

CHAPTER II.

THE CONSTITUTION AUTHORIZES THE PRESIDENT TO ESTABLISH MILITARY GOVERNMENTS.

Whenever the President is called on to repel invasion or to suppress rebellion by force, if the employment of military government is a useful and proper means of accomplishing that object, the Constitution confers on him the power to institute such government for that purpose.

The power of the President to establish military governments is derived from the Constitution, Art. II., Sec. 1, Cl. 1, and is a legitimate exercise of his authority as Commander-in-Chief.

Art. IV., Sec. 4, also provides that, "The United States shall guaranty to every State in this Union a republican form of government; and shall protect each of them against invasion, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

A condition of public affairs like that now existing in certain rebellious States, renders military government thereof indispensably necessary to enable the United States to perform this guaranty of the Constitution. The authority, therefore, to institute such a government for that purpose, belongs to the President, because he is bound to see the laws enforced; and also, under Art. I., Sec. 8, Cl. 18, to Congress, because it is bound to pass all laws necessary and proper to enable the President to execute his duties.

The topics now under consideration do not require any examination of the nature or extent of the right or duty of Congress, or of the President as an *executive* officer, to carry the Art. IV., Sec. 4, into effect. The erection and maintenance for a time, by executive authority, of a provisional government in any State or Territory as a "necessary and proper means" of carrying the guaranties of the Constitution into effect, may be the subject of explanation in a future essay.

The right of Congress is beyond question to establish temporary territorial or provisional governments over those parts of the country which, having been engaged in civil war against the United States, have by force of arms been coerced into submission to our government.*

It is not necessary in this place to make further explanations of Articles I. and IV., it being sufficient for our present purpose to refer to the powers conferred by the second Article.

The Constitution, Article II., Sec. 2, Cl. 1, provides that, "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."

This clause by necessary implication, confers upon the Commander-in-Chief of the Army and Navy, the right in time of war to subject public enemies to military government and regulation. No limits to the power of the President, acting as a military commander, are prescribed in the Constitution. The laws of war, by which alone his operations should be regulated, establish his right to erect such government, and to maintain it by force of arms. The war powers of the

* See *post*, Chap. VI.

President are interpreted and controlled only by the rules of belligerent law.* As authority to call into active service the army and navy, to capture or kill our enemies in battle, to seize and destroy their property, and to take and hold their lands by force, has been confided to the President without limitation, by deliberate acts of legislation, would it not seem inconsistent to withhold from him the right to keep what he has acquired by arms, and to hold in his control, while war lasts, those whom it was his duty to overthrow?

If it be said that the power thus claimed is not granted to the President *in express terms*, it may with equal correctness be said that the authority to carry on war, to suppress insurrections or to repel invasions, or to make captures on land or sea, is not conferred upon him in express terms. The Constitution enables the President to use war powers in no other way than by authorizing him under certain circumstances to call into service and to take command of the Army and Navy. But Congress is empowered to provide for raising and maintaining armies, and to make rules for captures on land and sea. Hence no one can doubt that when an army is raised, and captures are to be made, the President, being placed in command, has the right to employ these forces so as to accomplish the purpose for which they were organized, and therefore has the right to capture public enemies in arms as unquestionably as

* See cases subsequently cited:—

Fleming v. Page, 9 How. 615 (Appendix, p. 512).

Cross v. Harrison, 16 How. 189 (Appendix, p. 516).

Leitensdorfer v. Webb, 20 How. 177 (Appendix, p. 522).

Wheaton, 99.

See also "War Powers," p. 54.

if that right had been conferred on him in plain words by the Constitution.

There can be no reason to doubt that the army is placed under the supreme command of the Chief Magistrate for all purposes for which offensive or defensive war may be justly waged. If he has authority to commit any act of hostility for the suppression of rebellion or the repelling of invasion, he has a right to commit all acts of hostility which may in his judgment be required to secure success in his military operations; and he has, therefore, the same right to erect a military government in hostile territory, under circumstances justifying it, as to perform any other military act. The erection of such government over the territory and persons of a public enemy in time of war, is an act of war; it is, in fact, continuing against them a species of hostility without the use of unnecessary force. It is a mode of retaining a conquest, of continuing custody and supervision over an unfriendly population, and of subjecting malcontent non-combatants to the will of a superior force so as to prevent them from engaging in hostilities or inciting insurrections or breaches of the peace, and from giving aid and comfort to the enemy. Large numbers of persons may thus be held in subjection to the moral and physical force of comparatively few military men. Contributions may be levied, property may be confiscated, commerce may be restrained or forbidden, and an unfriendly population may be held in subjection by military government, for the same reasons which would justify the repression of their open hostilities by force of arms. If the Constitution allows the President to go to war and to conquer the public enemy, the greater power must include the less; the

power to make a conquest must include the authority to keep and maintain possession of it, while war continues.

No one would doubt our right to occupy a hostile district of country by military posts, or by soldiers stationed in commanding positions, or to enforce upon all its inhabitants the rigid rules of martial law.

How then can the right be questioned to hold the same territory by a *small* number of soldiers, administering the same law, under the same authority, whether these military men be called by their ordinary titles, or be styled provost marshals or military governors?

If the humanity of the conqueror allows the rigid rules of martial law to be relaxed, and permits the forms of local jurisprudence to be continued under the same authority, so far as it may be done consistently with the security of the conquest, on what principle can his right to do so be denied?

DUTY OF THE CONQUEROR TO GOVERN THOSE WHOM HE HAS SUBJUGATED.

In view of the necessity of securing the ends for which war is waged, and the consequences following from the absence of government over conquered territory, it is undoubtedly the right and duty of the conqueror to erect and maintain, during war, a *provisional military government* over districts which have been subjected to his power.

This right is recognized and confirmed by the acknowledged laws of war, and by the decisions of the Supreme Court of the United States; the propriety and necessity of its enforcement have been shown by our experience in New Mexico and California, and in the States now in rebellion.