MILITARY RULE UNDER THE RECONSTRUCTION ACTS --

MILITARY GOVERNMENT OR MARTIAL RULE

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either the Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

Major Richard D. Sanders, O-89848

April 1964

SCOPE

An inquiry into the nature of the military regime established by the Reconstruction Acts of 1867 for the purpose of determining whether that regime was subject to rules of international law or of domestic law.

TABLE OF CONTENTS

MILITARY RULE UNDER THE RECONSTRUCTION ACTS --
MILITARY GOVERNMENT OR MARTIAL RULE ?

INTRODUCTION

On 30 September 1867, the Adjutant General of the United States Army reported that there were some 18,000 officers and men stationed in ten recently rebellious states of the Union.[1] On this remnant of the mighty Union Army, Congress imposed the task of shepherding those ten states back into their proper relationship with the Federal Government. To do this in accordance with the Congressional plan of Reconstruction, the Army was required to supervise the processes of electing delegates to state constitutional conventions, drafting constitutions, electing legislatures, and ratifying the Fourteenth Amendment (and, in some cases, the Fifteenth). While all this was going on, the entire immediate governmental authority of the ten states rested with the military. Ultimate authority lay in Congress.

---

1. 1867 American Annual Cyclopedia 56.

During the period from 1861 to 1877, the Army's functions with respect to the civilian population of the South were carried out in four distinct legal and political environments; (1) war, (2) attempted restoration of the states to the Union under the Presidential plans, (3) reconstruction of the states under the Congressional plan and, (4) government by the reconstructed state governments. This paper will concern itself with the third situation. However, in order to understand the Congressional plan of reconstruction, it will be necessary to refer to the wartime situation and to the Presidential plans of restoration.

The restoration programs established by both Lincoln and Johnson depended on the pre-war electorate to select members of a constitutional convention. The electors were subject to some additional requirements,[2] and certain classes of active Confederates were excluded, but political power would have remained

---

2. Particularly, to the taking of an oath of allegiance "henceforth" to the Union. Oaths of various kinds and for various purposes were extremely popular throughout the Reconstruction period. The most famous was the "iron-clad" oath which, among other things, included a statement to the effect that the oath-taker had never voluntarily aided the Confederacy. 12 Stat. 502.

roughly where it had been before the war, had the Presidential plans been followed. That such an electorate would be disinclined to grant the franchise to the recently freed slaves was obvious. The central issue of the post-war period was the locus of political power. Reduced to its essential component, that issue may be stated as a question, which is still unresolved; who shall vote?

The Radical Republican leaders in Congress had no intention of restoring power to those whom they regarded and frequently referred to as traitors. In the opinion of many northern leaders, the South was prepared to renew its rebellion at the first favorable opportunity. Thus, one motive for the congressional reconstruction was to prevent such an opportunity from arising. Another motive was simple revenge. Still another was to establish a permanent Republican ascendancy in the South. But, allied with these practical motives, there was a genuine belief that the freed slaves had become citizens and were, by that fact, entitled to a share in political power.[3]

The actions of some of the "Lincoln" and "Johnson" state

---

3. See Bowers, The Tragic Era 82-83, 99; Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 136 (1914).

governments in the South quickly gave plenty of ammunition to northern leaders who doubted that the characters of the southern whites had been sufficiently reformed. Some states enacted so-called "Black Codes"[4] which were severely discriminatory and restrictive with respect to the negro population. The idea of enfranchising the late slaves scarcely crossed anyone's mind. It was considered liberal to grant the negro the right to testify in court if he was involved in the case. In fairness, it should be pointed out that, at the time, many northern states had statutes very similar to the "Black Codes" on their own statute books.[5] It is also remarkable that during the Reconstruction period, before the adoption of the Fifteenth Amendment, the voters of several northern states having substantial negro minorities resoundingly defeated proposals for the enfranchisement of negroes.[6] However,

---

4. Summarized versions of these "codes" are given in McPherson, The Political History of Reconstruction (hereinafter cited as McPherson, Reconstruction) 29-44. (1871).

5. See Henry, The Story of Reconstruction (hereinafter cited as Henry) 104. (1938).

6. id. 211

in spite of that kind of sentiment, the Congressional elections of 1866 produced an overwhelming majority for the Radicals in both Houses of Congress.

THE RECONSTRUCTION ACTS

The highly skilled leaders of the Radicals promptly exerted their majority in the passage of the first of the Reconstruction Acts on March 2, 1867.[7] It was vetoed by President Johnson but was immediately passed over his veto. The Act opened by recounting the situation in the South as seen from Capitol Hill:

> "Whereas, No legal State governments, or adequate protection for life or property now exists in the rebel states of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established; therefore, Be it enacted. . . ."

The Act then divided the named states into five military

---

7. 14 Stat. 428.

districts. Virginia constituted the first district, North and South Carolina the second, Georgia, Alabama, and Florida the third, Mississippi and Arkansas the fourth, and Louisiana and Texas the fifth.

The Act provided that it would be the duty of the commanding officer of these districts,

> "to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence, and to punish, or cause to be punished all disturbers of the public peace and criminals, and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose. . . ."

Section 6 of the Act provided in part,

> "that until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil government which may exist therein shall be deemed provisional

only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control or supersede the same. . . ."

The first Reconstruction Act made the lifting of military rule contingent on a number of things, but two of them led to the need for further Congressional action. These two requirements were that the new constitution of each state should be drafted by delegates elected by "the male citizens of said State...of whatever race, color, or previous condition..." and that the new legislature should ratify the proposed Fourteenth Amendment to the Constitution of the United States. Section 3 of that Amendment had the effect of prohibiting the former leaders of the Confederacy from holding Federal or State office. Faced with this, a movement began in the South to remain under military rule by the simple expedient of refusing to take the steps required for formation of the new constitutions. The Congress of that day was anything but indecisive, and, on March 23, 1867, the second Reconstruction Act was passed[8] over a veto. It provided for registration of voters by the commanding generals of the five districts and for military supervision of the

---

8. 15 Stat. 2.

entire political process leading to reconstruction of the States.

Very soon a question arose concerning the extent of the powers of the military commanders. Some of them took a restrictive view of the powers granted them by the first Reconstruction Act while others, notably General Sheridan, were inclined to exercise the broadest possible powers. The question was submitted to the Attorney General, and, on 12 June 1867, he expressed the opinion that the Acts should be strictly construed and that the authority of the military was limited to the negative function of maintaining order and did not extend to the positive exercise of civil government.[9] Therefore, in his opinion, the military commanders could not remove or appoint civil officers, change civil laws, interfere in civil litigation, or even interfere in criminal cases except as a last resort. Congress set him straight when it passed the third of the Reconstruction Acts, again over a veto, on July 19, 1867.[10] It declared the true intent of the first Reconstruction Act to have been that the governments of the affected States were not legal State governments and "if continued, were to be continued subject in all respects to the military commanders of

---

9. 12 Ops. Att'y Gen. 182 (1867).

10. 15 Stat. 14.

the respective districts, and to the paramount authority of Congress". It then specifically granted to the commanders of the military districts the power to remove or suspend any officers of the states or subdivisions thereof and to appoint either military or civilian personnel to any such office. This power was made subject to disapproval by the General of the Army of the United States (General Grant), who also was given the same powers granted to the commanders of the military districts. The Act then confirmed actions previously taken by the district commanders and capped the whole thing with a provision that no district commander or anyone acting under him "shall be bound in his action by any opinion of any civil officer of the United States".

Of the eleven states of the Confederacy, one, Tennessee, was not placed under military rule by the Reconstruction Act, as it had been "readmitted" to the Union on July 24, 1866.[11]

---

11. 14 Stat. 364. That the party in power in Tennessee was in sympathy with the Congressional majority in Congress may be deduced from the language in which the governor informed Congress of the State's ratification of the Fourteenth Amendment, "We have ratified the constitutional amendment in the House, 43 for it, 11 against it, two of Andrew Johnson's tools not voting. Give my respects to the dead dog of the White House", quoted in Henry, 169.

How much of the broad authority delegated by the Reconstruction Acts was used by the military commanders in practice? At one time or place or another, virtually every conceivable governmental power was used. The governors of Virginia, Georgia, Mississippi, Louisiana and Texas were removed along with various other high state officials.[12] Other officials removed included judges, mayors, sheriffs, coroners, and school commissioners.[13] Many orders were promulgated regulating various civil relations between negroes and whites.[14] New Taxes were levied and existing taxes were remitted or suspended in some cases.[15] In various instances, instructions were given to courts prohibiting them from taking certain actions and directing them to take others.[16] In the

---

12. Winthrop, Military Law and Precedents, (hereinafter cited as Winthrop) 857 (2d. ed. 1920).

13. ibid.

14. id. at 858.

15. id. at 859

16. ibid.

field of legislation, military officials issued orders annulling certain statutes and modifying or construing others.[17] In an order which Winthrop describes as "the most remarkable instance in our history of the exercise of legislative authority of a military commander", an order of the Second District forbade enforcement of certain money judgments by execution, created a lien for wages on crops, created a homestead exemption, abolished certain punishments for specified crimes and substituted other punishments, and granted powers of reprieve, pardon, and remission to the governors of the states of the district.[18] In putting into effect the ordinances of the constitutional conventions which had been called pursuant to the Reconstruction Acts, some district commanders excepted provisions of the ordinances and substituted or added provisions of their own.[19] Money was appropriated from state treasuries by military commanders for the support of civil governments and public institutions.[20]

---

17. id. at 859,860.

18. id. at 860.

19. ibid.

20. id. at 861

With all of this activity going on, one would expect that challenges to the constitutionality of the Reconstruction Acts would fly thick and fast and that sooner or later the Supreme Court would pass on the Acts. This was not the case, however. There were challenges, but the Court never met the constitutional issue squarely. The first challenge came in Mississippi v. Johnson[21] when Mississippi moved for leave to file a bill to enjoin President Johnson from carrying out the Acts. The court denied the motion saying, "neither [the Legislative Department nor the Executive] can be restrained in its action by the Judicial Department, though the acts of both, when performed, are, in proper cases, subject to its cognizance". In Georgia v. Stanton,[22] Georgia attempted to have Secretary of War Stanton enjoined from carrying out the Acts on the ground that the effect would be to over-throw the state government and to erect a new one. The court declined, holding that "the rights in danger... must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court, either in law or equity". That the court should decline to consider the constitutionality of a statute at that stage, before it had been applied, is

---

21. 71 US (4 Wall.) 475 (1866).

22. 73 US (6 Wall.) 50 (1867).

understandable, particularly since the court was even then under savage attack for its decision in Ex parte Milligan.[23] Various plans were afoot to limit the Court's jurisdiction and even to impeach the justices or reorganize the court.[24] In the political environment of the times, such threats could not be treated lightly. The Congress then in session failed by only one vote in its attempt to eject the President from office, when the power of the Executive lay athwart Congressional policies, and there was little to indicate that the judicial branch would be treated with any more delicacy. Indeed, in the McCardle case, discussed below, the Congress did deprive the Court of jurisdiction in a case in which a decision adverse to the Congressional plan was feared.

The case in which the Supreme Court came closest to meeting the issue of constitutionality was Ex parte McCardle.[25] McCardle was the editor of the Vicksburg Mississippi Times. As the result of some of his editorializing, he was arrested by military

---

23. 71 U.S. (4Wall.) 2 (1866).

24. 2 Warren, The Supreme Court in United States History (hereinafter cited as Warren) 446-448 (rev. ed. 1937).

25. 74 U.S. (7 Wall.) 506 (1868).

authorities and held for trial by a military commission on charges of disturbance of the public peace, inciting to insurrection and violence, libel, and impeding reconstruction. He applied to a United States court sitting in Mississippi for a writ of habeas corpus. His case was heard, and he was remanded to military custody. From that judgment he applied to the Supreme Court under the provisions of a statute[26] which had been enacted principally for protection from Southern state courts of persons loyal to the Union.[27] After the Supreme Court heard arguments in the case, but before a decision was given, Congress repealed the statute under which the appeal had been made.[28]

---

26. 14 Stat 385.

27. Henry, 274

28. 15 Stat. 44. A later case, Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868) came to the Supreme Court by a different route, but, after the Court held that it had jurisdiction, the prisoner was turned over to civilian authorities, and again, a holding on the constitutional issue was avoided. See Warren 496-97.

Winthrop, in his excellent chapter on the Reconstruction Acts[29] says, "In Texas v. White...it was held by the Supreme Court, of these laws generally that they were enacted by Congress in the exercise of a constitutional power..." A close examination of that statement reveals that Winthrop does not say that the court in Texas v. White[30] held the Acts constitutional. As a matter of fact, the issue in the case was whether the State of Texas, having only a "provisional" government, had the capacity to sue. The court held that it did, but it did not deem it necessary to pass on the constitutionality of the Reconstruction Acts to reach that result. Its holding and its language do have a bearing on the status of the State, as will be seen later, but it has only indirect relevance to the constitutionality of the Acts.

The fact that the constitutionality of the Reconstruction Acts was not judicially determined does not mean that the courts did not review the actions of military authorities purportedly taken under the Acts. For example, in Raymond v. Thomas[31] the Supreme

---

29. Winthrop, pt. II, ch. VII.

30. 74 U.S. (7 Wall.) 700 (1868).

31. 91 U.S. 712 (1876)

Court affirmed the decision of a state court which, in effect, ignored an order of the district commander annulling a state court decree of foreclosure. The Supreme Court stated as the grounds for its decision:

> "It was an arbitrary stretch of authority, needful to no good end that can be imagined. Whether Congress could have confirmed the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires."[32]

It may be noted that the language is very similar to that used by Attorney General Stanberry in his opinion which brought about the enactment of the third Reconstruction Act.[33] But by the time of the Raymond decision, passions had, if not cooled, at least become more diffuse, and there was no such sequel.

---

32. id. at 714

33. 12 ops. Att'y Gen. 182 (1867); And, in Ex parte Hewitt, 12 Fed. Cas. 73 (No. 6442) (S.D. Miss. 1869) the court held that it was not the purpose of the Reconstruction Acts to create any new law for the punishment of crime but only to secure enforcement of existing laws by use of military commissions, where an impartial trial could not be had in local courts, and that district courts had power to release on habeas corpus one who had been improperly sentenced by a military commission.

When actions taken on the authority of the Reconstruction Acts were presented for review by the courts of the affected states, some of them gave full recognition to such actions.[34] It must be remembered, though, that after the end of direct military rule, the states of the South were controlled by Radical Republican governments for various periods of time, the last one falling in 1877. Thus, by the time control of the state judiciary came under the control of elements which may be presumed to have been hostile to the Reconstruction Acts, many of the controversies arising during military rule, which ended in the last Southern state in 1870, had become moot. When such a case did come before a post-Reconstruction court, the actions of the military authorities fared less well, as might be expected.[35] However, this judicial reaction was inhibited somewhat by a reluctance to upset matters which had been considered settled for some years.[36]

---

34. Ex parte Williams, 43 Ala. 154 (1869); Purviance v. Broward, 15 Fla. 374 (1875).

35. Varner v. Arnold, 83 N.C. 206 (1880).

36. See Taylor v. Murphy, 50 Tex. 291 (1878). The judge expressed his "individual opinion" that the court which had decided a case cited to him as precedent, "did not exercise its functions under and by virtue of the Constitution and laws of the State of Texas, but merely by virtue of military appointment." However, he went on to say that while he did not regard cases decided by such courts as binding precedents he did regard them "as a conclusive and binding determination of the particular case in which such opinion was expressed."

CHARACTERIZATION OF THE MILITARY REGIME

How should this period of military rule under the Reconstruction Acts be categorized in the law? Should it be treated as an episode in the history of the law of military government? Or is it part of the development of martial rule? The commonly accepted distinction between the two terms is that military government is used to describe the regime of military control over territory of a foreign enemy or over domestic territory recovered from rebels treated as belligerents,[37] while martial rule, or martial law, is defined as a military regime established over domestic territory.[38]

The significance of distinguishing the terms is that military government is subject to the rules of international law[39] while martial rule is governed by domestic law.[40] Although it is

---

37. U. S. Dep't of Army, Field Manual No. 41-5, Joint Manual of Civil Affairs/Military Government [hereinafter cited as FM 41-5] para. 2c (1958); U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare [hereinafter cited as FM 27-10] para. 12 (1956).

38. U.S. Dep't of Army, Field Manual No. 19-15, Civil Disturbances and Disasters, [hereinafter cited as FM 19-15] app. V, para. 3a and para. 5c; (1958) FM 27-10, para. 12.

39. FM 41-5, para. 2c; FM 27-10, para. 12.

40. FM 19-15, app. V, para. 5c; FM 27-10, para. 12.

outside the scope of the present inquiry, it should be pointed out that the statement that military government is subject to international law does not necessarily exclude the applicability of the Constitution of the United States,[41] even though such a position was taken by the Supreme Court on at least one occasion.[42]

That confusion does exist on the question of the nature of the military regime imposed on the South by the Reconstruction Acts is readily apparent. Winthrop characterizes the military rule under the Reconstruction Acts as military government,[43] after clearly making the distinction between military government and martial law previously made herein. However, it is perhaps significant that he devotes a chapter to "military government",[44] a

---

41. See concurring opinion of White in Downes v. Bidwell 182 U.S. 244 (1901). Although a concurring opinion, it eventually prevailed. See Balzac v. Porto Rico 258 U.S. 298 (1922).

42. New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387 (1874).

43. Winthrop 846.

44. Winthrop pt. II, ch. IV.

chapter to "martial law",[45] and a separate chapter to military authority under the Reconstruction Acts.[46] Justice Black, on the other hand, in Duncan v. Kahanamoku,[47] seems to regard the Reconstruction Acts as a species of martial law. A military lawyer has stated flatly that it was martial law.[48] Fairman, in a section devoted to distinguishing "martial rule" from "military government", says of the military regime under the Reconstruction Acts:

> "This regime has been called 'Congressional Martial Law'; but it is not believed that the practice of the military governments maintained by Congress during reconstruction could safely be relied upon as criteria for the conduct of martial rule; only the most dire necessity would justify measures so extensive."[49]

It is not at all clear from this whether he regards the situation as an example of martial rule or military government. Of the concluding clause of the quoted sentence, it must be said that the lawmakers certainly regarded the case as one of "dire necessity". After all, the Union had come within an ace of total destruction, and it must have appeared to them that the South might strike again

---

45. id. ch. V

46. id. ch. VII

47. 327 U.S. 304 (1946).

48. Birkhimer, Military Government and Martial Law 481 (3d. ed. 1914)

49. Fairman, The Law of Martial Rule 42 (2d. ed. 1943) (emphasis added) (footnotes omitted).

if given the power to do so. Another writer implicitly expressed his frustration at the ambiguity of the Reconstruction era precedents in these words:

> "The Civil War cases are of doubtful value here [jus postliminii] because of the dual legal status ascribed to the Confederacy of lawful belligerence on one hand and sheer rebellion on the other. The acts of Congress which largely controlled this litigation curtailed its precedent value where applied to international belligerent occupation."[50]

As pointed out above, the essential difference between military government and martial rule is that the one is governed by international law and the other by domestic law. However, various definitions of the two terms include other characteristics, some of which present some difficulties when trying to fit the definitions to the situation which existed under the Reconstruction Acts. For example, paragraph 10, Army Regulations 500-50, 19 July 1961, provides, in part, "Martial law...is the exercise of the military power which resides in the Executive Branch of the Government..." If this statement is taken to exclude Congressional control of martial law, and, if it is a statement of an essential characteristic of martial law, then the military rule established by the Reconstruction Acts could not have been one of martial law, since there can be no question that Congress was firmly in control of the situation. However,

---

50. Wurfel, Military Government - The Supreme Court Speaks, 40 N.C.L. Rev. 717 (1962).

on closer examination of the quoted language, it may be seen that there is nothing in it which is inconsistent with Congressional control of the "exercise" of the power which is said to "reside" in the Executive Branch.

On the other hand, in Chief Justice Chase's concurring opinion in the Milligan case, he says that military government is military jurisdiction "exercised by the military commander under the direction of the President, with the express or implied consent of Congress..."[51] That seems to imply a passive role on the part of Congress, and, if accepted as an essential characteristic of military government, could lead to the conclusion that the form of rule set up by the Reconstruction Acts could not have been military government. However, Chief Justice Chase's language, if taken to exclude congressional "direction" of the military government jurisdiction, must be held subject to the caution expressed in Madsen v. Kinsella. In upholding the President's power to establish military tribunals in occupied enemy territory the court said, "The policy of Congress to refrain from legislating in this uncharted area does not imply the lack of power to legislate."[52]

---

51. 71 U.S. (4 Wall.) 2, 142.

52. 343 U.S. 341, 348 (1952).

That at least leaves the question open.

Chase also described "military government" as "superseding, as far as may be deemed expedient, the local law,[53] and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress."[54] Of "martial law", he said it is:

> "called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."[55]

Here, the Chief Justice distinguished military government from martial law on the basis of their different sources of authority. It appears that he regarded military government as falling primarily within the authority of the President subject to the "sanction" of Congress, except temporarily in emergency situations, when the President exercises the power. This distinction supports

---

53. The idea that only "necessity" could justify superseding the local law was not generally recognized by legal writers of the Civil War and Reconstruction eras. However, the Lieber Code did recognize it. General Orders No. 100, War Department, April 24, 1863, para. 3.

54. Ex parte Milligan 71 U.S. (4 Wall.) 2, 142.

55. ibid.

the view that ~~that~~ the military regime established by the Reconstruction Acts was one of martial rule, since, certainly, Congress was the sole support of those Acts.

One of the difficulties encountered in trying to determine whether the military rule exercised under the Reconstruction Acts was what we call martial rule or whether it was military government is that the writers of the day frequently used the terms "martial rule" or "martial law" in reference to situations which clearly were cases of belligerent occupation as well as to cases in which what we now call "martial rule" was involved. According to Winthrop,[56] it was Chase who first made a clear distinction between "military government" which, according to him, is "to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within the states or districts occupied by rebels treated as belligerents"[57] and "martial law proper" which is "to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise."[58]

---

56. Winthrop 818.

57. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 141-142.

58. id. at 142

It will be observed that these quotations from Chase's opinion have to do with the circumstances under which the two distinct kinds of military jurisdiction may be put into effect. It appears that the distinction made by Chase are essentially those made in the current Army Field Manuals.[59] However, Chase's distinctions were not always followed, and it is frequently necessary to probe beneath the terms "martial law" and "military government" as used by writers of those times to determine whether they are using them in the sense in which the same terms are used today. For example, in argument for the Government in the Milligan case,[60] the well-known statement of the Duke of Wellington that "Martial law is the will of the commanding officer..." was cited. As Fairman has pointed out[61] in referring to a similar statement of Wellington's and as appears from the argument of the Government in the Milligan case, Wellington was talking about what we would call "military government" in Spain, while the Milligan case (arising in Indiana) was entirely concerned with martial rule.

---

59. FM 19-15, app. V, para 5c; FM 27-10, para. 12.

60. 71 U.S. (4 Wall.) 2, at 91.

61. Fairman, The Law of Martial Rule and the National Emergency, 55 Harv. L. Rev. 1253 (1942).

Because the political and legal status of the states of the Confederacy was without parallel in our history, it has not been possible to pursue a direct approach in determining whether the Reconstuction Acts established martial rule or military government. Rather, it has been found necessary to proceed indirectly by testing the military rule of the Reconstruction Acts against generally accepted principles of martial rule on the one hand and of military government on the other, on the theory that it may be possible to eliminate one, if its governing principles can be shown to be intrinsically inapplicable to the situation in existence at the time the Acts were passed. As a result of the dearth of directly applicable precedents, it is not supposed that unassailable conclusions can be drawn, but it is hoped that a conclusion can be reached which is sufficiently justifiable to warrant at least prima facie acceptance in fitting the Reconstruction Acts into the whole picture of military rule over civilian populations.

STATUS OF THE STATES

What was the legal and political status of the ten "states" affected by the Reconstruction Acts at the time those Acts became operative? This question was debated extensively at the time, and the conclusions reached were as diverse as the minds which reached

them. President Lincoln proposed that the question be left unresolved. He felt that whether the Confederate states had or had not been out of the Union, all could agree that their relation to the Federal Government was distinctly abnormal.[62]

While it is unlikely that a conclusive determination can be made in these pages, a consideration of the issue may serve to illuminate the nature of the military authority exercised under the Reconstruction Acts, because the two questions are closely related. Thus, if the States had successfully left the Union for any period of time, it would have been easier to support a theory that military government is the proper appellation for the military rule imposed. If the States were deemed to have remained in the Union, then it would have been a question of putting down an insurrection (even though it may have attained the status of a belligerency from the standpoint of international law) and the accompanying military rule arguably would have been "martial rule" over domestic territory.

Ironically, those most inclined to adopt a view in support of the widest possible Federal authority over the conquered areas were faced with the difficulty that they had all along taken the

---

62. See the last speech of Lincoln, quoted in pertinent part 1 Fleming, Documentary History of Reconstruction [hereinafter cited as Fleming] 115. (1906).

position that secession was a nullity, that it was legally impossible to secede from the Union. On the other hand, those who had proclaimed the right of the state to secede and had considered themselves citizens of a separate nation now found that to argue that position could be taken to mean that they were not citizens and not entitled to the protection of all the guarantees of the United States Constitution.

In his executive actions during the war, President Lincoln held to the position that the Union could not be broken by any ordinance of secession and that the uproar to the south was the result of the actions of individuals in unlawful assemblage rather than actions of the states as states.[63] The majority of the Joint Committee on Reconstruction, set up by Congress to handle all matters relating to Reconstruction, regarded the question of whether the seceding states had been in or out of the Union as a "profitless abstraction",[64] but, in the same report in which they used that

---

63. Lincoln's actions indicating this position are summarized and discussed in Dunning, The Constitution of the United States in Reconstruction, in Essays on the Civil War and Reconstruction [hereinafter cited as Dunning] 65-66 (rev. ed. 1904).

64. Majority Report, Joint Committee on Reconstruction, McPherson 87.

term they said, "Whether legally and constitutionally or not, they (the pwople of the rebellious states) did, in fact, withdraw from the Union and made themselves subjects of another government of their own creation."[65] But, later, in the same report this language appears:

> "We assert that no portion of the people of this country...have the right, while remaining on its soil, to withdraw from or reject the authority of the United States...The Constitution, it will be observed, does not act upon States, as such, but upon the people; while, therefore, the people cannot escape its authority, the States may, through the act of their people, cease to exist in an organized form, and thus dissolve their political relations with the United States."[66]

The minority report of the Joint Committee points out that the citizens of a state "may be proceeded against under the law and convicted, but the State remains a State of the Union. To concede that, by the illegal conduct of her own citizens, she can be withdrawn from the Union, is virtually to concede the right of secession." The minority also denied that the war power could be used for the suppression of insurrection since there is a separately enumerated power for that purpose.[67]

---

65. id. at 86.

66. id. at 87.

67. Minority Report, Joint Committee on Reconstruction, McPherson 93.

Senator Sumner's theory of "state suicide"[68] held that an attempt by a state to end the supremacy of the Federal Constitution was void, and the treason involved in attempting to end this supremacy by force worked a forfeiture of the powers essential to the existence of a state. The state was thus dead, but the territory which it formerly occupied remained a part of the United State. But Sumner's theory held that the relation of the people to the Federal Government was not affected by the "suicide" of a state. His theory would seem to preclude the idea of a belligerent occupation since the territory involved never left the jurisdiction of the United States.

Thaddeus Stevens' view of the matter was that the territory occupied by the states of the Confederacy constituted a "conquered province", and, as such, could be governed in accordance with the principles of international law but were not entitled to the benefits of the Constitution.[69] The "forfeited rights" theory held that the states were not destroyed but in a state of suspended animation.

---

68. See Fleming 144-146; Dunning 105-107.

69. See Fleming, 147-153; Dunning 107-109.

Under this theory, Congress was obliged, in pursuance of the constitutional mandate to guarantee "a republican form of government", to establish a new political structure in the states. This theory held that the rebellious states remained part of the nation but forfeited their normal rights.[70] It is apparent that this was a compromise, and it was the theory embodied in the Reconstruction Acts.

In Texas V. White,[71] one of the central issues was whether the then unreconstructed state of Texas was a state so as to give the Supreme Court original jurisdiction.[72] Texas was, at the time, under the military jurisdiction set up by the Reconstruction Acts, and its civil government was, in the language of the first Reconstruction Act, "provisional". In holding that it did have original jurisdiction, the Court said, "The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States."

---

70. See Majority Report, Joint Committee on Reconstruction; Dunning 109-111.

71. 74 U.S. (7 Wall.) 700 (1868).

72. U.S. Const. art. III, section 2.

If the states did not sever their ties with the Union, their citizens did not cease to become citizens and, thus, could not logically have become proper subjects of a belligerent occupation (except, perhaps, when the war was actually in progress), since that would have implied that their individual rights were to be found by reference to international law rather than to the Constitution. In this connection, it should be noted that there were many people in various parts of the South who had remained loyal to the Union and many others who had at least made an effort to remain loyal. In the Prize Cases,[73] it was held that the property of citizens of the Confederate States was "enemies' property" even though the owner might not be in rebellion personally. However, the Court recognized that "the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights" and went on to point out that the term "enemies' property" is a technical term peculiar to prize courts, where it means property in the enemy's commerce, without regard to the domicile of allegiance of its owner.In a later case on the question, the Supreme Court had this to say: "At no time were the rebellious States out of the pale of the Union. Their rights under the Constitution were suspended but not destroyed...A citizen is still a citizen, though guilty of

---

73. 67 U.S. (2 Black) 635 (1862).

crime and visited with punishment."[74]

All theories aside, there were certain actions taken by the various branches of the Federal Government which were wholly inconsistent with any legal status of the subdued South other than that of states of the Union. One of these actions was the opening of the Federal Courts in the South after the war. These courts were in operation both before and during the military rule established by the Reconstruction Acts and were courts established under the authority of Article III of the Constitution.[75] That Article III courts are legally distinct from territorial courts has long been accepted.[76]

Secondly, the Thirteenth Amendment to the Constitution was ratified by seven state legislatures which Congress called "provisional" in the Reconstruction Acts, and these ratifications were necessary for the adoption of the Amendment and were treated as valid ratifications by the Secretary of State in his certification

---

74. White v. Hart, 80 U.S. (13 Wall.) 646.

75. See Warren 421

76. Downes v. Bidwell, 182 U.S. 244 (1900); American Insurance Company v. Canter, 26 U.S. (1 Pet) 511 (1828).

of adoption.[77] While Mr. Seward was criticised for this,[78] the ratification of the Fourteenth Amendment by legislatures in a very similar status[79] was required by section 5 of the first Reconstruction Act as a condition precedent to the acceptance of the states' congressional delegation and the termination of military rule. How could any entity other than a state ratify an amendment to the Constitution? Article V of that instrument requires ratification by "the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof..."

Another indicative action was the creation of West Virginia. The Constitution provides that "no new State shall be formed or erected within the jurisdiction of any other State... without the consent of the legislatures of the States concerned as

---

77. 13 Stat. 774.

78. Cong. Globe, 39th Cong. 2d sess. 598 (1867).

79. Of course, the legislatures did not have the same status as those which had ratified the Thirteenth Amendment. The first Reconstruction Act contemplated new state constitutions and new elections (with a new electorate). Thus, the legislatures would have Congressional sanction of a sort, but section 6 of the Act denominates even these as "provisional".

well as Congress."[80] The Virginia legislature which consented to the creation of West Virginia was one that had been formed after the "secession" of Virginia.[81]

It is concluded that judicial holdings and the bulk of the actions taken by the three branches of the Federal Government favor a theory that the states remained in the Union at all time during and after the Civil War.

AS MARTIAL LAW

What bearing has the famous case of Ex parte Milligan[82] on the question under examination? That case is still considered authoritative in the field of martial rule.[83] If its holding is inconsistent with the imposition of military rule, then we must conclude that either the Reconstruction Acts were unconstitutional

---

80. U.S. Const. art. IV, section 3.

81. This anomaly is discussed in Dunning 67.

82. 71 U.S. (4 Wall.) 2 (1866).

83. See Duncan v. Kahanamoku, 327 U.S. 304 (1946).

or that the military rule imposed (at least insofar as it included features at issue in the Milligan case) was not martial rule but some other form, probably military government.

Milligan was a civilian resident of Indiana who was tried by a military commission sitting in Indiana while the war was still in progress. He was sentenced to be hanged, and his sentence was approved by President Johnson. Milligan then sought a writ of habeas corpus on grounds that the military commission was without jurisdiction. The central proposition of the majority opinion may be gathered from the following excerpts:

> "They [the laws and usages of war] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed...Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise."[84]
>
> . . .
>
> "Not one of these [constitutional] safeguards can the President, or Congress, or the Judiciary disturb, except one concerning the writ of habeas-corpus."[85]
>
> . . .
>
> "As necessity creates the [martial] rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."[86]

---

84. 71 U.S. (4 Wall.) at 121 (emphasis added)

85. id. at 125.

86. id. at 127.

The minority opinion by Chief Justice Chase agreed that the military commission was without jurisdiction, but because Congress had not authorized it, not becuase it could not authorize it. There was in existence at the time a statute[87] which provided that a list of persons detained under the authority of the President (excluding prisoners of war) should be furnished to the judges of the appropriate Circuit and District Courts. This statute further provided that when a federal grand jury terminated its next session after the submission of such a list, without indicting a listed individual, he should be brought before the court for discharge or other disposition by the court. On the basis of that statute, the minority concluded that Congress had provided for a civilian trial rather than proceedings before a military commission. From their point of view, that disposed of the Milligan case, and the rest of the opinion is devoted to a rebuttal of the position of the majority opinion which denies the right of Congress to impose martial law except where the courts are closed in the locality of actual war. The following excerpts from the minority opinion will

---

87. 12 Stat. 755.

serve to illustrate their view of Congressional power to impose military rule, or, at least, to provide for trial by military commission.

> "We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists."
>
> "Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the dicipline or security of the army or against the public safety."
>
> . . .
>
> "The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the exercise of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty consperators..."
>
> "In times of rebellion and civil war it may often happen, indeed, that judges and marshalls will be in active sympathy with the rebels, and courts their most efficient allies."[88]

It has been pointed out by a leading authority that the language of the majority opinion in the Milligan case on the subject of Congressional power to impose martial rule is essentially

---

88. 71 U.S. (4 Wall.) at 140, 141.

dicta.[89] The majority clearly recognized that the statute relied on by the minority was relevant and that under its provisions Milligan should go free. Therefore, the case could have been decided without any discussion of congressional power. Fairman is clearly of the opinion that this dicta of the majority in the Milligan case is too inflexible, at least under modern conditions. However, in Duncan v. Kahanmoku,[90] the Supreme Court, in an opinion by Justice Black, quoted that same dicta with approval. However, the Duncan case is replete with dicta itself. It involved the validity of a trial by a military tribunal sitting in Hawaii in March 1944 while martial rule was in effect. The majority held that the authorization to establish martial law granted by Congress in the Hawaiian Organic Act[91] "was not intended to authorize the supplanting of courts by military tribunals."[92] In his concurring opinion, Chief Justice Stone said,

> "I assume that there was danger of further invasion of Hawaii at the times of those trials. I assume also that there could be circumstances in which the public safety requires and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts. But the record here discloses no such conditions in Hawaii, at least during the period after February 1942."

---

89. Fairman, The Law of Martial Rule and the National Emergency, 55 Harv. L. Rev. 1253 (1942).

90. 327 U.S. 304 (1946).

91. 31 Stat. 153.

92. 327 U.S. at 615-16 (emphasis added).

In a sequel to his previously mentioned article, Fairman observes of the Duncan case,

> "It may be noted that the Court was interpreting a statute of 1900 providing generally for the government of the Territory, and that the particular section under consideration looked indefinitely into the future and was pointed at no specific emergency. A statute enacted in the face of some actual peril, and importing a legislative judgment of what the immediate situation required, would no doubt be entitled to more indulgent consideration."[93]

From the foregoing analysis, it seems clear that there is nothing in the Milligan or Duncan decisions which would preclude categorization of military rule under the Reconstruction Acts as "martial rule". There is no doubt that the majority opinion writers in Milligan and in Duncan would have been hostile to the Acts, or, at least so much of them as authorized resort to military tribunals for the trial of civilians,[94] but that is not to say that

---

93. Fairman, The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case, 59 Harv. L. Rev. 833, 855 (1946).

94. Justice Black's language in the Duncan case is indicative. "Insofar as that legislation [the Reconstruction Acts] applied to the Southern States after the war was at an end it was challenged by a series of Presidential vetoes as vigorous as any in the country's history. And in order to prevent this Court from passing on the constitutionality of this legislation Congress found it necessary to curtail our appellate jurisdiction." 327 U.S. 304 at 323-24 (emphasis added).

they would have held them invalid, had they been faced with the necessity of giving due weight to the circumstances which led to the Acts. Reduced to their essential holdings, the Milligan case held only that the particular exercise of a martial law function had not been authorized, and the Duncan case held that the particular authorization for martial law involved in that case was not intended to authorize the action taken in the case at bar. The two cases are the leading ones on the validity of Federal martial rule, but neither really reaches the ultimate issue of what circumstances would justify Congress in imposing a regime of martial rule. Consequently, their holdings are not inconsistent with the imposition by Congress of martial rule for the purpose of guaranteeing a republican form of government to states in the situation of those affected by the Reconstruction Acts, or for the purpose of suppressing an incipient insurrection.

AS MILITARY GOVERNMENT

Having concluded that military rule under the Reconstruction Acts was not inherently inconsistent with principles applicable to martial rule, the next question is whether that military rule was exercised under conditions which would preclude the existence of a belligerent occupation.

It is generally conceded that there were occasions during

and immediately after the Civil War when the Union Army was a belligerent occupant. Army Field Manual 27-10 provides:

> "In the practice of the United States, military government is the form of administration which may be established and maintained for the government of areas of the following types that have been subjected to military occupation:
>
> ...
>
> d. Domestic territory recovered from rebels treated as belligerents."[95]

Chief Justice Chase also recognized that military government could be imposed "within states or districts occupied by rebels treated as belligerents..."[96] and he did this in the course of making the now accepted distinction between martial rule and military government. Nor is there any question that during the course of the Civil War, the Confederate States were treated as belligerent in most respects,[97] although the right of the Federal Government to treat the citizens of those states as rebels at its option was recognized.[98]

---

95. para. 12 (emphasis added).

96. Ex parte Milligan, 71 U.S. (4Wall.) 2, 141-42.

97. See Coleman v. Tennessee, 97 U.S. 509 (1878); New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387 (1874); The Grapeshot, 76 U.S. (9 Wall.) 129 (1869).

98. The Prize Cases, 67 U.S. (2 Black) 635 (1862).

But admitting that the South was a belligerent for most purposes, and, as such, a proper subject of belligerent occupancy, and that military government was imposed at various times during, and possibly after, hostilities, does not solve the problem of determining the nature of the military rule imposed two years after the hostilities had ceased.

The first relevant inquiry concerns the legally recognized duration of a belligerent occupancy. The generally stated rule is that such an occupation is terminated by withdrawal, by ejection, or by subjugation.[99] Obviously, the first two are inapplicable to the situation under consideration. It has been said that:

> "Termination by subjugation occurs when the displaced sovereign is defeated and part or all of the occupied territory is annexed by the occupant or permanently severed from the authority of the displaced sovereign....
>
> "Occupation does not cease upon the termination of all hostilities. It continues until full sovereignty of the occupied area is returned to the displaced sovereign or until such sovereignty is assumed by another state."[100]

---

99. U.S. Dep't of Army, Pamphlet 27-161-2, II International Law [hereinafter cited as DA Pam. 27-161-2], 162-63 (1962).

100. id. 162.

Certainly, in the case of civil war, the sovereign against whom the "rebellion" is being conducted is not likely to concede that sovereignty passed from it, even where it treats the rebels as belligerents. Under none of the theories of reconstruction[101] was it ever conceded by the victors that sovereignty over the territory of the South had passed from the National Government.[102] Thus, if we apply the principles of termination of the occupation by subjugation, it would follow that there can be no belligerent occupancy by the original sovereign in a civil war, because as soon as any of the territory in rebellion is "occupied", it is eo instante "subjugated", since it is "permanently severed" from the losing power and "annexed" to the gaining power.

However, a more likely deduction is that the term "subjugation" in the material quoted above is not used in reference to a

---

101. With the possible exception of the "conquered province" theory.

102. See Dunning 99-112

civil war. While there are many statements in legal writings to the effect that participants in civil strife may attain the status of belligerents for purposes of international law,[103] no instance has been found where this question of the time of termination of a military government in a civil war has been discussed (assuming military government could exist at all).

One authority in international law has expressed an interesting theory relating to belligerent occupation with reference to Germany after World War II:

> "During that period (until 1949) in which the internal and external sovereignty of the German State was suspended, the state of war, however nominal, continued. However, having regard to the utter defeat of the German forces, to the actual termination of hostilities, to the absence of any German governmental authority, and to the suspension of the international personality of Germany, the government of Germany by the Allied Forces was not in the nature of belligerent occupation... The legal basis of the authority exercised by the Allied powers in Germany during that period lay, in full conformity with International Law, in the unlimited power conferred upon them--or subsequently assumed by them--in virtue of the unconditional surrender of the German forces."[104]

The quoted language could not be more applicable to the conditions surrounding the defeat of the Confederacy. From the first

---

103. II Oppenheim's International Law [hereinafter cited as Oppenheim] 209 (Lauterpacht ed. 1952); DA Pam 27-161-2, 163.

104. Oppenheim, 602 (emphasis added); see also DA Pam 27-161-2, 163.

part of the statement, it seems clear that the author would not have regarded any military rule of the South after May of 1865, when the last military force of any importance surrendered, as a belligerent occupancy. The last sentence of the quotation, however, implies that there is some other sort of jurisdiction governed by international law, but this may be assumed to be based on the fact that, in the case of the occupation of Germany, the occupiers disavowed any intention of assuming sovereignty.

Other difficulties are involved in treating the military rule under the Reconstruction Acts as a belligerent occupancy. The power of Congress to legislate in the field of belligerent occupancy must surely come from its war power, since occupation is an incident of war.[105] However, the power on which Congress itself grounded the Reconstruction Acts was its power to guarantee a republican form of government to every state.[106] If the military rule is deemed to have been imposed for the purpose of carrying out this function, it does not appear to be compatible with principles of belligerent occupation.

---

105. See Oppenheim 437; Stone, Legal Controls of International Conflict 699 (1959); Greenspan, The Modern Law of Land Warfare 213 (1959).

106. Majority Report, Joint Committee on Reconstruction, McPherson, Reconstruction 85.

Another difficulty in maintaining a theory that the regime imposed was military government is that the President had declared the war to be at an end before the Reconstruction Acts were passed,[107] and the Supreme Court later accepted the Presidential determination as conclusive.[108] As a matter of fact, the war had begun in a similar manner, with various Presidential actions such as the establishment of a blockade,[109] which were later ratified by the Congress.[110] There was never a formal Congressional declaration of war.

---

107. 14 Stat. 811, April 2, 1866; 14 Stat. 814, August 20, 1866.

108. The Protector 79 U.S. (12 Wall.) 700 (1871) (accepted the Presidential proclamations as determinative of the end of tolling of a statute of limitations).

109. 12 Stat. 1258-1259.

110. 12 Stat. 319.

CONSTITUTIONALITY

As pointed out previously, there was never any judicial determination of the constitutionality of the Reconstruction Acts. In view of this, a consideration of the question at this late date may seem somewhat akin to trying to determine how many angels can dance on a pin point. However, a rather general inquiry into the matter does seem to be warranted, because, if it can be established that the Acts were clearly unconstitutional, they would not have any precedent value, of course.

There is little constitutional difficulty if the military regime is considered to be one of military government. The constitutional issue would not involve the rights of the governed but the powers of those governing. The most obvious issue is whether the Congress usurped Presidential authority in establishing "military government". Of course, there is little judicial authority since there is no other legislation in United States history like the Reconstruction Acts. However, there is dicta that Congress may legislate in the field of military government.[111]

If the military regime is held to be martial rule, a constitutional briar patch is encountered. President Johnson, among

---

111. Madsen v. Kinsella 343 U.S. 341 (1952).

among many others, believed the Acts were unconstitutional.[112]

It must be kept in mind that it might have been possible for some features of the Reconstruction Acts to have been held unconstitutional without affecting the rest. For example, ststutes requiring oaths similar to that required of voters by the second Reconstruction Act were held to be unconstitutional.[113] It is readily apparent that there would still be some substance if the oath-taking provision were eliminated.

On the fundamental question of the constitutional validity of martial rule in any given situation, Fairman states the controlling considerations:

> "Our constitutional system contains within itself all that is necessary to its own preservation... When force becomes necessary to repress illegal force and preserve the commonwealth it may lawfully be exerted. Martial rule depends for its justification upon this public necessity. It is not a thing absolute in its nature, a matter of all or nothing. On the contrary, it is measured by the needs of the occasion."[114]

---

112. See the messages accompanying the President's vetoes of the bills which became the Reconstruction Acts when passed over his vetoes, VI Richardson, Messages and Papers of the Presidents 498, 531, 536 (1897).

113. Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

114. Fairman, The Law of Martial Rule 47 (2d. ed. 1943).

It is a truism that Congress is not limited to the express powers granted it by the Constitution, but has such implied powers as are necessary for the exercise of its express powers.[115] In the case at hand, the Congress, arguably, was exercising either its power to guarantee a republican form of government or its power to suppress insurrection, or both. The Supreme Court has said that the power to suppress insurrection,

> "is not limited to victories in the field and dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which had arisen from its rise and progress."[116]

Thus, the power to suppress insurrection could, at least in theory, have continued to the time of the Reconstruction Acts.

In assessing the constitutionality of the Reconstruction Acts as martial rule measures it is extremely important to see the situation as it ~~appeard~~ appeared to Congress at the time. Viewing the circumstances after the passage of a century, it may seem that there was no real danger of a renewal of the insurrection, but that wasn't so clear at the time. Considering the great

---

115. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315 (1819).

116. Stewart v. Kahn, 78 U.S. (11 Wall.) 493 (1870).

number of insurgents and the vast territory of the Confederacy, as well as the narrow margin of victory, it must have seemed that there was real danger.

Considering the Reconstruction Acts as an exercise of the power to guarantee a republican form of government, there is no judicial precedent of value; but it is certainly a logically sustainable position that a state denying suffrage to half of its adult male population does not have a republican form of government.

Predicting what the Supreme Court will do is a notoriously hazardous undertaking; and trying to guess what the Supreme Court would have done had it been squarely faced with the question of the constitutionality of the Reconstruction Acts is more hazardous than most, because there has never been a really comparable situation in our history. However, it does seem fair to say that it would be very difficult to show that the end of the legislation was clearly beyond the power of Congress, or that, if the end be assumed to be legitimate, the means adopted were clearly more stringent than necessary, under all the circumstances.

CONCLUSIONS

In the light of all the facts and theories presented, it seems to me that the military rule exercised under the Reconstruction Acts must be considered to be an example of martial rule, as that term is generally understood today.

Both the conditions existing at the time the Reconstruction Acts went into effect, and, in general, the theories propounded by all three branches of the Federal Government seem inconsistent with the principles of belligerent occupancy and military government. For our purpose, it is not necessary to determine whether there was ever a true belligerent occupation at any time before the Reconstruction Acts. Even that may be subject to some question, as has been seen, though there are numerous statements that such a form of military rule did exist at one time or another during the period. Particularly, the unqualified acceptance by all concerned of the Southern ratifications of the ~~Thirteenth~~ Fourteenth Amendment is totally incompatible with any status of the South which could be termed belligerent occupation.

It is submitted that the apparent difficulties involved in considering the military regime one of martial rule stem rather from the uniqueness of the situation than from any basic

incompatibility between generally accepted principles of martial rule and the authority exercised by the military under the Reconstruction Acts. It is important to appreciate the magnitude of the peril from which the Union had but barely escaped. Almost half of the country had been in arms against the central Government. The governments of eleven states had been, for four years, in armed hostility to that Government. It was manifestly ridiculous to hold that the federal authorities were required by any principle of law to consider those state governments as legitimate governments of the states at the close of the hostilities.[117] Accepting that proposition, then, there was no local government in the conquered areas, whether states or something else. The real question, then, was whether the executive branch or the legislative branch of the federal Government was to control the process of establishing some kind of government compatible with our constitutional system. It seems clear that this function is inherently more appropriate for the Congress than for the President.

---

117. Some abortive attempts to operate in general conformity with such a policy were made, however. See the so-called "Sherman-Johnston Agreement", McPherson, Reconstruction 121. Some "rebel" governors convoked their state legislatures to meet the crisis resulting from the collapse of the Confederacy. Dunning, 100.

As the events showed, the President could go a very long way toward establishing a working government, but he could not take the final step needed to restore completely normal relations, that of obtaining representation for the states in Congress. Congress has sole control over who shall be accepted into its ranks, and, for that reason alone, if for no other, it was the most appropriate branch to control the formation of the new governments.

The next logical question concerned the means to be employed. How should the new state governments be formed, and how should the South be governed while they were in the process of formation? Accepting the principle that "martial rule depends for its justification upon this public necessity",[118] the question may fairly be asked, how, except by martial rule, could states in the circumstances of those of the South be governed? There may have been alternatives, such as the use of federal courts aided by the Army, but none which were so clearly adapted to the purpose as to justify a court in finding that martial rule was not necessary under the circumstances. Granting that martial law is

---

118. Fairman, The Law of Martial Rule 47 (2d. ed. 1943).

most typically resorted to in cases of outright insurrection or widespread violence or in areas closely connected with active hostilities, there is no accepted principle of martial law which precludes its use in situations where violence is neither active nor apparently imminent, always providing that martial law is necessary under the circumstances. The courts are empowered to review this question of necessity,[119] and it is entirely possible that the power given to the military authorities was in excess of that the required by the exigency. But that is not to say that no degree of martial law could have been justified and, hence, that the authority exercised under the Reconstruction Acts was not martial rule as the term is understood today. Should we be faced with as complete a hiatus of local government in a very extensive area inhabited by a population largely hostile to policies of the National Government, the martial rule established by the Reconstruction Acts could, and would, serve as a precedent for the imposition of martial rule to the extent required.

---

119. See Sterling v. Constantin 287 U.S. 378 (1932). And in the Milligan case Chief Justice Chase, considering the use of martial law as an adjunct of the war power, took pains to deny that Congress could use the war power when no war existed.

TABLE OF CASES AND STATUTES

United States Supreme Court

15 Stat. 14 ---------- 8

15 Stat. 2 ---------- 7

14 Stat. 814 ---------- 47

14 Stat. 811 ---------- 47

14 Stat. 428 ---------- 5

14 Stat. 385 ---------- 14

14 Stat. 364 ---------- 9

13 Stat. 774 ---------- 34

12 Stat. 1258 ---------- 47

12 Stat. 755 ---------- 37

12 Stat. 502 ---------- 2

12 Stat. 319 ---------- 47

BIBLIOGRAPHY

Birkhimer, Military Government and Martial Law (3d. ed. 1914) ---------- 20

Bowers, The Tragic Era (1929) ---------- 3

Dunning, Essays on the Civil War and Reconstruction (rev. ed. 1904) ---------- 28, 30, 31, 35, 44, 53

Fairman, The Law of Martial Rule (2d. ed. 1943) ---------- 20, 49, 54

Fleming, Documentary History of Reconstruction (1906) ----- 27, 30

Greenspan, The Modern Law of Land Warfare (1959) ---------- 46

Henry, The Story of Reconstruction (1938) ---------- 4, 9, 14

Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction (1914) ---------- 3

McPherson, The Political History of Reconstruction 4, 28, 29, 46, 53

Oppenheim's International Law (Lauterpacht ed. 1952) ------- 45, 46

Richardson, Messages and Papers of the Presidents (1897) ---------- 49

Stone, Legal Controls of International Conflict (1959) ---------- 46

U.S. Dep't of Army, Regulations No. 500-50 (July 19, 1961) ---------- 21

U. S. Dep't of Army, Pamphlet 27-161-2, II International Law (1962) ---------- 43, 45

U. S. Dep't of Army, Field Manual No. 19-15, Civil Disturbances and Disasters (1958) ---------- 18, 25

U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare (1956) ---------- 18, 25, 42

U.S. Dep't of Army, Field Manual No. 41-5, Joint Manual of Civil Affairs/Military Government (1958) ---------- 18

U.S. War Department, General Orders No. 100 (April 24, 1863) ---------- 23

Warren, The Supreme Court in United States History (rev. ed. 1937) ---------- 13, 14, 33

Winthrop, Military Law and Precedents (2d. ed. 1920) ----- 10, 11, 15 19, 20, 24

Fairman, The Law of Martial Rule and the National Emergency 55 Harv. L. Rev. 1253 (1942) ---------- 25, 39

Fairman, The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case, 59 Harv. L. Rev. 833 (1946) ---------- 40

Wurfel, Military Government - The Supreme Court Speaks, 40 N.C.L. Rev. 717 (1962) ---------- 21