cently been said: 'The supremacy of the civil over the military is one of our great heritages.' *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1945)." [201]

Martial Law and Constitutional Limitations

Two theories of martial law are reflected in decisions of the Supreme Court. The first, which stems from the Petition of Right, 1628, provides that the common law knows no such thing as martial law; [202] that is to say, martial law is not established by official authority of any sort, but arises from the nature of things, being the law of paramount necessity, leaving the civil courts to be the final judges of necessity.[203] By the second theory, martial law can be validly and constitutionally established by supreme political authority in wartime. In the early years of the Supreme Court, the American judiciary embraced the latter theory as it held in *Luther v. Borden* [204] that state declarations of martial law were conclusive and therefore not subject to judicial review.[205] In this case, the Court found that the Rhode Island legislature had been within its rights in resorting to the rights and usages of war in combating insurrection in that state. The decision in the *Prize Cases*,[206] although not dealing directly with the subject of martial law, gave national scope to the same general principle in 1863.

The Civil War being safely over, however, a divided Court, in the elaborately argued *Milligan* case,[207] reverting to the older doctrine, pronounced President Lincoln's action void, following his suspension of the writ of *habeas corpus* in September, 1863, in ordering the trial by military commission of persons held in custody as "spies" and "abettors of the enemy." The salient passage of the Court's opinion bearing on this point is the following: "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus

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[201] Surrogate's Court, Duchess County, New York, ruling July 25, 1950, that the estate of Franklin D. Roosevelt was not entitled to tax benefits under sections 421 and 939 of the Internal Revenue Code, which extends certain tax benefits to persons dying in the military services of the United States. New York Times, July 26, 1950, p. 27, col. 1.

[202] C. Fairman, The Law of Martial Rule 20–22 (1930); A. Dicey, Introduction to the Study of the Law of the Constitution 283, 290 (5th ed. 1923).

[203] Id. at 539–44.

[204] 48 U.S. (7 How.) 1 (1849). *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32–33 (1827).

[205] 48 U.S. (7 How.) at 45.

[206] 67 U.S. (2 Bl.) 635 (1863).

[207] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).