1971

Defining Presidential Powers Under the Commander In-Chief Clause

Phyllis M. Oman

Loyola University Chicago

Recommended Citation
https://ecommons.luc.edu/luc_theses/2590

This Thesis is brought to you for free and open access by the Theses and Dissertations at Loyola eCommons. It has been accepted for inclusion in Master's Theses by an authorized administrator of Loyola eCommons. For more information, please contact ecommons@luc.edu.
Creative Commons License
This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License.
Copyright © 1971 Phyllis M. Oman
DEFINING PRESIDENTIAL POWERS UNDER
THE COMMANDER-IN-CHIEF CLAUSE

This paper was written under the direction of
Rev. Joseph F. Small, S.J., Ph.D.
in partial fulfillment of the requirements
for the degree of Master of Arts
in Political Science.

by
Phyllis M. Oman
Loyola University of Chicago
June 21, 1971
CONTENTS

Introduction ........................................... 1

1. The Executive and the Military ......................... 4
   A. Military Commander. ............................... 4
   B. Troop Call-Up .................................... 10
   C. Military Justice .................................. 17
   D. Military Government .............................. 22

2. The Executive and the Enemy ........................... 32
   A. Alien Acts of 1798 ................................ 32
   B. Military Trial of Enemies ......................... 37
   C. Martial Law and the Japanese-Americans ....... 43
   D. Trading with the Enemy and Espionage .......... 48

3. The Executive and the Domestic Scene ................ 56
   A. Seizure and Regulation of Private Enterprise ... 56
   B. Habeas Corpus and Martial Law .................. 66

Conclusion ................................................ 77

Bibliography ............................................. 80
INTRODUCTION

The Founding Fathers in a few, simple sentences placed the supreme military command in the hands of the President and gave to Congress the power to declare war and to raise armies. To Alexander Hamilton this division of power seemed proper and uncomplicated. In The Federalist, #74, he wrote: "Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." ¹ The "propriety" that he was defending was that of the Commander in Chief clause of the Constitution of the United States of America which reads as follows: "The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several states when called into the actual service of the United States." ² Hamilton went on to say that this provision was "so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it." ³

The belief of the delegates to the Constitutional Convention that they had fashioned the key for popular control over military power is

²U.S., Constitution, Art. 2, Sec. 2, Cl. 1.
³Hamilton, Madison, Jay, p. 447.
reflected in The Federalist, #69, where Hamilton contended that this power "would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy," while the power of declaring war, raising and regulating the fleets and armies would belong to Congress.

In the intervening years since 1787 the exercise of military power has been endlessly challenged, and the federal courts have been repeatedly asked to define and to limit the Chief Executive in his role as Commander in Chief. While American constitutional law contains dozens of examples of judicial restraint and limitation on the Commander in Chief, commentators have suggested that the courts have been ineffectual in holding the President within judicially defined guidelines in the exercise of military power. Clinton Rossiter in The Supreme Court and the Commander in Chief states that:

...the Court has been asked to examine only a tiny fraction of his significant deeds and decisions as Commander in Chief, for most of these were by nature challengeable in no court but that of impeachment—which was entirely as it should have been. The contours of the presidential war powers have therefore been presidentially, not judicially shaped;

4Ibid., p. 418.
5Ibid., p. 418.
their exercise is for Congress and the people, not the Court, to oversee. 6

This paper will inquire into the validity of Rossiter's position. In the evolving of American history have the war powers of the President been defined and checked by the judiciary, or have they been shaped by the Chief Executive through various crises?

THE EXECUTIVE AND THE MILITARY
MILITARY COMMANDER

The President in his role as Commander in Chief of the Army and Navy may take personal command of the troops as can be seen from the following episode. In 1794 four counties in Western Pennsylvania rebelled against the imposition of a tax on whiskey. In two presidential proclamations Washington tried every measure short of actual combat to persuade the insurgents to obey the laws of the land. 7 When all else failed, Washington called into service 15,000 militia men from New Jersey, Pennsylvania, Maryland, and Virginia and personally led the militia from September 25th to October 20th. 8 Commenting on Washington leaving the seat of government to act as field commander of the militia force, Professor Clarence Berdahl states:

President Washington was not only clear as to his right to take personal command of the militia forces upon such occasions but in the case of the Whiskey Rebellion of 1794, was also convinced of the necessity of exercising that right. He assumed active command of the militia forces assembled to crush the insurrection, visited the place of rendezvous, and personally directed


8Ibid., pp. 164-165.
the forward movement of the troops, living and marching with them.\footnote{Clarence A. Berdahl, War Powers of the Executive in the United States (Urbana: University of Illinois Press, 1921), p. 135.} When criticism arose over his leaving the seat of government while Congress was in session, Washington denounced the criticism as "impertinence." \footnote{Ibid., p. 135.}

As military commander the President possesses all of those powers accorded by international law to any supreme commander. In The Constitution of the United States Edward Corwin has cited in the following Supreme Court cases a most comprehensive list of those powers: \footnote{Edward S. Corwin, The Constitution of the United States of America: Analysis and Interpretation (Washington: Government Printing Office, 1953), pp. 403-404.}

1850 - Commander in Chief - "He (the President) 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." \footnote{Fleming v. Page, 9 Howard 603 (1850).}

1852 - Power to Requisition Property - Against the enemy in the field, the President possesses the power to requisition property and compel services from citizens of the United States and friendly aliens when

\begin{itemize}
\item The forward movement of the troops, living and marching with them...
\item When criticism arose over his leaving the seat of government while Congress was in session, Washington denounced the criticism as "impertinence."
\item As military commander the President possesses all of those powers accorded by international law to any supreme commander. In The Constitution of the United States Edward Corwin has cited in the following Supreme Court cases a most comprehensive list of those powers:
\item 1850 - Commander in Chief - "He (the President) 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."
\item 1852 - Power to Requisition Property - Against the enemy in the field, the President possesses the power to requisition property and compel services from citizens of the United States and friendly aliens when
\end{itemize}
necessity requires. 13

1874 - Commercial Intercourse - The President may, at least in the absence of Congressional action to the contrary, permit a limited commercial intercourse with the enemy in time of war, and impose such conditions as he sees fit. 14

1876 - Secret Agents - "We (the Court) have no difficulty as to the authority of the President in the matter. He (the President) was undoubtedly authorized during the war, as Commander in Chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy." 15

1888 - Dismissal and Appointment of Officers - Having once dismissed an officer or accepted his resignation, the President cannot revoke that action and thereby restore the officer to his rank and office, but must make a new nomination and secure a new confirmation by the Senate, if confirmation was required in the first instance. 16

---

14 Hamilton v. Dillin, 21 Wallace 73 (1874).
15 Totten v. United States, 92 U.S. 105 (1876).
1891 - Dismissal and Appointment of Officers - The provision in the U.S. Code, Title 10, Section 1590 that the President's power to dismiss an officer in peacetime "in pursuance of the sentence of a general court martial or in mitigation thereof" does not prevent the President from displacing an officer of the Army or Navy by appointing with the advice and consent of the Senate another person in his place. 17

1897 - Convening of Courts-Martial - Despite the fact that the President is expressly authorized by statute to convene courts-martial under certain circumstances (Act of May 29, 1830. 4 Statute at Large, 417), he is by no means limited to that specific case, nor dependent upon statutory authority but is empowered to convene such courts-martial generally and in any case by virtue of his constitutional authority as Commander in Chief. 18

1901 - Territorial Occupation - While the President's power with regard to the government of occupied territory is justly said to be "necessarily despotic," it has been held that this applied only to his executive or administrative power and not to his power to legislate for that territory. "His power to administer would be absolute, but his power to legislate would not be without certain restrictions--in other words,

18Swaim v. United States, 165 U.S. 553 (1897).
they would not extend beyond the necessities of the case." 19

1909 - Territorial Occupation - The civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory.... The authority to govern such...territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander in Chief. 20

1942 - Creation of Military Commissions - The Court unanimously decided that this specific military commission had been lawfully constituted and that the saboteurs were clearly subject to its jurisdiction. It was not necessary for the Court to discuss the President's power as Commander in Chief to create this commission, for Congress in the 15th Article of War had in effect "authorized trial of offenses against the law of war before such commissions." The offenses charged against the saboteurs were offenses against the law of war, which has always recognized that unlawful combatants are subject "to trial and punishment by military tribunals for acts which render their belligerency unlawful." 21

1952 - Military Justice - An air force officer on duty in Germany was killed by his wife in October 1949. She was tried in the U.S. Court of

21Ex parte Quirin, 317 U.S. 1 (1942).
the Allied High Commission for Germany and was convicted of murder under the German Criminal Code and sentenced to a term of imprisonment in the federal penitentiary in the United States. Justice Burton ruled that the military court was properly set up under the power of the President as Commander in Chief. 22

Despite the fact that the President as Commander in Chief must be guided in the exercise of his power as military commander by his own judgment and discretion, subject to his general responsibility under the Constitution, it is found from the above Supreme Court cases, that the Court speaks only of the President as Commander in Chief in the most general and guarded terms. Justice Swayne has best expressed the Court's thinking on this in Stewart v. Kahn: "The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution." 23

One could, therefore, conclude that it is apparently up to the President to be specific about his powers as Commander in Chief, not the Court.


TROOP CALL-UP

One must admit that at specific times, particularly during war and mobilization, the government imposes certain obligations, but no one obligation is more oppressive than that one compelling personal service in the military. While it is true that the duty to render personal military service in the United States has been accepted as necessary, it has not always been desirable. Roger Little points out that prior to the Revolutionary War, the American colonies had conscripted men into their militias. For example, Massachusetts and Virginia resorted to conscription in 1777 and since only two-thirds of the authorized Continental army had been recruited by February, 1778, Washington recommended to the Continental Congress that the necessary men be recruited from all the colonies by universal conscription. 24

When the Constitutional Convention assembled in Philadelphia in 1787, Hamilton argued that the defense and military powers of the central government ought exist without limitation because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances

---

that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed....

The Constitution states that Congress is delegated with the power "to raise and support armies, to provide and maintain a Navy," and "to provide for calling forth the militia." These powers were reinforced by the provision authorizing Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." 26

Given the above, it would appear that the President as Commander in Chief has no powers with regard to troop call-up. This is not so, as Glendon Schubert succinctly points out: "The President has always been delegated considerable discretion in implementing the plans of Congress, especially with respect to the circumstances in which the reserves might be called up for temporary duty in time of national emergency proclaimed by the President himself. This was true in George Washington's time, as it is today." 27

Various Congressional Acts passed in the late 18th, 19th, and early 20th centuries gave the President virtually unlimited power in

26U.S., Constitution, Art. 1, Sec. 8, Cl. 12-16.
calling up the militia and in raising armies in case of invasion, threat of invasion or insurrection. 28 Clinton Rossiter in The Supreme Court and the Commander in Chief discusses two leading Supreme Court cases that challenge the President's authority and orders with regard to military conscription. 29

In the first case, Martin v. Mott, the governor of the State of New York, in compliance with a request from the President of the United States, ordered certain companies of militia to assemble in the City of New York for the purpose of entering the service of the United States. The President acted in accordance with a federal statute empowering him to call the militia whenever there shall be danger of invasion. Mott, a private in one of the companies called, refused to comply with the order of the governor. In 1818 a court martial imposed on him a fine of $96.00, and when he refused to pay he was sentenced to twelve months imprisonment. Martin, Deputy United States Marshall, seized certain goods of Mott, which Mott sought to recover by action of replevin. Mr. Justice Story in his opinion of a unanimous decision in 1827 stated that: "We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all.

28Berdahl, pp. 102-114.
29Rossiter, pp. 14-17.
other persons." In essence, then, the President under law can call for the militia of states when no invasion has taken place. 30

In the second case, Luther v. Borden, the people of the State of Rhode Island in 1871 were still operating under the old colonial charter with a few minor revisions, using it as their state constitution. This constitution strictly limited the right to vote. Led by a man named Dorr, the people at various mass meetings throughout the state instituted a new constitution whereby suffrage was greatly increased. The state government claimed that this was an insurrection and appealed to the President to declare martial law. However, no federal forces were used. Members of the state militia led by Borden forced their way into the house of Luther, a Dorr adherent, who sued for trespass. Mr. Chief Justice Taney in his opinion in 1849 declared that the President in exercising the power conferred on him by Congress to send federal troops to aid states in suppressing insurrection had indicated that he regarded the charter government as the lawful government, and this decision was binding upon the Court. In other words, this was a purely political case and must be left in the hands of the political branches of the government to decide. Moreover, once a political branch of the government reaches a decision, "the courts are bound to take notice of its decision, and to follow it." 31

30 Martin v. Mott, 12 Wheaton 19 (1827).
31 Luther v. Borden, 7 Howard 1 (1849).
Schubert cites four state cases in *The Presidency and the Courts* that upheld the President's authority to raise an army. 32

1863 - The Court of Common Pleas of Dauphin County, Pennsylvania, decided that the President's orders, (General Order #99 set up the method of selecting, drawing, and enforcing the attendance of the militia in the respective states; General Order #104 provided for the arrest of persons absenting themselves to avoid being drafted into military service), "must be considered as having all the force of a law, the same as if specially set forth at length in the act." 33

1863 - The Supreme Court of Wisconsin upheld President Lincoln's General Orders, Number 99 and 104. The argument that the President had been unconstitutionally delegated legislative power was expressly rejected on the basis that in merely filling in the details of the statute he was undertaking a necessary part of his function of executing its provisions. 34

1867 - The Supreme Court of Wisconsin ruled that the governor of Wisconsin, acting as an agent of the President had properly used his discretionary powers in putting down an insurrection and enforcing the laws, and that his (the governor's) actions were to be regarded as those acts of

---

32 Schubert, pp. 176-177.
34 In re Griner, 16 Wis. 423 (1863).
1867 - The Supreme Court of New Hampshire upheld the fact that the President had the power to cause the arrest of draft dodgers for the purpose of forcibly inducing them into military service. 36

In 1918 Chief Justice Edward White ruled that the Selective Draft Law Cases were "an act to authorize the President to increase temporarily the military establishment of the United States" and therefore upheld the conscription act which became and still remains the basic statement of the Court on the powers of the Federal government to conscript military manpower. 37

Also in a ruling on Arver v. United States, the Supreme Court ruled that the Selective Draft Law of 1917 was a valid exercise of the war power and dispelled once and for all the notion that there is something inherently unconstitutional or extraconstitutional about drafting men to fight wars. 38

In Arver v. United States the Court did not decide the constitutional question (Article I, Section 8) of whether or not the President as Commander in Chief has the power to raise armies even with congressional

35Drucker v. Salomon, 21 Wis. 621, 631 (1867).
36Allen v. Colby, 47 N.H. 544, 547-548 (1867).
37Selective Draft Law Cases, 245 U.S. 375 (1918).
38Arver v. United States, 245 U.S. 366 (1918).
approval. To date the Supreme Court has yet to face that question. 39

This can be seen again in United States v. Nugent where Chief Justice Fred M. Vinson ruled that the Selective Service Act is a comprehensive statute designed to provide an orderly, efficient, and fair procedure to marshall the available manpower of the country, to impose a common obligation of military service on all physically fit young men. It is a valid exercise of the war power. It is calculated to function—it functions today—in times of peril. 40

Therefore, the legislative history and administrative application on the question of compelling men to serve in the armed services of their country remains today, a political decision. The Supreme Court supported this policy when it stated that: "The power to compel men to serve in the armed forces is reasonably implied from the power to raise and support armies, for a grant of power with no compulsion behind it is no power at all." 41

39 Schubert, p. 117.
Military justice comes under the heading of two tribunals, i.e., courts-martial for those offenders of military law, and military commissions for the trial of those offenders of the laws of war as well as martial law. (See Section 2 for a discussion of military commissions.) Authority for courts-martial stems from congressional statutes whereas the authority for military commissions stems from the common law of war. 42 Despite the fact that authorization for courts-martial lies in the hands of Congress, its control rests primarily in the hands of the President as Commander in Chief. "They are creatures of orders, the power to convene them, as well as the power to act upon their proceeding, being an attribute of command." 43

Under the Act of May 29, 1830, the President is expressly authorized by statute to convene general courts-martial under certain circumstances. 44 However, this does not mean that the President as the fountainhead of military justice is expressly limited to that specific case, nor is he dependent upon statutory authority. As Rossiter points out in

42 Berdahl, p. 138.


44 U.S., Statutes at Large, IV, 417.
The Supreme Court and the Commander in Chief citing Swaim v. United States—
that he (the President) is empowered to convene such courts-martial, generally
and in any case, by virtue of his constitutional authority as Commander in
Chief. 45 David G. Swaim, Judge Advocate General with the rank of Brigader
General, was accused of fraud and improper dealings with a Washington bank.
He was found guilty, sentenced, and brought suit on the grounds that the
general courts-martial had been unlawfully constituted and that he had been
unlawfully tried and sentenced. Justice Shiras declared that the courts-
martial in question was duly convened and organized, and that the questions
decided were within its lawful scope of action, and further that it would be
out of place for the court to express any opinion. 46

A further discussion of non-intervention in cases of courts-martial
is found in the following cases:

1827 - The Court granted conclusive discretion to the President
and his officers in such matters as fixing the number of officers between
the statuatory limits of five and thirteen for any particular courts-
martial. 47

In 1894 the Court went so far as to say that a person convicted of

45Rossiter, p. 102.

46Swaim v. United States, 165 U.S. 553, 558 (1897).

47Martin v. Mott, 12 Wheaton 19, 34-35 (1827).
a courts-martial must exhaust all administrative remedies...before a federal court would be justified in granting a hearing to entertain collateral attack on the courts-martial's judgment. 48

The Civil Court ruled in 1857 in Dynes v. Hoover that civil courts do not handle courts-martial—if they did, they would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrates or civil courts. 49

1902 - The Court stated that a member of the armed forces belongs to a separate community recognized by the Constitution and therefore must be tried by a courts-martial. 50

In 1911 the Court ruled that "to those in military or naval service of the United States, the military law is the due process." 51

While it is the President's own judgment as to the convening of courts-martial, he may delegate this action to a subordinate such as the Secretary of War and the Secretary of the Navy as can be seen from the

48 In re Grimley, 137 U.S. 147 (1894).
51 Reaves v. Ainsworth, 219 U.S. 296 (1911).
rulings in the following cases.

In Runkle v. United States the Court declared that it was up to the President's judgment as to the convening of courts-martial, and the finding in United States v. Fletcher stated that he (the President) could delegate this power to one of his subordinates; namely the Secretary of War or the Secretary of the Navy. 52

The Court further ruled in Bishop v. United States that the actions of the presidential delegates in convening courts-martial were presumed to be those acts of the President. 53

Given a look at the above cases, it can be said that, in general, the Courts will not interfere in the jurisdiction of military justice. 54 The Courts will, however, review cases to ascertain if the courts-martial was legally constituted; to ascertain whether the military had jurisdiction of the case; and to ascertain whether or not the sentence was duly approved


and authorized by law. 55

Edward F. Sherman, in his article on "Military Injustice," sums up the Court's position on military law cases in the following statement:

Supreme Court decisions do not directly affect the military because military law has been held to be an autonomous legal system not subject to the same constitutional standards as civil courts. However, the Court of Military Appeals, a civilian court created in 1951 by the Uniform Code of Military Justice as a sort of 'Military Supreme Court' has applied a number of Supreme Court decisions to the military, the latest test being the application of Miranda to the military in United States v. Tempir in 1967. 56


Before attempting to discuss the President's role as Commander in Chief in military government, it must first be ascertained what military government is. Mr. Winthrop defines it as "that dominion exercised in war by a belligerent power over territory invaded and occupied by him and over the inhabitants thereof." 57 Chief Justice Chase defined military government in *Ex parte Milligan* as "military justice to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states and districts occupied by rebels treated as belligerents;... by the military commander under the direction of the President, with the express or implied sanction of Congress." 58

Belligerent or military occupation has been going on from ancient times up to and including the 20th Century in some way, shape, or form.

Caesar's memoirs provide a running commentary on his relations with the Helvetians, the Belgae, and the Nervii, while the protests back in Rome that Caesar was usurping the Senate's authority by making political decisions are not without their modern counterparts. Alexander, Belisarius, Hannibal, Napoleon, George Rogers Clark, Winfield Scott, Cecil Rhodes, Sherman, and


58 *Ex parte Milligan*, 4 Wallace 2, 141-143 (1866).
Pershing—all knew military government at first hand...."59

One out of every six years of our national existence has been spent in war, and there have been at least seventeen instances in which the United States has participated in military occupation of one kind or another. 60

In 1862 President Lincoln directed a lawyer, Francis Lieber, to draw up a code of laws for military occupation, directing the troops in the laws of war. Under Article I of the Code, it states that "Martial Law is the immediate and direct effect and consequence of occupation or conquest. The presence of a hostile army proclaims its martial law." Article II adds that "Martial Law does not cease during the hostile occupation, except by special proclamation, ordered by the Commander in Chief," and in Article III can be found a clause stating that "the commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authority." 61 Given Lieber's wording of his Code, one can easily assume that he was concerned more with the unhampered ability of the conquerors to act, than with limitations restricting the conquerors.

60 Ibid., p. 212.
Prior to Lieber's Code, Justice Story ruled in 1819 that by the conquest and military occupation of Castine (by the British in the War of 1812) the enemy acquired that firm possession which enabled him to exercise the fullest right of sovereignty over that place. 62 Along the same line of thought, President Polk stated in a special message to the House of Representatives on July 24, 1848, that "military occupation permits the occupant, during the war, to exercise the fullest rights of sovereignty" over the occupied territory. The sovereignty of the enemy is thereby suspended and his laws can "no longer be rightfully enforced over the conquered territory or be obligatory upon the inhabitants who remain and submit to the conqueror." 63

Given the above, then, when American military operations bring foreign territories under its control, it is up to the President as Commander in Chief to "take whatever measures he thinks necessary to insure the well-being of the American occupying forces and those of the people of the occupied area. This may involve the taking over of the entire government of the area under military control." 64 However, the military control of the

62 United States v. Rice, 4 Wheaton 246 (1819).
63 Richardson, Vol. IV, p. 595.
occupied territory does not give the President as Commander in Chief the authority to annex the occupied territory to the United States. This was evidenced in Chief Justice Taney's opinion in *Fleming v. Page*. In holding that military occupation of the port of Tampico during the Mexican War did not annex it to the United States, Taney said: "His (the President's) duty and his power are purely military. 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 a manner he may deem most effectual to harass and conquer and subdue the enemy....But his conquests do not enlarge the boundaries of this union." 65

In his article on "American Experiences with Military Government" Ralph Gabriel states that:

The exercise of military government is a command responsibility and full legislative, executive and judicial authority is vested in the command general of the theatre of operations. By virtue of his position he is the military governor of the occupied territory and his supreme authority is limited only by the laws and customs of war. Military government is primarily an instrument for carrying out the policy of the President in his role as Commander in Chief, established in the Constitution. 66

A classic example of command responsibility is that of General William S. Graves who refused to recognize General Otani of the Japanese


Imperial Army as head of the Allied Council and his disposition of American troops in the attempt by the United States to keep Japan out of Siberia. Graves demanded to know who put the American soldiers in their presently located areas; Otani responded that the Inter-Allied Council under his command had situated them. Graves then stated: "Well, let's get this matter straightened out right now. I am in command of the American Expeditionary Force, and in sole command of it. I don't recognize you or anyone else as being Commander in Chief of any so-called Allied Expedition. I'm at once ordering my troops to railroad zones...." The War Department and the President gave full approval to his conduct as military commander. 67

Professor Berdahl cites other cases in War Powers of the Executive in the United States whereby the Supreme Court has conceded that the President's power and authority as Commander in Chief gives him absolute discretion in the realm of occupied territory, 68 subject only to the vaguely defined international laws of war. 69

Early in 1847 the President as constitutional Commander in Chief of the Army and Navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on

---

67 Ibid., p. 438.
68 Berdahl, pp. 191-199.
69 Kallenbach, p. 541.
imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession. The Court ruled that no one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right to conquest, or that they were operative until the ratification and exchange of a Treaty of Peace. 70

Upon the conquest of New Mexico the executive authority of the United States properly established a provisional government which instituted a judicial system, the legality of which was recognized by the Supreme Court. 71

In Texas v. White the Supreme Court held that so long as the war continued it cannot be denied that he (the President) might institute temporary governments within insurgent districts, occupied by the national forces, or take measures, in any state, for the restoration of State governments faithful to the Union, employing, however, in such efforts only such means and such agents as were authorized by constitutional laws. 72

When during the late Civil War, portions of the insurgent territory

70Cross v. Harrison, 16 Howard 164, 190 (1853).
72Texas v. White, 7 Wallace 700, 730 (1868).
were occupied by the national forces, it was within the constitutional authority of the President as Commander in Chief to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States; and the provisional court for the State of Louisiana organized under the Proclamation of October 20, 1862 was, therefore, rightfully authorized to exercise such jurisdiction. The Supreme Court held that 'the duty of the national government... was no other than that which devolves upon the government of a belligerent occupying, during war, the territory of another belligerent. It was a military duty to be performed by the President as Commander in Chief and entrusted as such with the direction of the military force by which the occupation was held. 73

In Dow v. Johnson the Supreme Court ruled that "It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is the military law--the law of war"--that governs a militarily occupied territory. 74

It was declared in 1901 that Cuba is a foreign territory within the meaning of the Act of Congress of June 6, 1900, amending the United States Revised Statute, Section 5270... the island is under a military government appointed by the President of the United States in the work of assisting

73 The Grapeshot, 9 Wallace 129 (1869).
74 Dow v. Johnson, 100 U.S. 158, 170 (1879).
the inhabitants of the island to establish a government of their own. The Court ruled that the occupancy and control of the island of Cuba under military authority of the United States cannot be deemed to be an unconstitutional and unauthorized interference with the internal affairs of a friendly power, by virtue of the joint resolution of Congress of April 20, 1898 declaring that "the people of Cuba are, of right ought to be, free and independent," since this declaration was not intended as a recognition of the existence of an organized government instituted by the people of that island in hostility to the government maintained by Spain. 75

The Supreme Court ruled in Dooley v. United States that the President's power is necessarily despotic in military occupation, but that this must be understood rather in an administrative than in a legislative sense. 76

In Herrera v. United States the Court ruled that neither the capitulation of Santiago and the cessation of active military operations in the Santiago district, nor the Presidential proclamation of July 13, 1898, (General Order 101 - "private property, whether belonging to individuals or corporations is to be respected and can be confiscated only for cause"), with reference to the rights of private property, changed the character of a

76Dooley v. United States, 183 U.S. 151 (1901).
Spanish merchant vessel lying in the harbor as enemy's property, nor exempted it from liability to capture by the military authorities for military purposes. The Court upheld the capture of the vessel in that it was seized as property for purposes of war and not of gain. 77

The Supreme Court upheld all of the above decisions, as well as the President's power as Commander in Chief to organize and practically control the judiciary of the territory under military occupation, with the following exception:

In *Jecker v. Montgomery* decided in 1851, the Court held that neither the President nor any military officer can establish a court in a conquered country and authorize it to decide upon the rights of the United States or of individuals in prize cases, nor to administer the laws of the nation. The courts established and sanctioned in Mexico were nothing more than agents of military power to assist it in preserving order in the conquered territory and to protect the inhabitants in their persons and property while it was occupied by the American army. They were not courts of the United States and they had no right to adjudicate upon a question of a prize or no prize. 78

The issue of military occupation is not a dated subject. It is as current as present American involvement in Korea, the Dominican Republic and

---


78 *Jecker v. Montgomery*, 13 Howard 498, 515 (1851).
Vietnam. Though the forms, definitions, or styles may change, the problem of occupation will always be present as long as the United States has a military or national security problem. Professor Berdahl aptly sums up the situation by saying: "Since all the powers and functions of military government are concentrated in the hands of the President, with scarcely any limitation, it would not be an exaggeration to characterize such government as an absolutism of the most complete sort." 79

79 Berdahl, p. 164.
THE EXECUTIVE AND THE ENEMY
ALIEN ACTS OF 1798

The first attempt at alien and enemy control through legislation came with Congress' passage of a series of acts called the Naturalization, Alien, and Sedition Acts which were primarily aimed at domestic dissatisfaction as well as at foreign danger. This section of the paper will concern itself only with the Alien Act.

War with France was expected daily during the Summer of 1798 by which time "the French had captured over three hundred American merchant vessels, and an undeclared war with France was raging on the sea." \(^80\) The Federalist majority hastily passed the Alien Act among others. \(^81\) This Act not only authorized the President to remove all aliens whom he considered dangerous to the peace and safety of the country, but it also provided the President with the power to deport those aliens who were merely suspected of treasonable or secret schemes against the government. \(^82\)

If an alien was deported from the country, and should return and be found at large, he was to be tried and if convicted, sentenced to

---


\(^81\) U.S., Statutes at Large, I, 570.

imprisonment for a term not to exceed three years, as well as forfeiting all rights to ever becoming a citizen of the United States. 83 

The Act not only set forth the ground rules for expulsion, but also provided for a national registration and surveillance system in which those aliens remaining in the country would have to have a special permit issued by a presidential agent. There were exceptions to the rule, however, whereby the President might exempt foreign ministers, consuls, alien merchants, etc., from obtaining the special permits as well as an executive grant of safe conduct or passport privileges as long as the aliens conformed to presidential regulations. 84 

"The worst feature of this Act was the extent of the power that it left to the President. The poor aliens, as the Republicans called them, were placed at his mercy; ... it was necessary to create some authority for the enforcement of the law, and Congress considered that the President, through his marshalls, could best execute it." 85 

President John Adams, in a letter to Thomas Jefferson in 1813, asserted that he had never applied the Alien Act in a single instance.

83Ibid., p. 52.

84Ibid., p. 53, 54.

As your name is subscribed to that law, as vice-president, and mine as President, I know not why you are not as responsible for it as I am. Neither of us was concerned in the formulation of it. We were then at war with France. French spies then swarmed in our cities and our country; some of them were intolerably impudent, turbulent, and seditious. To check these, was the design of this law. Was there ever a government which had not authority to defend itself against spies in its own bosom—spies of an enemy at war? This law was never executed by me in any instance. 86

However, there were, as Frank M. Anderson points out in his article on "The Enforcement of the Alien and Sedition Laws:",

indications if not proofs that a considerable number of aliens anticipating the enforcement of the law, left the country on account of it. A large number of French refugees from the West Indies were in the United States when the Alien Act was passed. Letombe, the French consul general, estimated the number at 20,000 to 25,000. Other estimates were even higher. The Archives of the Department of State at Washington contain abundant evidence that directly after the passage of the Alien Act, large numbers of these French refugees left the United States. Although the going of most of these can be fully accounted for on other grounds, there are indications that with some of them, apprehension on account of the Alien Act was a factor in bringing about their departure. 87

The ultimate justification of the Alien Act which was to continue in force until December, 1799, was that it was necessary to the defense of the country against foreign aggression. Its powers conferred to the President


were upheld as a legitimate exercise of the war power in a House Committee Report submitted on February 21, 1799. The Report reads as follows:

The right of removing aliens, as an incident to the power of war and peace, according to the theory of the Constitution, belongs to the government of the United States...Congress is required to protect each state from invasion; and it is vested...with powers to make all laws which shall be proper to carry into effect all powers vested by the Constitution in the government of the United States, or in any department or officer thereof; and to remove from the country, in times of hostility, dangerous aliens, who may be employed in preparing the way for invasion, is a measure necessary for the purpose of preventing invasion, and, of course, a measure that Congress is empowered to adopt.... 88

Nearly a century passed before the Federal Statute of 1892 requiring all Chinese laborers to obtain certificates of residence was enacted. The Supreme Court upheld this statute in Fong Yue Ting v. United States by a 6 to 3 vote. Justice Gray ruled that the power of Congress to expel or exclude aliens is an aspect of the plenary control over international relations which is an inherent and inalienable right of every sovereign and independent nation. Gray was even of the opinion that Congress could have ordered deportation of aliens lacking certificates of residence by direct executive action, without any judicial trial or examination at all. 89

The Alien Enemy Act of 1798 is still in force, and its use was upheld in Ludecke v. Watkins. Luđecke, a German enemy alien, who had been

88Berdahl, pp. 187-188.
89Fong Yue Ting v. United States, 149 U.S. 698 (1893).
interned in the United States during World War II, was ordered deported to Germany in January 1946, when the shooting war was over, but before the legal state of the war had been terminated. Justice Frankfurter ruled that the President was acting under his war powers and that the order of deportation was not judicially reviewable. 90

In Harisiades v. Shaughnessy, Justice Jackson ruled that the policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government, which are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. 91

Although the Supreme Court has ruled that deportation of aliens is a civil rather than a criminal matter, and the power rests with the federal government, the basic constitutional authority of Congress to deport or to delegate this power to the President has not been questioned. One can assume, therefore, that this is a political question--one in which the Court will not become involved.

MILITARY TRIAL OF ENEMIES

Since courts-martial are for those offenders of military law, (see section on Military Justice) another type of tribunal was needed for the trial of civilians as well as military personnel who are accused of criminal acts contrary to the common laws of war as well as martial law. For this reason military commissions were established. 92

It is within the President's authority as Commander in Chief to determine the composition of the military commissions. There is no statutory maximum or minimum with regard to the number of members on the commission. Military commissions, however, have usually been composed of five members. Less than three members would be contrary to past precedent; but any number would be legal. 93 The military commission convened by order of President Johnson for the trial of Lincoln's assassins was composed of nine members. 94

Congress by statute has subjected to military trials any person who in time of war is found lurking as a spy or acting as a spy; and person who aids or attempts to aid the enemy with arms, ammunition, supplies, money,


93 Winthrop, An Abridgment..., p. 333.

or any other thing; any person who, without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy directly or indirectly; and any person who by the law of war is subject to trial by a military trial. 95

President Roosevelt established a military commission in 1942 to try eight German saboteurs who had been landed in the United States by submarine for the express purpose of blowing up factories, military equipment and installations. When the case before the military tribunal was nearly finished, the counsel for the saboteurs, despite an executive order denying the saboteurs all access to civil courts, obtained a writ of habeas corpus contending their right to a trial in a civil court. In a unanimous decision of 8 to 0, Mr. Chief Justice Stone ruled that it was unnecessary to determine the extent of presidential authority as Commander in Chief since Congress had provided for the trial of offenses against the law of war by such commissions, and the acts charged against the saboteurs were offenses against the law of war.

It has not hitherto been challenged, and, so far as we are advised, it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority

was conferred by the Constitution to try offenses against the law of war by military commissions, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury. 96

Following World War II certain Japanese generals who had commanded troops in the Pacific theatre of war were placed on trial before an American military commission in the Philippines. Yamashita, Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was charged with violating the laws of war in permitting members of his command to commit brutal atrocities and other high crimes against the people of the United States and its allies.

The Supreme Court again recognized the right to challenge the military proceedings by a petition for a writ of habeas corpus. However, the Court held that the military commission had been properly set up in accordance with federal statutes which provided for trial by such commissions of enemy combatants charged with violating the law of war. The Court ruled that the authority of the military had not ended with the cessation of hostilities, but only with the formal establishment of peace by either proclamation or treaty. The Court further held that the offenses charged against General Yamashita constituted violations of the law of war, and declared that the procedure and rules of evidence employed by the military commission are not

96Ex parte Quirin, 317 U.S. 1, 30 (1942).
subject to judicial scrutiny but are reviewable only by higher military authorities. 97

Hirota v. MacArthur differed from In re Yamashita in that the Japanese defendants involved had been tried for war crimes before a military tribunal set up by General MacArthur as the agent for the Allied Powers which had defeated Japan. The defendants attempted to file petitions of habeas corpus directly with the Supreme Court, but their motions were denied on the grounds that the courts of the United States could have no jurisdiction over this tribunal due to its international character.

We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other Allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers. Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of habeas corpus are denied. 98

Johnson v. Eisentrager was convened by twenty-one German nationals in the service of the German government who were located in China during World War II. They were charged with having, in violation of the law of war,
continued hostilities after the surrender of Germany by furnishing intelligence regarding American forces to the Japanese. After the surrender of Japan, the German nationalists were taken into custody and convicted by an American military commission in the Chinese theatre. The defendants applied for and obtained from the court of appeals in the District of Columbia, a writ of habeas corpus on the grounds that "any person, including an enemy alien, deprived of his liberty anywhere under the purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal." When the case reached the Supreme Court, however, it said that it had never heard of a writ of habeas corpus being issued by a court on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its (the United States) territorial jurisdiction. Residence within the country is essential to qualify an alien for judicial protection by American courts and an enemy alien not within our borders had no right of access to our courts. 99

As can be seen from the above cases, the Supreme Court shows little concern of enemy aliens and members of the armed forces of enemy powers with regard to their subjection to military trial and punishment. Enemy aliens who penetrate United States lines, in an attempt to commit sabotage, as well

as those captured enemies accused of war crimes, may be condemned to death by
a military commission set up by the President as Commander in Chief. Insofar
as the Court is satisfied that the military commission is set up under the
laws of war, it will not inquire into the conformity of their proceedings to
those of due process of law. The Court also has refused to look into the
procedures employed by military commissions in the trial of enemy aliens
outside the United States. In short, the Supreme Court will not interfere
with the President's authority as Commander in Chief with regard to military
commissions convened for the trial of offenders against the laws of war.
MARTIAL LAW AND THE JAPANESE-AMERICANS

Alarmed by the supposed danger of Japanese invasion of the Pacific coast after Pearl Harbor and under the apprehension that all persons of Japanese ancestry were a potential threat to the United States, President Franklin D. Roosevelt issued Executive Order No. 9066 in response to increasing pressures from the War Department as well as Congress. The Order authorized the Secretary of War to prescribe "military areas" from which any person deemed dangerous were to be excluded, expelled, or restricted, in order to prevent espionage and sabotage. In essence, the Order authorized the evacuation of some 112,000 West Coast Japanese, two-thirds of whom were American citizens, to relocation centers "in the desert country of California, Arizona, Idaho, Utah, Colorado, and Wyoming and in the delta areas of Arkansas, where they were put in charge of a presidentially created civilian agency called the War Relocation Authority." The essential paragraphs of the document read as follows:

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities....


Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the military commanders whom he may from time to time designate, whenever he or any designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his discretion. 102

A Congressional Resolution of March 21, 1942, made it a misdemeanor "to knowingly enter, remain in, or leave prescribed military areas" contrary to the orders of the commanding officer of the area. 103 This Executive Order, which in perspective seems to have been wholly unnecessary, has been called by Professor Corwin "the most drastic invasion of the rights of citizens of the United States by their own government that has thus far occurred in the history of our nation." 104

The first case to reach the Supreme Court challenging the right of the government to override the customary civil rights of the Japanese-Americans was Hirabayashi v. United States. The circumstances of this particular case provided an opportunity for the Court to avoid the more

103U.S., Statutes at Large, LVI, 173.
difficult constitutional question of whether the procedures were contrary to due process, or to justify them on the ground that they were a military necessity. Shortly before the evacuation program had been undertaken, the Army adopted a curfew regulation requiring all aliens and persons of Japanese ancestry to be in their residences between 8:00 p.m. and 6:00 a.m. Hirabayashi, and American-born citizen of alien Japanese parents, was convicted of failure both to obey the curfew and to report for registration for evacuation. The Court upheld the curfew regulations as a valid military measure to prevent espionage and sabotage.

Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety.... 105

While emphasizing that distinctions based on ancestry were "by their very nature "odious to a free people" the Court nonetheless felt "that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry." 106

The next case to reach the Court was Korematsu v. United States.

106 Ibid., p. 81.
Korematsu, and American citizen of Japanese ancestry, remained in California after it had been ordered cleared of all persons of Japanese descent by Executive Order, itself confirmed by an Act of Congress. He refused to leave and was convicted under the law. In an opinion written by Mr. Justice Black, the Court held that this was a valid exercise of the war power.

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified. 107

The third case to reach the Court and resolved on the same day as Korematsu v. United States was Ex parte Endo. Miss Mitsuye Endo, an American citizen of Japanese ancestry, with established loyalty to the United States, was a permanent employee in the California Civil Service. Under the order of relocation Miss Endo was evacuated from Sacramento to a relocation center near Tule Lake, California. The Court held that an American citizen of

Japanese ancestry whose loyalty to this country had been established could not constitutionally be held in a war relocation center but must be unconditionally released. The government had allowed persons to leave relocation centers under conditions designed to prevent "a disorderly migration of unwanted people to unprepared communities." The Court held that the purpose of the evacuation and detention program was to protect the war effort against sabotage and espionage. "A person who is concededly loyal presents no problems of espionage or sabotage.... He who is loyal is by definition not a spy or a saboteur." It follows, therefore, that the authority to detain a citizen of Japanese ancestry ends when his loyalty is established, and to be otherwise held would be not on grounds of military necessity, but on grounds of race. 108

The Court refused to rule on the basic constitutional issues of relocation, confinement, and segregation programs for the Japanese-Americans in the above cases. Undoubtedly the Court was influenced by what it felt was a feeling of military necessity on the part of those in charge at the time. The racial aspect of the entire program made the whole thing most unfortunate.

108Ex parte Endo, 323 U.S. 283 (1944).
TRADING WITH THE ENEMY AND ESPIONAGE

The Constitution empowers Congress to regulate interstate and foreign commerce. 109 In so doing, Congress may make such regulations as it deems fit toward the crippling of the enemy and the winning of the war. Events leading up to the War of 1812 prompted Congress to exercise this power, and it passed The Embargo Act of December 22, 1807, which in effect was an Act laying embargo on all ships and vessels in the ports and harbors of the United States.

Be it enacted that an embargo be, and hereby is laid on all ships and vessels in the ports and places within the limits or jurisdiction of the United States, cleared or not cleared, bound to any foreign port or place; and that no clearance be furnished to any ship or vessel bound to such foreign port or place, except vessels under the immediate direction of the President of the United States.... 110

Following this, and several other Embargo Acts, Congress passed the Non-Intercourse Act on March 1, 1809, interdicting the commercial trade between the United States and Great Britain and France as well as their dependent territories.

...the entrance of the harbors and waters of the United States...be interdicted to all public ships and vessels belonging to Great Britain or France.... And if any

109 U.S., Constitution, Art. 1, Sec. 8, Cl. 3.
ship or vessel...shall enter any harbor or waters within the jurisdiction of the United States...it shall be lawful for the President of the United States, or such other person as he shall deem necessary, to compel such ship or vessel to depart.... 111

The use of presidential powers under the Commander-in-Chief clause are virtually unlimited during times of crisis. President Lincoln made use of these powers in 1861 when he set forth his proclamation declaring a blockade on the southern ports of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas. 112

The constitutional power of the President to proclaim a blockade of enemy ports was upheld without exception. In The Amy Warwick case, the district court of Massachusetts ruled that the President had "plenary" power as Commander in Chief to proclaim and to enforce a blockade when war de facto existed without the necessity of a prior declaration of war by Congress.

There can be no doubt of the right of the President to make maritime captures and submit them to judicial investigation.... Some have thought that it was to be deemed enemy's country, because of the proclamation of the President. It seems rather that the proclamation and the blockade are to be upheld as legal and valid because the territory is that of an enemy. 113

111U.S., Statutes at Large, II, 528.
When the above case as well as others reached the Supreme Court on appeal, the Court held that the President by virtue of his power as Chief Executive and Commander in Chief is entitled to treat a region known to be in insurrection as enemy country and thereby strip all its inhabitants of their constitutional rights. President Lincoln's Declaration of Blockade for Confederate ports was valid on the basis that the rebellion was a state of war under domestic and international law. The Court further ruled that this was a political question to be decided by the President—not the Courts. 114

A number of Supreme Court cases decided after the war strictly construed the President's power as Commander in Chief to license trading with the enemy during the Civil War. 115

In The Sea Lion decided in 1867, the Court held that under the original Act of June 13, 1861, issued by President Lincoln on the blockade, the President could grant or authorize a permit to pass through the blockade. The Sea Lion, holding a license issued by a special agent of the Treasury Department who was acting under the orders of the commanding general of the Union Army in New Orleans, broke the blockade, and was captured for condemnation as a prize of war. The Court further held that the license held by the Sea Lion was null and void and that the ship and its cargo could validly be seized as a prize of war as the license had not been issued by the

114 The Prize Cases, 2 Black 635 (1863).
115 Schubert, p. 221.
The Court held the same view in Coppell v. Hall. Certificates were being issued by the British consul to protect cotton from seizure by the Union forces before it could be transported to New Orleans and then exported to England. The Court decision in this case reads as follows:

The military orders set forth in the record were unwarranted and void. The President alone could license trade with the rebel territory, and when thus licensed, it could be carried only in conformity to regulations prescribed by the Secretary of the Treasury (which had been approved by the President). The subject was wholly beyond the sphere of the powers and duties of the military authorities. 117

Under the provisions of the Trading with the Enemy Act of October 6, 1917, the President was given powers over importation and exportation to enemy countries except under such regulations as he might choose to make.

Be it enacted...that it shall be unlawful for any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of the enemy, as provided in this Act, to trade, or attempt to trade either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy. 118

116 *The Sea Lion*, 5 Wallace 630, 647 (1867).
117 *Coppell v. Hall*, 7 Wallace 542, 556 (1869).
Referring to President Wilson's authoritative use of the power given to him under the Trading with the Enemy Act of 1917 Berdahl elaborates by stating:

By virtue of this authority, President Wilson at various times during the war proclaimed an embargo on long lists of articles, and prohibited the importation of other articles, except under a system of licenses which he placed under the supervision of the War Trade Board. In this way he was able to exercise complete control over the foreign trade of the United States during the period of the war, and thus to prevent supplies from reaching the enemy, either directly or through neutral channels. 119

Following closely upon the heels of the Trading with the Enemy Act was the Espionage Act of May 16, 1918. This Act was far more drastic than the Act of June 15, 1917, and made the Sedition Act of 1798 look very mild. Under Attorney-General Palmer the Espionage Act was drastically enforced, and freedom of speech and of the press temporarily disappeared.

Be it enacted that...whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.... 120

The most famous case under these laws was Schenck v. United States. Schenck was the general secretary of the Socialist Party. He sent out about

120 U.S., Statutes at Large, XL, 553.
15,000 leaflets to men who had been called to military service, urging them to assert their opposition to the Conscription Act. He was indicted on three counts under the Espionage Act of 1917: (1) Conspiracy to cause insubordination in the military service of the United States, (2) Using the mails to send matter declared to be nonmailable by the Espionage Act, and (3) The unlawful use of the mails for the transmission of the same matter as mentioned above. Speaking for a unanimous Court, Chief Justice Holmes was faced with the problem of squaring the Espionage Act with the 1st Amendment which states, "Congress shall make no law...abridging the freedom of speech, or of the press...." Holmes ruled that Congress had the constitutional power to prevent speech and publication that constituted a "clear and present danger." Schenck's activities, Holmes ruled, did in fact constitute such a danger. 121

A week later the Court decided the case of Socialist leader, Eugene V. Debs. Debs made a speech before the Ohio state convention of the Socialist Party at Canton, and was subsequently arrested. The Court held that the delivery of a speech with such words and in such circumstances that the probable effect would be to prevent recruiting--and with that intent--is punishable under the Espionage Act of 1917 as amended in 1918. 122

Nine months later the Court decided Abrams v. United States. In

this case, Abrams and four other Russians were indicted for conspiring to violate the Espionage Act. They published two leaflets that denounced the efforts of capitalist nations to interfere with the Russian Revolution, criticized the President and the plutocratic gang in Washington for sending American troops to Russia, and urged workers producing munitions in the United States not to betray their Russian comrades. Without mentioning the clear and present danger doctrine the Court found that the defendants had intended to "urge, incite, and advocate" curtailment of production necessary to the war. The Court reasoned that the "men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce." 123

Only one case of espionage, that of Hartzel v. United States was decided by the Supreme Court during World War II. Hartzel was prosecuted for publishing and mailing "scurrilous and vitriolic attacks on the English, the Jews and the President of the United States" to a carefully selected mailing list. The Court held that two major elements are necessary to constitute an offense under the Espionage Act.

The first element is a subjective one, consisting of a specific intent...to cause insubordination or disloyalty in the armed forces.... The second element is an objective one, consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right

to prevent.... Both elements must be proved by the Government beyond a reasonable doubt. 124

The Court failed to find the requisite intent and ruled that a crime had not been committed under the statute.

Nearly all the cases tried under these Acts by the Supreme Court have been upheld, and the laws judged to be constitutional, thus enabling the President as Commander in Chief to exercise a complete control over all business having any relation to war needs, which in modern times includes practically the entire business life of the nation, as well as complete control over freedom of speech and the press during times of crisis.

THE EXECUTIVE AND THE DOMESTIC SCENE
SEIZURE AND REGULATION OF PRIVATE ENTERPRISE

The power of the President as Commander in Chief to confiscate citizen's property during time of crisis has increased immensely since World War I, due to the demands that war and its aftermath have made on the nation's economy.

During World War I, President Wilson, acting with statutory authority conferred on him by Congress under the National Defense Act of August 29, 1916, issued a proclamation permitting the seizure of various transportation utilities including all railroads in the United States and the terminals in seaports for ocean-going vessels as well as telephone, telegraph, and the commercial cable line.

...I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me...take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation...consisting of railroads, and owned or controlled systems of coastwise and inland transportation...also terminals, terminal companies, ...sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telephone and telegraph lines...to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment.... It is hereby directed that the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through
William G. McAdoo, who is hereby appointed and designated Director-General of Railroads... 125

Professor Schubert states that there were numerous cases decided in the state and lower federal courts dealing with the validity of the Director General's orders. The majority of cases decided in the state courts denied his authority whereas the majority of those cases decided in the federal courts upheld as constitutional and valid the authority of the Director General's orders. 126

In both Rhodes v. Tatum and Dahn v. McAdoo, the Court held that "Any order issued by Mr. McAdoo as Director General must be considered as the order of the President." 127

The Court made the same ruling in Mardis v. Hines in 1920. It said that "the orders of the Director General were in the sense of the Act of 1918, the orders of the President." 128

The most controversial aspects of federal control by the President came under the heading of interim rate-making powers in setting rate schedules for intrastate as well as interstate commerce. In reality, the

127Rhodes v. Tatum, 206 S.W. 114, 118 (Texas, 1918), and Dahn v. McAdoo, 256 F. 549 (N.D. Iowa, E.D. at Dubuque, 1919).
Director General in his order of May 25, 1918, had set the rates. The North Dakota State Utilities Commission on appeal to the state Supreme Court was granted a writ of mandamus ordering McAdoo to authorize only the lower rates that were previously approved by the Utilities Commission for intrastate hauling in North Dakota rather than the rates as set by McAdoo in his general order. The United States Supreme Court reversed the decision, however, and in so doing upheld the power of the President and his delegation of power to Director General McAdoo, to determine all rate schedules for railroads for the duration of the war emergency. 129

Similar legislation was passed by a joint resolution of Congress on July 16, 1918, and President Wilson in his proclamation of July 22, 1918, used the authority empowered to him by Congress, assumed possession and control over the operation of all telephone and telegraph systems throughout the United States. Wilson directed the Postmaster General to assume control and set a rate schedule. 130 The facts and results in Dakota Central Telephone Company v. South Dakota ex rel Payne are basically identical to those in the Northern Pacific Railroad Company case cited above. The South Dakota Supreme Court issued an order directing the utility companies not to put into effect the higher schedule of rates for intrastate telephone

130Schubert, p. 242.
service as established by the Postmaster General. The United States Supreme Court reversed the decision, as in the Railroad Case, on the basis that the joint resolution was constitutional, the acts of the Postmaster General under that delegation were the same in legal effect as though performed by the President himself, and the judiciary had no power to review the wisdom or necessity of the determination of the particular rate schedule here involved. 131

During World War II most seizures of industrial and commercial properties were made by the President under Section 3 of the War Labor Disputes Act of 1943. The Act authorized the President to seize any "plant, mine or facility equipped for war production which was threatened by a strike that might unduly impede or delay the war effort." The Act further enjoined the President with the authority to direct the management of the enterprises until such time as the labor dispute was settled. 132

> Be it enacted that...the power of the President under the foregoing provisions of this section to take immediate possession of any plant upon a failure to comply with any such provisions, and the authority granted by this section for the use and operation by the United States or in its interests of any plant of which possession is so taken, shall also apply as hereinafter provided to any plant equipped for the manufacture, production, or mining of any articles or materials which may be required for the national defense or which may be useful in connection therewith. Such


132 U.S., Statutes at Large, LIII, 163.
service as established by the Postmaster General. The United States Supreme Court reversed the decision, as in the Railroad Case, on the basis that the joint resolution was constitutional, the acts of the Postmaster General under that delegation were the same in legal effect as though performed by the President himself, and the judiciary had no power to review the wisdom or necessity of the determination of the particular rate schedule here involved. 131

During World War II most seizures of industrial and commercial properties were made by the President under Section 3 of the War Labor Disputes Act of 1943. The Act authorized the President to seize any "plant, mine or facility equipped for war production which was threatened by a strike that might unduly impede or delay the war effort." The Act further enjoined the President with the authority to direct the management of the enterprises until such time as the labor dispute was settled. 132

Be it enacted that...the power of the President under the foregoing provisions of this section to take immediate possession of any plant upon a failure to comply with any such provisions, and the authority granted by this section for the use and operation by the United States or in its interests of any plant of which possession is so taken, shall also apply as hereinafter provided to any plant equipped for the manufacture, production, or mining of any articles or materials which may be required for the national defense or which may be useful in connection therewith. Such


132 U.S., Statutes at Large, LIII, 163.
power and authority may be exercised by the President through such department or agency of the Government as he may designate, and may be exercised with respect to any such plant, whenever the President finds, after investigation, and proclaims that there is an interruption of the operation of such plant as a result of a strike or other labor disturbance, that the national defense program will be unduly impeded or delayed by such interruption, and that the exercise of such power and authority is necessary to insure the operation of such plant in the interest of the national defense...

Those cases that reached the Supreme Court did so after the hostilities ceased. The first case to reach the Court was Ken-Rad Tube and Lamp Corporation v. Badeau. Badeau, a colonel in the Army, assumed possession and management of the Ken-Rad Company in compliance with the President's order of April 13, 1944. Ken-Rad contended that the President's order directing the seizure of the plants was based on the fear of threatened strikes resulting from the fact of their refusal to comply with an allegedly invalid order of the War Labor Board, and therefore, the President's order was also invalid. The federal district court held that:

The record fails to disclose any grounds upon which the Court could find that the President, in issuing the order, acted arbitrarily or without cause. He was not bound by the findings of the War Labor Board. Even though they might have been based upon erroneous procedure or wrongful construction of facts, the President may have had other facts upon which he determined his course...it is our judgment that section 9 does not confine the President to any one field of information but that he may make his own independent investigation and, subject to the determination by the Courts that

133 Ibid., p. 163.
his action was not arbitrary, may act to prevent a
cessation of operations of any plant or business or
other agency which might be utilized to contribute
to the war effort. We further conclude that without
an Act of Congress there was sufficient authority by
the terms of the Constitution itself to justify the
action of the President in this case...when war has
been declared and is actually existing, his functions
as Commander in Chief become of the highest importance
and his operations in that connection are entirely
beyond the control of the legislature. There devolves
upon, by virtue of his office, a solemn responsibility
to preserve the nation and it is our judgment that there
is specifically granted to him authority to utilize
all resources of the country to that end. 134

In 1944 under Executive Order 9508 issued by President Roosevelt,
the Secretary of War took possession of and directed the operation of
Montgomery Ward's plant and facilities in Chicago. The Chicago Federal
District Court ruled that Montgomery Ward was engaged in retail selling and
distribution, not production and since the War Labor Disputes Act pertained
only to war production, the seizure of Ward's was an unconstitutional use of
the President's powers as Commander in Chief. The government succeeded in
getting the Seventh Circuit Court of Appeals to rule that Ward's was "a
plant engaged in war production" under the Fair Labor Standards Act of 1938
which stated that 'Produced' means producing, manufacturing, mining, handling,
or transporting, or in any other manner working on such goods, or in any
process or occupation necessary to the production thereof, in any State. The

(W.D. Ky., Owensboro D., 1944).
Circuit Court of Appeals did not, however, rule on any constitutional issues. Ward's then took the case to the Supreme Court. However, the day before the argument was to be heard, the government pulled all of its agents out of all Ward's plants and facilities. The Supreme Court remanded the case to the district court with directions to dismiss as moot due to the fact that the President had returned Ward's properties before the Supreme Court had reached the case on its docket. 135

In United States v. United Mine Workers of America the Court ruled on the President's constitutional powers to convert private property to public uses in time of war. The Court held that "in October, 1946, the United States was in possession of, and operating, the major portion of the country's bituminous coal mines. (1) The United States had taken possession of the mines pursuant to Executive Order 9728 of May 21, 1946, 11 FR 5593, in which the President, after determining that labor disturbances were interrupting the production of bituminous coal necessary for the operation of the national economy during the transition from war to peace, directed the Secretary of the Interior to take possession of and operate the mines and to negotiate with representatives of the mines concerning the terms and conditions of employment. The President's action was taken under the Constitution, as President of the United States and Commander in Chief of the Army

and Navy, and by virtue of the authority conferred upon him by the War Labor Disputes Act. 136

The development and use of presidential power as Commander in Chief to assume temporary control and possession of private enterprise was halted by the Supreme Court's decision in the Youngstown steel case of 1952. In the latter part of 1951 a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements. Long continued conferences failed to settle the dispute. On December 18, 1951, the employees' representative of the United States Workers of America gave notice of an intention to strike when the agreements expired on December 31. The Federal Mediation and Conciliation Service intervened, but unsuccessfully, and President Truman then referred the dispute to the Federal Wage Stabilization Board to investigate and make recommendations for fair and equitable terms of settlement. This failed, and the Union gave notice of a nationwide strike called to begin at 12:01 a.m., April 9. The indispensability of steel led President Truman to believe that the proposed strike would immediately jeopardize our national defense, and he issued an Executive Order directing Secretary of Commerce Sawyer to take possession of the steel mills and keep them running. In a 6 to 3 vote the Court ruled that the power of the President to issue such an order must stem

from an Act of Congress or from the Constitution itself. Only two statutes authorize seizure under certain conditions, but the government admitted these conditions were not met, since the production involved was too cumbersome and time-consuming. Moreover, in the consideration of the Taft-Hartley Act, Congress rejected an amendment authorizing governmental seizures in an emergency. Nor is there any provision in the Constitution that would warrant this seizure. As Commander in Chief of the Armed Forces, the President still has no right to seize private property to keep labor disputes from stopping production. This was a matter for Congress only, not for military authorities. Neither does the Constitution permit the President to legislate—a function which belongs only to Congress, in good times or in bad times. This seizure order cannot stand. 137

Professor Schubert best sums up the President's seizure powers when he says:

The question remains whether the President does not still have a choice among alternative procedures. Certainly the Supreme Court would uphold his selection if he acted under circumstances which the Court would accept as time of war, and the Youngstown case is the only instance in our entire history when the Supreme Court failed to follow the leadership of the Commander in Chief in such a matter. 138

138 Schubert, p. 251.
Schubert goes on to say that "the future will find the Youngstown decision being confined to its very special facts, something to be reprinted in casebooks for the enlightenment of students of constitutional law but not a precedent which the Court is obliged to take seriously in a moment of national crisis." 139

139Ibid., p. 251.
The provision in the Constitution permitting the suspension of the privilege of the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it" 140 indicates that the taking of extraordinary measures in cases of such emergency was clearly recognized as necessary and proper by the framers of the Constitution. It must be noted, however, that there was some objection to this clause at the time. In a letter to Madison, Jefferson protested as follows:

Why suspend Hab. Corp. in insurrections & rebellions? ...If publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken & tried, retaken & retried, while the necessity continues, only giving him redress against the government for damages. Examine the history of England. See how few of the cases of the suspension of the Habeas Corpus law have been worthy of that suspension. They have been either real treasons wherein the parties might as well have been charged at once, or sham plots where it was shameful they should ever have been suspected. Yet for the few cases wherein the suspension of the hab. corp. has done real good, that operation is now becoming habitual, & the minds of the nation almost prepared to live under its constant suspension. 141

140 U.S., Constitution, Art. 1, Sec. 9, Cl. 2.
The Constitution is notably silent as to who determines when and where an emergency has arisen and who determines the suspension of the writ—Congress, The President, or the courts. The general consensus has been, by its placement in the Constitution immediately following the delegated powers of Congress, that this power belongs to Congress. However, with the outbreak of the Civil War, this general consensus was disregarded by President Lincoln when he assumed the responsibility of authorizing General Scott, the commanding general of the Army, to suspend the writ.

You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend that writ.

On July 2, 1861, this authorization was extended to cover the line between New York and Washington.

The first case to come before the Supreme Court challenging the suspension of the writ was Ex parte Merryman. John Merryman, a Maryland...
secessionist sympathizer residing in Maryland, was apprehended by the military and placed in custody at Fort McHenry for attempting to hinder the success of the Northern cause. Merryman immediately appealed to Chief Justice Taney for a writ of habeas corpus. Taney issued the writ, directed to General Cadwalader who was in command of the fort. The general refused to honor the writ on the grounds that he was authorized by the President to suspend the writ of habeas corpus, but that he would seek further instructions. Taney then issued a writ of contempt against General Cadwalader and sent a United States marshal to serve it. The marshal reported to Taney that he had not been allowed to enter the outer gate of the fort, although he had sent in his card, and that he had not been able to serve the writ. Taney then delivered an opinion holding the President's power to suspend the writ null and void on the grounds that only Congress can suspend the writ since the provision appears in the Article of the Constitution dealing with Congress, and in a list of limitations on Congress, and further that a military officer cannot arrest a person not subject to the rules and articles of war, except in the aid of civil authority when the individual has committed an offense against the United States. In such a case the military officer must deliver the prisoner immediately to civil authority to be dealt with according to the law. President Lincoln ignored the ruling, but Merryman was later released from military confinement and turned over to civil authorities. 145

145 Ex parte Merryman, 17 Fed. Cas. 144, No. 9, 487 (1861).
Lincoln responded to the Merryman case of July 4, 1861, in his message to Congress. Posing the query, "Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?", he went on to say:

Now it is insisted that Congress, and not the Executive, is vested with this power (to suspend the writ); but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.... Whether there shall be any legislation on the subject, and, if any, what, is submitted entirely to the better judgment of Congress. 146

On March 3, 1863, Congress passed the Habeas Corpus Act which not only authorized the President to suspend the writ of habeas corpus, but it also legalized his past acts. 147 After Congress passed the Habeas Corpus Act, President Lincoln issued another proclamation regarding the suspension of the writ of habeas corpus, citing the Act as the basis of his authority to do so.

...Whereas by statute which was approved...the Senate and House of Representatives of the United States in Congress assembled that during the present insurrection the President of the United States, whenever in his judgment the public safety may require, is authorized to suspend the privilege of the writ of habeas corpus

146Richardson, Vol. VI, p. 25.
147U.S., Statutes at Large, XII, 755.
in any case throughout the United States or any part thereof; ... Now, therefore, I, Abraham Lincoln, President of the United States, do hereby proclaim and make known to all whom it may concern that the privilege of the writ of habeas corpus is suspended throughout the United States in the several cases before mentioned, and that this suspension will continue throughout the duration of the said rebellion or until this proclamation shall, by a subsequent one to be issued by the President of the United States, be modified or revoked. 148

Several state court and lower federal court rulings were made on the suspension of the writ of habeas corpus, however, none of the adverse rulings reached the United States Supreme Court. In most instances these state court and lower federal court rulings upheld the validity of the President's proclamation of September 15, 1863, as well as the congressional statute of March 3, 1863, on the grounds that both the statute and the proclamation were elements in a constitutional congressional plan of contingency legislation. They further held that there had been no delegation of legislative power. 149

Subsequent Supreme Court rulings on the suspension of the writ of habeas corpus were taken up in those cases dealing with martial law and subjection of civilians to military trials. 150


149 In re Fagan, 8 Fed. Cas. 947 (D. Mass., 1863), No. 4604; In re Dunn, 8 Fed. Cas. 93 (S.D.N.Y., 1863), No. 4171; In re Oliver, 17 Wis. 681 (1864).

150 Kallenbach, p. 547.
The suspension of the writ of habeas corpus merely means that it is possible to make military arrests and detention of individuals without interference by civil courts. Much more serious consideration is given to the question of the possibility of interfering in the constitutional rights of citizens under the proclamation of martial law. 151

According to the Manual for Courts-Martial, martial law is "military power exercised in time of war, insurrection, or rebellion, in parts of the country retaining their allegiance, and over persons and things not ordinarily subjected to it." 152 "Martial law," according to the Official Records of the Union and Confederate Armies, "is simply military authority exercised in accordance with the laws and usages of war...." 153

The most noteworthy controversies were first provided during the Civil War when President Lincoln issued his proclamation of September 24, 1862. Aside from suspending the writ of habeas corpus for those individuals in the North who were interfering with the war effort, he also made them subject to martial law.

Now, therefore, be it ordered, first, that during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all

---

151 Ibid., p. 547.
153 War of the Rebellion... , p. 146.
persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts-martial or military commissions...." 154

The first and only case to reach the Supreme Court in which the trial of civilians by military courts-martial or commissions was challenged was that of Ex parte Vallandigham. Vallandigham was an agitator and peace democrat from Ohio who had been outspoken in his opposition to the Civil War and the war efforts. He was tried by a military commission, convicted and sentenced to be imprisoned for the duration of the war. He appealed to the Supreme Court for a writ of habeas corpus. The Court held that it was without jurisdiction. Vallandigham's recourse to the federal courts via habeas corpus had been cut off by the suspension of the writ. The Court further ruled that the authority of a military commission is not subject to appeal to, or reversal by, any civil court. Since the Supreme Court had no original jurisdiction to issue writs of habeas corpus, it had no jurisdiction to hear Vallandigham's case, and the case was dismissed. 155

A year after the Civil War was over, the Court ruled on Ex parte Milligan. Milligan, a civilian, was arrested by order of General Hovey who commanded the military district of Indiana. Milligan was tried by a military

154Richardson, Vol. VI, p. 98.
155Ex parte Vallandigham, 1 Wallace 243 (1863).
persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts-martial or military commissions...." 154

The first and only case to reach the Supreme Court in which the trial of civilians by military courts-martial or commissions was challenged was that of Ex parte Vallandigham. Vallandigham was an agitator and peace democrat from Ohio who had been outspoken in his opposition to the Civil War and the war efforts. He was tried by a military commission, convicted and sentenced to be imprisoned for the duration of the war. He appealed to the Supreme Court for a writ of habeas corpus. The Court held that it was without jurisdiction. Vallandigham's recourse to the federal courts via habeas corpus had been cut off by the suspension of the writ. The Court further ruled that the authority of a military commission is not subject to appeal to, or reversal by, any civil court. Since the Supreme Court had no original jurisdiction to issue writs of habeas corpus, it had no jurisdiction to hear Vallandigham's case, and the case was dismissed. 155

A year after the Civil War was over, the Court ruled on Ex parte Milligan. Milligan, a civilian, was arrested by order of General Hovey who commanded the military district of Indiana. Milligan was tried by a military

154 Richardson, Vol. VI, p. 98.
155 Ex parte Vallandigham, 1 Wallace 243 (1863).
commission, found guilty of initiating insurrection and of various treasonable and disloyal practices, and sentenced to be hanged on May 19, 1865. Milligan appealed to the Circuit Court in Indiana for a writ of habeas corpus on the grounds that the military proceedings were unconstitutional and further claimed his rights to a trial by jury as guaranteed by the Constitution. The Circuit Court asked the Supreme Court for its opinion. The Supreme Court stated that every trial involves the exercise of judicial power and part of the judicial power of the country was conferred upon the military commission because the Constitution expressly vests it "in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish." The military cannot justify action on the mandate of the President because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not make, the laws. The Court stated that in times of grave emergencies the Constitution allows the government to make arrests without a writ of habeas corpus but it goes no further. In other words a citizen may be tried by means other than common law.

The Court further stated that martial law can be applied only when there is real necessity, such as during an invasion that would effectually close the courts and civil administration. However, as long as the civil courts are operating, as they were in this case, the military tribunal did not have any legal power and authority to try and punish this man--the
accused is entitled to a civil trial by jury. 156

There is a considerable parallel between Lincoln's military commissions and the situation which prevailed in Hawaii during the greater part of World War II. Immediately following the attack on Pearl Harbor, Governor Poindexter of the Territory of Hawaii proclaimed martial law, suspended the writ of habeas corpus, closed the local courts, and turned over the powers of government to the commanding general of the United States Army in Hawaii. The President approved the governor's actions, and the military ruled Hawaii until October 24, 1944. 157

In February 1944, Duncan, a civilian shipfitter employed by the Navy, was convicted of assault for engaging in a brawl with two Marine sentries. Duncan was tried and convicted by a military tribunal rather than a civil court. The Supreme Court in a 6 to 2 decision ruled that civilians in Hawaii are entitled to their constitutional privilege of a fair trial.

When Congress passed the Hawaiian Organic Act in 1900, it never intended to overstep the boundaries of military and civilian power. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military

156 Ex parte Milligan, 4 Wallace 2 (1866).
157 Pritchett, p. 353.
tribunals. The defendant, then was entitled to be tried by a civil court. 158

Whether the Court's decision in Duncan v. Kahanamoku will set a precedent in future emergencies, thereby hampering the executive power, remains to be seen. A large-scale simulated civil defense test was held in 1955 whereby A-bomb and H-bomb attacks took a toll of some 14 million civilian "casualties." President Eisenhower had purposely not been briefed in advance on actions which might be taken in order to simulate the exercise as close to reality as possible. Eisenhower's action was to immediately suspend the writ of habeas corpus and to declare a nationwide state of martial law, acting on the premise that "the ordinary processes of democratic and constitutional government do not suffice to protect the state in time of emergency and must surrender to a modified authoritarian regime." 159

It could very well be said, then, that the President as Commander in Chief will continue to have the power and authority to suspend the writ of habeas corpus and to declare martial law in future crises in that "this premise is deeply embedded in the teachings of democratic political theory, which in its traditional and contemporary expression have counselled the need to abandon the processes of democratic government as the first essential


response to emergency conditions." 160

160 Ibid., p. 4.
CONCLUSION

Having looked at judicial reaction under the broad topics of The Executive and the Military, The Executive and the Enemy, and The Executive and the Domestic Scene, we find that the war powers of the President have been shaped by the Chief Executive through various crises rather than being defined and checked by the judiciary. With a few exceptions the Supreme Court has sustained the President's actions as Commander in Chief either immediately or well after the fact. It must be noted, however, that in a majority of the cases reviewed, the Court declared in its decision that the subject matter covered was a political question--one to be decided by the involved organs of power rather than by the Courts.

Given the Court's past action in matters dealing with the President's power and authority under the Commander-in-Chief clause, one might then ask how strong should the President's power be? Louis W. Koenig in the New York Times Magazine wrote that the President should have more power, not less. He said that "...the task of future American leadership is clear. People must be aroused. Congress moved, the bureaucracy stirred and
alliances redirected. Only the President can do it." 161

President Kennedy said "a restricted concept of the Presidency is not enough" The decades of the sixties will demand "that the President place himself in the very thick of the fight," and "that he be willing to serve them (the people) at the risk of incurring their momentary displeasure." 162

Robert Hirschfield in his article, "The Power of the Contemporary Presidency," believed that "crisis has become the normal condition of our times," and the power that came to an earlier President because of war "today has become a permanent part of the executive office." 163

Richard Neustadt credits the President's own desire for power as the strongest deciding factor in determining just how large his powers will be. Neustadt feels "the outcome will often turn on whether he perceived his risk in power terms" and if the President "takes account of what he sees before he makes his choice." 164

Since crisis is a permanent facet of the modern executive office,

---

and since the Supreme Court has followed a consistent pattern of non-interference, the office of the President stands today as the focal point of American power to be exercised effectively to defend the country and to repel any armed attack against the forces of the United States.

In conclusion, then, we find that Rossiter was most accurate in stating that "the contours of the presidential war powers have therefore been presidentially, not judicially shaped; their exercise is for Congress and the people, not the Court, to oversee." 165 The Presidents of the future will undoubtedly mold their own powers as Commander in Chief in the light of their own interpretation of the Constitution, the actions of their predecessors, congressional statutes, and judicial decisions. Thus equipped they should prove able in their capacity as Commander in Chief to meet the ever new and challenging crises which they will inevitably have to face in domestic emergencies as well as in limited or unlimited wars.

165 Rossiter, p. 126.
BIBLIOGRAPHY

PUBLIC DOCUMENTS

U.S. Constitution.
U.S. Reports.
U.S. Statutes at Large. Vol. I, II, IV, XII, XL, LIII, and LVI.

BOOKS


Hardy, Charles O. Wartime Control of Prices. Washington: The Brookings Institution, 1940.


ARTICLES


APPROVAL SHEET

The thesis submitted by Phyllis M. Oman has been read and approved by members of the Department of Political Science.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated and that the thesis is now given final approval with reference to content and form.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

Aug 6, 1971

Date

Signature of Advisor