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AN ANALYTICAL STUDY OF THE MILITARY POWERS OF THE PRESIDENT UNDER THE CONSTITUTION OF THE PHILIPPINES

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The subject of this study is power. The nature and extent of the power of the President of the Philippines as granted in paragraph 2, section 11, Article VII of the Constitution, heretofore uncontroverted, is far greater than the power granted to the President of the United States or the different governors of the states of the United States. This power is contained in these words: "The President shall be commander-in-chief of all armed forces of the Philippines and, whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion, in case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof under martial law."

Power always conflicts with individual liberties. The history of constitutional law is the history of the struggle of the people to secure their individual rights of life, liberty and property against the encroachments of power. The Bill of Rights constitutes the bulwark of the rights of private individuals. In this study, we will analyze the conflict between the power of the President granted in this paragraph and the Bill of Rights of the Philippine Constitution. Provisions of the Constitution of the United States of general application in all American territory will also be applied in this study.

In a study of this nature, comparison with similar powers granted by the various constitutions of American states and the Federal Constitution is necessary in order to gain an insight into the Anglo-American precedents and jurisprudence on the subject. The authorities, it has been found out, are unsettled, especially on martial law which will be fully discussed. It will be noted upon comparison that the Constitution of the Philip-

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pines is distinct from all state constitutions and the Federal Constitution in that only in the Philippines and in the Territory of Hawaii is the power to declare martial law expressly granted to the executive. In other states, the power to declare martial law is not granted or if granted, is limited in the Bill of Rights, and vested in the legislature. The jurisprudence on martial law in the United States, therefore, has been based on inferences from the nature of different powers, such as the power of the executive to execute the laws or the power to call out the militia to repel or suppress rebellion, or the power as commander-in-chief of armed forces, or incident to the power to declare and prosecute wars. This is not so in the Philippines, for here there is an express constitutional power granted to the President to declare martial law.

GENERAL PRINCIPLES GUIDING THE ANALYSIS

Analysis of any subject-matter always presupposes certain general principles in accordance with which the discussion of the particular points are based. A study of a grant of power must investigate the sources of that power in order to know its nature and determine its limitations. The Philippines, not being a sovereign state but an unincorporated territory, all power comes from the Congressional power to govern territories. (Sinco, Phil. Gov't. & Pol. Law, 4th ed. p. 134). And naturally, limitations on power will arise not only from the limitations on the local government provided in the Constitution of the Philippines, but also limitations on the source of power itself. "Undoubtedly, those fundamental principles for the protection of life, liberty, and property of the individual 'which are the basis of all free governments' and upon which the American nation was built, whether appearing in the Constitution or not, constitute restrictions upon the exercise of the authority of Congress over the Islands" (Sinco, idem, p. 135, citing Insular cases 182 U. S. 276, 45 L. ed. 1088, Balsac v. People of Porto Rico, 258 U. S. 298, 66 L. ed. 627).

The Tydings-McDuffie Act will also be considered as governing the Constitution and the Commonwealth of the Philippines.

Within the Constitution of the Philippines itself, two general principles will be taken into account: first, that the Constitutional Convention intended that the President should be a strong, almost dictatorial executive (Aruego, Framing of the

Philippine Constitution, p. 384-390); and second, that when the Convention adopted the Bill of Rights, it adopted them verbatim so as to preserve their original historical meanings. Delegate Laurel, chairman of the committee on the Bill of Rights, on presenting the draft of the Bill of Rights spoke: "Modifications or changes in phraseology have been avoided, whenever possible. This is because the principles must remain couched in a language expressive of their historical background, nature, extent and limitations, as construed and expounded by the great statesmen and jurists that have vitalized them."

Within the paragraph itself, upon a close examination of its clauses, it will be noted that powers granted in that paragraph are of different gradations. The power to call out the armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion is one power. The suspension, of the writ of habeas corpus in case of invasion, insurrection, or rebellion, or imminent danger thereof is a further withdrawal of constitutional restrictions on that power. And finally, the placing of the Philippines or any part of it under martial law during any of the cases when habeas corpus may be suspended is the greatest power. These different powers will be analyzed, their natures and extents determined, in this study.

Another general consideration that should be brought to mind is that the Supreme Court of the United States has the power to review provisions of the Constitution of the Philippines, and considering the decision in Sterling v. Constantin, 287 U. S. 278, the United States Supreme Court has proved itself vigilant to check encroachments of power assumed by state officers against individual rights guaranteed by the Constitution of the United States.

As may have been noted from the foregoing, the author has confined the discussion to constitutional issues during the Commonwealth. American and Filipino-American constitutional law precedents shall therefore be applied. The peculiar idiosyncracies of the Constitution of the Philippines, especially the provision relating to martial law, will be analyzed in relation to existing superior principles which must prevail during the commonwealth period either by direct Congressional Acts or by reason of the inherent nature of American constitutional law. To have extended the subject to issues beyond the Commonwealth period would be to indulge in speculation in legal

philosophies, for which the writer, a beginner in the study of constitutional law, has neither the sufficient legal perspective nor the inclination.

"COMMANDER-IN-CHIEF"

The text of the Constitution is: "The President shall be commander-in-chief of all armed forces of the Philippines * * *" In the constitutional convention there was unanimous support of making the President the constitutional commander-in-chief of all the armed forces of the Philippines. This provision is common to practically all constitutions.

The term "commander-in-chief" is also used in the National Defense Act, Commonwealth Act No. 1. Par. (d) Sec. 2, Article I of the Act provides: "Sec. 2. The national defense policy of the Philippines shall be as follows: * * * (d) The civil authority shall always be supreme. The President of the Philippines as commander-in-chief of all military forces shall be responsible that mobilization plans are prepared at all times."

The whole scheme of the army as provided in the National Defense Act is the vesting of supreme command of the army in the President, the Chief of Staff being directly subordinate to him. The term implies supreme authority over the army and navy (Bouvier's Law Dictionary, p. 187.) As to the provision that civil authority shall always be supreme over military power, all the state constitutions, except New York, declare that the military is forever subordinate to the civil power (Stimson, Federal and State Constitutions, p. 245.)

One of the questions that may be asked is this: Does the provision that the President shall be commander-in-chief of all armed forces satisfy the principle that military power shall always be subordinate to the civil authority?

The authorities are divided. The affirmative is stated in Re Moyer, 35 Colo. 159, 85 Pac. 193: "* * * Nor do these views conflict with Sec. 22, Article 2, of the Bill of Rights which provides that the military shall always be in strict subordination to the civil power. The governor in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the state, and although exercising his authority conferred by law through the aid of the military under his command, he is but acting in a civil capacity. In other words, he is but exercising the civil power vested in him by law through a particular means which the law has provided for the protection of its citizens."

The negative view refuting the opposite and stating its own stand is expressed by Ballantine in his monogram, Unconstitutional Military Claims, p. 14: "In a Colorado case (Re Moyer) it was held that a governor, acting through the militia, might seize and detain suspects without turning them over to the civil courts, until the insurrection was suppressed. It was said that this did not violate the constitutional provision that the militia shall always be in strict subordination to the civil power, since the governor acts in his civil capacity when commander-in-chief of the state militia. Thus the clause was allowed to have no restraining effect. But as Justice Steele points out in his able dissenting opinion, does this provision have no meaning except that the military shall always be under the command of the governor? That is simply annulling this section of the Bill of Rights. The provision must have some meaning. It can have no meaning if construed as it is by the majority of the Colorado court in the Moyer case. Such a method of construction cannot but be regarded as disingenious. It is a form of juggling which makes our constitutions 'mere scraps of paper.'

"The 'military authorities' of a state can only be the governor and his military representatives in command of its armed forces. The 'civil authorities' include not only the sheriff, police and ordinary peace officers but also the courts of law to which they are subordinate. By civil power or authority in general must be understood the ordinary law, as declared by the courts of law."

This last opinion is supported by a long line of cases: Fluke v. Canton, 31 Okla. 718, 123 Pac. 1049 (1912); Franks v. Smith, 142 Ky. 323, 134 S. W. 484, Ann. Cass. 1912 D. 319; Christian County v. Merrigan, 191 Ill. 484, 61 N. E. 479 and Re Milligan, 4 Wall. (US) 2.

To find out which of the two opinions we should apply to our commander-in-chief, we should take into consideration the fact that in our case, the principle of civil supremacy over military power is not based on the Constitution but on a mere law.

The answer must be qualified. Restating, the question is: Does the provision that the President shall be commander-in-chief of all armed forces satisfy the principle that the military power shall always be subordinate to the civil authority? The answer is *yes*, if the President acts within the scope of his authority, for the power to act, when the constitution gives dis-

cretion as to when and how that power should be exercised, cannot be checked if exercised within its lawful scope. (State v. Dickinson 33 Nev. 113, 113 Pac. 1051; Barcelon v. Baker, 5 Phil. 87.) But if the acts done are beyond the scope of the power granted, the courts being open and functioning, the courts have jurisdiction to review acts and check abuses of executive power. (Re Milligan, 4 Wall. 2). But this answer leads to another question as to when courts may have jurisdiction to review and when they do not have such power—this will be discussed more thoroughly in the topic Martial Law.

POWER TO CALL OUT ARMED FORCES, WHEN NECESSARY, TO PREVENT OR SUPPRESS LAWLESS VIOLENCE, INVASION, INSURRECTION, OR REBELLION

We shall now consider the text of the Constitution which reads: "* * * whenever it becomes necessary he may call out such armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion." The constitutions of most states of the Union authorize the governor, in his capacity as commander-in-chief, to call out the militia to execute the laws, suppress insurrection and repel invasion. (Stimson, Federal and State Constitutions, p. 347.)

The antecedent of this power of the executive is found in the Jones Law, Section 21: "* * * He (The Governor-General) shall be responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine Islands, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Islands, or summon the *posse comitatus*, or call out the militia or other locally created armed forces, to prevent or suppress lawless violence, invasion, insurrection, or rebellion; and he may in case of rebellion or invasion, or imminent danger thereof, when the public safety, requires it, suspend the privileges of the writ of habeas corpus, or place the islands, or any part thereof, under martial law. Provided, that whenever the Governor-General shall exercise this authority, he shall at once notify the President of the United States thereof, together with the attending facts and circumstances, and the President shall have the power to modify or vacate the action of the Governor-General."

The orthodox common law doctrine as to the source and scope of the powers of the military when called out to prevent or suppress lawless violence, when a state of public war does not exist is that of public self-defense or police power (3 Willoughby, On the Constitution, p. 1587). This doctrine is extensively discussed in Franks v. Smith, 142 Ky. 232; 134 S. W. 484. The military is held to be merely an extension of the police force of the State for the restoration of public order. It therefore falls short of Martial Law in its technical sense.

The discussion in Franks v. Smith, supra, is well worth repeating. "The supremacy and authority of the law at all times and places must be asserted and maintained at all hazards and whatever cost. There should not be a moment in the life of any orderly, well established and Republican form of government like ours, when it has not the means and the ability to give to every citizen that peace, safety, happiness, and protection guaranteed to him by the constitution. Having this view of the power and duty of the Governor, it must nevertheless be kept in mind that in its exercise, he acts in his capacity as a civil officer of the State and not as Commander-in-chief of its Army. As the Chief civil magistrate of the State, he calls out and must direct in accordance with law the movements and operations of the military forces. * * * The military cannot in any state of case take the initiative or assume to do anything independent of the civil authorities. Ours is a government of civil, not military forces. The militia in active service and in every emergency that arises in such service is subordinate to the civil power. The soldier and citizen stand alike under the law. Both must obey its commands and be obedient to its mandate."

To the same effect, Ela v. Smith, 5 Gray (Mass.) 121, held: "While thus recognizing the authority of the civil officer to call out and use an armed force to aid in suppressing a tumult actually existing, or preventing one which is threatened, it must be borne in mind that no power is conferred on the troops when so assembled, to act independently of the civil authority * * *. They are to act as armed police only, subject to the absolute and exclusive control and direction of the Magistrates and other civil officers designated in the statutes, as the specific duty or service which they are to perform."

NATURE OF THE POWER TO CALL OUT THE ARMED FORCES TO PREVENT OR SUPPRESS LAWLESS VIOLENCE, INSURRECTION, OR REBELLION

The doctrine is now well settled that the power to call out the armed forces to suppress lawless violence, insurrection or rebellion, there being no actual public war, is in the nature of police power. An adventitious expansion of this power was started in the early case of Luther v. Borden, 7 How. 1, 60, wherein Chief Justice Taney fortunately included the "rights and usages of war" as a source of power. Because of this holding, several state courts have held as valid, acts probably beyond ordinary police power in the cases of McCall v. McDowell, 1 Abb. (US) 212, 15 Fed. Cas. 1235, Case No. 8673; Re Moyer 35 Colo. 159, 12 LRA (N.S.) 979, 117 Am. St. Rep. 189 and the West Virginia cases—State ex. rel. Mays v. Brown 71 W. Va. 527, 77 S. E. 243; Ex parte Jones, 71 W. Va. 609, 77 S. E. 1029, Hatfield v. Graham W. Va. 81 S. E. 533, Ma. 14, 7914. But these decisions have not received wide support and constitutional authorities have severely criticized them (2 Hanes, Am. Const. Law 906; Wm. Ivins, 18 Albany Law Journal 85; XII Columbia Law Rev. 529, 2 Willoughby Const. Law 1281.)

The weight of authority holds that the nature of the power to call out the armed forces to prevent or suppress lawless violence, insurrection or rebellion is that of police power. (Bristol Riots S. T. U. S. III, 2-56); Ela v. Smith, 5 Gray (Mass.) 121, Franks v. Smith, 142 Ky. 232, 134 S. W. 484; Fluke v. Canton, 31 Okla. 718, 123 Pac. Rep. 1054; Ex parte Jones, 77 S. E. Rep. 1053; Griffin v. Wilcox, 21 Ind. 320; Dicey, Law of the Const. 7th ed. 538; 2 Hare, Am. Const. Law p. 906; 2 Willoughby Const. Law, 1241.)

In this part of the discussion, *invasion* is left out because invasion presupposes a public war, declared or undeclared. This part of the discussion deals with the nature of the power to quell civil disturbances, not to engage in international conflict. The distinction between war and mere insurrection made by Willoughby is apropos: "War, in public law, has as is well known, a definite meaning. It means a contest between public enemies termed belligerents, and, to the status created, definite legal rights and responsibilities are attached by international and constitutional law. War is thus sharply distinguished from a mere insurrection or resistance to civil authority. Until the parties to such a contest are recognized as belli-

gerents that is, until the struggle has become a "war", the matter is wholly one of ordinary law,—one lying wholly without the province of the rules which define and fix the laws and usages of war."

As to the extent of the powers of the military when called out, the different views are well discussed in Franks v. Smith, supra: "The views concerning these questions presented in argument are widely separated. To restate them: One is that the soldier engaged in active service should be treated as a private citizen, with no more authority than such a citizen to make an arrest, suppress disorder or prevent crimes. The other is that the military forces of the State when called into active service have the right to take such action as in the judgment of the commanding officer may be necessary to control the situation, and the right to act in obedience to order received through regular military channels, and when so acting they are not amenable in the civil or criminal courts for executing any reasonable orders received from a commanding officer. In our opinion, each of these positions is open to serious objection. One gives too much power to the military; the other, not enough. One makes the soldier a mere figurehead, the other a machine to do the bidding of his superior. * * *.

"On the other hand, to say that the state militia acting in obedience to military order may commit any act that may suggest itself to the commanding officer as being necessary to restore the peace and quiet, although such act might be a grave violation than was committed by the person it was visited upon, would place the militia above the civil authorities, and give to the soldier power not conferred upon the civil officer charged with the duty of enforcing the law. * * * Of course, we have not in mind a state of case in which actual war between contending armies or nations or states exists, as it would be entirely beyond the scope of the question we are considering to venture an opinion much less lay any rule of action for the government of military forces operating in territory where a state of war actually prevailed. * * *

"Upon this point, after mature deliberation, we have reached the conclusion that any military order, whether it be given by the Governor of the State or any officer of the militia or a civil officer of a city or country, that attempts to invest either officer or private with authority in excess of that which

may be exercised by peace officers of the state is unreasonable and unlawful."

Acting under this act of power, when armed forces are called out by the President to suppress lawless violence, insurrection, or rebellion, what can the military lawfully do? Ballantine gives the opinion that: "The powers of the military, coming to the aid of civil authority, would seem in general to be limited to what peace officers may do, unless valid statutes give them additional powers. At common law a peace officer could not arrest anyone merely because suspected of being an agitator or instigator of disturbances, or of being guilty of riot or any other misdemeanor. American common law, however, seems disposed to grant this authority to the military, and to go to the extent of holding that the exercise of the police powers justify not only the arrest but also the temporary, provisional, preventive detention of dangerous characters during an insurrection." (Ex parte McDonald 143, Pac. 947). In Philippine criminal law and procedure, the jurisprudence is well settled that police officers cannot arrest without warrant, except when a crime has been committed in the presence of the peace officer, or when there is a reasonable ground to suspect that a person is about to commit a crime or a breach of the peace. (Albert, Rev. Penal Code, p. 310.)

From the very nature of their power as a police force it would seem that the military has no authority either in itself or acting from orders coming from the President as its Commander-in-Chief to lawfully try and punish for insurrection or other violations of the law. It would constitute a usurpation by the executive of the judicial power vested in our courts. In the case of Ex Parte MacDonald, 143 Pac. 947 (Mont.) the Montana Supreme Court held that neither the Governor nor the military under him can lawfully punish for insurrection or other violations of the law. The court cannot be ousted by the agencies detailed to aid them, nor can their functions be transferred to tribunals unknown to the constitution.

SUSPENSION OF THE WRIT OF HABEAS CORPUS

The text of the Constitution reads: "In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus * * *." The corresponding part in the Bill of Rights is as follows: "(14) The privilege of the

writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, or rebellion, when the public safety requires it, in any of which events the same may be suspended, wherever during such period the necessity for such suspension exist."

In the constitutional convention, there were debates as to this suspension of the privileges of the writ of habeas corpus. A group of delegates under the leadership of Delegate Araneta, wanted to limit the power of the executive to suspend the writ of habeas corpus by requiring the consent of the majority of the Supreme Court and subsequent confirmation by the National Assembly. The purpose was to reduce if not remove the possibility of abuse of that power and consequently to protect the life and individual liberties of citizens. But notwithstanding the brilliant defense by Delegate Araneta, the convention approved the provision as it now stands.

The history of this power may be traced from the Philippine Bill of 1902. Section 5, paragraph 7—"That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion, the public safety may require it, in either of which events the same may be suspended by the President, or by the Governor-General, with the approval of the Philippine Commission, wherever during such periods the necessity for such suspension shall exist." The same power was continued with more force in the Jones Law, Section 21: "The Governor-General 'may in case of rebellion, or invasion, or imminent danger thereof, when the public safety requires it, suspend the privileges of the writ of habeas corpus, or place the islands or any part thereof, under martial law: Provided, That whenever the Governor-General shall exercise this authority, he shall at once notify the President of the United States thereof, together with the attending facts and circumstances, and the President shall have the power to modify or vacate the action of the Governor-General.' "

A careful study of the constitutions of most states shows that this writ can only be suspended when, in cases of invasion or rebellion, the public safety requires it. By the constitutions of several states, the writ can never be suspended in any case. The constitutions of several states provide that the writ can only be suspended by the legislature, and in other states this is implied by the due process of law clause. (Ballantine, Op. cit. p. 19, citing Stimson, Fed. and State Const., page 127).

It is now well settled that the findings as to the state of necessity to suspend the privileges of the writ by the executive are incontrovertible. In the case of Barcelon v. Baker, 5 Phil. 887, it was held that when the President or the Governor-General with the approval of the Philippine Commission declares that a state of rebellion, insurrection, or invasion exists, this declaration or conclusion is conclusive against the judicial department of the government. And furthermore, that after the President or the Governor-General with the approval of the Philippine Commission declares that a state or rebellion, insurrection, or invasion exists, that condition will be considered by the judicial department as continuing until the President or the Governor-General shall declare it to be at an end.

EFFECT OF SUSPENSION

The suspension of the privilege of the writ does not deprive the courts of the right to issue it. It merely furnishes a legal ground for a refusal to obey it. (Ex Parte Vallandingham, 1 Wall. 243.) It has been supposed by some that the practical effect of the suspension of the writ is to authorize the arbitrary arrest and imprisonment of persons against whom no legal crime can be proved. The case of McCall v. McDowell et. al., 1 Abb. (US) 212; 15 Fed. Cas., p. 1235, Case No. 8673, held: "Plainly expressed, the suspension of the privilege of the writ is an express permission and direction from Congress to the executive to arrest and imprison all persons for the time being whom he has reason to believe or suspect of intention or conduct in relation to the rebellion or invasion which may be injurious to the common will * * *. If the suspension of the privilege of the writ is not intended to authorize and permit arrests without ordinary cause or warrant, for what is it intended?"

The true doctrine, however, is that stated in the leading case of Ex Parte Milligan, 4 Wall. 2, 115: "The suspension of the writ does not authorize the arrest of anyone, but simply denies to the arrested the privilege of the writ in order to obtain his liberty." Ballantine observes that "it merely enables the government to detain a prisoner arrested for good cause for an indefinite time, without trial or bail. It does not legalize seizures otherwise arbitrary." Willoughby also observes that: "It thus enables executive agents to make arrests at will, and while the suspension, is enforced, renders it impossible for those apprehended to obtain a judicial judgment on the legality of such

arrests and detention. But it does not operate actually to authorize such arrests, or to deprive the individual of any of the other rights which the law secures him, and therefore, the persons responsible for the arrests and detention may still be held civilly and criminally responsible for any illegal acts that may have been committed. In time of war, or of domestic insurrection and disorder when so-called martial law has been declared, the privilege of the writ of habeas corpus together with all the other civil guarantees may, for the time being, be suspended; but as we have already learned in the preceding chapter, actual public necessity, and this alone, will furnish legal justification for this." (2 Willoughby 1254.)

SUSPENSION OF WRIT OF HABEAS CORPUS DISTINGUISHED FROM MARTIAL LAW

The suspension of the privileges of the writ of habeas corpus has often been connected with the power to declare martial law. While it is true that the same public necessity is required in order to suspend the privileges of the writ of habeas corpus as to place a territory under martial law, all other effects are different. During the suspension of habeas corpus all other civil rights and remedies continue to exist, only that the person arrested may not gain his release. In martial law not only the privilege of the writ of habeas corpus but all other civil guaranties are for the time being suspended on the plea of actual public necessity. (2 Willoughby, p. 1255). Thus the suspension of the privileges of the writ of habeas corpus is wholly unlike and falls far short of martial law. (Ballantine, supra page 20, citing Luther v. Borden, 7 How. 1, 60; Griffin v. Wilcox, 21, Ind. 370; Pomeroy Const. Law, sec. 708-714; 2 Willoughby, On the Constitution, Chap. 62, page 1247; Cooley, Principles of Const. Law, page 289; G. B. Davis, Military Law, p. 332.)

MARTIAL LAW

The text of the Constitution reads: "In case of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it, he may suspend the privileges of the writ of habeas corpus, or place the Philippines or any part thereof, under martial law." In the constitutional convention, while there was some discussion as to the suspension of the privileges of the writ of habeas corpus, there was no discussion as to martial law.

This power to place the Philippines or any part of it under martial law was taken from Section 21 of the Jones Law which provides that the Governor-General "* * * may in case of rebellion, or invasion, or imminent danger thereof, when the public safety requires it, suspend the privileges of the writ of habeas corpus, or place the Islands, or any part thereof, under martial law, provided, that whenever the Governor-General shall exercise this authority, he shall at once notify the President of the United States thereof, together with the attending facts and circumstances, and the President shall have the power to modify or vacate the action of the Governor-General."

A comparison with the Federal and State constitutions regarding this power brings out the following facts: The Federal constitution makes no mention of martial law. A careful examination of this constitution makes it clear that no such power was conferred, upon any department of the government, either directly or by necessary implication. (G. B. Davis, Military Law, p. 305.)

In the states the power to declare martial law is expressly recognized only in four states, viz.; by the constitutions of Massachusetts, New Hampshire, Rhode Island, and South Carolina, and by three of these it is confined to the legislature. These provisions are contained in their Bills of Rights. By the Massachusetts declaration of rights: "No person can, in any case, be subject to law-martial, or to any penalties or pains by virtue of that law except those employed in the army or navy, and except the militia in active service, but by authority of the legislature." The provisions of the constitutions of New Hampshire and South Carolina are the same. By the Rhode Island Declaration of Rights, "The military shal lbe held in strict subordination to the civil authorities. And the law-martial shall be used and exercised, in such cases only as the occasion shall necessarily require. It is observed that these provisions of the respective Bills of Rights of these four states are intended as limitations not as grants of power. (Ballantine, id. pp. 11-12). Before proceeding to discuss the constitutional provision, a definition of the term Martial Law is in order.

DEFINITION OF MARTIAL LAW

The term "martial law" has been loosely construed by authorities and writers. There are two prevailing doctrines. One is that martial law being a means of the government to pre-

serve peace and order is at all times subject to constitutional limitation. The other is that martial law is no law at all, the will of the commander prevails, and the justification of all acts is found not in law but in necessity. Between one and the other, the courts have held different degrees of constitutional control. An idea of the unsettledness of the decisions may be obtained from a perusal of representative decisions:

"Martial law is founded on paramount necessity. It is the will of the commander of the forces. It is merely a cessation from necessity of all municipal law and what necessity requires it justifies. Under it, a man in actual armed resistance may be put to death on the spot by anyone acting under the orders of competent authority, or if arrested, may be tried in any manner which such authority shall direct; but if there be an abuse of power so given him, and acts done under it are not bonafide to suppress rebellion and in self-defense, but to gratify malice, or in the caprice of tyranny, then the party doing them is responsible" In re Ezeta (U. S.) 62 Fed. 972, 977, 1002.

"Martial law is the law of force, and is employed under two general conditions. First, in a part or whole of a foreign country, our army may invade it and expel the governing power from a part or the whole of it; second, when force may expel the civil authority from part or the whole of our territory, or, perhaps, it may be said, martial law is exercised in our own country the military being on the spot to execute it where no civil authority exists. But where civil authority exists the Constitution is imperative that it shall be paramount to the military" Griffin v. Wilcox 21 Ind. 370, 377.

"Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity, it is arbitrary, but it must be obeyed; and where the place is in which it is in force is the theater of most active and important military operations, and the civil authority is overthrown, the general in command is the military ruler, and his will is law, and necessarily so." Diekelman v. U. S., 11 Ct. Cl. 417, 439; Carver v. U. S. 16 Ct. Cl. 361, 385 (citing U. S. v. Diekelman Case 92 U. S. 520, 23 L. ed. 742.)

"Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to compel the enemy, and depends for its extent, existence, and operation on the imminence of the peril and the obligation to provide for the general safety. As

the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens." Commonwealth v. Shortall, 55 Atl. 952, 954; 206 Pa. 165.

"Martial law is neither more nor less than the will of the general in command of the army. It overreaches and supercedes all civil law by the exercise of military power, and every citizen or subject within the confines of its power is subject to the mere whim and caprice of the commander. He holds the life and liberty of all in the palm of his hand. Martial law is regulated by no known or established system of codes of laws, as it is over and above all of them. The commander is the legislator, judge, and executor. His order to the provost marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing or not, as he wills. If permitted, it may before a drum-head court-martial or the more formal board of a military commission, or both forms may be dispensed with and the trial and condemnation be equally legal, though not equally human and judicious." In re Egan, (U. S.) Fed. Cas. 367.

It may be seen from these various definitions that the authorities are conflicting either as to the amount of constitutional restrictions on Martial Law or whether Martial Law is completedly independent from the constitution.

At this point we should distinguish. The meanings of the term martial law in the different American states where it has been declared, have been obtained through forced constructions of the executive powers to execute the laws and as commander-in-chief of the armed forces to call out such armed forces to repel or suppress lawless violence, invasion, insurrections, or rebellion. In only four states—Massachusetts, New Hampshire, Rhode Islands and South Carolina—has the power to declare martial law been expressly recognized. And in three of them, this is power confined to the legislature. But in all of these states this power is contained in the Bills of Rights and is intended as a limitation and not as a grant of power. In the Constitution of the Philippines, not only is martial law used as a term, but the power to place the Philippines or any part of it under martial law is expressly and exclusively vested in the President.

The only other constitution that contains a similar provision is that of the Territory of Hawaii, which provides that the

President might, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the writ of habeas corpus or place the whole or any part of Hawaii under martial law. (Art. 31, Constitution of Hawaii.)

In view of this lack of constitutional basis, Willoughby is sustained by other writers when he says: "In European countries living under written constitutions, provision is quite generally made for the declaration in times of danger of what is called a 'state of siege,' the effect of which is immediately to suspend the operation of all the ordinary constitutional limitations upon executive power. No similar status is known to American law. The use of the military arm of our States or of the Federal Government in time of peace and upon domestic soil to maintain order and secure the execution of the law in no wise operates to suspend civil law or negate individual rights of liberty and property, any more than the exercise of the ordinary police powers by the states has this effect. The use of the military forces of a State for the maintenance of order and law is, indeed, not dissimilar in purpose and character to the employment by sheriff of a *posse comitatus* to assist him in making an arrest, prevent an escape, or executing a writ. In all these cases those who exercise authority are obliged to justify whatever acts they may have committed by showing their necessity, or, at least, producing evidence to show that they had reasonable grounds for believing them to be necessary. * * *

* * * There is then, strictly speaking, no such thing in American law as a declaration of martial law whereby military law is substituted for civil law. So-called declarations of martial law are, indeed, often made, but their legal effect goes no further than to warn citizens that the military powers have been called upon by the executive to assist him in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will in any way render more difficult the restoration of order and the enforcement of law."

The opinion that true martial law does not exist in American States is supported by Ballantine who says: "It is further to be remembered that every article in the Declaration of Rights, as well as the constitution of a state, is subject to the paramount control of the Constitution of the United States, which annuls and destroys everything irreconcilable with it. The power of the legislature of a state to declare martial law, in

the strict sense, is doubtless forbidden by the Fourteenth Amendment to the Federal Constitution, requiring due process of law. Martial law in the sense of the unrestricted power of military officers, or others, to dispose of the persons, liberties or property of the citizens, is in Tennessee, declared inconsistent with the principles of a free government, and is not confided to any department of the state government." (Op. cit., p. 12)

It is clear therefore that the so-called martial law as has been declared by the different states is not martial law in the technical sense—independent of and superior to civil authority, but merely military aid to civil supremacy. Martial law in the technical sense has been repudiated by the Supreme Court of the United States in the famous case of Re Milligan. "Martial law established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power' * * * Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish."

Having determined the meaning of martial law as used in the United States we shall now determine its meaning as used in the Constitution of the Philippines.

MEANING OF MARTIAL LAW IN THE CONSTITUTION

The theory of the writer is that "martial law" as used in the Constitution means the severest form of martial law or martial law in its technical sense—that of the will of the commander, unlimited by any restrictions from statues or the Bill of Rights. To support this proposition the argument is advanced that the very phrasing of the provision and the general principles that motivated the framers of the constitution lead to such a conclusion.

Upon a close examination of the provision it will be seen that the powers granted to the President are graduated. Thus, the power to call out the armed forces to prevent or suppress lawless violence, invasion, insurrection, or rebellion is the least of his military powers. The suspension of the privileges of the writ of habeas corpus in cases of invasion, insurrection, or rebellion or imminent danger thereof is a greater power. The placing of the Philippines or any part thereof under martial law during any of the foregoing situations is the greatest power.

In the first case the powers of the military forces are in the nature of superior police force to aid civil supremacy. This point has been discussed in this thesis and is supported by a line of decisions notable of which are Ela v. Smith, 5 Gray (Mass.) 121, and Franks v. Smith, 142 Ky. 232.

In the second case, that of the suspension of the privileges of the writ of habeas corpus, the same nature and extent of the military forces still obtain, with the further addition that persons arrested can avail themselves of the writ in order to be released. However, the suspension of the writ, as has been held in the case of Re Milligan, is not an absolute fiat for officers to arbitrarily arrest anyone. Thus, civil rights and remedies still continue to exist and action for illegal detention will lie, after the suspension of the writ has been lifted in favor of the person illegally detained against the officer who detained.

But in the third and last case, that of martial law, it would seem, in order to give full meaning to every word of this paragraph of the constitution, that the term martial law cannot be less than the severest form of martial law. To interpret otherwise would be to reduce the term martial law to a mere repetition of the lesser powers granted in the preceding clauses. And if we should construe this provision with the known intent of the framers of the constitution to make the President of the Philippines a strong, almost dictatorial executive, the conclusion seems inevitable.

Considering that the Federal and State Constitutions do not contain this express grant of powers to the executive to declare martial law, the doctrines in the cases of Re Milligan, supra, Ela v. Smith, supra, Franks v. Smith, supra, will not apply, when the President of the Philippines places the Philippines or any part thereof under martial law but may apply when he exercises the lesser power of calling out the armed forces, and suspending the privileges of the writ of habeas corpus.

COMPARISON WITH THE CONSTITUTION OF THE TERRITORY OF HAWAII

The only two constitutions in American law which contain express grants of power to the executive to declare martial law are contained in the constitution of the Philippines and the constitution of the Territory of Hawaii. Article 31 of the constitution of Hawaii provides that the President may, in case of rebellion or invasion or imminent danger thereof, when the

public safety requires it, suspend the writ of habeas corpus, or place the whole or any part of Hawaii under martial law.

In the case of In re Kalanianaole (1895) 10 Hawaii Rep. 29, involving this provision, it was held that the executive alone had discretion to decide whether the exigency was such as to require martial law, how long martial law was to continue in force, and that the measures taken by the military authorities could not be inquired into or reviewed by the courts, the trial of a citizen for treason by a military court was sustained although the civil courts were open and in session.

It may be seen from this judicial interpretation that martial law as determined by the constitution of Hawaii is martial law in its technical sense—that of independence from the civil courts. In the case of Barcelon v. Baker, 5 Phil. 87, the Supreme Court of the Philippine Islands, speaking of the power of the Governor-General to suspend the privileges of the writ of habeas corpus, said that if such a discretionary power is derived from the constitution, it is ipso facto withdrawn from legislative or judicial regulation as no department has the right to interfere with powers conferred upon another which carry or imply any discretion.

DOES "MARTIAL LAW" AS EMBODIED IN THE CONSTITUTION OF THE PHILIPPINES VIOLATE THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES?

The Philippines has the status of an unincorporated territory, and as such the source of all governmental power emanates from Congress. Professor Sinco, well known constitutional authority, in speaking of unincorporated territories states: "The United States constitution does not apply to them in its entirety. The provision in that Constitution granting Congress authority to 'make all needful rules and regulations respecting the territory or other property belonging to the United States,' has been pointed out as a recognition of the power of the United States to hold unincorporated territories. Until Congress incorporate them, they shall be subject to its plenary authority which is limited only by those fundamental principles for the protection of life and liberty embodied in the Constitution; but such 'limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express application of its provisions.' " (Sinco, Phil. Gov't. and Pol. Law, 4th ed. p. 137.)

Regardless therefore of the provisions of the Constitution of the Philippines, every Filipino citizen in his status as an American national has that minimum quantum of individual rights and liberties that are embodied in the Bill of Rights of the United States Constitution which are substantive in their nature and are applicable wherever the American flag flies.

Assuming that the power of the President to place the Philippines or any part thereof under martial law is compatible with the rights granted to Filipino citizens in the Bill of Rights of the same constitution, our question is: May a Filipino citizen in his capacity as an American national contest any executive act done under the power of the President to place the Philippines or any part thereof under martial law affecting his rights of liberty, or property as being violative of the substantive rights granted to all nationals in American territory by the Bill of Rights of the United States? The question resolves itself into a question of power. Congress being the source of all power from which flowed that which was embodied in the Constitution of the Philippines establishing the Commonwealth Government, the Commonwealth Government as against individual rights and liberties can not have greater power than that possessed by the Congress which established it. To maintain otherwise would be to admit that the United States denies the universal applicability of the fundamental substantive principles of American government.

The United States guarantees the rights to life, property and individual liberty in paragraph 14, Sec. 2, of the Tydings-McDuffie Law. This provision has been incorporated into the Ordinance appended to the Constitution of the Philippines, Section 15 thereof, and which provides: "The United States may by presidential proclamation, exercise the right to intervene for the preservation of the government of the Commonweatlh of the Philippines and for the maintenance of the government as provided by the Constitution thereof, and for the protection of life, property, and individual liberty, and for the discharge of government obligations under and in accordance with the provisions of the Constitution." And the Supreme Court of the United States have the power to review decisions of the courts of the Philippines as is now provided by law and such review also extends to all cases involving the Constitution of the Philippines (Sec. 1, par. 13, Ordinance appended to the Constitution; Sec. 7, par. 6, Tydings-McDuffie Law.)

With such a guarantee solidly established by an Act of Congress and the Constitution of the Philippines, it is interesting to speculate as to the ultimate validity of the martial law power of the President. There is no doubt that the Supreme Court of the United States will uphold his lesser powers considering its stand in the long line of cases headed by In re Milligan, *supra*. So far, no question involving the exercise of martial law especially granted by the constitution of a state or territory to its executive has ever been brought before the Supreme Court of the United States. The case of In re Kalanianaole, supra, which would have decided the question authoritatively, did not reach the Supreme Court of the United States but was decided by a territorial court.

The Supreme Court of the United States has always shown itself to be vigilant whenever individual rights and liberties granted by the Bill of Rights are encroached upon by state executives. In the recent case of Sterling v. Constantin, 287 U. S. 378, the Supreme Court asserted federal jurisdiction to afford appropriate remedy when the governor of a state and other state officials purporting to act under state authority invaded rights secured by the Federal Constitution. In that case the petitioner claimed the benefit of due process under the United States Constitution. The Governor of Texas declared a territory which included the petitioner's oil wells to be in a state of insurrection. Under the guise of martial law the state officers restricted the production of oils by the defendant on the ground that such production was contributing to the maintainance of the state of insurrection. The Supreme Court of the United States granted the relief asked by the petitioner on the ground that the exercise of martial law even if authorized by the state constitution cannot operate to deprive the citizen of the rights secured to him by the Bill of Rights of the United States Constitution.

In the light of all the foregoing exposition and argument the writer ventures to say that if a future case involving the power of the President of the Philippines to declare and enforce martial law in its technical sense, were to be brought before the Supreme Court of the United States a body which has proven itself to be the staunch defender of the people's right and liberties and which declared in that famous case of re Milligan that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or

the other must perish," it would declare that part of the powers of the President of the Philippines to be unconstitutional, as being repugnant to the principle enunciated by Justice Matthews in the famous case of Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, that "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country, where freedom prevails, as being the essence of slavery itself."