Supreme Court of the United States.

No. 350. Ex Parte.

In the Matter of Lambdin P. Milligan, Petitioner for a Writ of Habeas Corpus.

Brief in behalf of the United States.

The petitioner seeks from the Circuit Court of the United States in and for the District of Indiana, a writ of *Habeas Corpus*, to relieve him from imprisonment by the military authorities of the United States. He sets forth in his petition and the exhibits annexed the cause and reasons of his detention, alleging that on the fifth day of October, 1864, at his home in Indiana, he was arrested under the authority of the President, by order of Brevet Major General Alvin P. Hovey, at that time in command of the Military District of Indiana, within the geographical Military Department of the Ohio, and he has been held ever since under a military guard, as a military prisoner, by the authority of the President, at a military prison, in the city of Indianapolis. That after his arrest and imprisonment, the Judge Advocate of the department of the Ohio, preferred five several charges against him and his alleged confederates, with sixteen specifications, all of which are made part of the petition by "Exhibit A."

The charges are in brief:

1st. A conspiracy against the Government of the United States.

2nd. Affording aid and comfort to the rebellion against the authority of the United States.

3d. Inciting an insurrection.

4th. Disloyal practices.

5th. Violation of the laws of war.

The specifications under these charges set forth, with more or less particularity that in a time of actual war, the petitioner set on foot, with others, a secret military organization, for the purpose of overthrowing the government. (Record, page 12.)

That he, with others, conspired to seize the United States and State Arsenals, and to release the prisoners of war confined in the military prisons, under charge of the military authorities; to arm these prisoners; to join with them such other forces as they could raise; and to march into Kentucky and Missouri; to co-operate with the rebel forces there. (*Record page* 13.) That the conspirators communicated with the enemy to induce them to invade the States of Kentucky, Indiana and Illinois, intending themselves to join and co-operate with the enemy in the event of such an invasion, and that they armed themselves for that purpose. (*Record page* 13, 14 *and* 15.) That the petitioner was an officer in a military force organized and armed for this and other purposes. (*Record page* 17.) That he advised and counselled the enrolled militia of the United States to disregard the authority of the United States, and to resist the draft then ordered to increase the army of the United States, and armed citizens of the State, for the purpose of resisting the draft. (*Record page* 15.) That he attempted to introduce the armed forces of the enemies of the United States into loyal States, to overthrow and destroy the authority of the United States. That all these practices and acts are alleged

to have been pursued and committed at several places "within the District of Indiana and within the military lines o the armies of the United States, and within the theatre of military operations which had been and was constantly threatened with invasion." (*Specifications passim.*)

All these acts are alleged to have been committed between the first day of October, 1863, and the first day of August, 1864, inclusive.

All of which charges and specifications were approved by General Hovey, and the petitioner was arraigned and tried thereon, by a Military Commission, previously appointed and convened by order of the military commander of the district, at Indianapolis, on the twenty-first day of October, 1864, and continued by adjournment from time to time to the first day of May, 1865.

After objecting to the jurisdiction of the Military Commission, the petitioner pleaded not guilty; but upon full hearing he was found guilty upon all the above recited charges and specifications, and by the Commission sentenced to death by hanging—two-thirds of the members of the Commission concurring therein.

The record, proceedings, findings and sentence being ap proved by the proper Commanders, and the record being forwarded for the action of the President, the sentence was approved and directed to be carried into execution on the second day of May, 1865. Afterwards the sentence was either respited or commuted.

Upon the hearing, the learned Judges of the Circuit Court certify for the decision of this Court these questions, viz:—

"1st. On the facts stated in the said petition and exhibits, ought a writ of Habeas Corpus to be issued according to the prayer of said petition?"

"2d. On the facts stated in the said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

"3d. Whether upon the facts stated in said petition and exhibits, the Military Commission therein named had authority to try said Milligan, in manner and form as in said petition and exhibit stated?"

There is no allegation by the petitioner, in this his petition, under oath, that he is innocent of any of the things laid to his charge.

No question is raised by the petition, or in the questions submitted, upon the regularity of the proceedings or propriety of action of the Commission.

IT IS ASSUMED to be the well settled practice of the Courts of the United States, upon application for a writ of *Habeas Corpus*, that if it appear upon the facts stated by the petitioner, all of which shall be taken to be true, that he could not be discharged upon a return of the writ, then no writ will be issued. Therefore the questions resolve themselves into two, which, for convenience of argument, may be reversed thus:—

I. Has the Military Commission jurisdiction to hear and determine the case submitted to it?

II. The jurisdiction failing, had the military authorities of the United States a legal right, at the time of filing the petition, to detain the petitioner in custody as a military prisoner, or for trial before a civil court?

I. A Military Commission derives its powers and authority wholly from martial law; and by that law and by mili-

tary authority only are its proceedings to be judged or reviewed.

Dynes vs. Hoover, 20 Howard, S. C., Rep. 78.

Vallandigham's case, S. C., Dec. Term, 1863.

II. MARTIAL LAW is the will of the commanding officer of an armed force, or of a geographical military department. expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or supreme executive ruler.

Hansard's Parliamentary Debates, 3d series, vol. 95, page 80. Speech of the Duke of Wellington.

Opinions of Attorneys General, vol. 8, page 367.

III. MILITARY LAW is the rules and regulations made by the legislative power of the State for the government of its land and naval forces.

Kent's Commentaries, vol. 1, *p.* 341, *Note A.*

IV. THE LAWS OF WAR (when this expression is not used as a generic term) are the laws which govern the conduct of belligerents towards each other and other nations, *flagranti bello.*

These several kinds of laws should not be confounded, as their adjudications are referable to distinct and different tribunals.

Infractions of the Laws of War can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations.

Offenses against Military Laws are determined by tribunals established in the acts of the legislature which create these laws—such as Courts Martial and Courts of Inquiry.

The officer executing Martial law is at the same time Supreme Legislator, Supreme Judge, and Supreme Executive.

As necessity makes his will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction he alone can judge; and his sole order punishes or acquits the alleged offender.

But the necessities and effects of warlike operations which create the law also give power incidental to its execution. It would be impossible for the Commanding General of an army to investigate each fact which might be supposed to interfere with his movements, endanger his safety, aid his enemy, or bring disorder and crime into the community under his charge. He, therefore, must commit to his officers, and in practice, to a board of officers, as a tribunal, by whatever name it may be called, the charge of examining the circumstances and reporting the facts in each particular case, and of advising him as to its disposition—the whole matter to be then determined and executed by his order.

Examination of Major André before board of officers, Colonial pamphlets, vol. 18.

Hence arise *Military Commissions*, to investigate and determine, not offenses against military law by soldiers and sailors, not breaches of the common laws of war by belligerents, but the quality of the acts which are the proper subject of restraint by martial law.

Martial law and its tribunals have thus come to be recognized in the military operations of all civilized warfare. Washington, in the Revolutionary war, had repeated recourse to Military Commissions. General Scott resorted to them as instruments with which to govern the people of Mexico within his lines. They are familiarly recognized in express terms by the Acts of Congress of July 17th, 1862, chap. 201, sect. 5; March 18th, 1863, chap. 75, sect. 36; Resolution No. 18, March 11th, 1862; and their jurisdiction over certain offences is also recognized by these acts.

But, as has been seen, Military Commissions do not thus derive their authority. Neither is their jurisdiction confined to the classes of offenses therein enumerated.

Assuming the jurisdiction where military operations are being in fact carried on, over classes of military offenses, Congress, by this legislation, from considerations of public safety has endeavored to extend the sphere of that jurisdiction over certain offenders who were beyond what might be supposed to be the limit of actual military occupation.

As the war progressed, being a civil war, not unlikely, as the facts in this record abundantly show, to break out in any portion of the Union, in any form of insurrection, the President, as Commander-in-Chief, by his proclamation of September 24th, 1862, "ordered that during the existing insurrec-"tion, and as a necessary means for suppressing the same, all "rebels and insurgents, their aiders and abettors, within the "United States, and all persons discouraging volunteer enlist-"ments, resisting militia drafts, or guilty of any disloyal prac-"tice, affording aid and comfort to rebels, against the authori-"ty of the United States, shall be subject to martial law, and "liable to trial and punishment by courts-martial or military "commission.

"Second. That the writ of *habeas corpus* is suspended in "respect to all persons arrested, or who now, or hereafter du-"ring the rebellion shall be, imprisoned in any fort, camp, "arsenal, military prison, or other place of confinement, by "any military authority, or by the sentence of any court-mar-"tial or military commission."

This was an exercise of his sovereignty in carrying on war, which is vested by the Constitution in the President. (Brown vs. the United States, 8 Cranch, 153.)

This Proclamation, which by its terms was to continue during the then existing insurrection, was in full force during the pendency of the proceedings complained of, at the time of the filing of this petition, and is still unrevoked or

unannulled by any counter Proclamation, Treaty or Law of Congress.

While we do not claim that any legislation of Congress was needed to sustain this Proclamation of the President, it being clearly within his power, as Commander-in-Chief, to issue it, yet, if it is claimed that legislative action is necessary to give validity to it, Congress has seen fit to expressly ratify thi Proclamation by the act of March 3d, 1863, by declaring that the President. whenever in his judgment the public safety may require it, is authorized to suspend the writ of Habeas Corpus in any case throughout the United States, and in any part thereof. And the fourth Section further declares, "that any order of the President, or under "his authority, made at any time during the existence of the "present rebellion, shall be a defence in all courts to any ac- "tion or prosecution, civil or criminal, pending or to be com- "menced, for any search, seizure, arrest, or imprisonment, "made, done, or committed, or acts omitted to be done, under "and by virtue of such order."

The offences for which the petitioner for the purpose of this hearing is confessed to be guilty, are the offences enumerated in this Proclamation. The prison in which he is confined is a "military prison" therein mentioned. As to him, his acts and imprisonment, the writ of *Habeas Corpus* is expressly suspended.

The time of the commencement and the duration of the insurrection are matters of which the Court will take judicial notice, (*Prize cases*, 2*d Black* 641.)

Apparently admitting by his petition that a Military Commission might have jurisdiction in certain cases, the Petitioner seeks to except himself by alleging that he is a citizen of Indiana and has never been in the Naval or Military service of the United States, or since the commencement of the rebellion a resident of a rebel State. "Therefore it has "been and still is wholly out of his power to have acquired "belligerent rights and to have placed himself in such a rela- "tion to the government as to enable him to violate the laws "of war."

But we submit that neither residence, nor propinquity, to the field of actual hostilities is the test to determine who is or who is not subject to martial law even in a time of foreign war, and certainly not in a time of civil insurrection. The Commander-in-Chief has full power to make an effectual use of his forces. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war taken in battle and confined within his military lines.

These crimes of the petitioner were committed within the State of Indiana, where his arrest, trial and imprisonment took place; within a military district of a geographical military department, duly established by the Commander-in-Chief; within the military lines of the army, and upon the theatre of military operations; in a State which had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize, and prisoners of war whom he plotted to liberate; its citizens were liable to be made soldiers, and were actually ordered into the ranks; and to prevent their becoming soldiers the petitioner conspired with, and armed others to interfere.

This record does not raise the question which was argued in another case and before another tribunal, whether a military commission has jurisdiction over a purely civil crime; for the acts of which the petitioner has been found guilty are not only civil but military offenses. These are, holding communication with the enemy, conspiring with others to seize the munitions of war stored in the arsenals, to liberate prisoners of war held for exchange, and organizing an armed force against the Government. He is not less an enemy because a traitor, not less a traitor because an enemy.

Thus far the discussion has proceeded without reference to the effect of the Constitution upon war making powers, duties and rights, save to that provision which makes the President Commander-in-Chief of the Armies and Navies. Does the Constitution provide restraint upon the exercise of this power?

The people of every sovereign State possess all the rights and powers of government. The people of the States in forming a "more perfect Union to insure domestic tranquility, and to provide for the common defense," have vested the power of making and carrying on war in the General Government, reserving to the States, respectively, only the right to repel invasion and suppress insurrection "of such imminent danger as will not admit of delay." This right and power thus granted to the General Government is in its nature entirely *Executive*, and in the absence of Constitutional limitations would be wholly lodged in the President, as Chief Executive Officer and Commander-in-Chief of the Armies and Navies.

Lest this grant of power should be so broad as to tempt its exercise in initiating war, in order to reap the fruits of victory, and therefore be unsafe to be vested in a single branch of a Republican Government, the Constitution has delegated to Congress the power of originating war by declaration, when such declaration is necessary to the commencement of hostilities, and of provoking it by issuing Letters of Marque and Reprisal—consequently, also, the power of raising and supporting armies, maintaining a navy, employing the militia, and of making rules for the government of all armed forces while in the service of the United States.

To keep out of the hands of the Executive the "fruits of victory" Congress is also invested with the power to "make rules for the disposition of captures by land or water."

After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities and duties of the occasion, their extent and duration.

(8 Cranch; Luther vs. Borden, 7 Howard, 42–45; Knott vs. Martin, 12 Wheaton, R. 19)

During the war his powers must be without limit, because, if defending, the means of offense may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view—"to conquer a peace." New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet.

(Hamilton Federalist, No. 26; Madison same, No. 41.)

These propositions are certainly axiomatic in the absence of all restraining legislation by Congress.

By the Constitution, as originally adopted, no limitations were put upon the war making and war conducting powers of Congress and the President, and after discussion and after the attention of the country was called to the subject, no other limitation by subsequent amendment has been made, except by the Third Article, which prescribes that "no soldier shall be quartered in any house in time of peace without consent of the owner, or in *time of war* except in a manner prescribed by law."

This, then, is the only expressed constitutional restraint upon the President as to the manner of carrying on war. There would seem to be no implied one; on the contrary, while carefully providing for the privilege of the writ of *Habeas Corpus* in time of peace the Constitution takes it for granted that it will be suspended "in case of rebellion or invasion, (*i. e.*, in time of war,) when the public safety requires it."

IT IS CLAIMED that the 4th, 5th and 6th Articles of amendment are restraints upon the war making power.

It never could have been intended by the Second Article, declaring that "the right of the people to keep and bear arms shall not be infringed," to hinder the President from disarming insurrectionists, rebels and traitors in arms while carrying on war against them.

Nor that he would contravene the Fourth Article by searching and seizing their persons, houses, papers and effects, without a warrant upon probable cause, previously supported by oath; or that the Fifth Article would be violated in "depriving of life, liberty or property, without due process of law," the armed battalions of rebel foes of the country marching to attack the Capital, by killing some, making prisoners of others, and taking the arms, provisions and munitions of war of all.

All these amendments are in *pari materia,* and if either is a restraint upon the President in carrying on war, in favor of the citizen, it is difficult to see why each and all of them are not.

The Fifth Article, confirming the right of presentment for crime, by its exception, in cases arising in the land or naval forces, or in the militia when in service in time of war or public danger—*i. e.* when under the control of the general government—makes provision for allowing Congress to enact rules and regulations for the government of the armed forces of the country in time of peace as well as in time of war, without thenecessity of subjecting the offender to indictment and trial by jury.

These are all Peace provisions of the Constitution, and, like all other Conventional and Legislative laws and enactments, are silent "*inter arma,*" when "*salus populi suprema est lex!*"

(John Quincy Adams, Debates in Congress, 1836.)

IT IS CLAIMED in the Petitioner's brief that if he is accused of any crime against the law it is under the Conspiracy Act of 1861, and that by its terms he can only be punished upon conviction in a District or Circuit Court.

We may well admit a portion of the offences charged are within the purview of that Act.

But that Act only provided for the punishment of a new offense before certain Courts, but did not oust the Military tribunals of their jurisdiction of military offenses.

It is a familiar exercise of Martial law to allow the Courts of a country, when it may be done with safety, to perform their ordinary functions, in regard to crimes committed among the people toward each other, but rarely, if ever, is any jurisdiction permitted, of crimes affecting the safety, well being or movements of the occupying army.

But such exercise of civil power is wholly permissive, and subordinate to the military power; and whether it shall be exercised at all is entirely within his discretion. (See Wellington's speech, *ubi supra.*)

The Second and Third sections of the Act relating to *Habeas Corpus* of March 3d, 1863, apply only to those persons who are held as "State or political offenders," and not to those who are held as prisoners of war, The petitioner was as much a prisoner of war, as if he had been taken in action with arms in his hands.

These sections apply also only to those persons, the cause of whose detention is not disclosed, and not to those, who at the time when the lists by the provisions of said sections are to be furnished to the Court, are actually undergoing trial before military tribunals upon written charges made against them.

The law was framed to prevent imprisonment for an indefinite time without trial, not to interfere with the case of prisoners undergoing trial. Its purpose was to make it certain that such persons should be tried.

The Petitioner does not complain that he has been kept in ignorance of the charges against him, or that the investigation of those charges has been unduly delayed.

A single question further remains.

If the military tribunal has no jurisdiction, the petitioner may be held as a prisoner captured in war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates, then to be handed over by the Military to the Civil authorities, to be tried for his crimes under the acts of Congress, and before the Courts which he has selected.

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