

Martial Law in California*

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IT IS needless for me to say that I am happy to be present at so distinguished a gathering, and this notwithstanding the subject you have asked me to discuss is far from being a happy subject. For martial law, gentlemen, whatever its occasion, never connotes peace, but always trouble. In time of war, however, it is a most important subject; and it is especially so to us, who live in the very center of a zone of military operations which may at any moment be transformed into a theater of active combat.

First let me say that while we of the military service, like everybody else, are accustomed to speak of “martial law”, we do not like the term, for we do not think it accurate. Indeed, we consider it misleading, for *martial law*, so called, is not law at all in the ordinary sense. Therefore we prefer to designate it by a name more truly descriptive of what it really is, and so, for want of something better, we call it martial rule. We have little choice of names, however, for the word “military”, which we might prefer as a descriptive term, has been preempted by other forms of military jurisdiction. The legal system which governs the affairs of the armed services has long been known as *military law*; while the rule of an army over occupied enemy territory is designated *military government*. And thus, with use of the word “military” denied us, we retain the word “martial” to distinguish this form of military jurisdiction from the others.

It is a confused subject, and a highly controversial one; and it has been made so, I regret to say, by lawyers and by courts. And because the subject is so confused and so controversial, I think I ought to tell you that the views I shall express this evening are my own views, and are in no sense official. They are, however, views that have been acquired during the course of many years of experience as a member of the legal department of the Army; but, as they are wont to say in the movies, any resemblance to the official view must be

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regarded as purely co-incidental. As a matter of fact, I have no information as to what present official views may be. I shall thus betray no military secrets, because I don't know any; but you will forgive me, I am sure, if upon so critical a subject, I do not speak off-hand.

Martial law—or better—martial rule, is not difficult to define, as understood in the military service. It consists in the total or partial exercise by military authority, of governmental functions over our own people, in our own territory; and is frequently, but by no means always, coupled with the temporary suspension of some or all the functions of civil government. It is a flexible military control of the civilian population, which may bear down heavily at times, while its touch at other times may be so light as hardly to be noticed. And it is thus flexible because the scale of its weight rises and falls according to the military necessities of the moment. When necessity ends, martial rule ends with it.

True martial rule operates only in time of war; but unfortunately, in time of peace there do occasionally occur, as we all know, disturbances of a domestic nature that require in their repression, measures similar to those employed in war-time martial rule. And therein lies the reason for most of the confusion and all the controversy that for three-quarters of a century has enveloped this subject in a veritable fog.

In time of peace, the soldier who is called upon to quell a riot or suppress incipient insurrection, does so in aid of the civil authority, which for the moment has been submerged by waves of violence. His objective is to restore that civil authority to its proper place as soon as possible. For the time being he becomes a glorified policeman, whose powers are greater and whose immunities are broader than are those of the ordinary peace officer; but who, nevertheless, is controlled to a degree in what he does by the municipal law, and is limited by its restrictions.

But the soldier who in time of war is called upon to administer martial rule, is governed by the laws and usages of war, and is guided, not by the municipal law, but by directives contained in the orders of his superiors.

And it is because of this difference in the soldier's status, as between peace time and war time employment during periods of so-called martial law, that the professional soldier seldom thinks of riot duty—the most disagreeable of all forms of military duty—as

constituting martial rule at all. The regulations which govern duty of that nature we designate "the law of domestic disturbances", and let it go at that.

It is with that kind of duty, however, that courts and lawyers have had most frequently to deal, and the resulting confusion, and the age-old controversy over the proper limits of martial rule are due, in large measure, to efforts, upon the one hand to apply the rules of war to peace conditions; and upon the other hand, to apply peace time rules to war conditions. And this attempt to mix oil with water, as might have been expected, has not served to clarify the subject.

I shall not, this evening, have anything to say concerning the law of domestic disturbances, beyond inviting to your attention that we had, in this community, an unusual demonstration of its operation during June of last year, when acting under the orders of the President, federal troops took over the North American Airplane Factory at Inglewood, and quickly brought to an end a disturbance which threatened to halt the production of war planes that were greatly needed, not only by our own forces, but by nations that have since become our allies in the greatest war in history.

Some diversity of opinion as to the propriety of the action resulted from that seizure, mainly because the statement made by Attorney General Jackson in explanation of the presidential proclamation, omitted, except by inference, any mention of the one element that has ever been regarded as a *sine qua non* when justifying the use of troops in cases of that nature—the element of necessity. But that necessity was present, notwithstanding it was undisclosed—we all discovered on the 7th of December!

Wartime martial rule is no less grounded in necessity; but the necessity of war time is that of preserving the life of the nation and insuring the safety of its people. It is the necessity of national defense against the national enemy. Its roots and its authority are manifest in the inevitable implications of those provisions of the Constitution that set out in the preamble the purposes of its adoption, among which provision for the national defense is basic and fundamental; and in the provisions of the initial section that empower the Congress to declare war, to raise and support armies and maintain a navy, and to enact all laws necessary to carry these powers into effect. These constitutional provisions, coupled with those of the second section that designate the President Commander-in-Chief of

the Army and Navy, and enjoin upon him the duty and the obligation to take care that the laws be faithfully executed, all in accord with his oath of office, in which he solemnly undertakes to "preserve, protect and defend the Constitution of the United States", invest the government not only with the power to wage war, but with the right to adopt any means necessary to wage war with success.

And if, therefore, it shall become requisite while waging war, temporarily to place, either partially or wholly under military control, a civilian population, in order that the operations of the Army and the Navy against the common enemy may proceed unhampered by unnecessary obstacles and hazards, not only does it lie within the constitutional power of government, but it becomes the constitutional duty of government to so control it. And such control as this but follows the usage of nations and the unwritten law of war from time immemorial.

And final proof, if further proof be needed, is found in that provision of the Constitution which permits suspension of the privilege of the writ of habeas corpus whenever in time of rebellion or invasion, the public safety may require it. The history of that *writ of right* reveals that its privilege was wrung from an unwilling English King who without need or proper cause oppressed his people by the tyranny of martial rule, and the provision for suspension of that privilege in our Constitution looks to that history for its reason. By the clearest of implications it contemplates martial rule when, but *only* when the public safety is endangered.

Thus imbedded in the very fiber of the Constitution, we find not only the authority for martial rule, but the occasions which require and justify it, and as well the limits of its operation. And we find there also the substance of two familiar maxims of the ancients—*Salus populi suprema est lex* and *Inter arma, silent leges*.

John Quincy Adams, than whom no wiser statesman or more accomplished scholar has occupied the presidential chair, thus summed up the matter in 1836, speaking from his place in the House of Representatives, of which he was then a member.

"In the authority given to Congress by the Constitution of the United States to declare war," said he, "all the powers incident to war are by necessary implication conferred upon the Government of the United States. Now the powers incidental to war are derived, not from their internal municipal source, but from the laws and usages of nations. There are, then, in the authority of Congress and the Ex-

ecutive, two classes of powers 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. 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."

Obviously, martial rule *may* be a bad and vicious thing. Particularly is this true when needlessly applied without restraint; for total martial rule supersedes the civil power entirely. It takes over all governmental functions, even to the process of the courts, which it supplants with military tribunals that deal out quick and summary justice. If clear necessity for its institution does not exist, it is surely bad and vicious, for there is no tyranny more oppressive than a military tyranny. But when martial rule *is* necessary, it becomes a wise and a beneficent thing, notwithstanding it may temporarily impinge upon the privileges and even upon the rights of individuals. If its necessary operation shall interfere with business as usual, business must understand that but for such interference, no business may exist except the business of the enemy. If it shall interfere with liberty of action or freedom of movement as usual, those deprived of either must appreciate that no liberty or freedom is possible in an enemy stockade. If it shall interfere with government as usual, it must be realized that the very existence of government as we know it, is at stake. And I might add that should it even interfere with politics as usual—but perhaps it would be better not to bring that up!

Not infrequently the public press announces that somewhere martial law has been, or is about to be "declared"; and from this oft repeated formula the public has been led to think that prior proclamation is requisite to military action. But such is not the case. The office of a proclamation is to notify the public that military necessity requires for the time being, that the Army or the Navy, as the case may be, must exercise some governmental function. But prior proclamation is not necessary, nor is any proclamation necessary; and should a situation suddenly arise that requires immediate action to surmount it, such immediate necessity will serve to justify the action.

The measure of wartime martial rule is military necessity; and as no one can predict the scope of that necessity from month to month, from week to week—or even from day to day, so no one can predict

what degree of martial rule may be applied in any given locality at any given time. Some eventualities may be planned against and methods framed to meet them; some, on the other hand, cannot. Always and ever, in stating an equation that looks to the future course of martial rule, there appears at least one unknown quantity—the enemy. No one knows with certainty what he will do, or when, or how, or where; no one, that is, except himself. And no one knows with certainty how many of our own people will prove disloyal, or when and how such disloyalty may be manifested. Quick action may become necessary—action that is sure and certain as it may be violent: action that is beyond the power and the capacity of civil government. Urgent military necessity cannot wait for democratic processes. It cannot, because the enemy will not.

At this very moment, though the public generally does not realize it, we in California are living under conditions of martial rule; and we have been so living ever since the 19th day of February, when the President promulgated his Executive Order Number 9066; an order that for more than a month stood by itself, depending for its validity upon the constitutional power of the Commander-in-Chief. Let me quote you some of its provisions:

“I hereby authorize and direct the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave, shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. . . .

“I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such steps as he or the appropriate Military Commanders may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.”

Stripped of all verbiage, what does this order mean? As I read it, it means that in the discretion of the head of the Western Defense Command, the Commanding General of the 4th Army, whose headquarters are located at the Presidio of San Francisco, you and I, or any one of us may be excluded from this, or any other area in Cali-

fornea; it means that you and I or any one of us may be ordered to remain in or to depart from such an area; and whether we stay or whether we leave in obedience to his orders, we are at all times subject to whatever restrictions he may choose to impose upon us. Under the terms of this order, he may, if in his opinion military necessity requires it, regulate the lives and the occupations of every person in California; he may impose limitations upon our travel; he may regulate the speed at which we will be permitted to drive our cars; he may order us to drive with dimmed out lights at night, or to cease night driving altogether. The order gives him power over the state of California and its people limited only by what, in his discretion, he shall consider requisite to meet the military situation from day to day. And to enforce compliance with his orders, he is empowered to use whatever force is necessary, whether it be the Army, the F.B.I., the O.C.D. or any other federal agency; and any state or local agency willing to cooperate.

Until lately he has made no order that has profoundly affected citizens generally, excepting those of Japanese ancestry, whom he has removed from their homes and segregated with others of that race who are alien enemies. He has apparently preferred to leave to civilian agencies the execution of many of his wishes. "Blackout" regulations, I understand, have been generally imposed through municipal ordinances, enacted upon his suggestion, or at his request for cooperative effort upon the part of local authorities.

But on the 5th day of this month [August 1942], acting under the terms of this Executive Order, and of a ratifying act of Congress which I shall take up shortly, by his Public Proclamation No. 10,¹ he issued orders which do affect the lives and the occupations of us all. You know the provisions of that proclamation. It is unnecessary to repeat them. They are in no sense oppressive, and everyone appreciates the necessity for their promulgation.

These orders are issued to be obeyed. They are not published as suggestions or requests; and the public should be plainly told that the government is not pleading for cooperation in their observance. It is demanding obedience.

To insure such obedience, the Military Commander has designated the Ninth Regional Defense Board as the *primary* agency to aid in the enforcement of the order, and has requested the assistance of local agencies as well.

¹ Pacific Coast dim-out regulations, effective August 20, 1942.

In considering this designation of the Defense Board note well the word "*primary*"; and remember that by the terms of the Presidential Order of February 19th, the use of troops is authorized; for I have little doubt that should civilian agencies fail in the performance of this mission, the Army would perforce take over.

I was somewhat astonished to read in the daily press, following the promulgation of Proclamation No. 10, a statement attributed to an official of the Defense Board to the effect that this order "contains no element of Martial rule". I think he must have been misunderstood, for the order, in my opinion, is of the very essence of martial rule. The fact that a nominally civilian agency is designated to enforce a military order in no wise affects the nature of that order. It is who *makes* the rules that matters—not who is designated primarily to enforce them. And to that question there is but one answer. The order not only exercises governmental functions, but to the extent that it conflicts with state law or local ordinance, it supersedes them both, for under the provisions of the ratifying act of Congress approved March 21st, the orders of the Military Commander are endowed with the added sanction of federal statutes.

That act, known as Public Law 503 of the current session of Congress, has been neither widely published nor generally commented upon by the press, which is surprising in view of its extraordinary terms. The act is very short, and I shall read it to you; it provides,

"That whoever shall enter, remain in, leave, or *commit any act* in any military area or military zone prescribed, under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, *contrary to* the restrictions applicable to any such area or zone or *contrary to the order of the* Secretary of War or any such *military commander*, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense."²

It is unnecessary to discuss the language of this act. It speaks for itself. It ratifies every provision of the presidential order; and to frame a law more comprehensive in its terms would be difficult indeed.

The power here delegated to the Secretary of War and to Commanders named by him is thus enormous, and places under military

² Italics added.

jurisdiction every man, woman and child on the Pacific Coast; and, in my judgment, except as it implies the trial by jury in federal court of civilian violators, it authorizes martial rule without limit or restraint.

Measured by the principles governing peace time delegation of legislative power, the act is vulnerable, and attacks upon its validity are already pending; but measured as I think it should and must be —by legislative precedent and war time usage, I expect the courts to hold it valid. Martial rule includes, and in the nature of things, it *must* include the delegation of unlimited power to meet and cope with every military exigency as it develops. It is a necessary adjunct to waging war; and as neither the nature nor the extent of military exigency can be foreseen or controlled by the legislative power, it inevitably follows that the defense power must be unrestricted and unhampered.

I have mentioned legislative precedent to support this act of Congress, and because I think that you may wish to know in what that precedent consists, I shall take the time to tell you that during the darkest days of the Civil War, when the fate of the Union was in the balance, the Congress on March 3, 1863, enacted a statute which validated all orders of the President or under his authority, both past and future, made at any time during the pendency of that bitter conflict. It was an act which even went beyond the terms of the current act in that it contained no implication of the right of trial by jury.

To what extent is martial rule likely to be applied in California? That question I know is in your minds, because you have expressed it in your faces. I do not know the answer, nor I think, does anyone. Patrick Henry, upon an occasion famed in history, exclaimed that he knew of no way to judge the future but by the past, and I, alas, am no wiser than was he.

Upon the 7th of December, before the smoke of battle had cleared away, and the carnage and destruction at Pearl Harbor stood as a bloody token of the deadliness of modern war, the Governor of Hawaii, as he was authorized to do, with the President's approval turned over the reins of government to the Military Commander, who at once proclaimed that total martial rule was in effect. The courts were closed, though later permitted to function in a limited capacity as agents of the Military Governor. Trials by jury and compulsory process to witnesses were alike suspended; a curfew was established; commodity sales and prices were strictly regulated; liquor sales re-

stricted, and compulsory measures to prevent the spread of disease were taken. Bank withdrawals were prohibited—property was requisitioned for military use—firearms in the possession of civilians seized. Critical areas were cleared by the evacuation of their populations—night driving was all but stopped and blackouts of the strictest kind enforced. The entire area was treated as if it constituted an extended fortification, in which everything and everybody was under drastic military regulation. All criminal jurisdiction was taken over by the Army, and military tribunals set up for the trial of civilians who might violate orders or resist authority.

That, in short, gives you a picture of total martial rule as it existed in Hawaii. It is not a pretty picture, to be sure; but, so far as my information permits me to describe it, it is a true one.

I have recounted what happened in Hawaii to show you what martial rule *may be* when military necessity requires its total application. I do not even remotely suggest that such an application is likely in California. I do not think it is. But I do mean that the Hawaiian picture *might* be duplicated here should military exigency demand it, though I believe that evacuation of the civil population under military convoy, rather than its retention under martial rule, would be effected here, should formidable invasion appear imminent.

One rule I know will surely guide the military authorities in any further application of martial rule, as it has guided them thus far; and that, the rule of necessity. And this coast may count itself fortunate indeed that in the Commanding General of the Western Defense Command, it has an able and distinguished soldier of long command experience, who has occupied many offices of heavy responsibility in the Army, and whose conduct of each and every one of them has been characterized by energy and firmness and the exercise of wise discretion.

I think that you may rest assured that in his administration of martial rule, the Commanding General will do no act that is not necessary; and by the same token you may be equally assured that whatever *shall* prove necessary, that he will do, and promptly.