

## Total War and the Constitution (Book Review)

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student to draft an indictment, secure the release of a prisoner on bail, or prepare a motion for a bill of particulars, but it should acquaint him with the methods generally by which an accused is brought to justice. The fundamentals of due process by which the accused must be informed of the charge against him and the cause tried, the limitations upon the right of arrest and search and seizure, the protection against "double jeopardy," and the mechanics of extradition are adequately presented. The American Law Institute's Code of Criminal Procedure is quoted extensively and frequent reference is made to the Federal Rules of Criminal Procedure. The practical phases of administration are dealt with textually and illustrated by statistical charts.

Much of the textual comment is focused on the absurdities in criminal procedure exemplified by instances many of which are anomalous and reflect the foibles of men as much as the incongruities of law. But the critical tone is a natural attribute of the informal style in which the editor's texts are cast.

The work is no mere collection of authoritative materials but is a pedagogical device for training students in the criminal law and its enforcement.

G. ROBERT ELLEGAARD.\*

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**TOTAL WAR AND THE CONSTITUTION.** By Edward S. Corwin, McCormick Professor of Jurisprudence Emeritus, Princeton University. Alfred Knopf: New York. \$2.50.

The primary purpose, in the minds of the framers, for ordaining and establishing the Constitution as the supreme law of the land is expressed in the preamble. It is "to secure the blessings of liberty to ourselves and our posterity." The spirit of Liberty belonged to the people and was possessed by them as a blessing. There was no doubt from Whom it came. It was to be enjoyed now and throughout posterity by all. Some, it is true, would limit its application to the immediate family and interpret it by the saying: "God bless me and my wife, my son, John, and his wife, us four and no more." Others, more liberal, in their vision, would extend their petition to include "them, their children and their grandchildren." But, in 1789, loyal representatives, who established the document and offered it to the People for their ratification, intended that the newly created government would insure Liberty to all of them and their posterity.

Professor Corwin can be truthfully called an apostle of the Constitution. In his "Total War and the Constitution," consisting of five lectures delivered on the William W. Cook Foundation at the University of Michigan, he presents facts which conclusively establish how total war has destroyed this supernatural gift of liberty.

By the term "total war" is intended a functional totality by which the author means the politically ordered participation in the war effort of all per-

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sonal and social forces. This would include 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 most direct relevance to a study of the impact of war on the Constitution.

More than a quarter of a century prior to Professor Corwin's lectures, another scholar of the Constitution, the Honorable Charles Evans Hughes, on June 21, 1920, recognized this trend when he said: "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."<sup>1</sup>

It is the view of Professor Corwin that the constitution did not withstand the assaults of World War II. Prior to World War I we enjoyed a peacetime constitution and its main structural elements were

- 1—The doctrine or concept of dual federalism;
- 2—A certain interpretation of the doctrine of the separation of powers; and
- 3—Judicial review.

The Constitution of 1946 is by contrast a Constitution of Powers, one that exhibits a growing concentration of powers in the hands, first, of the National Government; and secondly in the hands of the President and administrative agencies. "So the situation . . . is that for the first time in our history there is, following a great war, no peacetime Constitution to which we may expect to return in any wholesale way, inasmuch as the Constitution of peacetime and the Constitution of wartime have become, thanks to the New Deal, very much the same Constitution."<sup>2</sup> The gratitude, mentioned by the author which we owe to the New Deal, is the complete abolition of the three main pillars of our peacetime constitutional law.

Since the primary purpose of the Constitution was the preservation of Liberty, it may be of interest to note how Daniel Webster put the matter in 1839 and how it supported the peacetime constitution.

"The first object of a free people is the preservation of their liberty; and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power. Nothing is more deceptive or more dangerous than the pretense of a desire to simplify government. The simplest governments are despotisms; the next simplest limited monarchies, but all republics, all governments of law, must impose numerous limitations and qualifications of authority and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions. The spirit of liberty is, indeed, a bold and fearless spirit. It demands checks; it seeks for guards; it insists on securities; it entrenches itself behind strong defences, and fortifies itself with all possible cure against the assaults of ambition and passion. . . . This is the nature of constitutional liberty; and this is our liberty, if we will rightly understand and preserve it."<sup>3</sup>

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<sup>1</sup> P. 2.

<sup>2</sup> P. 172.

<sup>3</sup> P. 171.

Three years later when the panic of 1837 stimulated demands that the government come to the assistance of the financial community, President Van Buren rebuked such suggestions with an excellent statement of the conception of governmental functions which underlay the Constitution of Rights.

"All communities (said he) are apt to look to government for too much. . . . The Framers of our excellent Constitution and the people who approved it acted with calm and sagacious deliberation at the time on a sounder principle. They wisely judged that the less government interferes with private pursuits the better the general prosperity."<sup>4</sup>

No review could be complete which omits the author's summary.

"For good or ill we have chosen to 'walk the hot plowshares of international politics,' we have invented the atomic bomb and used it against civilian populations, thereby creating a great new problem not only of international security, but of security for our own people; we have legislated into existence nation-wide labor combinations that are able to subject great communities to a state of siege for indefinite periods; our public men from President down have repeatedly held forth the notion that 'economic independence and security' for everybody are within the competence of government to provide; on the plea of war necessity we have assembled the most numerous bureaucracy since the Roman Empire, and now that the war is over, appear to be unable or unwilling to reduce it materially. We have contracted a national debt that approaches, if it does not overtop, the entire expenditures of all governmental units in the United States prior to World War II."<sup>5</sup>

Professor Corwin's book is an accurate analysis of the most important problem confronting our country today. No attempt is made to solve it. Perhaps he leaves the solution to the political party and its Presidential candidate who seeks our support one year from this fall. Before we can decide we, too, should understand the problem. No better investment could be made by the voter than studying these lectures.

WILLIAM TAPLEY.\*

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THE NURNBERG CASE. By Robert H. Jackson. New York: Alfred A. Knopf, 1947. Pp. xviii, 269.

This handsome little book, in appearance similar to a popular novelette, deals with a subject that might well be regarded as the most important single event of modern history bearing upon the development of an International Criminal Law.

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<sup>4</sup> Pp. 171 and 172.

<sup>5</sup> P. 181.

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