means all officers, general and regimental; so that the organization prescribed under the first part of the clause is to be put into effect by the State's appointment of the officers prescribed by Congress for the organization. The power to train the militia according to the discipline prescribed by Congress is exclusively reserved to the States. So that whenever the militia, as such, are called into the service of the United States, they come as a State organization, all of whose officers are commissioned by the State and hold under its authority.

§ 287. It is proper to add that the President is the commander-in-chief of this militia when called into actual service, and by implication is to be governed by the rules and articles of war for the regular forces by the terms of the fifth amendment. In confirmation of these views, a brief reference to the history of this clause in the debates of the convention may now be made.

In Mr. Pinckney's plan the power was to be given to Congress to pass laws for arming, organizing, and disciplining the militia.[1] In the report of the Committee of Detail that clause was left out, and the power to call forth the militia was alone retained. Later in the session Mr. Mason proposed that Congress should have the power "to regulate the militia." Subsequently Mr. Mason again proposed to give power for the regulation and discipline of the militia, reserving to the States the appointment of officers. Mr. Ellsworth strongly objected against taking the authority over the militia from the States, "whose consequence would pine away to nothing after such a sacrifice of power." Dickinson said: "We are come now to a most important matter, that of the sword. . . . The States never would, nor ought to, give up all authority over the militia." Sherman objected to the States' giving up on this point. Gerry said to surrender on this point would put upon the plan "as black a mark as was seen on Cain."[2] The question was referred to the Grand Committee. The committee on August 21st re-

[1] Madison Papers, 740. [2] Id. 1361–64.

ported the clause as it now reads in the Constitution, except that the words "to provide" are in the Constitution where the words "to make laws" were in the report.[1] On the 23d of August Mr. Sherman moved to strike out of the clause the last words, "and authority of training," etc. Ellsworth objected, and Sherman withdrew the motion. Mr. Madison moved to amend the clause so as to give to the States the appointment only of officers under the rank of general officers. Sherman and Gerry warmly opposed this. On the motion, there were ayes three States, noes eight States, Virginia dissenting from Mr. Madison's motion. The clause was then adopted as it now stands.[2] So that the power of appointing officers, reserved to the States, included general as well as regimental officers. The adoption of this clause in the form it now assumes is therefore a matter of great consideration, and was regarded as a matter of essential importance. The effect of it has already been remarked upon in a former part of this work. But the action of the framers of the Constitution in the reservation of this exclusive command of the militia to the States, subject to the provisional arrangement for organizing, arming and disciplining vested in Congress, gave rise to two articles in the *Federalist*, one by Madison and the other by Hamilton, which demonstrate that it was the purpose of the Constitution to give to the States a reserved military force with which they might by warlike resistance oppose the usurpation of power by the Federal government. Mr. Hamilton says:[3] "But in a Confederacy, the people, without exaggeration, may be said to be entirely the masters of their own fate. . . . It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men as of the people at large. The legislatures

[1] Id. 1378.
[2] Id. 1402, 1408.
[3] Federalist, No. XXVIII.

will have better means of information; they can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

"The great extent of the country is a further security. We have already experienced its utility against the attacks of a foreign enemy. And it would have precisely the same effect against the enterprises of ambitious rulers in the national councils. If the Federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed and its resistance revive. . . . When will the time arrive that the Federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their State governments, to take measures for their own defense, with all the celerity, regularity and system of independent nations? The apprehension may be considered as a disease, for which there can be found no cure in the resources of argument and reasoning."

Mr. Madison adopts the same course of reasoning, and, after estimating the probable size of the standing army of the United States, says:[1] "To these would be opposed a militia amounting to nearly half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia

[1] Id., No. XLVI.

thus circumstanced could ever be conquered by such a proportion of regular troops."

These statements of two great writers, members of the Federal Convention, urging the ratification of the Constitution by the people of the States, are conclusive evidence to show that the power over their militia is reserved to the States, in order, in an exigency created by Federal usurpation, that with arms in hand they might defend their liberties against the power of the Federal government, and under the direction of their own State authorities. These clauses thus considered may be regarded as constituting the war power.

§ 288. The war power has been a fruitful source of adjudication since 1861 in respect to the events and consequences of the memorable civil war. The solution of the litigated question as a scientific problem rests at last upon the determination of the fundamental question as to the validity of the act of secession of the Southern States of the Union. If it was a constitutional act, two countries were created by it, which by the results of the war have been re-knit into one. Or was it an attempted revolution, which if successful would have made two countries, but which, having failed, is to be construed as an unlawful attempt to overthrow the original government?

The author will venture elsewhere in this work to state his own views on this subject. For the present he will consider the judicial decisions based upon the Federal theory of the war between the States, which involves the denial of the right of secession, the legal existence of the Confederate States, and recognizes the Union as restored upon the overthrow of an illegal insurrection against its authority. This restoration, even if not *de jure*, may be conceded to be *de facto;* and we may in a treatise of this kind take the adjudications of the restored Union as a judicial statement of the law of the country, without regard to the contrary views, which can have, in the result, no effect in any political sense, however interesting they may be regarded in the historic discussion of the subject.

Assuming then that the restored Union is rightful, and especially because of the new amendments adopted by the formal methods provided by the Constitution, we will proceed to consider the war power under the light of the decisions of the Supreme Court, with such candid criticism upon them as shall be proper from their standpoint as to the historic questions involved, putting out of view what may be characterized as the secessionist views of the Southern States in their withdrawal from the Union in 1861.

The leading cases upon this subject are the *Prize Cases*.[1] The question involved was, whether or not certain vessels were liable to capture for violating the blockade proclaimed by the President of the United States before the recognition of a state of war between the United States government and the Confederate States by an act of Congress. The court, five judges concurring and four dissenting, held that the civil war between the United States and the Confederate States gave to the United States the same rights and powers that they could exercise in a foreign war, and that they had the right *jure belli* to institute a blockade of any ports in possession of the Confederacy; that the proclamation of the President was conclusive evidence that a state of war existed, which authorized a recourse to blockade. The dissenting judges held that until the act of Congress recognized the existence of war, the power to blockade the ports of the Confederacy did not arise and could not be instituted by the President under his power as commander-in-chief. All the judges concurred in holding the act of Congress valid, and the blockade a legal means of conducting a civil war; and all agreed that the so-called insurrection of the Southern States had assumed the proportion of a civil war, which existed in constitutional contemplation after it was recognized by the act of Congress on the 13th of July, 1861; and that the President did not possess the power to declare war or to recognize its existence and then order a blockade. The point at issue between the judges of the court was, whether or not the status of war

[1] 2 Black, 635.

could be created in any other way than by Congressional recognition, whether the war was foreign or civil. The majority held it could, and went so far as to hold that the proclamation of blockade was at once a constitutional institution of the status of war, and the exercise of a power resulting from that status. It may be conceded that the President as commander-in-chief may institute a blockade as an act of war, but whether he can declare or institute war is a different question. That is for Congress.

It may be noted that to blockade a port of a State of the Union is a clear violation of the Constitution, even by act of Congress. It violates the clause which declares, "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."[1] But it is claimed that it could be done under the war power. The Confederate States, being a *quasi*-foreign State, were held to be subject to blockade, and not subject to the above clause in reference to preference, etc. It would seem to be a great stretch of power to suppose that the President could do this without an act of Congress, when he had no power either to regulate commerce or to declare war.

§ 289. It may be stated as a result of the decisions of the Supreme Court, to use the language of Chief Justice Waite in the case of *Lamar v. Brown*,[2] that "It is quite true that the United States, during the late war, occupied a peculiar position. They were, to borrow the language of one of the counsel for the plaintiff, both 'belligerent and constitutional sovereign'; but, for the enforcement of their constitutional rights against armed insurrection, they had all the powers of the most favored belligerent. They could act both as belligerent and sovereign. As belligerent, they might enforce their authority by capture; and, as sovereign, they might recall their revolted subjects to allegiance by pardon, and restoration to all rights, civil as well as political. All this they might do when, where, and as they chose." Chief

[1] Art. I, sec. 9, clause 5.

[2] 92 U. S. 195.

Justice Waite, in the case of *Texas v. White*,[1] said: "The ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation of law. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation. Our conclusion, therefore, is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred."[2]

These cases placed the citizen of the Confederate States in a double relation to the government of the Union. He was recognized as a rebel to its authority, but at the same time as a public enemy to his country. For civil, criminal and municipal purposes they were citizens; for confiscation of property they were not entitled to due process of law, being public enemies. All the rules of public war applied to their condition. Their property might be seized by the most rigorous laws of war; they might be subjected to the forfeiture of their property, as if convicted traitors, without trial or conviction. The punishment for treason might be inflicted in the forfeiture of their property because they were guilty of treason as citizens and they were divested of the rights of trial guarantied by the Constitution because they were public enemies.

It is obvious that, if either theory be adopted as the correct one, the results must be absolutely inconsistent. It was only by treating them in the double aspect of public enemies, sub-

[1] 7 Wall. 726.

[2] *Accord:* White v. Hart, 13 Wall. 646; Keith v. Clark, 97 U. S. 454

ject to the most rigorous laws of war, now disused, however, and as guilty of treason to their country, that the penalty to which they were subjected could be held to be properly inflicted. If the Confederate was not out of the Union, how could his property be forfeited without trial and conviction of treason? But confiscation without trial or conviction was held constitutional.

In *Miller v. United States*,[1] the stocks owned by Miller in railroads and other corporations were libeled in behalf of the United States and his property confiscated, he having been a resident of Virginia during the war. He did not appear, nor did any one for him; but it was proved *ex parte* that he was an adherent of the Confederacy. The judgment of confiscation was sustained by the Supreme Court, Justices Field and Clifford dissenting. The court held that so much of the acts as were in the exercise of the war powers of the government were not subject to the fifth and sixth amendments of the Constitution, which required indictment by grand jury and trial by petit jury before confiscation; that they were not to be considered as the exercise by the government of its municipal power; and that in the war of the rebellion the United States had belligerent as well as sovereign rights. They had a right, therefore, to confiscate the property of public enemies wherever found, and also the right to punish offenses against their sovereignty. They might be treated as public enemies or as rebellious citizens. So in the case of *Mrs. Alexander's Cotton*,[2] the property of Mrs. Alexander was seized and confiscated, because of her residence in rebel territory, under the Captured and Abandoned Property Act.

By the act of July 17, 1862,[3] and of August 6, 1861,[4] Congress provided for the confiscation of property used for insurrectionary purposes and for the confiscation and sale of the property of rebels. In *Miller v. United States*, *supra*, these laws were held to be constitutional.

[1] 11 Wall. 268.

[2] 2 Wall. 404.

[3] 12 Statutes at Large, 319.

[4] Id. 589.

Contemporaneously with the act of July 17, 1862, a joint resolution was passed, at the instance of President Lincoln, providing that a forfeiture of the real estate of the offender should not extend beyond his natural life, because contrary to article III, section 3, clause 2, of the Constitution, which provided that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. This resolution was held in *Wallach v. Van Ryswick*[1] to leave the estate in remainder after the death of the offender to pass to his heirs, and that the joint resolution qualified the act of July 17, 1862, but did not defeat it. Wallach conveyed a lot in fee simple to the purchaser at the confiscation sale in 1866, and the court held that the deed did not convey the remainder in fee.

In the case of *Railroad Co. v. Bosworth*,[2] the court decided that despite the condemnation decreed under the said act, such a right in the remainder was vested in Bosworth that he could dispose of it after receiving a full pardon from the President. This case was different from *Wallach v. Van Ryswick*, because of the fact that Wallach in that case had made a deed *before pardon*, which was ineffectual to convey any right against the claim of his heirs. In the latter case the conveyance was made after pardon, which wiped out his offense and all of its consequences, and restored the title to him in fee simple. But in *Jenkins v. Collard*[3] the deed was made before pardon, but with a covenant of seisin, and a warranty against the lawful claims of all persons whomsoever. The court held that the warranty estopped the heirs of the grantor from claiming against his deed.

In the case of *United States v. Dunnington*,[4] the doctrine was affirmed that under the act of July 17, 1862, and the joint resolution aforesaid, the forfeiture operated upon the life estate of the offender, the fee remaining in him after the confiscation, but without power of alienation until his disability was removed; and that the deed, as in *Jenkins v. Collard*, made prior to pardon, with warranty against the claim of the heirs, was operative against the heirs after the disability was removed by pardon.

[1] 92 U. S. 202.
[2] 133 U. S. 92.
[3] 145 U. S. 546.
[4] 146 U. S. 338.

Another class of property was seized during the war under the name of "captured and abandoned property," which was seized and sold under proceedings defined by the act of March 12, 1863,[1] and the proceeds paid into the treasury and held in trust for the owners who proved loyalty before the Court of Claims. In the case of *United States v. Klein*[2] the court held that this act did not confiscate or absolutely divest the title of the original owner, even though disloyal. The government constituted itself a trustee for those who were lawfully entitled to it, and it was held that a pardon wiped out guilt and all its consequences.[3] After pardon a disloyal person could recover the fund in the treasury as if he had been originally loyal.[4]

§ 290. These various acts of Congress which forfeited the property of disloyal citizens of the United States, except in the single case of the forfeiture of real estate, which was qualified by the joint resolution referred to so as only to operate for the life of the offender, were all effected by *ex parte* proceedings against the owners, either as belligerent citizens of the public enemy, or as citizens of the United States subject to the penalty of forfeiture without trial under the Constitution of the United States. And while the condemned person was subjected to the forfeiture of realty only, according to the terms of the Constitution, the forfeiture of all other property was without any such qualification, being absolute forfeiture without trial or conviction. These acts were decided to be constitutional by the Supreme Court, and without any dissent. Without controverting these judg-

[1] 12 Statutes at Large, 820.
[2] 13 Wall. 128.
[3] Ex parte Garland, 4 Wall. 380; Railroad Co. v. Bosworth, 133 U. S. 103; Jenkins v. Collard, 145 id. 546.
[4] Carroll v. United States, 13 Wall. 141; Pargoud v. United States, Id. 156.

ments of the court, it may be questioned whether they would be held to apply in ordinary insurrections, or in any case of insurrection which did not assume the form of a powerful and well-established *de facto* government ruling exclusively within its territorial boundaries.

Another class of questions may be noticed as of great interest. All acts of the government of the Confederacy in aid thereof, as the issue of notes, bonds and the like, and acts of sequestration against citizens of the loyal States, were held to be absolutely null and void;[1] and all acts of any State of the Confederacy in aid of the rebellion as above mentioned were also held to be null and void.

But acts affecting merely the private rights of persons living in the Confederacy, as marriage, divorce, proceedings in courts, judgments, and laws for the order and peace of society, by the several States of the Confederacy, were held to be valid. Thus, in *Thorington v. Smith*[2] the court decreed the specific performance of a contract for the sale of land in Confederate notes. This results from the fact that the seceded States were still States, Bodies-politic, and not out of the Union.[3] The acts of the Confederate States courts were held to be nullities, but not the decisions of the courts of the Confederate States individually.[4] A law which allowed notes for money to be solvable in Confederate money was held valid, and the notes could be recovered on for the scaled value in real money;[5] but it was held that a law which allowed the recovery of the real value of the article sold, and not its scaled price, impaired the original contract, and was void under article I, section 10, clause 1, of the Constitution.

[1] United States v. Insurance Cos., 22 Wall. 99; Stevens v. Griffith, 111 U. S. 48.

[2] 8 Wall. 11. *Accord:* Chase, C. J., in Evans v. Richmond, Chase's Dec. 551.

[3] White v. Cannon, 6 Wall. 443; Texas v. White, 7 Wall. 700; Keith v. Clark, 97 U. S. 454; Coleman v. Tennessee, Id. 509.

[4] United States v. Insurance Cos., 22 Wall. 99; Stevens v. Griffith, 111 U. S. 48.

[5] Gavinzel v. Crump, 22 Wall. 308; Stewart v. Salamon, 94 U. S. 434; Bissell v. Heyward, 96 id. 580.

During the Civil War there were gross violations of the constitutional rights of northern citizens by the military power under the sanction of the President, when citizens were held to trial by court-martial for what were called acts of disloyalty or rebellion.

In *Vallandigham's Case*[1] the prisoner was tried by a military commission at Cincinnati, Ohio, for an offense declared and defined by a military officer, among other things for the habit of declaring his sympathies with the enemy. For this latter offense and for uttering disloyal sentiments he was arraigned and tried. The prisoner plead to the jurisdiction, and asked to be allowed to call witnesses, which he did. He was convicted and sentenced to close confinement in a prison of the United States, there to be kept during the war. This was confirmed by the commanding general. The President commuted the sentence to an order of banishment beyond the military lines of the United States. The prisoner applied for a *certiorari* before the Supreme Court of the United States. He claimed the right of trial by jury, and further claimed that the conviction was wrong because the offense charged was not known to the law of the land. The court decided that it had no jurisdiction to issue a *certiorari*, and therefore denied the writ, and the sentence was enforced.

In *Milligan's Case*[2] the prisoner was tried by a military commission and sentenced to death. He was a citizen of the United States, and the alleged crime was committed in Indiana. After the war he sued out a writ of *habeas corpus* before the Supreme Court of the United States, which discharged him, five of the judges holding that Congress had no power to subject him to such trial, and four of them, while holding that Congress had such power, decided it had not exercised it by law.

The Civil War closed, as far as hostilities were concerned, in 1865. The armies of the South surrendered in the spring and early summer of 1865. The Union was restored. The State of Virginia, whose restored government under Gov-

[1] 1 Wall. 243.

[2] 4 Wall. 2.

ernor Pierpont was recognized by the government of the United States, took possession of the executive government in Richmond. The Court of Appeals and the Legislature under the Constitution of Virginia assembled and performed their respective duties; but the Supreme Court of the United States, in a number of cases, has referred to the question as to when the war should be held to have closed. In *The Protector*[1] it was decided that the war began in different States at different dates, and was closed by the different proclamations of the President. In that case it was held that it closed in Virginia and other States, including Alabama, by the proclamation of April 2, 1866, and in other States, embracing Texas, as late as August 20, 1866, and that the war had begun in the different States by the two proclamations of President Lincoln in April, 1861. Thus by the power of the President the war was not closed until about a year after hostilities had ceased.[2].

§ 291. In 1867 Congress passed the Reconstruction Acts, by which the government of the State of Virginia, already recognized as the legal government of Virginia by the Federal authorities, with the governments of all the other States, was superseded as not being republican according to the Constitution. Under this sweeping act the seceded States were governed by military officers of the army, and parties were arrested and tried by military commissions. The Supreme Court of Virginia and other courts were succeeded and displaced by judges appointed by military authority.

Generals Ord and Gilham ordered the arrest for trial under the alleged authority of the Reconstruction Acts of a certain McCardle, on charges of disturbing the public peace, inciting to insurrection, libel, and impeding reconstruction. McCardle sued out a writ of *habeas corpus* before a Circuit Court of the United States, which adjudged the petitioner to be remanded to the custody of General Gilham, and from that judgment he appealed to the Supreme Court of the United

[1] 12 Wall. 700.

[2] The Protector, 9 Wall. 687.

States. The Supreme Court affirmed its jurisdiction upon the appeal from the decision of the Circuit Court and refused to dismiss the appeal. The case was held for consideration upon its merits, but by an act passed in March, 1868, Congress repealed the former act under which the Supreme Court had asserted jurisdiction in the case on appeal. Upon argument the court decided that its previous jurisdiction on appeal in this case had been taken away by the said act of Congress, and thereupon McCardle's case was dismissed for want of jurisdiction, and the decision of the court below operated to remand him to the custody of the military. The validity of the Reconstruction Acts was never passed upon by the Supreme Court in any case, and the result was that the military power was in full force in all the seceding States until the year 1870.

The author feels justified in stating that the Reconstruction Acts would never have been sanctioned by the Supreme Court if a case which brought the question before it for adjudication had arisen. The unlimited military power of the President under those acts subjected the Southern citizen to trial, in time of peace, without a jury, before military commissions, and the proclamation that the war had closed in 1866 made the Reconstruction Acts of 1867 unconstitutional. The restoration of the Union made it unconstitutional to charge any citizen of the South with crime or subject him to trial, except according to due process of law by indictment, presentment or other criminal proceeding in the civil courts of the country, and by a trial by a jury of his peers before such court.[1]

Power Over the Seat of Government.

§ 292. The next clause for consideration is that which gives power to Congress[2] "To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all

[1] Const. U. S., 5th and 6th Amendments.

[2] Art. I, sec. 8, clause 17.