much more favorable to the person using the power. It is worth repeating:

'In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted must govern the decision for he must necessarily act upon the information of others as well as his own observations. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it, and the

discovery afterwards that it was false or erroneous will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of emergency, such as he has reasonable grounds to believe it to be, and it is then for a jury to say whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good. (Mitchell v. Harmony, 13 How. 427).

"Under the Constitution of the United States there can never be any justification for the exercise of the military power to which these remarks relate other than the rule of necessity as thus applied."

In the North Carolina cases, supra, it was sought to justify the acts of the Governor on provisions of the Constitution and statutes of that State similar to those relied on in the cases before us; that is to say that the Governor may call out the militia, and may declare a state of war to exist. But the Constitution of that State provided exactly as ours provides: "The privilege of the writ of habeas corpus shall not be suspended." That which was said by the Chief Justice of North Carolina, in an opinion approved by his associates, aptly applies to our own Constitution and laws and to the cases under consideration:

"Mr. Badger, of counsel for his Excellency, relied on the Constitution, Art. XII., sec. 3, 'The Governor shall be Commander-in-Chief, and have power to call out the militia to execute the law, suppress riots or insurrections, and to repel invasion,'—and on the Statute of 1869-'70, chap. 27 sec. 1—'The Governor is hereby authorized and empowered, whenever in his judgment the civil authorities in any county are unable to protect its citizens in the enjoyment of life and property, to declare such county to be in a state of insurrection, and to call into active service the militia of the State, to such an extent as may become necessary to suppress the insurrection;' and he insisted that:

'1. This clause of the Constitution, and the statute, empowered the Governor to declare a County to be in a state of insurrection, whenever, in his judgment, the civil authorities are unable to protect its citizens in the enjoyment of life and property. The Governor has so declared in regard to the County of Alamance, and the judiciary cannot call his action in question, or review it, as the matter is confided solely to the judgment of the Governor;

'2. The Constitution and this statute, confer on the Governor, all the powers "necessary' to suppress the insurrection, and the Governor has taken military possession of the county, and ordered the arrest and detention of the petitioner as a military prisoner. This was necessary, for unlike other insurrections, it was not open resistance, but a novel kind of insurrection, seeking to effect its purpose by a secret association spread over the country, by scourging, and by other crimes committed in the dark, and evading the civil authorities, by masks and fraud, perjury and intimidation; and that,

'3. It follows, that the privilege of the writ of habeas corpus, is suspended in that county, until the insurrection be suppressed.'

"I accede to the first proposition; full faith and credit are due to the action of the Governor in this matter, because he is the competent authority, acting in pursuance of the constitution and the law. The power, from its nature, must be exercised by the executive, as in case of invasion or open insurrection. The extent of the power is alone the subject of judicial determination.

"As to the second, it may be that the arrest and also the detention of the prisoner is necessary, as a means to suppress the insurrection. But I cannot yield my assent to the conclusion: the means must be proper, as well as necessary, and the detention of the petitioner as a military prisoner, is not a proper means. For it violates the Declaration of Rights, 'The privilege of the writ of habeas corpus, shall not be suspended.'—Constitution, Art. I, sec. 21.

"This is an express provision, and there is no rule of construction, or principle of constitutional law, by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument. The clauses should be construed, so as to give effect to each, and prevent conflict. This is done, by giving to Art. XII., sec. 3, the effect of allowing military possession of a county to be taken, and the arrest of all suspected persons, to be made by military authority, but requiring, by force of Art. I., sec. 21, the persons arrested, to be surrendered for trial, to the civil authorities, on habeas corpus, should they not be delivered over without the writ.

"This prevents conflict with the habeas corpus clause and harmonizes with the other articles of the 'declaration of rights,' i. e. trial by jury, &c., all of which have been handed down to us by our fathers, and by our English an-

cestors, as great fundamental principles, essential to the protection of civil liberty.

"I declare my opinion to be, that the privilege of the writ of habeas corpus has not been suspended by the action of his Excellency; that the Governor has power, under the Constitution and laws, to declare a county to be in a state of insurrection, to take military possession, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, but he has no power to disobey the writ of habeas corpus, or to order the trial of any citizen otherwise than by jury. According to the law of the land, such action would be in excess of his power.

"The judiciary has power to declare the action of the Executive, as well as the acts of the General Assembly, when in violation of the Constitution, void and of no effect."

No power for the recognition of martial law could be found in our Constitution, even were those provisions which directly condemn and prohibit it not in the instrument. To say that merest implication or presumption totally at variance with express inhibitions, and directly overthrowing all the important guaranties of the instrument itself, may be resorted to for the purpose of justifying martial law, introduces a new rule of constitutional construction. The constitutional purposes of the militia can not rightly be so subverted. True, the militia exists by the Constitution. But that military establishment is not raised by it ever to take the place of the Constitution its creator. The mere raising of a militia does not signify as the majority conceive, that it is raised for martial law It is raised to enforce the laws by constitutional methods. It is raised to comply with the great military organization of the Federal Government, under the provisions of the Constitution of the Union. Art. I., sec. 16.

Let us look at some guaranties of our Constitution that may now lightly be ignored by the force of the majority decision that may be cast aside by the Governor of this State and he not be made to answer for ignoring them Let us see what express words of the instrument other than those already observed are torn down by this resort to mere implication and presumption. Let us see provisions which the people as a whole deemed necessary for good government, and sought to place beyond power of change, which are now held to be under the control of the commander-in-chief of the militia, by resort to a denounced plea of necessity judged by a single individual. It

is well enough at least to preserve them here:

Art. III., sec. 4. * * * * "No person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury. No bill of attainder, ex post facto law, or law impairing the obligation of a contract shall be passed."

Art. III., sec. 10. "No person shall be deprived of life liberty, or property, without due process of law, and the judgment of his peers."

Art. III., sec. 14. "Trials of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offence was committed unless upon petition of the accused, and for good cause shown, it is removed to some other county. In all such trials, the accused shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witnesses against him, and shall have the assistance of counsel, and a reasonable time to prepare for his defense; and there shall be awarded to him compulsory process for obtaining witnesses in his favor."

Art. III., sec. 17. The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."

Can the absolute, unrestrained, and unreviewable will of the Governor be substituted for these provisions? That it may is the decision of the majority of this Court. One gross error of that decision is that it bases the right to martial law solely on the decision and proclamation of the Governor and not on actual necessity. No mere decision or proclamation can justify martial law, even where it might be legally recognized. It can only be justified by the absolute necessity of fact for it. War may be so effective as to make the necessity for martial law. War must have made it wholly impossible to enforce or invoke the civil laws before martial law can be invoked. Even then the military commander is accountable before the civil laws when the exigency has passed. His judgment as to the necessity may be reviewed. There must be ultimate responsibility. It is even so as to the suspension of the writ of habeas corpus, when a Constitution authorizes the suspension. Cooley, Principles of Constitutional Law, 300. The military commander may be compelled

to show reasonable ground for believing that the infringement of personal and property rights was demanded by the occasion. Stephen, History of Criminal Law, 214. We have seen these principles enunciated by Lieber, above. See also Ballantine, post. And as long as there is a civil court that has the power to try an offender for breach of a civil law, martial law can not be applied for the trial of that offender. Blackstone Book I., 413. If a civil court exists that may take cognizance, then necessity for martial trial does not exist. As long as the civil law can be executed by the presence and operation of civil courts, martial law through military courts can not take its place. Martial law can only operate where the civil law has become inoperative by the absence of courts. It is the actual, physical annihilation of the civil courts by the war, that makes the only necessity upon which trial by martial law may ever be had. It is not merely the decision of the executive or the legislature that military courts will be more effective than the existing civil courts, that can make the necessity. Nothing short of the absence of civil resort for trial, can ever justify military trial of civil offenses. "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 active 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. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are re-instated, it is a gross usurpation of power." Ex parte Milligan, supra.

We shall now soon proceed to see how these principles, announced by the Supreme Court of the United States, sustained pre-eminently by the best thought of all constitutional governments, as a research will show, apply to the cases of the petitioners, Nance and Mays. But before proceeding thereto, it will be necessary to show the actual status of these cases. It may be inferred from the majority opinion that Nance and Mays are mere prisoners of war. They occupy no such relation. Nor are they merely detained by the militia in the suppression of riot, insurrection or rebellion. Their petition for writs of habeas corpus, and the returns of the Warden of the Penitentiary thereto make no such cases against them. Nor was it argued at the bar or in the briefs that they have any such re-

lation. It plainly appears that they are citizens of Kanawha county, not connected with the military service, charged before a military commission for violations within that county of certain provisions of the statutes of West Virginia amounting thereunder to misdemeanors, arrested by the militia, tried by military commission pursuant to the order of the Governor, sentenced for specific terms in the Penitentiary, and transported thereto for imprisonment for their respective terms of sentence by the approval of the Governor as commander-in-chief, all at a time when the criminal courts of Kanawha County were open, able and with full jurisdiction to try the charges against them. In other words, these petitioners are held, as the returns show, on specific sentences, one for five years, the other for two, in the Penitentiary, as civil offenders tried and committed by a military court under the guidance of the following military order:

"State Capitol,
Charleston, November 16, 1912.

General Orders

No. 23.

The following is published for the guidance of the Military Commission, organized under General Orders No. 22, of this office, dated November 16, 1912:

1. The Military Commission is substituted for the criminal courts of the district covered by the martial law proclamation and all offences against the civil laws as they existed prior to the proclamation of November 15 1912, shall be regarded as offences under the military law and as a punishment therefor, the Military Commission can impose such sentences, either lighter or heavier than those imposed under the civil law, as in their judgment the offender may merit.

2. Cognizances of offences against the civil law as they existed prior to November 5, 1912, committed prior to the declaration of martial law and unpunished, will be taken by the Military Commission.

3. Persons sentenced to imprisonment will be confined in the penitentiary, at Moundsville, West Virginia.

By Command of the Governor:
C. D. ELLIOTT,
Adjutant General."

The returns of the Warden do not pretend to justify his authority to hold petitioners other than under sentences for specific terms, by this military commission. He

justifies under no other commitments. It is to the commitments that we must look in these proceedings to determine the legality of the imprisonment. Says the great commentator: "The glory of the English law consists in defining the time, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity." Blackstone Book III., page 133.

What actual necessity justified the creation of this military commission and the recognition of its powers to supplant the civil courts. As we have seen nothing but the complete lack of power of the civil courts for the trial of the charges against Nance and Mays, arising by the annihilation and inoperation of those courts, could, if martial law was at all allowable, justify their military trial and sentence. Could Nance and Mays have been tried for the offences with which they were charged by the civil courts, under the ordinary forms of law, as an actual fact? We know by the record of these cases, we know judicially, that they could have been so tried. But an answer that is attempted is this, that the Governor by his proclamation had set off the portion of the county in which the offences were committed and the offenders were arrested, as a martial law district. Again we say the mere proclamation could not alone make the necessity. The physical status must make it. No physical status existed, like the destruction of the ordinary courts to make it necessary to try Nance and Mays other than they would have been tried if no disturbances had existed in Cabin Creek District. Those disturbances had not interrupted the very court that would have tried them if there had been no such disturbances. Those disturbances did not physically prevent the transportation of Nance and Mays out of the riotous district to the county seat for trial. If they could be transported out of that district to Moundsville for imprisonment, as they were, they could readily have been transported to Charleston for trial. It is said that the process of the court was prevented from execution in that district by the disturbances. That made no necessity for trial there. Surely the militia which was in possession of the district could execute all process of the court, or cause the sheriff so to do. That was a very proper sphere of the militia in a riotous district. Ballantine, post. It can legally assist in the execution of the

process of the civil courts. Thus, it may assist in the execution of the laws. But plainly it can not supplant operative civil courts. The militia must aid the courts, not supplant them. Both are created by the same Constitution. They belong to the same people. They must work in harmony as the people contemplated when they established both. The proper province of the army in such cases of disturbance as those on Cabin Creek was observed in the beginning of the government, at the time of the Whiskey insurrection in Western Pennsylvania in 1793. "President Washington did not march with his troops until the judge of the United States District Court had certified that the Marshal was unable to execute his warrants. Though the parties were tried for treason, all the arrests were made by the authority of the civil officers. The orders of the Secretary of War stated that 'the object of the expedition was to assist the Marshal of the District to make prisoners.' Every movement was made under the direction of the civil authorities. So anxious was Washington on this subject, that he gave his orders with the greatest care, and went in person to see that they were carefully executed. He issued orders declaring that 'the army should not consider themselves as judges or executioners of the laws, but only as employed to support the proper authorities in the execution of the laws.'" Garfield's Works (Hinsdale), Vol. I., page 162.

The offenses of Nance and Mays were cognizable by a civil court. That is, they were capable of being tried in the proper criminal court of Kanawha county, by a jury, upon presentment and indictment by a grand jury. The disturbances did not make it impossible to give them the constitutional course of trial. Thus no necessity justified the course pursued. No actual physical fact, in the widest view, prevented the operation of the direct shield of the Constitution, wherein it provides: No citizen * * shall be tried or punished by any military court, for an offence that is cognizable by the civil courts of the State.' The offences charged against Nance and Mays were plainly cognizable by a civil court—capable of being presented and tried there. The only excuse for their not being tried there is that the Governor ordered otherwise. Thus the Governor alone made the necessity. Under the circumstances, in any considerate view, their trials and sentences were not by due process of law, and were grossly illegal and void.

There were no courts, other than those of justices within the actual theatre of the disturbances on Cabin

Creek that could be rendered inoperative by the riotous condition there. The criminal court that pertained to that part and to the whole of the county was far from the seat of riot and wholly unaffected in its powers for regular and orderly presentment and trial. Even as to offenses cognizable only by justices, there was power and opportunity to bring offenders from that region to trial before justices in undisturbed districts of the county. But it does not even appear that the disturbances in the district rendered it impossible, by the aid of the militia there present, for the courts of justices of the peace there to mete out justice according to the civil law. The war must put the ordinary courts out of business, out of reach before military courts can ever take their place. This of course may be different in foreign conquered territory where the courts of the conquered country are not in sympathy with the obligations of the conquering army to society. It can not be gainsaid that the ordinary courts for Cabin Creek District were at all times during the disturbances within reach and in operation. The militia could reach them with prisoners for trial much more easily than it could reach the Penitentiary with prisoners for imprisonment. The State courts were more accessible than the State prison. This principle, that accessibility to the ordinary civil courts excludes resort to martial law, is established by the decision in the Milligan Case in no uncertain language. We need no greater precedent.

Some ofthat which we have written in preceding paragraphs, is basd on the assumption of the tolerance of martial law, simply of course for the purposes of argument. We reiterate that it can never be rightly tolerated in this State. Indeed martial law to the extent of trial and sentence for civil offenses anywhere within our fair land deserves no support from any student of constitutional history. Garfield, by his great argument and review of history, before the Supreme Court of the United States, in the Milligan Case, convinces any thoughtful reader, in this behalf. No greater exposition of the subject, no severer condemnation of martial law as connected with constitutional government, was ever given to the world. It was given voluntarily, gratuitiously, faithfully solely in behalf of constitutional government. Yet it is but one among the many supporting the great weight of opinion on the subject. Garfield's Works (Hinsdale), Vol. I., page 143.

The most recent review of the subject of martial law

is that by Professor Ballantine, of the University of Montana. It deals with all the adjudged cases, and assures one of the soundness of its conclusions. Specific citation to it will hereinafter be made. It denies that martial law may be applied in State government. This writer says:

"It is believed that there is no warrant in the history of constitutional government for vesting in the governor as commander of the military forces of the state the absolute discretionary power of arrest, and, as a logical consequence, of life and death, so that his command or proclamation may take the place of a statute, and convert larceny into a capital offence, in going beyond legislative power, deprive citizens unreasonably and arbitrarily of life or liberty without review in the courts. Johnson v. Jones (1867), 44 Ill. 142; Ela v. Smith (Mass. 1855), 5 Gray 121.

"The true view, undoubtedly, is that during a riot or other disturbance militia-men and their officers are auauthorized to act merely as a body of armed police with the ordinary powers of police officers. Franks v. Smith (Ky. 1911), 134 S. W. 484. This is as far as the actual decision goes in Luther v. Borden (1849), 7 How. 1. Their military character cannot give them immunity for unreasonable excess of force. The governor of a state, as commander of the militia, is merely the chief conservator of the peace, and entirely destitute of power to proclaim martial law, punish criminals or subject citizens to arbitrary military orders which he unreasonably believes to be demanded by public emergency.

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"In a garrisoned city, held as an outpost of loyal territory, or in home districts threatened or recently evacuated by the enemy, military necessity for the public defense would certainly justify all temporary restrictions on the liberty of citizens essential to military operations such as the extinguishment of lights, the requiring of military passes to enter or depart, and the quelling of public disorder. But the prosecution and punishment of persons suspected of conspiracy, sedition, or disloyal practices, and of treason itself, belongs to the tribunals of the law, and not to the sword and bayonet of the military Where the army is not invading enemy territory of a recognized beliggerent, but is in its own territory, the military authorities remain liable to be called to account either in habeas corpus or any other judicial proceeding for excess of authority toward citizens, no matter whether it occurred in propinquity to the field of actual hostilities

or while the courts were closed, or after a proclamation of Martial Law."

The issue involved in these cases is a marked one: Shall a citizen be subjected to trial before a military commission regardless of constitutional guaranties at any time the Governor may see fit, and that citizen have absolutely no redress from such proceedure? In other words: May any citizen be absolutely within the power of the Executive and the militia which has been placed in his hands? These questions are indeed more momentous than the people of this busy era may conceive. The affirmative answer to them annuls that true liberty which was bought by blood and sacrifice and which long has been jealously guarded and defended. It seems necessary that we should repeat what Mr. Justice Davis said in the Milligan Case:

"It is claimed that martial law covers with its broad mantle the proceedings of this Military Commission. The proposition in this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

"If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for for mere convenience, the commander of one of them can, if he chooses within the limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules

"The statement of this proposition shows its importance; for, if true, Republican government is a failure and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together: the antagonism is irreconcilable and, in the conflict, one or the other

must perish.

"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, with hatred of liberty and contempt of law may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities o 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 freemen. 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.

"It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion, to make arrests, should not be required to produce the person arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law. If it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of

unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizens against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolate. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."

A search of the books, extending over many days of labor in the investigation of this subject, discloses that no state in the Union has ever declared, by judicial decision or otherwise, principles to the extent of those announced by the majority opinion of this court. West Virginia, born of a love for, and an adherence to, constitutional government, seems now to have departed further therefrom. In Colorado and Idaho arrests and extended detention by the militia for the suppressing of riot and insurrection have been upheld as authorized by the exigencies existing and as necessary for the suppression of uprisings. But further than this no state has ever gone The Supreme Court of the United States went no further in the Moyer Case, 212 U. S. 78. No court ever before upheld the action of a governor in ousting the courts of their jurisdiction as to civil offences and in substituting himself therefor.

This State is a government of its own people. It should matter not that civil rights may at some time have been trangressed elsewhere. We should not permit them to be transgressed here. The insignia of the State bears our legend of freedom. It can not be kept unless we sacredly observe the Constitution by which all, whether guilty or innocent, are bound alike. Freedom for a West Virginian means the giving to him what his State Constitution and that of the nation guarantee to him. Nor does it matter whether that West Virginian be rich or poor, idler or laborer, millionaire or moutnaineer. The Constitution is no respecter of persons.

A sense of duty has impelled the writing of this opinion. If it may in the future only cause the doctrine promulgated by the majority to be questioned, the labor will not have been in vain.

Will the reader of this opinion reserve hasty judgment against conclusions which it announces, until he has

made studious examination of the citations herein and the three following expositions on the subject of martial law, together with the cases cited in them:

"Military Commissions," Garfield's Works (Hinsdale). Vol. I., page 143.

"What is the Justification of Martial Law," Lieber, War Dept. Doc. No. 79; North American Review, Nov. 1896.

"Martial Law," Ballantine, Columbia Law Review, June 1912.

The decisions and treatises relied on herein make no distinction in the test for martial law, whether in pacific districts or in the theatre of actual war. In the one place as well as in the other the test is the same—the want of operative civil courts. An examination of the subject will not sustain a contention that the courts and the writers referred to were dealing only with martial law outside the theatre of actual war. They clearly show that martial law is as objectionable in the one place as in the other, unless it is justified by the absence of civil law.

Will the reader who refers to the decisions and treatises cited also note that there is a clear distinction between the power to use martial acts for the suppression of riot, insurrection or rebellion and the power to use martial law for the trial of civil offenses. Martial acts are one thing; martial law is another.

It may be said that the treatises referred to are not judicial in character. The same is true as to every text book of the law.

And now, how applicable are the words of David Dudley Field, that ardent advocate of constitutional government:

"I could not look into the pages of English law—I could not turn over the leaves of English literature. I could not listen to the orators and statesmen of England, without remarking the uniform protest against martial usurpation, and the assertion of the undoubted right of every man, high or low, to be judged according to the known and general law, by a jury of his peers, before the judge of the land. And when I turned to the history, legal political, and literary, of my own country,—my own undivided and forever indivisible country,—I found the language of freedom intensified. Our fathers brought with them the liberties of Englishmen. Throughout the colonial history, we find the Colonists clinging, with immovable tenacity, to trial by jury, Magna Charta, the principle of Representation, and the Petition of Right. They had won them in the Fatherland in many a high debat and on many a bloody field; and they defended them her

against the emissaries of the crown of England and against the veteran troops of France. We, their children, thought we had superadded to the liberties of Englishmen the greater and better guarded liberties of Americans." Brewer's Orations, Vol. 6, page 2154.

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