

CHAPTER III.

DISTRIBUTION OF POWERS UNDER MILITARY GOVERNMENT.

Military governments control and regulate a great variety of public, private, civil, criminal, judicial, legislative and military affairs. Their powers may be concentrated in a single officer, acting as a military governor; or they may be distributed among several persons acting under authority of the Commander-in-Chief, who may appoint one as commander, another as governor, a third as chief justice, and others as collectors of customs, in the same department.

Among the various modes of instituting military governments, one is by a proclamation of martial law and by authorizing or appointing courts martial, courts of inquiry and military commissions to carry that law into execution over belligerent districts. These institutions are best adapted to localities whose inhabitants are too hostile to admit of milder forms of administration.

The character of the laws, and the organization of the tribunals now *authorized by the statutes* to administer such government, will next be considered.

DIFFERENT KINDS OF LAW OF WAR.

Martial Law consists of a system of rules and principles regulating or modifying the rights, liabilities, and duties, the social, municipal, and international relations in time of war, of all persons, whether neutral or belligerent.*

Military law is that part of the martial law of the

* See "Military Arrests," p. 166.

land designed for the government of those who are engaged in the military service.

Of the rules and principles of martial law, many have not as yet been reduced to the form of statutes or regulations, although they are familiar to practitioners in courts martial. The 69th Article of War refers to and adopts them as part of the martial law. They may be styled the "*lex non scripta*," the custom of war, the *common law of the army*.

In the United States, martial law is modified by military laws made by Congress as articles of war, by general regulations for the government of the army, by all statutes on military subjects which the Constitution empowers Congress to pass, and by all lawful orders of the President, as Commander-in-Chief, and of the Secretary of War, or officers acting under them.

Martial law thus modified, is, when in force under the Constitution, administered within or without the United States by various *military tribunals*, including courts martial, military commissions, and courts of inquiry.*

MILITARY TRIBUNALS — HOW AUTHORIZED — THEIR CHARACTERISTICS.

The war courts now established by statutes and recognized by judicial decisions are called *courts martial*, *courts of inquiry*, and *military commissions*.†

The Constitution, Art. I., Sect. 8, Clause 14, gives Congress power "to make rules for the government and regulation of the land and naval forces."

* See Benet on Military Law and Courts Martial, 11; Dehart on Military Law and Courts Martial, 3.

† See Note to Forty-third edition, p. 460, on "Military Commissions as regarded by the Supreme Court and in Congress," and on the case of *Ex parte Milligan*, in the Appendix.

The 16th clause declares that Congress shall have power to "provide for organizing, arming, and disciplining the militia; and for governing such part of them as may be employed in the service of the United States."

To provide for disciplining and governing militia in the service, means *to make laws, rules, or regulations* for their discipline and government. The power to make them would be inoperative, unless means could be employed to administer them. Congress, therefore, has power to provide *means* as well as rules for governing. No uncertainty is left upon this question; for the 18th clause of the same section gives Congress power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof."

In the execution of this authority, Congress has provided for governing the army by erecting military courts, which are not merely necessary and proper, but are the only practical means yet found for carrying into execution the rules and regulations so enacted. Such courts are therefore sanctioned as positively as if established by express language in the Constitution.

POWER OF THE PRESIDENT TO ESTABLISH COURTS OF WAR.

Not only has Congress power to create tribunals to administer "rules and regulations for governing the army and the navy," but there exists another independent power to create and establish courts with jurisdiction over a wider range of subjects and of persons. That power is vested by the Constitution in the President, as Commander-in-Chief of the army and navy,

when in actual service in time of war, and is a branch of the power to erect and maintain military governments.

Military courts are a usual and essential part of the machinery of military government; the right to institute the one necessarily implies the right to organize the other. Courts martial have jurisdiction over offences not declared punishable by any law of Congress, and persons out of the reach of any but military process.

How far it may be within the province of Congress to control the operations of war courts instituted by the President, need not be here discussed.

As has been said, one class of courts of war may be instituted by laws of Congress, and another class may be created by the President. Both are under his control as military chief of the forces, while at the same time he is bound to execute the laws of the land. The right of the Commander-in-Chief, as well as that of Congress, to create military tribunals, has been sanctioned by many decisions of the Supreme Court of the United States.*

DO COURTS OF WAR EXERCISE JUDICIAL POWER?

As the proceedings of war courts in some respects resemble those of courts of law, it has been questioned whether they exercise any part of the judicial power of the United States which is vested by the Constitution (Art. III., Sect. 1) in "one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." It has been decided by the Supreme Court of the United States, that military tribunals exercise no part

* See authorities in the Appendix.

of the *judicial* power, but only a portion of the military power of the Executive. And it has also been determined that the sentences or other lawful proceedings of courts martial of the United States are not the subject of appeal or revision in any judicial courts of the States or of the United States.*

WOULD JUDICIAL COURTS BE USEFUL AS WAR COURTS ?

If it be said that judicial courts ought to be employed for the administration of the laws of war, in order thereby to preserve the safeguards of civil liberty, the answer is that the whole system of judicial courts would be worse than useless in armies moving from place to place. Their organization is incompatible with the administration of military rights and remedies, by reason of local jurisdiction, jury trials, territorial limitations of process, and slowness of procedure, to say nothing of the inexperience of learned jurists in military affairs.

* *Vallandigham's Case* (Appendix, 524); *Dynes v. Hoover*, 20 How. 81, 82 (Appendix, 520).

See Notes to Forty-third Edition. Opinion delivered by Mr. Justice Davis in *Ex parte Milligan*; and remarks on this decision, Appendix, 460, 536.