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The United States "War Power" and Limited Government

Forrest Revere Black

University of Kentucky

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THE UNITED STATES "WAR POWER" AND LIMITED GOVERNMENT

"Let everything that is in favor of power be closely construed; everything in favor of the security of the citizen and the protection of the individual comprehensively, for the simple reason that power is power, it is able to take care of itself and tends by its nature to increase, while the citizen needs protection."

FRANCIS LIEBER.

In the whole field of constitutional law, we know of no problem that has been exposed to so little analysis and concerning which there has been such utter confusion of thought, as the nature and extent of the war power. Much of the literature of the subject has been forged in the heat of conflict when the passions of war were rampant. Our Civil War especially brought forth a voluminous literature and it is obvious that most of the writers of that period were guided by their emotional reactions and not by any critical analysis of the problem. Their statements bear all the earmarks of the special pleader and none of those of the scholar.

As an illustration, consider the work by Mr. Whiting entitled "War Powers Under the Constitution" published in 1871. It is the thesis of this writer that on the outbreak of war, the Constitution automatically becomes a scrap of paper. Without any attempt to classify and distinguish the various functions that have been grouped under the term "the war power," he proceeds to demonstrate the absurdity of the view that the war power is or could be limited. He says, "If enemy's property cannot be taken without 'due process of law,' how can the soldier disarm his foe and seize his weapons? If no man can be deprived of life without trial by jury, a soldier cannot slay the enemy in battle. If no person can be arrested, sentenced or shot without trial by jury in the county or state where his crime is alleged to have been committed, how can a deserter be shot or a spy hung or an enemy be taken prisoner?"

Here is the argument of the legal advisor to the War Department in Lincoln's administration. It is the argument of one, who in his own mind is convinced that he has presented an irresistible case. Previous to his appointment Mr. Whiting was

1 P. 52.
a patent attorney. It was claimed at the time that his interpretation of the war power was a pure invention and it was aptly designated as "Patent-War-Office-Constitutional-Law." In any discussion of the war power of the President and of Congress this book should receive considerable attention for two reasons: Mr. Whiting, by virtue of his official position in the Lincoln administration, played an important role in the determination of policy during the Civil War; and secondly, his book is the first and thus far the only attempt that has been made to give a complete and exhaustive presentation of the war power of the Federal Government.

Mr. Whiting relies on three main arguments in the development of his case for an unlimited government in war time. First, he says, "It was intended by the framers of the Constitution, or, what is of more importance, by the people who made and adopted it, that the powers of Government in dealing with civil rights in time of peace, should be defined and limited; but the powers to 'provide for the general welfare and common defence' should be unlimited." This interpretation of the "general welfare and common defense" clause is in conflict not only with the decisions of the highest court and of the great authorities in constitutional law, but if put into practice it would subvert the powers of the states and destroy the limited character of the national government. The Constitution reads, "The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States."

Mr. Justice Story says, "If the clause 'to pay the debts and provide for the common defence and general welfare of the United States' is construed to be an independent and substantive grant of power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers; but it plainly extends far beyond them, and creates a general authority

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3 Prof. Berdahl of the University of Illinois has written a thesis on the War Power of the Executive branch of the Government.
5 Art. 1, Sec. 8, clause 1.
in Congress to pass all laws, which they may deem for the common defence or general welfare. Under such circumstances, the Constitution would practically create an unlimited National government. The enumerated powers would tend to embarrassment and confusion; since they would only give rise to doubts as to the true extent of the general power, or of the enumerated powers. . . . On the other hand, construing this clause in connection with, and as a part of the preceding clause, giving the power to lay and collect taxes, it becomes sensible and operative. It becomes a qualification of that clause and limits the taxing power to objects for the common defence or general welfare. It then contains no grant of any powers whatsoever; but is a mere expression of the ends and purposes to be effected by the preceding power of taxation.\(^6\)

In the Constitutional convention, Governor Randolph, answering Patrick Henry as to the meaning of common defense and general welfare clause, said, "No man who reads it can say it is general. You must violate every rule of construction and common sense if you sever it from the power of raising money and annex it to anything else, in order to make it that formidable power which it is presented to be."\(^7\)

If the Constitution can be so construed as to authorize any measure which Congress or the President under the stress of a war hysteria deem expedient to adopt, then there is no longer any place in our constitutional theory for the conception of usurpation. We have then gone one step beyond the British Constitution, which, while it "admits Parliament to be omnipotent, and asserts that the King can do no wrong, maintains that ministers may sometimes usurp power, and holds them accountable for the usurpation."\(^8\)

In the second place, Mr. Whiting places much weight on the elastic clause. It reads "Congress shall have the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."\(^9\) He says, "The powers conveyed in this 18th clause of Art. 1, sec. 8, are of vast impor-

\(^6\) Story, Commentaries on the Constitution, Sections 905, 906, 908.
\(^7\) Elliot's Debates 599.
\(^9\) Art. 1, Sec. 8, clause 18.
tance and extent. It may be said that they are in one sense, un-
limited and discretionary. They are more than imperial.” In
reply to this contention, two points should be considered: first,
the elastic clause does not grant any new or additional power
It is only a formal recognition of the legislative duty to provide
the necessary laws for carrying into effect the “foregoing pow-
ers.” What the foregoing powers are will never be discovered
from this clause but only from the foregoing clauses. In the
second place, the Constitution being a written document, it must
be construed as a whole and any particular grant, however un-
qualified the language, must be construed so as to be consistent
with the other provisions.

Finally, Mr. Whiting’s whole work seems to be permeated
with the idea that the Federal government can exercise every
power which is not expressly prohibited to it by the Constitu-
tion. One illustration of this is where he says, “If the framers
of the Constitution intended to take from Congress the power
of passing laws relative to slaves in the states or elsewhere, they
would have drafted a clause to the effect.” This interpreta-
tion is in direct conflict with the Tenth amendment which pro-
vides, “The powers not delegated to the United States by the
Constitution, nor prohibited by it to the states are reserved to
the states respectively or to the people.” Mr. Joel Parker com-
menting on this bizarre interpretation of the solicitor to the Lin-
coln War Department says, “The Constitution contains no clause
or sentence prohibiting Congress from reenacting the edicts of
Herod, that all the young children should be slain, under an
assumption, within such discretionary power of Congress, that
if they were permitted to live, they might rebel, and endanger
the safety of the government. Nor does the Constitution contain
any clause or sentence, prohibiting Congress from directing that
all the Catholics shall be murdered on a particular day; and
what shall hinder that body, in the exercise of powers ‘unlim-
ited’ and ‘more than imperial’ from proceeding to such consti-
tutional legislation, whenever in their judgment, the public wel-
fare requires it? Why may we not conclude that ‘If the framers
of the Constitution intended to take from Congress the power of

27 Ibid., Chap. 1.
28 Kneedler v. Lane, 46 Pa. St. 238.
29 Ibid., Chap. 1.
passing' such laws 'they would have drafted a clause to that effect.'”

To cap the climax, Mr. Whiting resorts to this unconvincing a priori reasoning: "The rights of war and the rights of peace cannot co-exist. One must yield to the other, hence the Constitution is framed with full recognition of that fact.”

We submit that no light can be thrown on our problem by such an uncritical approach. Before we can intelligently discuss the question whether there are constitutional limitations on the war power, we must know first, what powers are included under this term; and second, what is the relation of the Constitution to each of them. These questions cannot be answered by any rhetorical flourish, however clever; this problem cannot be solved by any patriotic appeal, however powerful. It is imperative that a critical analysis should precede the statement of conclusions.

At the outset it should be noted that the “war power” of the Constitution is to be found in the following provisions:

Art. 1, Sec. 8, clause 11, ‘‘The Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

Clause 12, ‘‘To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;’’

Clause 13, ‘‘To provide and maintain a navy;’’

Clause 14, ‘‘To make rules for the government and regulation of the land and naval forces;’’

Clause 15, ‘‘To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;’’

Clause 16, ‘‘To provide for organizing, arming and disciplining the militia, and for the governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;’’

Clause 18, ‘‘To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and

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"Joel Parker: The War Powers of Congress and of the President, 1863, p. 10.
"War Powers Under the Constitution, 1871, p. 51."
all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof;"

Art. 2, Sec. 2, clause 1, "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."

We cannot proceed far in our analysis without making the distinction between the internal and the external aspects of the war power. The internal aspect covers that phase of the war power as it afflicts our own citizens and as it tends to abrogate the safeguards contained in the Bill of Rights. The external aspect covers the phase of the war power as exercised against public enemies, including the rules and practices of warfare, the treatment of prisoners and enemy non-combatants and the general status of neutrals. We are concerned in this work solely with the internal aspect of the war power. This distinction is well founded and has been followed by the Supreme Court of the United States. It is our contention that the internal war power is subject to constitutional limitations. It is true, that as against public enemies, the external war power is unlimited, except as regulated by the law of nations.15–16 Our highest court has gone so far as to say that the law of nations may be modified as against public enemies by peculiar conditions.17 In Dooley v. United States18 the Supreme Court held that "the right of one belligerent to occupy and govern the territory of the enemy while in its military possession is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the Constitution or political institutions of the conqueror for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war. . . ."

In order that there may be no misunderstanding as to our purpose and no confusion as to the distinction between the in-

15 100 U. S. 158, New Orleans v. N. Y. Mail S. S. Co.
16 20 Wall. 387.
ternal and the external aspects of the war power, a further limitation should now be recognized. We intend to deal only with the problem of foreign war, that is to say, the sort of war that usually begins with a declaration and ends with a treaty. We concede that in a great civil war, in a country such as ours, it would be impossible, in all cases, to maintain the distinction between the internal and external aspects of the war power.

A study of our Civil War will show that many of the war measures of the Lincoln administration and the reconstruction program which followed, were utterly inconsistent with the constitutional theory on which the Union based its case at the outset. Lincoln in his first inaugural said, "No state upon its mere motion can lawfully get out of the Union; that resolves or ordinances to that effect are legally void and that acts of violence within any state or states against the authority of the United States are insurrectionary or revolutionary, according to circumstances." Chief Justice Chase, speaking for the Supreme Court in the case of *Texas v. White*, expressed the same view. The legislative branch, acting on the same theory, did not declare war against the South and no treaty of peace was signed with the Confederacy at the close of the war.

Only four days after Lincoln's first call for troops, he declared a blockade of southern ports, which from the standpoints of both Constitutional and international law was the exercise of a war power. Almost from the start the Federal Government treated the Confederates for some purposes as public enemies and at the same time for other purposes as citizens. The Supreme Court in *re Mrs. Alexander's Cotton* affirmed the opinion of the lower court in which Judge Sprague had held that "The (the Confederates) are at the same time belligerents and traitors and subject to the liabilities of both." Certain property of the Confederates was considered contraband and at the same time certain owners of that property were being tried for treason and would have been executed if Jefferson Davis' threat of retaliation had not been effective. The whole Reconstruction program in its attempts to penalize the Confederate states was obviously inconsistent with the original theory of the North as ex-

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19 See W. W. Willoughby, "The American Constitutional System."
20 74 U. S. 726.
21 2 Wall. 404.
pressed by the executive, the legislative and judicial departments.

In introducing this brief sketch relating to the Civil War period it is not our intention to condone all of the acts of the Lincoln administration or to contend that in the case of a civil war that all constitutional guarantees must of necessity be abrogated. On the contrary it is our belief, that there were many instances of a wanton and unnecessary use of power on the part of the Federal government during the unfortunate fratricidal strife. But with that we are not here concerned.

We are deliberately limiting the scope of our inquiry in order that the discussion may be logically consistent and at the same time of some practical significance. Those who are cognizant of the facts of contemporary world politics and who appreciate the relationship existing today between diplomacy and international finance, must realize that the real danger that America must face is another trans-oceanic crusade. Inasmuch as another great civil war in this country is unthinkable, in making the above exception and concession, we are not thereby weakening our case in fact.

Let us consider from the standpoint of constitutional theory the status of the Constitution of the United States in war time. We start with the proposition that the basic idea of the American plan of government is an irreconcilable opposition to unlimited power. We now come to the second link in our argument, that the Constitution binds in war as well as in peace. On this point there is no finer statement in legal literature than that of Justice Davis of the Supreme Court of the United States in the famous case of *ex parte Milligan*. The context and the nature of the facts show that he is discussing the internal aspect of the war power. We quote at length: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the

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22 4 Wall. 2.
The theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

"This nation as experience has proved cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln. . . . Our fathers knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued human foresight could not tell; and that unlimited power wherever lodged at such a time was especially hazardous to free men. For this and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution, the safeguards which time had proved were essential to its preservation."

The internal war power of the United States government is limited. This follows logically from the principle that our Constitution sets up a limited government and that certain interests are thereby secured to the individual even against the will of the majority. Furthermore in the Constitution of the United States there is no express recognition of the doctrine of a suspension of constitutional guarantees in times of emergency except in the case of the writ of habeas corpus and then only in times of rebellion or invasion. Art. 1, Sec. 9, Clause 2, reads: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." It should be noted first, that as far as the United States territory is concerned, the words "rebellion" or "invasion" are virtually synonymous with the word "war," and second, that this express exception in the case of habeas corpus negatives the idea of a general implied power of suspension of constitutional guarantees in war time. Those who believe that the Constitution of the United States should be suspended as soon as we enter a war, will have an insuperable difficulty in explaining why the framers of the Constitution ex-
pressly provided for this single exception. The Supreme Court of the United States in referring to this point has said, "Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the writ of habeas corpus." And it is now well settled that Congress alone has the power to suspend this writ in case of invasion or rebellion. Speaking of the limitations in the habeas corpus clause, Taney, C. J., says in Merryman's case, "The introduction of these words is a standing admonition to the Legislative body of the danger of suspending it (the writ) and of the extreme caution they should exercise before they give the government of the United States such power over the liberty of a citizen."

There is one other provision of the Constitution that should be considered in this connection, altho the word "suspended" is not there used. The Fifth Amendment provides that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." This exception also negatives the idea of a general implied power of suspension in war time and becomes mere surplusage if the Constitution is considered only as a peace document. Professor Wambaugh of the Harvard Law School has also given aid and comfort to the advocates of unlimited power in war time. He says, "Regarding all the powers given to the national government it is to be said that the Constitution, like any other document, prima facie is to be understood as having in mind normal life and not abnormal life; for normal life, is, so to speak, its atmosphere and content. . . . All general language must be taken prima facie as referring to normal life, and the normal life is peace, not war." There is a modicum of truth in this as an abstract proposition, but it cannot legitimately be pushed to such an extreme as to justify the complete abrogation of the Constitution in war time. How much evidence would the author of this statement require to rebut this prima facie presumption? The history of the debates in the Constitutional Convention do not support the proposition that the Constitution was intended

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22 Ex Parte Milligan, 4 Wall. 2.
23 Ex Parte Merryman, Campbell's Reports 246.
exclusively as a peace time document. The two express exceptions referred to above relating to habeas corpus and indictment by grand jury negative the idea of a general implied power of suspension of constitutional guarantees. Finally, before this interpretation can have any validity and before the doctrine of unlimited power can be made a part of the American constitutional system, it is necessary to answer the great constitutional arguments in behalf of limited government that have been expounded by the Supreme Court of the United States in a long line of cases, and perhaps in their most perfect form in ex Parte Milligan.26 When these propositions are squarely met, the *prima facie* presumption vanishes.

Further, it has been claimed by some statesmen and politicians that the war power is unlimited and they have attempted to defend their position by resorting to the following extra-constitutional theories: 1. Self-preservation. 2. Necessity knows no law. 3. Salus populi suprema lex est. 4. Retaliation. 5. A supreme species of police power. 6. Inherent sovereignty. It is to be noted that all of these extra-constitutional bases are utterly inconsistent with the Tenth Amendment and with the fundamental idea underlying our constitutional system, i.e., that is a limited government. To adopt any of these theories is to ignore the Constitution and to make the majority faction in the government omnipotent, in time of war.

A typical illustration of this doctrine is found in a speech by Senator Sumner in the United States Senate, June 27, 1862. He said, "Pray, sir, where in the Constitution is any limitation of the war powers? Let the Senators who would limit them mention a single section, line, or phrase which even hints at any limitation. . . . The war powers are derived from the Constitution but, when once set in motion, are without any restraint from the Constitution; so that what is done in pursuance of them is at the same time under the Constitution and outside the Constitution. It is under the Constitution in the latitude with which it is conducted; but whether under the Constitution or outside the Constitution, all that is done in pursuance of the war power is Constitutional."

26 Sumner again said, "But in bestowing upon the government war powers without limitation, the

26 *4 Wall. 2.*

27 *Works of Chas. Sumner, VII, pp. 131-2.*
makers of the Constitution embodied in the Constitution all the rights of war as completely as if those rights had been severally set down and enumerated; and among the first of these is the right to disregard the rights of peace."

That this is sophistry and that it is utterly incompatible with our written Constitution is established by the following considerations. In the first place the history of the ratification of the Constitution and the incorporation of the bill of rights and especially the ninth and tenth amendments, give the lie to the theory of unlimited power. In the second place it is only fair to assume that the framers of the Constitution anticipated the time when this nation would be involved in war and having set up a limited government they refused to place in the fundamental law any recognition of the doctrine of a suspension of constitutional guarantees except in the case of the writ of habeas corpus, and this single express exception negatives the idea of a general implied power of suspension. Thirdly, Senator Sumner fails to distinguish between the internal and the external aspects of the war power. And finally, without revealing any basis, historical or legal, for his theory of constitutional construction, he wants us to accept on the authority of his ipse dixit the proposition that "Whether under the Constitution or outside the Constitution, all that is done in pursuance of the war powers is constitutional."

Another statement of a similar nature in favor of an unlimited war power was made by John Quincy Adams in a debate in the United States Senate in 1836. He said, "Sir, in the authority given to Congress by the Constitution to declare war, all the powers incidental to war are, by necessary implication, conferred upon the government of the United States. Now the powers incidental to war are derived, not from any internal municipal source, but from the laws and usages of nations. There are then, Mr. Chairman, in the authority of Congress and the Executive, two classes of power, altogether different in nature and often incompatible with each other—the war power and the peace power. The peace power is limited by regulations and restricted by provisions prescribed within the Constitution itself. The war power is limited only by the laws and usages of nations.

— Ibid., pp. 136-7.
— Ibid., pp. 136-7.
This power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property and of life."

This statement of John Quincy Adams is just as vulnerable as that of Senator Sumner. Mr. Adams claims that an unlimited war power may be implied from the express war provisions in the Constitution. But there is no justification for an implied power which directly conflicts with an express constitutional guarantee; that is to say, with the Bill of Rights. He not only fails to distinguish between the internal and the external aspects of the war power, but he also refuses to be governed by the constitutional limitations on the war power. He ignores the basic idea of a limited national government as expressed in the Ninth and Tenth Amendments and sets up an external standard for implied war powers, namely, the practices of other nations. No more effective theory could be devised to abrogate the Constitution in war time so far as the rights of American citizens are concerned. In the last analysis this doctrine does not even rest on the law of nations. It may ultimately lead to the recognition and acceptance of the pernicious idea of retaliation and thus the combatant with the lowest standard sets the pace.

Senator Platt, at the time of the Spanish American war, enunciated a theory of constitutional construction which was properly labelled the theory of inherent sovereignty. The particular occasion for this statement was the acquisition of territory at the end of the war. Senator Platt said, "I propose to maintain that the United States is a nation; that as a nation it possesses every sovereign power not reserved in its Constitution to the states or to the people; that the right to acquire territory was not reserved and is therefore an inherent sovereign right." This doctrine as extended to apply to the general war power has been stated as follows: Before the Constitution was adopted, the American people had asserted their right to wage war as a unit. Hence it is argued that the national government gets its power to wage war—not from the Constitution—but that the power is inherent in sovereignty. It is claimed that the consti-

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tutional provisions simply regulate in some particulars the exercise of the power.

The Supreme Court of the United States in 1906 emphatically repudiated this doctrine in the case of Kansas v. Colorado. The Court said, "But the proposition that there are legislative powers affecting the nation as a whole which belongs to, altho not expressed in the grant of powers, in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the constitution independently of the amendments; for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, discloses the widespread fear that the national government might, under the pressure of supposed general welfare, attempt to exercise powers which had not been granted. With equal determination, the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary, they should be granted by the people in the manner they had provided for amending the act."

Professor W. W. Willoughby says, "There can be no question as to the constitutional unsoundness as well as the revolutionary charter of the (inherent sovereignty) theory thus advanced. To accept it would be at once to overturn a long line of decisions that have held the United States government to be one of limited powers."

This theory is undesirable, that is, sets up an extra constitutional standard and in so doing makes our fundamental law superfluous.

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206 U. S. 46, 89, 90.

23 Prof. Willoughby after criticising the inherent sovereignty theory has pointed out that the Supreme Court has at times used language which, especially when taken out of its context, would seem to imply the correctness of the inherent sovereignty theory. Such cases are Legal Tender Cases, 12 Wall. 457; U. S. v. Jones, 109 U. S. 513; Church v. U. S., 136 U. S. 1; Fong Yue Ting v. U. S., 149 U. S. 698. Most of these decisions are really based on the theory of "resulting powers." (Student's edition, Footnote, p. 55.)

24 Const. Law, Vol. 1, p. 66.
On April 20, 1906, Representative Bourke Cockran, in a speech in the House of Representatives, formulated the empiric theory of constitutional construction. He said, "Wherever a wrong is found to exist with which the nation can deal more effectively than a state, it is the business of Congress to suggest a remedy. We can tell whether it is constitutional or unconstitutional when the court pronounces upon it and not before. Even if the court declares it unconstititutional its decision will not reduce us to helplessness. When it drives us from establishing a remedy by legislation it will by that very act direct us to propose a remedy by constitutional amendments." This theory is especially objectionable in war time. In the first place it virtually disregards the distribution of power between the states and the central government as defined in the fundamental law and sets up the effectiveness of the legislation as an extra constitutional basis for the existence of the power. Obviously, the uniformity of national law as contrasted with the diversity of state regulation would be a compelling argument for the exercise of a sweeping national power if this theory were adopted in war time. It would mean that the states would be reduced to mere administrative areas. Secondly, the adoption of this theory would cause members of Congress to violate their oaths to support the Constitution of the United States and would cause them to "pass the buck" to the Supreme Court, and as I shall show later that court, in the case of war time legislation would be in such a peculiar position and under such tremendous pressure that it would uphold the act. In this manner Congress, for the period of the war, would virtually set itself above the Constitution, encroaching alike on the states and on minorities.

Another theory of constitutional construction is known as the James Wilson-Roosevelt theory. Professor Willoughby states the theory as it applies to congressional powers as follows: "That when a subject has been neither expressly excluded from the regulating power of the Federal government, nor expressly placed within the exclusive control of the states, it may be regulated by Congress if it be, or become, a matter the regulation of which is of general importance to the whole nation, and at the same time a matter over which the states are, in practical fact,
unable to exercise the necessary controlling power.’ The Supreme Court of the United States has repudiated this theory in the case of Kansas v. Colorado as being contrary to the Tenth Amendment.

As far as the President’s office is concerned, the James Wilson-Roosevelt theory leads to a belief in inherent executive power. Roosevelt said, “I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws.” It has been claimed that Article II of the Constitution, dealing with the executive, warrants this view inasmuch as the language used is much more general than that used in Article I dealing with the legislative department or in Article III dealing with the judiciary. Article II reads, “The executive power shall be vested in a President, etc.” Article I begins as follows: “All legislative power herein granted shall be vested in a Congress,” and Article III expressly states that the judicial power “shall extend to” certain enumerated cases. But the Supreme Court has also emphatically repudiated the Roosevelt theory of executive power. The court said, “We have no officers in this government from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority.”

Ex-President Taft states the correct view of executive power. He says, “The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. The grants of executive power are necessarily in general terms in order not to embarrass the executive

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35 Willoughby, “Constitutional Law” 1, p. 47.
36 U. S. 46, 89-90.
38 The Floyd Acceptances, 7 Wall. 665, 676.
within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provisions or it does not exist."\(^\text{39}\)

Roosevelt while President pleaded for the expansion of federal power "thru executive action . . . . and thru judicial interpretation and construction of law." Referring to the Constitution of Cuba, an instrument which our government had helped to frame, on September 28, 1906, he telegraphed Secretary Taft concerning an adjustment of Cuban affairs as follows: "I do not care in the least for the fact that such an agreement is unconstitutional."\(^\text{40}\) As part of the same program he urged that "states' rights should be preserved when they mean the people's rights, but not when they mean the people's wrongs."\(^\text{41}\) In this connection it is well to remember the words of Edward Livingston, "The gloss of zeal for the public service is always spread over acts of oppression, and the people are sometimes made to consider that a brilliant exertion of energy in their favor which, when viewed in its true light, would be found a fatal blow to their rights. In no government is this effect so easily produced as in a free republic; party spirit, inseparable from its existence, aids the illusion, and a popular leader is allowed in many instances impunity, and sometimes rewarded with applause for acts which would make a tyrant tremble on his throne."\(^\text{42}\)

The so-called James Wilson-Roosevelt theory of constitutional construction is in reality a cross between the inherent sovereignty theory and the empiric theory with a special emphasis on the evolutionary point of view. As such, it is subject to the same general objection; namely, that it violates the fundamental feature of our constitutional system as expressed in the Tenth Amendment and attempts to set up an extra constitutional standard for governmental action.

It is interesting to note that in no case has the Supreme Court of the United States based its decision squarely on any of these extra constitutional theories of the politician and statesman. Most of its members have thruout its history been avowed

\(^{39}\) Our Chief Magistrate and His Powers, pp. 139-40.
\(^{40}\) Quoted in Pierce, Federal Usurpation, p. 154.
\(^{41}\) Pierce, Federal Usurpation, Preface IX-XI.
\(^{42}\) Quoted in Bryce, American Commonwealth, Vol. 1, p. 63, footnote.
advocates of one or two theories of constitutional construction. The one is often referred to as the Jeffersonian theory of strict construction; the other as the Marshall theory of implied powers. The Tenth Amendment is the keystone in the Jeffersonian theory and the words "necessary and proper" in the elastic clause are construed to mean absolutely necessary or indispensable. The best statement of this doctrine of strict construction was made by Jefferson as a protest against the first United States bank. Jefferson said, "I consider the foundation of the Constitution as laid on this ground: that all powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states or to the people." To take a single step beyond the boundaries thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of definition . . . . It has been urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true; yet the Constitution allows only the means that are 'necessary,' not those which are merely 'convenient,' for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to everyone, for there is not one which ingenuity may not torture into a convenience in some instance or other, to some one of so long a list of enumerated powers. It would swallow up all of the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to necessary means; that is to say, to those means without which the grant of power would be nugatory." When Jefferson became President he abandoned to a great extent his theory of strict construction and most of his appointees to the Supreme bench were more or less swayed by John Marshall, who was appointed by John Adams as chief justice and held this important post for thirty-four years in the formative period of American constitutional law.43

43 Mr. Justice Daniel of Va., for a period of nineteen years on the Supreme Bench, consistently dissented from every judgment of the court which was based upon the recognition of any implied power. He stated his position as follows: "The constitution itself is nothing more than an enumeration of general abstract rules, promulgated by the several states for the guidance or control of their creature or agent, the federal government, which for their exclusive benefit they were about
In a number of famous cases Marshall gave expression in its most perfect form to the doctrine of implied powers. As the first step in the Marshall doctrine, it was pointed out that the Tenth Amendment upon which Jefferson relied for his theory of strict construction "omits the word, 'expressly,' and declares only that the powers 'not delegated to the United States nor prohibited to the states are reserved to the states or to the people,' thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend on a fair construction of the whole instrument." As the second step, Marshall insisted that the words "necessary and proper" in the elastic clause be construed to mean appropriate or convenient. In United States v. Fisher et al. he said, "In construing this clause it would be incorrect, and produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of the power granted by the Constitution." As a third step in his theory of implied powers, Marshall insisted that it was not necessary to trace back every implied power of the Federal government to some single grant of authority, but that it might result from the aggregate authority granted to the Federal government, by the Constitution. In Cohens v. Virginia he said, "It is to be observed that it is not indispensable to the existence of every power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than

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44 There were two decisions in constitutional law prior to Marshall's coming to the bench. There were fifty-one decisions in constitutional law during his chief justiceship. Bryce, Am. Com., Vol. 1, p. 386n.
45 2 Cr. 358, 396.
46 6 Wheat. 294.
one of the substantial powers expressly defined, or from them all combined. It is allowable to group together any number of them and to infer from them all that the power claimed has been conferred.” Judge Story coined the term “resulting powers” to describe this sort of case.

Altho the Marshall theory is sometimes referred to as the theory of loose construction, Marshall realized full well that there must be a limit to the doctrine of implied powers beyond which no court could legitimately go in construing our written constitution. That limitation was best exprest in the now famous sentence from the decision of McCullough v. Maryland:47 “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly-adapted to that end, which are not prohibited, but which consist with the letter and the spirit of the Constitution, are constitutional.” In another famous case Marshall said, “The powers of the legislature (referring to Congress) are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained. The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts followed are of equal obligation.”48

The advocates of the inherent sovereignty, the James Wilson-Roosevelt and the empiric theories and all of the other exponents of unlimited power in war time claim that they are also loose constructionists, but in no true sense can they be considered followers of John Marshall and of his doctrine of implied powers. The Marshall doctrine looks to the Constitution of the United States as the source of all governmental authority, and is consistent with the letter and the spirit of the fundamental law. All of these and other doctrines set up some extra constitutional standard as a justification for the exercise of governmental power and in war time would always ignore and often nullify the fundamental law.

47 4 Wheat. 316, 421.
48 Marbury v. Madison, 1 Cr. 137.
There is no room in American constitutional law for the doctrine "Inter arma silent leges." Chief Justice Waite expressed the sound doctrine when he said, "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the states or to the people. No rights can be acquired under the Constitution or laws of the United States except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states." Justice Brandeis has said, "The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations."

We have now discussed two general methods of approach resorted to by the advocates of unlimited war power; first, the employment of various extra constitutional theories of construction; and second, the acceptance of the doctrine of a general suspension of constitutional guarantees in times of emergency. We have shown that both methods have been emphatically repudiated by the Supreme Court of the United States and that they are in their very nature inconsistent with the basic principle of the American plan of government.

There is a variation of the second method of approach accepted by a large class who thoroughly believe in the abrogation of individual guarantees and the establishment of an omnipotent government during the period of a war. But the members of this group would be highly indignant if anyone should advance the harsh sounding doctrine that the Constitution is suspended in war time. They reach the same result, however, by a more circuitous process. It is their contention that the application of the constitutional guarantees is so different in war than in peace that the American Congress in war time is virtually subject to no limitation except its own discretion, which, as a matter of fact, is no limitation at all. In their zeal to give the government unlimited power they have twisted and distorted the doctrine of implied powers as conceived by the master mind of John Mar-

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*Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156.
shall. They have accepted the doctrine that the end justifies the means and have often disregarded every sound canon of constitutional construction, submitting a Biblical for a juristic interpretation of the fundamental law. It is an unfortunate fact that on several occasions, the Supreme Court of the United States has been confronted by such tremendous pressure, that it has virtually been forced to accept this view.

Before considering the nature and extent of the president's power as commander-in-chief in war time, we must note in passing an interesting theory of constitutional construction which logically cannot be classified under any of the foregoing extra constitutional theories of interpretation. In 1862, Mr. Fisher published a book entitled "The Trial of the Constitution" in which he attempted to develop the thesis that "Congress is omnipotent, in the sense that in the English system, Parliament is omnipotent."51 His argument might be paraphrased as follows: A law that cannot be enforced is a nullity, and so is power that cannot be exerted. The reserved power of the people cannot be exercised, and therefore does not exist.52 Power which people cannot use they do not possess, whether the Constitution reserves it to them or not.53 If the people cannot make laws nor execute them, nor apply them judicially nor alter the Constitution—and therefore all of these things must be done by the government—it is not easy to see wherein their reserved power consists.54 Therefore he concludes that a government limited by internal power is an impossibility.55

This argument of Mr. Fisher is based on the assumption that all of the officials of all departments of the government will flagrantly violate their oaths of office and brazenly ignore all of the checks and limitations on governmental power. If such a situation should come to pass, it is indeed true that the only remedy of the citizen would be thru the exercise of the ballot, and if the officials should refuse to yield office at the expiration of their respective terms, the only remaining recourse of the citizen would be revolution. But this is far from saying that

51 Ibid., p. 54.
52 Ibid., p. 41.
53 Ibid., p. 48.
54 Ibid., p. 49.
55 Ibid., p. 70.
“the Congress of the United States is omnipotent in the same sense that in the English system Parliament is omnipotent.”

Mr. Fisher continues in the defense of his position by assuming an impossible case. He says, “Assume that Congress should declare that the president should hold for life, that a deliberate and matured public opinion demanded the alteration, altho the experiment of making it according to the Fifth Article (the amending process) was deemed too hazardous because it would produce the very dangers which the change itself was intended to avoid. Assume that the people would acquiesce and that after ten years of peaceful and prosperous establishment a ‘case’ should arise before the Supreme Court of the United States.”

Obviously, if we accept all of the conditions of the impossible assumption and if the people continue to acquiesce, we will be forced to agree with Mr. Fisher that the answer to the riddle is, “Nothing will happen.” But his purpose in introducing this discussion is to show that the government itself has within its discretion the right to determine whether an amendment to the Constitution shall be made by the government or whether it shall be made in the manner provided in the Constitution of the United States. He asks, “Does the Constitution contain no clauses, from which it may be inferred, that altho the Fifth Article (the amending process) was intended to be used, if possible, for important and organic amendments, yet that others of a less serious character may be made by the government itself, as experience shows them to be needed?”

We submit that a careful perusal of Mr. Fisher’s book will not reveal one scintilla of evidence to establish the proposition that our government has the constitutional discretionary power to determine when it shall amend the Constitution by an ordinary legislative act and when the provision of the amending process shall be followed.

There remains to be considered the nature and extent of the president’s power as commander-in-chief. Art. 2, Sec. 2, clause 1, provides that “The president shall be commander-in-chief of the army and the navy of the United States, and of the militia of the several states when called into the actual service of the

\[a\] pp. 80-81.

\[a\] p. 31.
Concerning this matter, there has been much confusion of thought. There are those who believe that on the outbreak of war this clause confers upon the president unlimited power. In the late World War a patriotic cult developed in America with representatives in every community which preached the doctrine that "the president can do no wrong." These well-meaning people were unaware of or indifferent to the age-long struggle against arbitrary power and they failed to realize that the immunity of the citizen from the unlimited caprice of the executive has been the greatest single victory of the masses of men in their march toward free government. It can be laid down as an axiom of political science that any individual, who in his political thinking has completely discarded the very conception of usurpation and who holds that what is, is legal, will be found in times of stress in the tyrant's camp.

To even the novice in constitutional law, these questions would occur. Does the president, as commander-in-chief, have the power to declare the whole country under martial law? Does he have the same power over civilians as over persons of military status? Is there no distinction between the public enemy and the civilian in domestic territory accused of being an enemy sympathizer? Does the commander-in-chief have exactly the same power in invaded hostile territory as in territory outside the theater of war? Is there no difference between martial law, military law and military government? Can the commander-in-chief exercise complete legislative and judicial power in war time?

What is the nature and extent of this power? First, it should be noted that there are no express limitations on the president's power as commander-in-chief of the army and navy. But it should be remembered that altho the framers of the Constitution gave the president this apparently unlimited power, they gave him no army or navy to command. For that he must come to Congress.

For general discussion see Berdahl: "War Powers of the Executive of the United States." Univ. of Ills., 1920, Chap. 7: "Powers of Command," pp. 115-137.

2 Art. 1, Sec. 8, clauses 12 and 13.
Second, with reference to the militia of the several states, the Constitution expressly limits the president's command in several respects. (a) He has command of the militia only "when called into the actual service of the United States." Judge Story says, "The right of governing them (the militia) was confined to the single case of their being in the actual service of the United States. . . . It was then and then only that they could be subjected by the general government to martial law." In *McCall's case* a United States District court declared that "whether a man is lawfully in military service must always be a judicial question. It is peculiarly a question for decision under habeas corpus." (b) The president cannot upon his own authority, order the militia into "the actual service of the United States." That power is expressly given to Congress. (c) Moreover, when the militia is in "the actual service of the United States, the president is limited in the purposes for which he may use the said militia." Art. 1, Sec. 8, clause 15, provides that Congress can call forth the militia for three purposes, "to execute the laws of the Union, to suppress insurrections and to repel invasions." (d) Art. 1, Sec. 8, clause 16, provides that the appointment of militia officers shall be reserved to the states. This is another limitation on the president's power as commander-in-chief. "The Constitution is not clear as to what authority may appoint the commanding officers when several different militia units, or militia from several different states are called into the service of the United States."

Third, it follows as a corollary from what has been said, that he is not commander-in-chief of the citizens of the United States, but only of the army and navy and of the militia when called into the actual service of the United States.

Fourth, no president has ever assumed actual personal command of the army in the field. To do so would prevent him from carrying out other functions imposed by the Constitution. The authorities are not in agreement as to whether the Con-
stitution, by implication, confers this power. We are inclined to believe that he does have this power. The office of commander-in-chief is not inconsistent with but complimentary to that of the office of chief executive. We are in complete agreement with Senator Bacon when he said, "I want to give my idea as to why the Constitution vests in the president the office of commander-in-chief. The president is an executive. Upon him devolves the execution of the law and the enforcement of the law; and the enforcement of the law must necessarily be, in its last analysis, thru the military arm. Of course the president cannot be the supreme executive unless he has the supreme command of that thru which the execution of the law must be enforced." It should be in the discretion of the president whether or not he should assume personal command.

Fifth, congress itself cannot direct the conduct of campaigns. It cannot delegate that power to any person or persons. It can legislate relative to the size of the army and navy, the compensation of officers and men, the term of service as well as on many other matters, but the command of the army and navy, and with that the plan of campaign, is vested in the president.

The distinction must next be made between military law, military government and martial law. Military law is for the government of the army and navy and of the militia when called into the actual service of the United States. It has no application whatever to the civilian.

Military government has been defined as "that dominion exercised in war by a belligerent power over territory invaded and occupied by him and over the inhabitants thereof." Military government has to do with the external aspect of the war power. It is a government imposed upon the public enemy and the president's power in this matter is not limited by the Constitution, but by the laws and usages of war. It exists "simply as a consequence of conquest and occupation."

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65 See McLain, Const. Law, 210; Finley and Sanderson: "The American Executive and Executive Methods," 267; Watson on the Const. 11, 919; Miller on the Constitution, 163; Von Holst, Const. Law of the U. S., 197.
66 Cong. Record XLII, pt. 3-60, Cong. 2 Sess., 2542-2543.
67 Winthrop, Abridgment of Military Law, 322.
69 Winthrop ibid., 322-323.
The term martial law has been used in two senses; one to describe a foreign or international fact, the other describing a domestic or municipal fact.\textsuperscript{7} Martial law as exercised by the commander of a foreign army when he invades another country is an element of the \textit{jus belli}. It is incidental to the state of war and appertains to the law of nations. With this we are not here concerned. We are interested in the \textit{internal} aspect of the war power, and as such we intend to deal with the martial law in our own country as administered by our military commanders. When the term is used in this sense "it is but a form of police power of the state. In its origin, its operation and its consequences, it is but the utilization of the military forces by the civil authorities. Civil rights are not destroyed, new offences are not created, military government is not established by a proclamation of martial law."\textsuperscript{71}

The leading case on this point is \textit{ex parte Milligan.}\textsuperscript{72} The real question before the court was whether President Lincoln's proclamation authorizing military trial of civilians was constitutional. The court unanimously decided that the president could not establish a military commission to try capital crimes where the civil courts were open. The majority of the courts went further and decided what was not before them: i.e., that not even congress could do this; and from this obiter there were four dissents. This case emphasizes three limitations on the scope of martial law; the territorial limitation, the time limitation, and the legal effect of denying the writ of habeas corpus. The court said as to the first, "Martial law can never exist where the courts are open, and in the proper unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." As to the second, "as necessity creates the rule, so it limits its duration, for, if this government (military commission) is continued after the courts are reinstated, it is a gross usurpation of power." As to the third, "The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of


\textsuperscript{71} 4 Wall. 2.
the common law. If it had intended this result it was easy by
the use of direct words to have accomplished it. The illustrious
men who framed that instrument were guarding the foundations
of civil liberty against the abuses of unlimited power. . . . But it is insisted that the safety of the country in time of war
demands that this broad claim for martial law shall be sustained.
If this were true, it would be well said that a country, preserved
at the sacrifice of all the cardinal principles of liberty, is not
worth the cost of preservation. . . . Civil liberty and this kind
of material law cannot endure together; the antagonism is irre-
concilable and in the conflict, one or the other must perish.”

This case stands out as a landmark in the great struggle
against arbitrary government. It constitutes the most forcible
protest that has been made against that policy which would sub-
ject the civilian, residing remote from armies and the actual
theater of war, in a neighborhood where all the laws of the land
may be enforced by constitutional means, to the arrogance of a
military commission operating under a capricious procedure and
prescribing penalties for offenses unknown to Anglo-Saxon juris-
prudence. That decision will be appealed to as long as men be-
lieve in the primary principle of free government, that the mili-
tary shall be subservient to the civil power.

Not only does our constitutional law safeguard the personal
liberty of the civilian from arbitrary action by the military
authorities, but it also extends its protection about his property.
Mitchell v. Harmony is another great case, altho not so well
known as ex Parte Milligan. The decision delivered by Chief
Justice Taney holds that “a military officer cannot take posses-
sion of private property for the purpose of insuring the success
of a distant expedition upon which he is about to march. The
officer who makes the seizure cannot justify his trespass by show-
ing the orders of his superior officer. Private property may be
taken by a military commander to prevent it from falling into
the hands of the enemy or for the purpose of converting it to the
use of the public; but the danger must be immediate and im-
pending, or the necessity urgent for the public service, such as
will not admit of delay, and where the action of the civil author-

13 Howard 115.
ity would be too late in providing the means which the occasion calls for.”

We introduce one further judicial utterance on the limits of martial law. “That the president, can of his own accord assume dictatorial power, under any pretext, is an extravagant assumption. The proposition cannot be entertained by any court; no such inquiry can arise under the Constitution of the United States; it does not reach to the proportions or stature of a question. . . . Neither can even the commander-in-chief of the army extend martial law beyond the sphere of military operations. . . . Within the immediate theater of insurrection or war, the commander-in-chief and his subordinates, where the exigency of the occasion makes it necessary, we repeat, do possess it; beyond it the ordinary course of proceeding in courts of justice will be sufficient to punish any persons who furnish information or afford any aid or comfort to the enemy, or in any way are guilty of the detestable crime of betraying their country.”

In addition to these limitations on the scope of martial law, it should be remembered that the military power of the president is derived from the Constitution of the United States. The idea of executive prerogative has no place in American constitutional theory. The states would never have adopted the Constitution if they had supposed that in time of war the reins of government would be in the hands of a dictator. In the case of United States v. Lee the court ordered to be restored to the son of Robert E. Lee the estate of Arlington taken from his wife during the war under an irregular tax sale and at the time of the suit in the hands of the military authorities. Justice Miller said, “No man in this country is so high that he is above the law. Shall it be said . . . that the courts cannot give a remedy when a citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without any process of law and without compensation, because the president has ordered it and his officers are in possession?” The fact that there is no express

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74 Jones v. Seward, 40 Barb. 563 (1863).
75 Art. 2, Sec. 2, clause 1.
76 106 U. S. 196, 220.
limitation in the clauses conferring on the president the power of commander-in-chief, does not mean that that power is absolute. Those who argue that the president has an implied constitutional right as commander-in-chief in time of war, to disregard any one positive prohibition of the Constitution, or to exercise any one power not delegated to the United States by the Constitution, because in his judgment he may thereby best subdue the enemy, must admit that he has the same right, for the same reason to disregard each and every provision of the Constitution and to exercise all power needful in his opinion to enable him to win the war.

We have seen that to be an advocate of unlimited power in war time, it is not necessary to belong to that class that rudely asserts that the Constitution has been temporarily interred. Many prefer to reach the same result by a resort to ingenious and bizarre interpretations. A favorite argument, much used by advocates of unlimited power, has been well expressed by Congressman Welty. He says, "When the life of a country is at stake, we cannot question the constitutionality of an act if that act will preserve the Constitution." But who is to determine whether the life of the country is at stake and who is to decide that the act will preserve the Constitution? Shall the Legislative, the Executive or the Judiciary determine when and on what occasion this dormant power of self preservation shall be called into active exertion? And if the decision involves discretion, who shall revise and correct that discretion?

It is our belief that all of these extra constitutional theories are fraught with danger. The "war power," when properly viewed, is a constitutional power. It is not a power outside or above the Constitution. It is within the Constitution. True, war powers are greater than other powers because war is the supreme effort of a nation. We believe in the doctrine of the Supreme Court of the United States as expounded in the case of Ex Parte Milligan. "The government, within the Constitution has all the powers granted to it which are necessary to preserve its existence."

\textsuperscript{77} Cong. Record, Vol. 55, pt. 4, p. 3939, June 20 1917.
\textsuperscript{78} 4 Wall. 118.
The advocates of all the extra-constitutional and necessitarian theories of construction, however great their divergence in their particular method of approach, have this similarity in fact; they are equally uncritical in their attitude. They see no inherent difference between the person of military status and the civilian. They recognize no distinction between the power of a commander invading hostile territory and his power in domestic territory, far from the actual theater of war. They would place the public enemy and the civilian, accused of being an enemy sympathizer, in exactly the same category. They would introduce into American constitutional law the continental conception of the "state of seige," in which constitutional guarantees are suspended. They would attempt to widen the scope of martial law so as to include communities far distant from the clash of arms, for they insist that in modern war "there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put upon the exercise of acts of hostility."79

The advocates of unlimited power have failed to glean from the pages of history that the strict subordination of the military to the civil power is at the foundation of freedom and that the first object of a free people is the preservation of their liberty and that under a constitutional system such as ours, liberty can be preserved, not by a blind reliance on the benevolence of rulers, but by effectively maintaining constitutional restraints.

Forest R. Black
University of Kentucky,
College of Law.