overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the 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 proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."[208] Four Justices, speaking by Chief Justice Chase, while holding Milligan's trial to have been void because it violated the Act of March 3, 1863, governing the custody and trial of persons who had been deprived of the *habeas corpus* privilege, declared their belief that Congress could have authorized Milligan's trial. The Chief Justice wrote: "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions. . . ."

"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 offences against the discipline or security of the army or against the public safety."[209] In short, only Congress can authorize the substitution of military tribunals for civil tribunals for the trial of offenses; and Congress can do so only in wartime.

Early in the 20th century, however, the Court appeared to retreat from its stand in *Milligan* insofar as it held in *Moyer v. Peabody*[210] that "the Governor's declaration that a state of insurrection existed is conclusive of that fact. . . . [T]he plaintiff's position

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[208] 71 U.S. at 127.

[209] 71 U.S. at 139–40. In *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864), the Court had held, while war was still flagrant, that it had no power to review by *certiorari* the proceedings of a military commission ordered by a general officer of the Army, commanding a military department.

[210] 212 U.S. 78 (1909).