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# TOTAL WAR *AND THE* CONSTITUTION

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Five lectures delivered on the William W. Cook Foundation  
at the University of Michigan, March 1946

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By EDWARD S. CORWIN

*With an Introduction by E. BLYTHE STASON*  
*Dean, University of Michigan Law School*

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New York

ALFRED A. KNOPF

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## *Total War and the Constitution*

**THE WILLIAM W. COOK FOUNDATION**  
*was established at the University of Michigan to endow a distinguished Lectureship on American Institutions. The donor, William Wilson Cook, long a member of the New York bar, received the degree of Bachelor of Arts from the College of Literature, Science, and the Arts of the University in 1880, and the degree of Bachelor of Laws from the Law School in 1882. The lectures presented in this volume are the second in the series of lectures under the Foundation. They were delivered in the Rackham lecture halls at the University in March 1946, and are published, under a special arrangement between the University and the publisher, as the second volume in the lectureship series. The first volume was Freedom and Responsibility in the American Way of Life, by Carl L. Becker.*

# Introduction

By E. BLYTHE STASON

*TOTAL WAR AND THE CONSTITUTION* is a written record of constitutional interpretation in one of the most difficult periods in American history. First delivered as a series of lectures under the auspices of the William W. Cook Foundation at the University of Michigan and now published in this volume, the monograph is a carefully reasoned record of recent trends in constitutional theory, and, in addition, it is a repository of a wealth of factual information concerning the maneuvers of the years immediately prior to and during World War II, resulting in the shift in constitutional dominance over the affairs of the nation from the legislative and judicial supremacy of bygone years to the ascendancy of the executive branch of government. Written by a master of constitutional history, government, and political theory, the volume is an authoritative interpretation of events of paramount contemporary interest.

It is not seemly for a foreword to foretell the author's story. But the summarization in Professor Corwin's final lecture on the "Postwar Constitution" calls forth one important and unanswered question. Is the proper balance being maintained between the forces demanding change and those representing the desire for reasonable stability in national affairs? Or is current constitutional interpretation proceeding with undue haste to scrap tried and still useful landmarks?

The question is, of course, unanswerable except by way of general speculation, but no thinking person can study recent regulatory legislation without wondering about the matter — without asking himself, for example, how far we can continue to progress in the direction of conferring

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upon administrative officials more and more virtually unreviewable discretionary power over the lives and activities of men without finally reaching a state of absolutism that can no longer be called a liberal democracy. To offer but a single illustration of the trend, the very latest Congressional venture in administrative legislation is most revealing. I refer to the so-called Atomic Energy Act adopted in June 1946, creating the Atomic Energy Commission and giving it plenary powers over the production and use of fissionable materials. Although the history of recent years reveals many instances of somewhat similar, but less sweeping delegation of discretionary regulatory powers, no other peacetime enactment of anything like the importance of the Atomic Energy Act has conferred upon an administrative agency anything like so much uncanalized discretionary power over an important phase of American life. Conceding the necessity in this as in many other instances, nevertheless, we are confronted by the uncomfortable fact that the experience of history has not yet shown us how constitutional democratic institutions can be preserved in the presence and under the control of ever increasing administrative discretion. The solution is one of the prime tasks posed for the future—a challenge to the scientific world.

In two successive years the lectures on the William W. Cook Foundation have furnished substance for careful and reflective attention on the part of all who are interested in constitutional democracy. In 1945 the late Professor Carl L. Becker delivered his lectures entitled *Freedom and Responsibility in the American Way of Life*, presenting therein the wisdom derived from a lifetime of scholarship as a historian in the American scene. In 1946 Professor Corwin gives us *Total War and the Constitution*, which, by its constructive comment upon current trends in constitutional theory, broadens and enriches our understanding of the

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American institution that is our fundamental law. It is impossible that too much of such thought-provoking comment be made accessible if American institutions are to serve their best in a scientific but bewildered and thoroughly chaotic world.

Ann Arbor, Michigan  
October 15, 1946

## Preface

A PREFACE is a kind of last call to dinner. It affords the author his last clear chance to say something that should have been said earlier and to make appropriate acknowledgments. I am availing myself of the present opportunity for both purposes.

The tangency of the Nuremberg trials — that is to say, of American participation in them — with the Constitution is so slight that I have dealt with the subject in a footnote, to which I wish here to add a supplementary word or two. Many defenders of the trials resent the contention that the punishment of Göring and his associates violated the maxim "*nulla pœna sine lege*" and our own Constitution's condemnation of *ex post facto* laws. Dealing with this objection in its verdict, the Nuremberg Court describes "*ex post facto* legislation" as "abhorrent to all civilized nations," but adds quite inconsequently: "the Tribunal has been concerned with matters of substance and not mere procedure"! Perhaps the Court had in mind the distinction between *legislation* and *adjudication*, for, as Bentham pointed out, the latter is characteristically retroactive — like "beating a dog for what he has done." This is clearly Justice Jackson's position in his opening statement as Prosecutor, when he remarks: "The fact is that when the law evolves by the case method . . . it advances at the expense of those who wrongly guessed the law and learned too late their error." The answer is, of course, that the Constitution intended to rule out this element of retroactivity in the devising and imposition of *penalties*. Justice Jackson was rather more forthright when he remarked on the same occasion: "If there is no law under which to try these people, it is about time the human race made some."



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Throughout the entire discussion of the merits of the Nuremberg verdict one curious but very pertinent fact seems to have been forgotten, and I am much indebted to my friend Charles Howard McIlwain for bringing it to my attention. This is the fact that as far back as 1935 the Nazis themselves had given their enthusiastic endorsement to the idea of *ex post facto* penalties. I quote from a dispatch of July 5, 1935 from the Berlin correspondent of the *London Times*:

A principle entirely new to German jurisprudence has been introduced by the Penal Code Amendment Law, which was one of the batch of laws published by the Reich Cabinet on June 26 and is promulgated today in the official *Gazette*. It is that the Courts shall punish offences not punishable under the code when they are deserving of punishment "according to the underlying idea of a penal code or according to healthy public sentiment (*Volksempfinden*).” If no penal code applies directly, such an offence is to be punished according to that law the underlying idea of which best fits it . . . (McIlwain: *Constitutionalism and the Changing World*, p. 268).

The dispatch also notes that Dr. Hans Frank, "former Reich Commissar for Justice," "declares the new law to be a landmark on the road to a National Socialist penal code."

Dr. Frank was one of the ten men executed two weeks ago — "hoist," one may possibly be permitted to remark, "by his own petard"!

I gave these lectures last March 18 to 22, inclusive. For the kindnesses and courtesies extended to me in the course of those five days by Dean Stason and other representatives of the University of Michigan and by friends and relatives I find it impossible to make adequate acknowledgment in

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this place. Suffice it to say, I don't see how I could have been better treated or given a pleasanter time.

I wish to thank Professor McIlwain for assistance in reading proof, Mr. Milton Rugoff for his practiced patience with authors, and Alma Fell for her efficient work as typist.

EDWARD S. CORWIN

Princeton, New Jersey  
October 29, 1946

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*Total War and the Constitution*

*WE MAY well wonder in view of the precedents now established whether constitutional government as hitherto maintained in this Republic could survive another great war even victoriously waged.*

THE HONORABLE CHARLES EVANS HUGHES

June 21, 1920

# I

## The War Before the War

WHEN most people encounter the expression "total war" they think of an aggressor pursuing ends that take no account the rights of others, by means equally ruthless. While the phrase itself is of recent coinage, total war in this primary sense is at least as old as recorded history and enjoys, at times, the most exalted sanction. In Deuteronomy xx we read:

Of the cities of these people, which the Lord thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth: But thou shalt utterly destroy them; namely, the Hittites, and the Amorites, the Canaanites, and the Perizzites, the Hivites, and the Jebusites; as the Lord thy God hath commanded thee.

The character of the justification that was supposed to underlie this policy of ruthlessness is interesting too:

For thou art an holy people unto the Lord thy God: the Lord thy God hath chosen thee to be a special people unto himself, above all people that are upon the face of the earth.<sup>1</sup>

Anglo-American policy toward the Indians stemmed from a similar motivation and a similar objective. Many years ago I had occasion to go through the statute books of the early American colonies. In Volume I of Henning's *Virginia Statutes* I came upon this entry:

March 5, 1623-4. . . . That at the beginning of July next the inhabitants of every corporation shall fall upon their adjoining salvages as we did the last year.<sup>2</sup>

<sup>1</sup> Deuteronomy vii, 6.

<sup>2</sup> Henning: *Statutes at Large*, I, 128 (1823).

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In this brisk enactment are summarized the essential characteristics of British-American Indian policy from start to finish — that is to say, the finish of the Indians as a power capable of disputing our appropriation of the North American continent. At the same time our none too sensitive forebears salved their consciences by courting the belief that the Indians were an inferior race, supposing indeed they really were human. British-American conquest of North America thus bore many resemblances to the Nazi conquest of Poland, only the latter, thanks to modern science, was of course vastly more speedy and more efficient. And Spanish conquest of the southern portion of the American continent, although less systematically prosecuted than that by our ancestors of the northern portion, frequently paralleled it in fortuitous violence, as is illustrated in Humboldt's allusion to a South American tribe which was so completely wiped out by its Spanish conquerors that "only a parrot was left to perpetuate the idiom of the race" — a feat that, to judge from the usual preferences of parrots in such matters, was no service to the memory of either the idiom or the race.

Totality of objective and method is of only passing interest in the present connection, however, for while it has given international law as it previously existed the *coup de grâce*, its traceable influence on constitutional law, at least prior to the Nuremberg trials, has been too indirect to be assessable. The totality we are interested in is "functional totality," by which I mean the politically ordered participation in the war effort of all personal and social forces, the scientific, the mechanical, the commercial, the economic, the moral, the literary and artistic, and the psychological. This is the aspect of total war that is of directest relevance to a study of the impact of war on the Constitution, and not solely in this war but also in lesser measure in those earlier more or less total wars, World War I and the Civil War.

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When did "functional totality" make its first appearance as idea if not as fact? I am disposed to answer by pointing to the proclamation of the Committee of Public Safety to the people of France at the beginning of the War of 1793:

The young men will go to battle; married men will forge arms and transport food; the women will make tents, garments, and help in the hospitals; the children will cut old rags into strips; the old men will place themselves in the public square to inflame the courage of the warriors, incite hatred against the Kings, and recommend the unity of the Republic.<sup>3</sup>

The picture we have here is of a society every human element of which is involved in the struggle. But more than that, this document signalizes in the *levée en masse* the appearance of the conscript army, which is one of the *two* efficient causes of total war in the functional sense. Following the decline of the feudal array after Agincourt in 1415, European armies gradually became volunteer, mercenary, and professional. They were also, by modern standards, small armies; and the social consequences of their creation and maintenance were correspondingly slight. Very different was it with the conscript army from the outset. The creation of such a force marked a tremendous accession to the conceded powers of government; the forced withdrawal of such great numbers from the normal pursuits of daily life disturbed the social economy profoundly, while the task that was put upon the depleted society of supplying and equipping such numbers aggravated the disturbance. Finally, as the Committee of Public Safety was alert to perceive, a conscript army poses a problem of *morale* not only

<sup>3</sup> Quoted in Edward Mead Earle (editor): *Modern Strategy* (Princeton, 1944), p. 77. On the invasion of Ethiopia by the Fascists early in 1935, the King of Kings issued the following order: "All married men from 14 to 80 report, bringing weapons. Married men bring wives to cook and work. Single men bring any convenient woman. Men found at home will be shot."



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as respects the army itself, but also as respects society at large.

The conception of war that the French Revolution imposed upon the world through the *levée en masse* has been *today amplified and extended by science and invention — by technology*, in a word; and whereas the key word of total war was once *personnel*, today it is *personnel* and *matériel*, with the latter at times manifesting an almost moral preponderance. The two things cannot of course really be separated. Napoleon's epigram that "God is always on the side of the heaviest artillery" may have expressed an attitude that was more deferential toward matériel than toward Deity, but it nevertheless pointed down the road that warfare was to take till August 6, 1945. In the recent war we were informed variously that it took ten, fifteen, twenty, even forty men on the ground to service a single bomber, which, whether it spells the subordination of personnel to matériel or not, certainly symbolizes the stress and strain that total war, because of its requirements of both of these, puts upon society, government, and the Constitution.

#### 2

The question inevitably, if somewhat prematurely, suggests itself of how the atomic bomb will be likely to affect the impact of total war on the Constitution. The strategy that will stem from that horrendous discovery has still to be elaborated, but a few remarks may be ventured without too great an appearance of rashness. I assume that the principal cause of war, aside from sheer desperation on the part of the attacking party, or the motive of revenge — which, to be sure, may play a considerable role in the future<sup>4</sup> — is

<sup>4</sup> "The exhaustion of defeat does not itself bring mental conversion; it is more likely to bring increased desire for revenge, since every misfortune can be attributed to the malevolence of the conqueror. Thus, while the victors may be led to believe that owing to their victory there will be no more