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## COURT-MARTIAL JURISDICTION OVER NON-MILITARY PERSONS UNDER THE ARTICLES OF WAR.\*

ON THE first of February, 1918, the military authorities apprehended at Nogales, Arizona, a young man travelling under the name of Lathar Witcke, whose real name was Pablo Waberski. He had just crossed the border with two companions, who were, contrary to his belief, secret agents of the American and British Governments respectively. To them he had confided the fact that he was a German spy and was re-entering this country for the purpose of destroying property of military value as well as for the purpose of obtaining information for transmission to the enemy. He was traveling as a Russian but was in fact a subject of the Kaiser. He had on his person a cipher message in the German consular code signed by Von Eckhardt, the German Ambassador to Mexico. Was he triable by a military tribunal or must he be turned over to the civil authorities and be given a trial by jury? The judge advocate general had no difficulty in determining that a military tribunal had jurisdiction. Waberski was accordingly tried for violation of the 82nd Article of War,

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\*I desire at the outset to acknowledge my great indebtedness for much of the material used in the preparation of this paper to Major George S. Hornblower of the New York City Bar. Major Hornblower served during the war both in the Intelligence Branch of the General Staff, and later, in the Division of Constitutional and International Law of the Judge Advocate General's Office. He purposed to write for the MINNESOTA LAW REVIEW a discussion of the interpretation and constitutionality of the eighty-second article of war. Before leaving the service, he prepared a memorandum containing the data which he had collected as to the legislative and administrative history of that article, besides much other valuable material. This he turned over to me and I have used with his permission. Unfortunately, press of business has compelled Major Hornblower to abandon his purpose to write the article which he planned.

was found guilty and sentenced to death.<sup>1</sup> It was most strenuously urged by civilian officials high in authority, that Waberski's offense was triable only in the civil courts, and that the president ought not confirm the sentence. On the mistaken supposition that he was a Russian national, it was argued that he was entitled to a jury trial under the constitution. Before the controversy was settled, he most conveniently died a natural death in prison.

Although Waberski was in fact an alien enemy and, therefore, clearly without the protection of the constitutional guaranties,<sup>2</sup> his case served to raise sharply the questions of the proper interpretation and the constitutionality of those provisions of the articles of war which purport to subject non-military persons to trial by courts-martial. The ninety-fourth article provides that any person who, while in the military service, is guilty of any offense denounced therein and is thereafter discharged or dismissed from the service shall continue to be liable to trial and sentence by a court-martial in the same manner, and to the same extent as if he had not been so discharged or dismissed. The second article makes subject to military law all persons under sentence adjudged by courts-martial; all persons admitted into the Regular Army, Soldiers' Home at Washington, D. C.;<sup>3</sup> and all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States. The eighty-first article authorizes trial by court-martial of any person who relieves the enemy with arms, ammunition, supplies, money or other thing, or who knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy. And the eighty-second article subjects to trial and sentence by court-martial any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters or encampments of any of the armies of the United States, or elsewhere. To what extent, if at all, may these provisions be properly and constitutionally applied to persons having no military status?<sup>4</sup>

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<sup>1</sup> C. M. No. 119966.

<sup>2</sup> *DeLacey v. United States*, (1918) 249 Fed. 625, L. R. A. 1918E 1011.

<sup>3</sup> A similar provision as to inmates of other soldiers' homes is found in U. S. Rev. Stat. sec 4835.

<sup>4</sup> This paper does not deal with the law of military occupation of hostile or conquered territory, commonly called military government.

An understanding of the nature and character of the court-martial is a prerequisite to an intelligent consideration of this question. First, it must be remembered that our court-martial system is older than the constitution. Whether its remote predecessor was the Court of the High Constable and Earl Marshal, from which developed the Court of Chivalry, it is not important here to determine, for the Court of Chivalry had ceased to function before 1689.<sup>5</sup> And certain it is that since the passage of the first Mutiny Act in that year, the English courts-martial have owed their existence to parliamentary authorization. The English system was recognized in this country before the Revolution. All of our military codes, beginning with that of June 30, 1775, and including the present articles of war, have provided for courts-martial.<sup>6</sup> Second, let it be understood that the court-martial is a court in the truest sense of the word. Much confusion has resulted from the failure of writers upon military law and of the military authorities to realize this.<sup>7</sup> It is true that courts-martial are not a part of the judicial system of the United States provided for in article 3 of the constitution.<sup>8</sup> But nothing is better settled than that section 1 of that article does not exhaust the power of Congress to create courts.<sup>9</sup> Authority for the establishment by

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wherein the entire civilian population is under military control. Neither does it discuss martial law, as to which, see the opposing views of Dean Henry W. Ballantine, *Unconstitutional Claims of Military Authorities*, 5 *Journal American Institute of Criminal Law and Criminology* 718, and Col. George S. Wallace, *The Need, Propriety and Basis of Martial Law, with a Review of the Authorities*, 8 *Journal American Institute of Criminal Law and Criminology* 167, 406. Nor is the question, when a man called or drafted into the military service takes on a military status, considered. As to this, see *Franke v. Murray*, (1918) 248 Fed. 865, 160 C. C. A. 623, L. R. A. 1918E 1015; *Houston v. Moore*, (1820) 5 Wheat. (U.S.) 1, 5 L. Ed. 19; *Martin v. Mott*, (1827) 12 Wheat. (U. S.) 19, 6 L. Ed. 537.

<sup>5</sup> 1 Winthrop, *Military Law*, 1st ed 1886 46-51.

<sup>6</sup> The British Articles of War of 1765; the Massachusetts Articles of April 5, 1775; the American Articles of June 30, 1775; the Additional Articles of November 7, 1775; the American Articles of 1776, 1806 and 1874 are printed in 2 Winthrop (op. cit.) Appendix 40-125. The existing articles, so far as pertinent to this discussion, are found in 39 Stat. 650-670.

<sup>7</sup> See, for example, 1 Winthrop, 51-53, where Colonel Winthrop asserts that courts-martial "are in fact simply *instrumentalities of the executive power*, provided by Congress for the president as commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

<sup>8</sup> *Dynes v. Hoover*, (1857) 20 How. (U.S.) 65, 15 L. Ed. 838; *Kurtz v. Moffitt*, (1885) 115 U. S. 487, 500, 29 L. Ed. 458, 6 S. C. R. 148. See note 20 L. R. A. (N. S.) 413.

<sup>9</sup> *American Insurance Co. v. Canter*, (1828) 1 Pet. (U.S.) 511, 7 L. Ed. 242; *McAllister v. United States*, (1891) 141 U. S. 174, 35 L. Ed. 693,

Congress of courts in and for the territories is found, not in article 3, but in the "general right of sovereignty which exists in the government over territories," or in "the clause which enables Congress to make all needful rules and regulations respecting territory belonging to the United States."<sup>10</sup> In like manner, authority for the creation of courts-martial is to be found in the eighth section of article 1 of the constitution, which empowers Congress, among other things, to provide for the common defense and general welfare, to declare war, to raise and support armies, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, and to make all laws necessary and proper for carrying into execution the foregoing powers. As no one could successfully contend that a territorial court is not, in truth and in fact, a court, so no one could successfully maintain that a court-martial is not a court. Indeed, the tribunal of last resort has expressly held otherwise. It has declared that the proceedings of a court-martial are from their inception judicial, that "the trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law."<sup>11</sup> Within the limits of its jurisdiction, its judgments "rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under the circumstances."<sup>12</sup> And it is a court of the United States to the extent that a person tried and convicted or acquitted therein cannot be again tried for the same offense by any other court deriving its authority and jurisdiction from the United States.<sup>13</sup> But it is a court of special and limited

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11 S. C. R. 949; *United States v. Coe*, (1894) 155 U. S. 76, 39 L. Ed. 76, 15 S. R. C. 16.

<sup>10</sup> *United States v. Coe*, (1894) 155 U. S. 76, 85, 39 L. Ed. 76, 15 S. C. R. 16; constitution of United States, Art. 4, sec. 3. And in the exercise of this authority Congress may place such courts under the supervisory power of the Supreme Court. *United States v. Coe*, *supra*, at page 86.

<sup>11</sup> *Runkle v. United States*, (1887). 122 U. S. 543, 558, 30 L. Ed. 1167, 7 S. C. R. 1141.

<sup>12</sup> *Ex parte Reed*, (1879) 100 U. S. 13, 23, 25 L. Ed. 538; *Johnson v. Sayre*, (1895) 158 U. S. 109, 39 L. Ed. 914, 15 S. C. R. 773; *Swaim v. United States*, (1897) 165 U. S. 553, 41 L. Ed. 823, 17 S. C. R. 448.

<sup>13</sup> *Grafton v. United States*, (1907) 206 U. S. 333, 51 L. Ed. 1084, 27 S. C. R. 749.

jurisdiction;<sup>14</sup> and the power of Congress to confer jurisdiction upon it is in some respects restricted by the constitution.<sup>15</sup>

The effect of the history and character of the tribunal and of the constitutional limitations upon the power of Congress to clothe it with jurisdiction can be considered to better advantage in the discussion of the separate provisions.

*Offenders against the 94th Article of War.* As a general rule military jurisdiction over a person begins with his entry into the military service and ceases upon his separation therefrom. For an offense committed while in the service, he cannot, in the absence of express statutory authority, be tried after discharge or dismissal,<sup>16</sup> unless prior thereto he has been arrested or served with charges.<sup>17</sup> And this is true even though his offense was not discovered until after his separation from the service.<sup>18</sup> Nor will his later re-entry into the service revive the right to try him.<sup>19</sup> The 94th article, however, is not susceptible of two interpretations; it clearly and specifically confers upon courts-martial jurisdiction to try former officers and soldiers, who have become civilians, for certain offenses committed by them while in the service. If this jurisdiction cannot be exercised, it must be because the grant thereof is unconstitutional.

And so it has been asserted to be by Col. Winthrop, by far the most painstaking and scholarly American writer upon military law. His argument, in brief, is that it cannot be justified under the power of Congress to make rules for the regulation and government of the land forces, because discharged officers and soldiers are no part of such forces, and that to hold them to be such for the purpose of subjecting them to trial is to disregard the true signification of the term, land forces, as accepted from the time of the adoption of the constitution to the present.<sup>20</sup> There can hardly be a serious question that such discharged officers and soldiers do not belong to the land forces. But can

<sup>14</sup> *Dynes v. Hoover*, (1857) 20 How. (U.S.) 65, 15 L. Ed. 838; *Runkle v. United States*, (1887) 122 U. S. 543, 30 L. Ed. 1167, 7 S. C. R. 1141.

<sup>15</sup> Constitution of United States, Art. 1, sec. 9; Art. 3 secs. 1, 2, 3; amendments 2, 3, 4, 5, 6, 8, 9, 10.

<sup>16</sup> Dig. Ops. J. A. G. 1912, 514; VIII I 1; Ops. J. A. G. 250.419 Aug. 15, 1919.

<sup>17</sup> 1 Winthrop Military Law 1 ed. 1866 107.

<sup>18</sup> Dig. Ops. J. A. G. 1912, 514 VIII I 1 a.

<sup>19</sup> *Ibid*, 515 VIII I 1 b. In this connection it should be noted that an honorable discharge terminates only the enlistment to which it relates. The same is true of the now obsolete discharge without honor. A dishonorable discharge, however, completely separates the soldier from the service. *Ibid*, 515 VIII I 1 C.

<sup>20</sup> 1 Winthrop, Military Law 1st ed. 1886 128-131.

it be reasonably contended that the grant of power to provide for the regulation and government of the land forces does not include the power to continue military jurisdiction over a discharged member thereof with respect to offenses committed by him while he was such member? It is submitted that a reasonable interpretation of the granting clause requires a negative answer. And this conclusion is fortified by the language of the fifth amendment. The test therein prescribed of the power to dispense with presentment or indictment is not the status of the accused but the source of the case. Cases arising in the land or naval forces are expressly excepted from the operation of that clause requiring presentment or indictment for capital or otherwise infamous crimes. And by judicial construction such cases are excepted from that requirement of the sixth amendment which makes necessary a trial by jury in all criminal prosecutions.<sup>21</sup> In other words, the excepting clause in the fifth amendment authorizes trial by a military tribunal of all cases arising in the land forces. It has been argued that a case does not arise until charges have been prepared, but this fanciful and technical contention has not prevailed.

The provision in question has been upon our statute books and has been enforced by our military authorities for over half a century.<sup>22</sup> Its constitutionality has been sustained in opinions of the judge advocate general.<sup>23</sup> And the corresponding section in the Naval Code was upheld as against a claim of unconstitutionality in an elaborate opinion by Judge Sawyer of the United States district court for the district of California,<sup>24</sup> in which, after referring to the case of *Ex parte Milligan*,<sup>25</sup> he said:

"Mr. Justice Davis, in the opinion of the court, quotes from the clause of the constitution, 'except in cases arising in the land and naval forces,' and then in the very next sentence, in alluding to this class of cases, says: 'In pursuance of the power conferred by the constitution, Congress declared the kinds of trial, and the manner in which they shall be conducted for offenses committed while the party is in the military or naval service,' thus manifestly using the phrase, 'offenses committed while the party is in

<sup>21</sup> *Ex parte Milligan*, (1866) 4 Wall. (U.S.) 2, 123, 138, 18 L. Ed. 281.

<sup>22</sup> 1 Winthrop, *Military Law* (1 ed. 1886) 1020, note 4, in which Col. Winthrop cites cases decided in 1864, 1865, 1866, 1867, 1869, 1871; *Dig. Ops.* J. A. G. 1912, 139 LX E 1 in which cases are cited decided in 1870, 1883, 1896, 1899, 1905, 1909.

<sup>23</sup> *Ibid.*, 140 LX E 3 and footnote No. 1.

<sup>24</sup> *Ex parte Bogart*, (1873) 2 Sawy. (U.S.C.C.) 396, Fed. Cas. No. 1596.

<sup>25</sup> *Ex parte Milligan*, (1866) 4 Wal. (U.S.) 2, 123, 138, 18 L. Ed. 281.

the military service,' as entirely synonymous with and equivalent to, the phrase, 'cases arising in the land and naval forces.' . . . There is, certainly, no express limitation of the power of Congress to authorize a trial by court-martial, for military and naval offenses committed while the offender is in actual service, after his connection with the service has ceased. If the limitation exists, it must be implied from a strained and unnatural construction to be given to the clause, 'cases arising in the land and naval forces.' "

It, therefore, seems clear that the ninety-fourth article may properly and constitutionally be applied to dismissed officers and discharged soldiers.

*Persons under sentence adjudged by courts-martial.* Section 1361 of the Revised Statutes of the United States, a part of the enactment which authorized the establishment of military prisons at Rock Island and Fort Leavenworth, provided that all prisoners confined therein undergoing sentences of courts-martial should be liable to trial and punishment by courts-martial, under the rules and articles of war, for offenses committed during confinement. Section 5 of the Act of June 18, 1898,<sup>26</sup> made soldiers sentenced by courts-martial to dishonorable discharge and confinement amenable to the articles of war and other laws relating to the administration of military justice, until discharged from such confinement. Subdivision (e) of the present second article subjects to military law all persons under sentence adjudged by courts-martial. Obviously the present provision is broader than either of its predecessors and than both of them combined. Section 1361 applied only to persons confined in the designated military prisons.<sup>27</sup> These persons might include (1) officers sentenced to confinement without dismissal and soldiers sentenced to confinement without dishonorable discharge,<sup>28</sup> (2) soldiers sentenced to confinement and dishonorable discharge, where the execution of that portion of the sentence imposing dishonorable discharge is suspended, (3) officers sentenced to dismissal and confinement, and soldiers sentenced to dishonorable discharge and confinement, the portion of the sentence adjudging dismissal or dishonorable discharge being immediately executed, and (4)

<sup>26</sup> 30 Stat. 484.

<sup>27</sup> It was held not to apply to the military prison at Alcatraz Island, California. 1 Winthrop (op. cit.) 110.

<sup>28</sup> While it is conceivable that an officer might be sentenced to confinement without dismissal, it is believed that such a case would never occur except through inadvertance. Suspension of sentence of dismissal is unknown in the service.



civilians properly sentenced to confinement by courts-martial. Section 5 of the Act of June 18, 1898, applied only to soldiers sentenced to dishonorable discharge and confinement. Under its terms, however, the place of confinement was immaterial: it might be any military prison or a penitentiary. The existing statute includes all the foregoing classes and, in addition, officers sentenced to dismissal and confinement in a penitentiary, and civilians sentenced to confinement in a penitentiary.

There can be no question of the validity of the provision as applied to officers and soldiers whose sentences do not include dismissal or dishonorable discharge, or as applied to soldiers under suspended sentences of dishonorable discharge. They are part of the land forces. Their cases arise in the land forces. And they have a full military status not only at the time of the commission of the offense but also at the time of the trial.

As applied to officers and soldiers whose sentences, so far as concerns dismissal and dishonorable discharge, have been executed, and who are confined in a military prison, its validity has been questioned. These men, it has been said, have been completely separated from the service, and offenses thereafter committed by them cannot be regarded as constituting cases arising in the land forces.<sup>29</sup> To this objection two authoritative answers have been made. First, a military prison is as much under military control as the guardhouse of a military unit, and its inmates as thoroughly subject to military surveillance and discipline; it is in the sole charge of officers and enlisted men of the army; it is a military institution and is as really a part of the military establishment as is a fort or an arsenal. Second, the statute, by necessary implication, limits the power of the court-martial in imposing sentence and prevents it from completely separating the accused from the service. The accused, notwithstanding the sentence, retains his military status for the purposes of discipline and punishment.<sup>30</sup> Furthermore, under the terms of another

<sup>29</sup> 1 Winthrop (op. cit.) 110, 128. This was the contention of counsel for the prisoner in the cases cited in the following note.

<sup>30</sup> Ex parte Wildman, (1876) Fed. Cas. No. 17653a; In re Craig, (1895) 70 Fed. 969; 16 Ops. Atty. Gen'l 292. See also Carter v. McClaughry, (1902) 183 U. S. 365, 46 L. Ed. 236, 22 S. C. R. 181. In the Craig case, p. 971, it was said: "A discharge executed under these circumstances and for such a purpose cannot be said to have had the effect of severing his connection with the army, and of freeing him forthwith from all the restraints of military law. The discharge was no doubt operative to deprive him of pay and allowances, but so long as he was held in custody under the sentence of a court-martial, for the purpose of enforcing discipline and

enactment, he is eligible for restoration to duty to complete the unexpired portion of his enlistment period.<sup>31</sup> This second answer seems conclusive. These men were once members of the land forces in good and regular standing. They are still such members, but no longer in good standing: they are now deprived of certain of their former rights, privileges and immunities, and are subject to certain new burdens. But their military status endures.

The same is true with reference to officers and soldiers sentenced to dismissal or dishonorable discharge and to confinement in a penitentiary. The place of confinement does not affect their status. And so long as they are members of the land forces, they remain subject to trial by military courts for offenses against the rules and articles of war. The fact that such offenses occur in a penitentiary or other place outside the control of the military authorities is immaterial. Jurisdiction in this class of case may be predicated solely upon the status of the offender.<sup>32</sup>

But this line of reasoning will not sustain the exercise of military jurisdiction over civilians sentenced by courts-martial to confinement.<sup>33</sup> If they are to be tried by courts-martial for offenses committed during confinement, it must be because of the exclusive military control over them and over the place of their confinement. They have never had a military status. As before stated, the military prison is a part of the military establishment. It is an institution necessary for the regulation and government of the military forces. Its inmates are under military discipline

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punishing him for desertion, he remained subject to military law, which prevailed in the prison where he was confined, and subject also to the jurisdiction of a court-martial for all violations of such law committed while he was so held."

<sup>31</sup> Act of March 4, 1915, Ch. 143, sec. 2, 38 Stat. 1084, 1085. The same is true if confinement is in a penitentiary. 38 Stat. 1074.

<sup>32</sup> Manual for Courts-Martial, par. 37. See also 1 Winthrop (op. cit.) 95-98. In *Carter v. McClaughry*, (1902) 183 U. S. 365, 46 L. Ed. 236, 22 S. C. R. 181, the prisoner was confined in a penitentiary. The decision was that the portion of the sentence imposing confinement was not rendered illegal by the fact that the confinement was to be served after the portion of the sentence imposing dismissal had taken effect. In dealing with the question, the court said on page 383:

"Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

"He was a military prisoner, though he had ceased to be a soldier; and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. Rev. Stat. sec. 1361."

<sup>33</sup> No case has been found upon this precise point, nor any discussion by any text-writer.

and control. They are necessarily treated as an integral part of the establishment. Offenses committed by civilians properly incarcerated therein constitute cases arising in the land forces, just as really as offenses committed by retainers to the camp. The basis of jurisdiction here is not the status of the offender, but the dominion of the military over him and over the place of the commission of the offense. But offenses committed by civilians confined in penitentiaries cannot reasonably be designated cases arising in the land forces upon any theory. Such civilians have no military status; they are not under military control; they form no part of the military establishment.

It is, therefore, submitted that the provision here in question may properly be applied to officers and soldiers under sentence of dismissal or dishonorable discharge and to confinement, wherever confined, but that it cannot be constitutionally applied to civilians whose sentence to confinement is to be executed in a penitentiary or other institution under civilian control.

*Persons admitted into the Regular Army Soldiers' Home at Washington, D. C.* Subdivision (f) of the second article of war re-enacts section 4824 of the Revised Statutes of the United States, which subjects the inmates of the Soldiers' Home at Washington to the rules and articles of war. Section 4835, which makes the same provision with reference to inmates of the National Home for Disabled Volunteers, is nowhere included in the present articles of war, although it is not repealed thereby. The validity of these sections has not been tested in the civil courts for the very good reason that no attempt has been made to enforce section 4824 and only one attempt to apply section 4835.<sup>34</sup> In the published opinions of the attorney general, both sections have been referred to, without any intimation as to their validity or invalidity,<sup>35</sup> and section 4835 has been mentioned arguendo by the federal courts, apparently upon the assumption of its entire validity.<sup>36</sup> It has been asserted, however, that the attorney general has held section 4835 to be unconstitutional;<sup>37</sup> and the

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<sup>34</sup> 1 Winthrop (op. cit.) 110, 127, 128.

<sup>35</sup> 16 Ops. Atty. Gen'l. 13.

<sup>36</sup> In re Kelly, (1896) 71 Fed. 545, 553, 19 C. C. A. 25; Ohio v. Thomas, (1899) 173 U. S. 276, 281, 43 L. Ed. 699, 19 S. C. R. 453. See, however, United States v. Murphy, (1881) 9 Fed. 26, where it was held that clothing issued to an inmate of the National Home for Disabled Volunteers at Dayton, Ohio, was not issued to be used in the military service of the United States.

<sup>37</sup> General E. H. Crowder, on page 48 of Appendix to Senate Document, Report 229, 63rd Congress, 2d Session, is reported as testifying as follows:

judge advocate general has unequivocally declared both sections void and unenforceable, on the ground that the inmates of these homes are pure civilians, and cannot be regarded as part of the land forces.<sup>38</sup>

These rulings must apply with equal force to the existing provision. With the administrative officials assuming this attitude, there is no likelihood that an authoritative ruling from a civil court will be sought. And this is unfortunate, for though the judge advocate general's opinion seems supported by the weightier reason, yet in view of the nature of the institution, and the complete control over it by the military authorities,<sup>39</sup> the statute does not seem so palpably unconstitutional as to justify mere administrative officers in refusing to enforce it.

*Retainers to the Camp and Persons accompanying or serving with the Armies of the United States.* Article 32 of the articles of war of June 30, 1775, subjected to the "articles, rules and regulations of the Continental army" "all sutlers and retainers to a camp and all persons whatsoever serving with the continental army in the field." Article 23 of section XIII of the articles of war of September 20, 1776, made all "sutlers and retainers to a camp and all persons whatsoever serving with the armies of the United States in the field" subject "to orders, according to the rules and discipline of war."<sup>40</sup> This was re-enacted as the 60th

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"Existing legislation, held by the Attorney General and by the Judge Advocate General to be clearly unconstitutional, provides that inmates of the volunteer soldiers' homes are to be subject to the Articles of War. The statute has, so far as I can inform myself, never received any execution. While I have not included this, I have not undertaken to repeal the law by making any reference to the sections of the Revised Statutes conferring this extraordinary jurisdiction, in the repealing clause which will be found at the end of the project."

This testimony was given May 14, 1912, upon the hearing before the Committee on Military Affairs, House of Representatives, 62d Congress, 2d session on H. R. 23628, being a project for the revision of the Articles of War. It seems strange that General Crowder omitted to mention the decisions of the Judge Advocate General with respect to section 4824 Revised Statutes.

<sup>38</sup> Dig. Ops. J. A. G. 1912, p. 1010, I A.; *ibid* p. 1012, II.

<sup>39</sup> See *Ohio v. Thomas*, (1899) 173 U. S. 276, 43 L. Ed. 699, 19 S. C. R. 453.

<sup>40</sup> This adopts the language of Article 23 of Section XIV of the British Articles of War of 1765. The provision was a part of the British articles from 1744 to 1828. In this connection it must be remembered that the British Articles of War were not parliamentary enactments. Parliament enacted the Mutiny Act; the Crown promulgated the Articles of War. Clode says that these civilians could not have been tried by court-martial "because they were neither designated in the (Mutiny) Act nor were they Officers or Soldiers." Charles M. Clode, *Military and Martial Law* (1874) 94.

article of the Code of April 10, 1806. The same provision, omitting reference to sutlers, was embodied in the 63rd article of the enactment of June 22, 1874. The settled construction of these articles was that they subjected the civilians designated not only to military control and orders but also to the jurisdiction of courts-martial.<sup>41</sup> Their application, however, was strictly limited to the time of war.<sup>42</sup> Consequently, the second article of the existing code, in making amenable to military law in time of war, all retainers to the camp and all persons serving with the army in the field, merely gave legislative sanction to then existing practice. But it did not stop there; it put in the same class (1) persons accompanying the armies in the field in the United States in time of war, and (2) retainers to the camp, and all persons accompanying or serving with the armies without the territorial jurisdiction of the United States both in time of war and in time of peace.

Retainers to the camp, it has been held, include officers' servants, sutlers, employees of sutlers, newspaper correspondents and other camp followers not in the employ of the government.<sup>43</sup> Persons serving with the army consist of civilians employed by the government, such as teamsters, watchmen, inspectors, interpreters, guides, contract surgeons,<sup>44</sup> nurses, ambulance drivers, and employees of the quartermaster, engineer and ordnance departments, including employees on troop trains and transports.<sup>45</sup> The phrase, persons accompanying the army, was intended to cover civilians "who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith."<sup>46</sup> It has

<sup>41</sup> Dig. Ops. J. A. G. 1912, 152 LXIII D; 1 Winthrop (op. cit.) 117.

<sup>42</sup> Dig. Ops. J. A. G. 1912, 151 LXIII B; 1 Winthrop (op. cit.) 121.

<sup>43</sup> 1 Winthrop (op. cit.) 118; Comparative Print showing S 3191, Senate Committee Print, 64th Congress, 1st Session (1916) 6.

<sup>44</sup> Contract surgeons and members of the Army Nurse Corps are now part of the Army. Secs. 2 and 10 of Act of June 3, 1916 (39 Stat. 166, 171); Ops. J. A. G. 211, Nov. 27, 1918.

<sup>45</sup> 1 Winthrop (op. cit.) 119; Dig. Ops. J. A. G. 1912, 151 LXIII A; C. M. Nos. 110574; 113740; 113099; 110866; 116446; 115774; 108605; 110496; 118055; 117909-117915; 118120. For example, the conductor and engineer of a military train running from Alexandria to Manassas, were held by Judge Advocate General Holt to be triable by court-martial. Ops. J. A. G. R. 7, 116. (1864). Ex parte Falls, (1918) 251 Fed. 415; Ex parte Jochen, (1919) 257 Fed. 200; Hines v. Mikell, (1919) 259 Fed. 28, overruling ex parte Mikell, (1918) 253 Fed. 817.

<sup>46</sup> Comparative Print showing S 3191, Senate Committee Print, 64th Congress, 1st Session (1916) 6 Gen. E. H. Crowder, testifying before the Committee on Military Affairs of the House of Representatives, on May 14, 1912, said: "The words 'accompanying or' are new and are intended to cover attachés who accompany the Army but who do not necessarily

been used as the authority for exercising military jurisdiction over a passenger on an army transport, who volunteered to stand watch and thereafter refused to continue the work,<sup>47</sup> over employees of independent contractors,<sup>48</sup> and over employees of the Young Men's Christian Association.<sup>49</sup> The United States district court for the district of Massachusetts, however, has expressly denied its application to an employee of a contractor for construction work at a camp where soldiers were undergoing intensive training for immediate active service on the fighting front, although this employee did practically all his work within the camp and had his quarters within the camp.<sup>50</sup> After pointing out that such a person cannot be classified as a retainer, the court said:

"Persons 'accompanying or serving with . . . armies in the field' are those who, though not enlisted, do work required in maintenance, supply or transportation of the army. The work that Weitz was doing was not of that character. . . . There is, I think, a clear distinction between work done in the erection or maintenance of a camp of semi-permanent character, and work having a direct relation to the transport, maintenance or supply of an army in the field. Both sorts of work are necessary to the army, but only persons engaged in the latter sort are amenable to military law and punishment. To hold otherwise would be to subject to military law a very large body of civilian employes, never directly coming in contact with military authority and not heretofore generally supposed to be subject thereto."

It is respectfully submitted that this reasoning will not bear analysis. The court entirely ignores the word, "accompanying" in the statute. Its earlier quotation from General Davis, it fails to note, has to do with the statute before this word was inserted. To make the character of work done by a person, who performs his duty in the camp and who has his quarters therein, the test of whether that person is accompanying the army is to disregard the obvious meaning of unambiguous language. And to say that to interpret the article as it reads will be to make amenable to military law persons not heretofore generally believed to be subject thereto, is merely to say that Congress in interpolating

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serve with the field Army. The phrase includes also newspaper correspondents; we have been trying them in every war we have had for divulging military secrets and nonconformity with regulations and like offenses." See p. 48 of Report referred to in Note 37, *supra*.

<sup>47</sup> C. M. No. 107168; *Ex parte Gerlach*, (1917) 247 Fed. 616.

<sup>48</sup> C. M. No. 115772; 117642; *Ops. J. A. G.* 250401 Dec. 11, 1918.

<sup>49</sup> C. M. No. 118327; 118333; 119135.

<sup>50</sup> *Ex parte Weitz*, (1919) 256 Fed. 58.

a new word into the statute intended to have that word given some effect. Furthermore, it is difficult to see how any line can be drawn, for the purposes of jurisdiction, between the employees who transport provisions and place them in a storehouse and the employees who build the storehouse; or between the men who build mere temporary shelters for soldiers and those who build semi-permanent barracks, or between the chauffeur who transports soldiers and supplies for them and the chauffeur who transports employees of the quartermaster's corps who look after and check up those supplies. The character of the work done is not the test. The test is whether the civilian in question is really accompanying the army in the field or without the territorial jurisdiction of the United States.

"In the field," as used in the articles of war, appears not to have been judicially interpreted until very recently.<sup>51</sup> By the administrative officials of the government it was formerly construed narrowly as equivalent to "in the theatre of war"<sup>52</sup> or, at least, as connoting military operations with a view to the enemy,<sup>53</sup> although it was distinctly held that it was not limited to the zone of immediate operations against the enemy and that the entire army as mobilized in the Civil War might well be considered as in the field.<sup>54</sup> This interpretation gave some plausibility to the contention that troops in the United States during the late war could not be considered in the field, because the battle front was "three thousand miles away, separated by an immense ocean from the United States, with peace within all the territorial limits of the United States."<sup>55</sup> It was urged that the field denoted "the area of actual conflict with an enemy," or an area occupied by troops that "sustain such a relation to the combatant troops in the actual field of battle, as that constructively they are part and parcel of the field operations."<sup>56</sup> These arguments overlooked several important facts: (1) That subdivision (d) of the second article of war substantially enlarged the scope of military jurisdiction as previously conferred by the sixty-third article of the Code of 1874, and the sixtieth article of the

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<sup>51</sup> *Sargent v. Town of Ludlow*, (1870) 42 Vt. 726, defines the phrase as applied to a bounty statute.

<sup>52</sup> Dig. Ops. J. A. G. 1912, 151, LXIII A, B, C; 1 Winthrop (op. cit.) 121.

<sup>53</sup> 14 Ops. Atty. Gen. 22.

<sup>54</sup> Ops. J. A. G. R. 12, 376 (1865).

<sup>55</sup> See Ex parte Mikell, (1918) 253 Fed. 817.

<sup>56</sup> See Ex parte Jochen, (1919) 257 Fed. 200.

Code of 1806; (2) that these administrative rulings were made under these earlier articles and with reference to such conditions as prevailed in the Civil War and Indian wars, where the theatres of operations were comparatively limited; (3) that the existing provision was enacted in the presence of a world war and after the term "in the field" had been recognized as having a much broader meaning, both in departmental regulations and in Congressional legislation.<sup>57</sup> Moreover, when occasion for the application of this provision arose, the United States had already been transformed "into a vast manoeuvre field with concentration, mobilization and training camps and quarters scattered broadcast."<sup>58</sup> Many civilians were necessarily attached to the army and commingled with its officers and men; and every consideration of policy demanded that they be subjected to the same control and jurisdiction. It was, therefore, to be anticipated that the military authorities would emphasize those of the earlier rulings which looked toward a broader construction of the term, "in the field," and by a rephrasing of old definitions reach results in consonance with the requirements of existing conditions. Thus, when the judge advocate general was called upon to determine whether a civilian serving at a National Army cantonment was serving with the army in the field, it was not unexpected to find him holding:

"This cantonment was established for the period of the war and will, no doubt, be abolished when the war is over. It is one of the places where soldiers stop on their way toward the battle line; the troops there are, in fact, reserves to those serving at the front; they are in process of movement towards the enemy, and their stay is indefinite; in the field does not mean on the actual battle front. The theatre of war will be considered the territory of all belligerent countries. The battle front is constantly shifting; the troops sent to the front to-day may defend our coast to-morrow. The reason of this rule must determine its construction. Civilians in time of war serving with troops must be subject to military discipline. They cannot be allowed to embarrass the military commanders. The military establishment would be hindered just as much by unlawful acts of civilian employees at this cantonment as would be the case were this a camp stationed somewhere behind the lines in France."<sup>59</sup>

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<sup>57</sup> Act of Feb. 27, 1893, 27 Stat. 480; Army Regulations, par. 183 et seq.

<sup>58</sup> Ex parte Jochen, (1919) 257 Fed. 200.

<sup>59</sup> C. M. No. 117,909.



This reasoning was, in a later case, substantially adopted by the United States circuit court of appeals (4th Circuit).<sup>60</sup> The court referred to statutes and regulations which recognized the distinction between service in the field and service at a permanent station, and between service in the field and service in the theatre of operations. It then held that when troops leave their permanent station or post and move in the direction of the enemy or to an intermediate point where they may stop temporarily for training, they are in the field. The men who, as soldiers, entered a National Army cantonment were said to be taking "the first step which was to lead to the firing line" and to be as much in the field as "those who were encamped in the fields of Flanders awaiting orders to enter the engagement."

Upon somewhat similar grounds, the judge advocate general held the army transport service to constitute a portion of the lines of communication of the army between the battle front and the reserves, and service therein to be service in the field.<sup>61</sup> In these rulings he was sustained by the United States district courts for the southern district of New York<sup>62</sup> and for the district of New Jersey.<sup>63</sup> Both courts agreed that:

"The words, 'in the field,' do not refer to land only, but to any place on land or water, apart from permanent cantonments and fortifications, where military operations are being conducted."

This definition seems to effectuate the legislative intent as evidenced by the use of the term in prior and later statutes,<sup>64</sup> is in accord with the modern administrative interpretation as expressed in departmental orders and regulations<sup>65</sup> and in the opinions of the judge advocate general, and, it is submitted, provides a reasonable and workable construction of the statute.

"Without the territorial jurisdiction of the United States" has reference primarily to those places beyond the limits of the territory over which the United States exercises dominion as an independent sovereign power. Since the jurisdiction of each sovereign within its own territory is absolute and exclusive, no state can exercise jurisdiction within the limits of another with-

<sup>60</sup> *Hines v. Mikell*, (1919) 259 Fed. 28, overruling *Ex parte Mikell*, (1918) 253 Fed. 817. A vigorous opinion to the same effect, especially considering and disapproving *Ex parte Mikell*, is found in *Ex parte Jochen*, (1919) 257 Fed. 200.

<sup>61</sup> C. M. 107168; 114012.

<sup>62</sup> *Ex parte Gerlach*, (1917) 247 Fed. 616.

<sup>63</sup> *Ex parte Falls*, (1918) 251 Fed. 415.

<sup>64</sup> See note 57 *supra*, and Act of April 16, 1918, 40 Stat. 530.

<sup>65</sup> See note 57 *supra* and General Orders 6 and 53, W. D. 1918.

out the consent of the latter.<sup>66</sup> When, however, a sovereign, by invitation or license, allows troops of a foreign state to enter, remain in, or pass through his dominions, he thereby cedes a portion of his territorial jurisdiction. Usually such cession is made by convention, but it may be implied from the license or invitation.<sup>67</sup> Where it includes jurisdiction over civilians attached to or accompanying the army, some provision must be made for their government and discipline. Prior to the passage of the present article, no such provision was contained in the articles of war, and this clause was inserted to cure that defect.<sup>68</sup> The words, however, are also apt to denote the non-territorial jurisdiction exercised by the nation over its public vessels on the high seas and over private vessels covered by its flag. Thus they might well apply to civilians on army transports whether owned or merely chartered by the government.<sup>69</sup> Under the statute as drawn, it is believed that the jurisdiction must be exercised or must at least attach prior to the return of the civilian to the territorial jurisdiction of the United States. Upon such return his position is analogous to that of a discharged soldier or of a civilian after the restoration of peace, who has served with the army in the field during war. For offenses committed prior to discharge such soldier cannot be tried by court-martial, for offenses committed during war such civilian cannot be tried by court-martial, unless arrested or served with charges therefor prior to discharge or restoration of peace respectively.<sup>70</sup> In like manner the civilian accompanying the army abroad will, upon reentry into the United States, pass beyond the jurisdiction of

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<sup>66</sup> See Hall, *Int. Law* (6 ed. 1909) 101.

<sup>67</sup> *Ibid.* 196; 2 Moore *Dig. Int. Law* 559, sec. 251; *Schooner Exchange v. McFaddon*, (1812) 7 *Cranch (U.S.)* 116, 136, 139.

<sup>68</sup> In the Comparative Print referred to in note 43 *supra*, which was prepared in the office of the Judge Advocate General, it is said on p. 6: "The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in places to which the civil jurisdiction of the United States does not extend, and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906-07 in Cuba."

<sup>69</sup> *Ex parte Gerlach*, (1917) 247 *Fed. 616*; 1 *Hall Int. Law* (6 ed.) 161.

<sup>70</sup> 1 *Winthrop (op. cit.)* 122; *Dig. Ops. J. A. G.* 1912, 151 LXIII B1; Notes 16, 17, 18 *supra*.

the military courts unless he has, prior thereto, been arrested or served with charges.

Although the provision subjecting to military law these civilians, accompanying the field army as retainers or serving therewith, has been repeatedly enforced since its adoption in 1775, its constitutionality seems never to have been questioned prior to the late war. Constitutional authority for its enactment is found in section 8 of article 1 of the constitution, and in the excepting clause of the fifth amendment. Cases arising in the land forces may be tried by courts-martial. Offenses committed by such civilians under such circumstances constitute cases arising in the land forces. If these civilians are not part of the land forces, "a due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and communication with the enemy"<sup>71</sup> requires that they be subjected to the same control and jurisdiction as the troops themselves. Prior to the adoption of the constitution they were thus subjected; they have ever since been thus subjected, and it must be assumed, in the absence of clear language to the contrary, that the framers of the constitution did not intend to derogate from the established jurisdiction of the military courts in this respect. It is, therefore, believed that the recent decisions upholding the constitutionality of the provision are entirely sound.<sup>72</sup>

The clause making these persons amenable to military law when without the territorial jurisdiction of the United States is, where the offense occurs and the trial is had either in the territory of a foreign sovereign or upon the high seas, unquestionably constitutional. The constitutional guaranties with reference to indictment, presentment, and trial by jury have no extra-territorial effect.<sup>73</sup> They are operative only in territory incorporated into the United States.<sup>74</sup> The United States Supreme Court has used the following pertinent language:

"By the constitution a government is ordained and established 'for the United States of America,' and not for countries outside their limits. The guaranties it affords against accusation of capi-

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<sup>71</sup> 1 Winthrop (op. cit.) 118.

<sup>72</sup> Ex parte Gerlach, (1917) 247 Fed. 616; Ex parte Falls, (1918) 251 Fed. 415; Ex parte Jochen, (1919) 257 Fed. 200.

<sup>73</sup> In re Ross, (1891) 140 U. S. 453, 35 L. Ed. 581, 11 S. C. R. 897.

<sup>74</sup> Hawaii v. Mankichi, (1903) 190 U. S. 197, 47 L. Ed. 1016, 23 S. C. R. 787; Dorr v. United States, (1904) 195 U. S. 138, 49 L. Ed. 128, 24 S. C. R. 808.

tal or other infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial of alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States*, 138 U. S. 157, 181. The constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be upon such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States."<sup>75</sup>

Where, however, the accused is returned to the United States, before the jurisdiction of the military tribunal has attached by arrest or service of charges, the constitutional provisions are doubtless applicable. In such event justification for trial by court-martial would have to be based upon the ground that the case arose in the land forces. If an offense committed by a civilian confined in a military prison, if an offense committed by a civilian attached to the army in the field, constitutes a case arising in the land forces, the same, it is submitted, must be true of an offense committed by a civilian accompanying or serving with the army abroad or on the high seas.<sup>76</sup> A fortiori, military jurisdiction may constitutionally be asserted in cases where the accused has been arrested or served with charges prior to his return to this country.

*Whosoever relieves the enemy with arms, ammunition, supplies, money or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly.*

Notwithstanding this unrestricted language, it has been suggested that its application must be limited to members of the military establishment.

<sup>75</sup> In re Ross, (1891) 140 U. S. 453, 464-5, 35 L. Ed. 581, 11 S. C. R. 897. In this case Ross was tried by a consular court in Japan, without a jury, for a murder alleged to have been committed on board an American vessel in Japanese waters. The language quoted, therefore, was part of the ratio decidendi of the case.

<sup>76</sup> See pp. 87-92, *supra*. As pointed out above the statute would probably not be interpreted as covering a case where jurisdiction had not been initiated prior to return to this country.

"The sounder construction," it has been said, "would seem to be that as the articles of war are a code enacted for the government of the military establishment, they relate only to persons belonging to that establishment unless a different intent should be expressed or otherwise made manifest. No such intent is so expressed or made manifest."<sup>77</sup> This contention is obviously unsound. Its premise is based upon an unduly narrow interpretation of the enacting clauses of the various military codes; but granting its premise, its conclusion is erroneous. It ignores the legislative history of the article and disregards the construction administratively accepted and applied for at least a century. It is supported by no opinion of the judge advocate general, of the attorney general or of the courts.

The articles of 1775 were introduced by a resolution that they "be attended to and observed by such forces as are or may hereafter be raised;" those of 1806 were enacted to be "the rules and articles by which the armies of the United States shall be governed." The language of the Code of 1874 was similar. The existing articles, it is declared, "shall at all times and in all places govern the armies of the United States." A reasonable construction of the foregoing language in each case, it is submitted, does not prevent the application of the articles to civilians coming into contact with the army in cases arising in the land forces. No military code would be complete without making provision for such cases. Rules authorizing the exercise of military jurisdiction over civilians under such circumstances are no less rules for the government of the military establishment than are those regulating the internal affairs of the army. Relieving, corresponding with, and giving intelligence to the enemy must be prevented largely by the military.

"The power to repress the communication of intelligence to the enemy," said Judge Advocate General Holt,<sup>78</sup> "has found a prominent place in the military codes of all warlike nations. Without the authority to visit upon this class of offenses sum-

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<sup>77</sup> Davis, *Military Law* (3ed.) 417. This language is repeated in footnote 7, *Dig. Ops. J. A. G.* 1912, 128. The statement is also made that the application of the article to civilians may be justified only under martial law. Except in so far as this statement is based upon authority of General Davis, it is entitled to no greater weight than its inherent reasonableness commands. It is the mere opinion of the compiler of the digest, who, so far as is known, has achieved no recognition as an authority upon military law.

<sup>78</sup> *Case of William T. Smithson*, *Ops. J. A. G. R.* 5, 291, November 13, 1863.

mary and severe punishments, the war making power would be greatly enfeebled if not absolutely paralyzed. . . . To confine the exercise of this authority to those actually in the military service would be absolutely to defeat its object, since those who convey intelligence to the enemy are not to be found among officers and soldiers who are offering up their lives for the government, but among demoralized and disloyal classes outside the army. If such cannot be promptly and unsparingly punished, there can be no successful prosecution of hostilities.”

Therefore, even were the enacting clause and the article in question to be considered alone, the more reasonable construction would not confine their operation to military persons.

But they must not be considered alone. The language of the article or articles dealing with these offenses must be interpreted in the light of the language of the other punitive provisions. In the existing code most of the other punitive articles are made applicable expressly to officers, soldiers, or persons subject to military law, as defined in the second and twelfth articles.<sup>79</sup> In the Code of 1874 most of the acts denounced are made punishable when committed by any officer or soldier. The article therein preceding the provisions here involved is applicable to “any person belonging to the armies of the United States.” Substantially the same thing is true in the articles of 1806 and those of 1776. The inference is irresistible that Congress used this unrestricted language, “whosoever,” advisedly, and therefore made manifest its intent to have it apply to civilians.

This conclusion is fortified by the legislative history of the article. The twenty-seventh and twenty-eighth articles of the first American military code denounced substantially the same offenses as the present eighty-first article; but their application was restricted to members of the continental army. By a resolution of November 7, 1775,<sup>80</sup> all persons holding a treacherous correspondence with, or giving intelligence to, the enemy were made punishable by general court-martial. Articles eighteen and nineteen of section thirteen of the Code of 1776, copying the language of articles eighteen and nineteen of section fourteen of the British articles of 1765, gave courts-martial jurisdiction to punish the

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<sup>79</sup> The British Articles of War of 1765; the Massachusetts Articles of April 5, 1775; the American Articles of June 30, 1775; the Additional Articles of November 7, 1775; the American Articles of 1776, 1806 and 1874 are printed in 2 Winthrop (op. cit.) Appendix 40-125. The existing articles, so far as pertinent to this discussion, are found in 39 Stat. 650-670.

<sup>80</sup> 2 Winthrop (op. cit.) Appendix 76. Compare the provisions of the Naval Code retaining the restrictive language. 2 Stat. 46, 47.

offenses covered by the twenty-seventh and twenty-eighth articles of the previous code, by whomsoever committed. Under the terms of a resolution of October 8, 1777,<sup>81</sup> any person guilty of giving aid or intelligence to the enemy was to be considered an enemy and traitor to the United States and to be punished by death or such other punishment as a court-martial might think proper. A resolution of February 27, 1778,<sup>82</sup> directed against the taking or conveying of any loyal citizen to any place within the power of the enemy, provided that:

“Whatever inhabitant of these states shall, by giving intelligence, acting as a guide, or in any other manner whatsoever, aid the enemy in the perpetration thereof, . . . shall suffer death by the judgment of a court martial, as a traitor, assassin, and spy, if the offense be committed within seventy miles of the headquarters of the grand or other armies of these states where a general officer commands.”

The act of September 29, 1789,<sup>83</sup> continued the previously existing articles of war in force until the end of the next session of Congress. Section 13 of the Act of April 30, 1790,<sup>84</sup> subjected the army to the existing rules and articles of war, “as far as same may be applicable to the Constitution of the United States.” From time to time various other statutes<sup>85</sup> to the same effect were enacted until the articles of 1806 became operative. Articles fifty-six and fifty-seven thereof were essentially a reenactment of articles eighteen and nineteen of section thirteen of the Code of 1776. They continued in force until incorporated into the Code of 1874 as articles forty-five and forty-six thereof, which were, with slight changes, consolidated into the present eighty-first article.

The foregoing makes it clear beyond dispute that the present provision and all its predecessors, beginning with November, 1775, were intended to be operative against civilians. The original articles were restricted to members of the army, but this limitation was removed in less than six months. And it has never been restored. As an original question of statutory construction, therefore, it is submitted, the article can not reasonably be held

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<sup>81</sup> 2 Journals of Congress 281.

<sup>82</sup> 2 Journals of Congress 459.

<sup>83</sup> 1 Stat. 95, 96.

<sup>84</sup> 1 Stat. 119, 121.

<sup>85</sup> 1 Stat. 223; 242; 430 at 432; 483 at 486; 552; 558; 604; 725; 2 Stat. 132 at 134.

to be confined in its application to members of the military forces. And in practice, it has never been so confined. On May 19 and 20, 1777, a court martial of which Stephen Moylan was president tried a civilian, one John Brown, alias John Lee, for violation of the nineteenth article of the thirteenth section of the Code of 1776, found him guilty, and sentenced him to death, but recommended him to General Schuyler as an object of mercy. The General laid the proceedings before Congress, which ordered them referred to the board of war.<sup>86</sup> The military orders for the Army of West Lake Champlain, issued in 1813, published articles fifty-six and fifty-seven of the Code of 1806, with the warning that they were as applicable to civilians as to soldiers.<sup>87</sup> During the Civil War the judge advocate general interpreted them as applying to civilians. This construction was approved by the secretary of war and promulgated in orders of the War Department.<sup>88</sup> And numerous trials of civilians occurred pursuant thereto.<sup>89</sup> In 1871 the attorney general held that civilians captured by the military forces, while engaged in supplying ammunition to hostile Indians, were triable by court-martial.<sup>90</sup> And in

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<sup>86</sup> 2 Journals of Congress 135. The trial of Joshua Hett Smith under the resolution of February 27, 1778, for aiding and assisting Benedict Arnold "in a combination with the enemy, to take, kill and seize such of the loyal citizens or soldiers of the United States as were in garrison at West Point and its dependencies" should also be noted here. Smith, a lawyer, made a strong argument against the jurisdiction of the court-martial to try him, a civilian, as being contrary to the several constitutions of the states and in "violation of the right of trial by jury, one of the principal reasons assigned by Congress for their separation from Great Britain in the Declaration of Independence, as well as allowing the military an extent of power incompatible with free Government." He was tried but found not guilty. 2 Chandler Am. Crim. Trials.

<sup>87</sup> 1 Winthrop (op. cit.) 124. Col. Winthrop also mentions the trial of R. C. Ambrister by order of General Jackson in 1818, as an example of the prosecution of a civilian by court martial for giving aid to the enemy. This entire proceeding, however, was so wholly irregular that it cannot be regarded as a precedent for any proposition, save that an arbitrary military commander may, under peculiar circumstances, have a civilian put to death and escape the consequences of his illegal act. Col. Winthrop, regarding the proceeding as a trial by court-martial, says with reference to General Jackson's disapproving the final sentence and ordering the first sentence of the court executed: "For such an order and its execution a military commander would *now* be held indictable for murder." 1 Winthrop (op. cit.) 657. For an attempted defense of General Jackson's conduct on the theory that Jackson had conquered the whole of West Florida, although no war had been declared against Spain, that as military commander of conquered territory he had the right to execute persons accused of aiding in uncivilized warfare, and that the so-called court was merely an advisory body to the General, see Birkheimer, Military Government and Martial Law, 3 ed. 1914, 351-354.

<sup>88</sup> 1 Winthrop (op. cit.) 125.

<sup>89</sup> Id. 125, note 6.

<sup>90</sup> 13 Ops. Atty. Gen. 472.



no opinion of the judge advocate, of the attorney general or of a court has any expression been found from which it might reasonably be deduced that members of the military establishment alone are amenable to military trial for violation of this provision.

Certainly if the ordinary rules of statutory construction are to be applied and effect is to be given to the manifest intention of Congress, members of the military establishment are not the only persons subject to trial by court-martial for violation of the eighty-first article of war. But does it follow that it is unrestricted in its operation both as to the person of the offender and as to the locus of the offense? So construed will it not be objectionable on constitutional grounds? Article III of the constitution vests the judicial power of the United States in one Supreme Court and such inferior courts as Congress may ordain and establish. It provides that the trial of all crimes, except in cases of impeachment, shall be by jury; it defines treason as consisting in levying war against the United States, or in adhering to their enemies, giving them aid and comfort, and prohibits conviction of treason except upon the testimony of two witnesses or on confession in open court. The fifth amendment forbids holding any person to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. And the sixth amendment requires the trial of the accused in all criminal prosecutions to be by an impartial jury. Do these constitutional guaranties not protect the civilian from such trial by court martial?

It has been vigorously and ably argued that they do not, for three reasons. First, that the practice of subjecting civilians to the jurisdiction of military tribunals for the trial of these offenses is older than the constitution and impliedly sanctioned by it: second, that the authority of Congress so to provide is inherent in its war-making power: third, that all such offenses constitute cases arising in the land and naval forces.

The first reason was forcibly put by Judge Advocate General Holt in the *Smithson* case.<sup>91</sup>

"The history of the 57th article of war [now embodied in the 81st] will go far to show the conviction which has obtained from

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<sup>91</sup> See Note 78, *supra*. In this case a civilian was tried by court-martial for giving intelligence to the enemy by means of a letter. The letter was sent from Washington, which was then fortified, and in reality in the theatre of operations.

the foundation of the government, of the necessity of summarily and severely punishing, by military courts, this class of offenders, and the acquiescence in such proceedings as in harmony with the constitution. At the outset of the revolution, as is learned from the correspondence of this period, so strong a popular prejudice existed against the military, that the establishment of a military code—now known as the articles of war—was an extremely difficult and almost odious task. . . . The article of war, now known as the 57th, but which was the 28th of the code adopted by Congress on the 30th of June, 1775, was restricted to persons ‘belonging to the Continental Army.’ This restriction was probably the fruit of the prejudice referred to. It was soon discovered, however, that thus restricted the article would be in effect a brutum fulmen, since the offenders against whom its penalties were directed, were not within, but without the military service. Accordingly in November following, the same Congress threw off this restriction and enacted that ‘*all persons* convicted of holding a treacherous correspondence with or giving intelligence to the enemy shall suffer death, or such other punishment as a general court-martial shall think proper.’ This article of war thus enlarged was in full force on the ratification of the federal constitution, and on the adoption of the amendment, which is claimed in the defense to be invaded by this trial. It continued to be the law of the service until 1806, when it was substantially reaffirmed by Congress, and adopted as it now exists, the word ‘whosoever’ having been substituted for ‘all persons.’ The feature of the article now assailed thus appears to be older than the constitution, to have been in force when that instrument came into existence, and to have been readopted a few years thereafter by a Congress, in which were in all probability many who must be ranked among the founders of the republic, and who were doubtless intimately acquainted with the spirit and import of this and other provisions of the constitution. This action may well be accepted as virtually a contemporaneous exposition of this clause of the fundamental law, which added to the usage in the service, that has constantly prevailed, must be regarded as precluding the government from opening a question thus long closed. The power now contested has been exercised without doubt as to its constitutionality through all the wars in which the republic has been engaged; and involved as we are, in civil commotions, and grappling with a gigantic rebellion, whose emissaries are found everywhere in our midst, and hanging about our military camps, such a power could not be surrendered without culpable disregard of the highest considerations connected with the public safety.”

In the same opinion General Holt maintained that authority of Congress to enact the legislation was to be found in its power to declare war, to raise and support armies and to make all laws necessary and proper for carrying this power into execution.

As shown above,<sup>92</sup> he asserted that the power to repress the communication of intelligence to the enemy has found a prominent place in the military codes of all war-like nations. He pointed out that this provision in our law was taken from the articles of Great Britain, which "in their turn were but a translation of the Roman Code, which had inspired a discipline that achieved the conquest of the world." He declared that unless military tribunals could promptly and severely punish such civilian offenders, there could be no successful prosecution of hostilities, and continued:

"The 57th article of war is by its very terms confined to a period of war; in peace it is necessarily inoperative. The military experience of the world shows that its adoption was both a 'proper and necessary' measure for making effective the war-making power which certainly carries with it the right to render by all means customary among civilized nations the prosecution of hostilities successful."<sup>93</sup>

He also insisted that such offenses, even when committed by civilians, constitutes cases arising in the land and naval forces. In this connection he said:

"In a period of hostilities relieving the enemy with money, victuals or ammunition, or knowingly harboring and protecting him, or holding a correspondence with or giving intelligence to such enemy is a crime which may be held within the meaning of the constitution to 'arise in the land or naval forces,' since it directly connects itself with the operation and safety of those forces, whose overthrow and destruction it seeks. This is especially true when, as in case of the prisoner, the correspondence is held or intelligence given from the midst of our military camps, whose shelter he was enjoying, and with those plans and preparations for movements, he had every opportunity of acquainting himself. This view of the constitutionality of these articles of war (56 and 57) has uniformly prevailed. Benet (311) and O'Brien treat as clear the right to try by military courts certain classes of persons not belonging to the army. The latter author at page 147 remarks with much force on the necessity of such a power as resulting from the nature of the offenses and urgency with which the public safety demands their prompt and immediate punishment."

<sup>92</sup> *Ex parte Milligan*, (1866) 4 Wall. (U.S.) 2, 123, 138, 18 L. Ed. 281.

<sup>93</sup> The reasoning of the minority in *Ex parte Milligan*, (1866) 4 Wall. (U.S.) 2, 139, would lead to the same result: "Congress has the power not only to raise and support 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 the 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."

These contentions, so powerfully and persuasively put, are not, however, unanswerable. The historical argument, it is submitted, ignores several controlling considerations. True it is that the legislation in question is older than the constitution. But it is likewise true that most of the acts which it denounces were then regarded both legislatively<sup>94</sup> and judicially<sup>95</sup> as constituting treason. General Holt himself,<sup>96</sup> like other authorities upon military law, so characterizes them.<sup>97</sup> Before the adoption of the constitution, a military tribunal might well be invested with authority to try accusations of treason. But since its adoption, it could not be seriously argued that one accused of treason against the United States may be lawfully tried other than in a court organized under article III thereof,<sup>98</sup> except in cases arising in the land and naval forces. Similarly, constitutional guaranties aside, presentment or indictment and trial by jury might in many cases be properly dispensed with by appropriate legislation. The fact that Congress reenacted the article without substantial change after the adoption of the constitution does not necessarily imply that it intended it to be interpreted exactly as before, without respect to constitutional restrictions. The legislation may still have a wide field of operation within the limits defined by the constitution. Moreover, it was not expressly reenacted until more than fifteen years after the constitution became effective; and it does not appear that the constitutionality of its unrestricted application to civilians was ever discussed or even considered by Congress.

That the war power of Congress furnishes authority for subjecting all persons to trial by military tribunals for all acts which obstruct the successful prosecution of hostilities, regardless of the status of the offender, is based upon the theory that those provisions conferring upon Congress the power to declare and carry on war are in time of war supreme, and that all other provisions in anywise limiting them are pro tanto suspended. This assumes that

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<sup>94</sup> See resolutions of October 8, 1777, and February 27, 1778, 2 Journals of Congress 281; *ibid* 459.

<sup>95</sup> *Republica v. Carlisle*, (1778) 1 Dallas (U.S.) 33, 1 L. Ed. 26.

<sup>96</sup> In the *Smithson* case, he said:

"Proceedings in the ordinary criminal courts, by indictment and jury trial, would have no terror for such traitors."

<sup>97</sup> 1 Winthrop (op. cit.) 898, citing Samuel and O'Brien.

<sup>98</sup> "One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and composed of judges appointed during good behavior." *Ex parte Milligan*, (1866) 4 Wall. (U.S.) 2, 122.

the constitutional guaranties of individual rights contemplate only peace-time conditions. The language in which they are framed negatives any such assumption. Certainly the constitutional definition of treason presupposes war conditions. And it would be most unnatural to assume that the fifth amendment, with its express exception of cases arising in the land and the naval forces anticipates perpetual peace. This theory that the constitution is in fact a peace-time document, was expressly repudiated by the majority opinion in the *Milligan* case:<sup>99</sup>

"These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. . . .

" . . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the constitution has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its authority."

The assertion that every offense of this character constitutes a case arising in the land or naval forces "since it directly connects itself with the operation and safety of those forces" almost carries its own refutation. Every act of treason would, by this reasoning, be punishable by court-martial, and the third section of article III of the constitution would have no field of operation.

It is, therefore, believed that the operation of the eighty-first article of war cannot be confined to members of the military establishment, on the one hand, and cannot, on the other, be extended so as to cover all civilians under all conditions. In

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<sup>99</sup> *Id.* 119, 121.

what cases, then, may the article be properly applied to civilians? In those cases expressly authorized by the constitution, namely, cases arising in the land or naval forces. An offense may constitute a case arising in the land forces, even though the offender never had a military status. Military status is not the exclusive test. Certainly, civilian retainers to the camp and civilians accompanying or serving with the army in the field or beyond the territorial jurisdiction of the United States would be triable by court-martial for violations of this article. An offense committed in the field of operations or in the theatre of war would seem, by reasonable construction, to constitute a case arising in the land forces.<sup>100</sup> And it is submitted that the same is true whenever the offense is committed in any place subject to the actual control and jurisdiction of the military forces. Properly construed, therefore, the word "whosoever," as used in the eighty-first article of war should be held to include not only members of the military establishment and those civilians properly subject to military law under the second article of war, but also those civilians whose offenses occur in the theatre of war, in the theatre of operations or in any place over which the military forces have actual control and jurisdiction.

*Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere.*

It was not until August, 1776, that the Continental Congress enacted any legislation dealing with spies.<sup>101</sup> On June 24, 1776,

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<sup>100</sup> 1 Winthrop (op. cit.) 126; Manual for Courts Martial, paragraph 431. It is believed that in most cases where the military authorities have exercised this jurisdiction over civilians, the offense occurred in a place subject to military control, as in the Smithson case, or in the theatre of operations. Col. Winthrop says the article applies to acts "committed in the theatre of war or within the scope of martial law." As stated before, this paper does not deal with military jurisdiction over civilians by virtue of so-called martial law. For an able discussion of the effect of the constitutional guaranties upon the power of Congress to subject civilians to trial by military courts in time of war in territory not otherwise under military control, in which the view of the majority in the Milligan case is disapproved, see Henry J. Fletcher, *The Civilian and the War Power*, 2 Minn. L. Rev. 110. Paragraph 431 of the Manual of Courts-Martial seems to restrict the application of the article to offenses committed in the theatre of operations.

<sup>101</sup> Neither the British Articles of War of 1765, nor the Massachusetts Articles of 1775, nor the American Articles of 1775, contained any provision as to spies. The common law of war was doubtless adequate to take care of the usual cases. Even after the passage of legislation expressly

it had, after considering a report of the Committee on Spies, adopted a resolution, recommending that the legislatures of the several colonies pass laws for the punishment of acts denounced as treasonable, committed by persons declared to owe allegiance, as follows:

*“Resolved*, That all persons abiding within any of the United Colonies and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colonies; and that all persons passing through, visiting, or making a temporary stay in any of the said colonies being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same, allegiance thereto;

“That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the King of Great Britain, or other enemies of the said colonies, or any of them, within the same, giving to him or them, aid or comfort, are guilty of treason against such colonies.”<sup>102</sup>

On August 21, it passed the following resolution and ordered it printed “at the end of the rules and articles of war”:

“RESOLVED, That all persons, not members of, nor owing allegiance to, any of the United States of America, as described in a resolution of Congress of the 24th of June last, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or of any of them, shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct.”<sup>103</sup>

This was the only enactment directly touching the subject during the Revolutionary period.<sup>104</sup> It was probably kept alive, by the various acts which continued in force the rules and articles affecting the army,<sup>105</sup> until the passage of the Act of April 10, 1806.<sup>106</sup> Section 1 of that Act contained a code of one hundred and one articles of war; and section 2 replaced the resolution of August 21, 1776, by providing:

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authorizing trial of spies by court-martial, the legislation was in some instances disregarded and the common law of war applied, as, for example, in the case of Major André. General Henry W. Halleck, *Military Espionage*. 5 Am. Journal of International Law 590, 599. General Davis' statement that a court-martial had no jurisdiction to try André disregards the resolution of August 21, 1776. *Id.* 597.

<sup>102</sup> 1 Journals of Congress 385.

<sup>103</sup> *Id.* 450.

<sup>104</sup> The resolution of February 27, 1778, (2 Journals of Congress 459) though condemning the offender as a traitor, assassin and spy, had nothing to do with the military offense of spying.

<sup>105</sup> See notes 83, 84, 85 *supra*.

<sup>106</sup> 2 Stat. 359.

“Section 2. *And be it further enacted*, That in time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court martial.”

And so the law remained until 1862.

Under it, however, the military courts had no jurisdiction over citizens or persons owing allegiance to the United States.<sup>107</sup> This made the provision entirely inadequate to meet the conditions created by the Civil War, wherein practically the entire civilian population of the seceding states and almost all the personnel of their armed forces were citizens. Accordingly, in January, 1862, it was proposed to amend it so as to read:

“That in time of war *or rebellion against the supreme authority of the United States*, all persons who shall be found lurking *or acting* as spies in or about the fortifications, encampments, post, *quarters, or headquarters* of the armies of the United States, or any of them, shall suffer death by sentence of a general court-martial.”

The Chairman of the Senate Committee on Military Affairs explained to the Senate that the change was necessary to make the law applicable to existing conditions:

“We recognize these persons as citizens of the United States, and hence we have no power to punish a South Carolinian for lurking around our camps as a spy, while we have a right to punish an Englishman. This bill applies to all persons hostile to the Government; if we are going to carry on the war, we need the change.”

Senator Harris moved an amendment to the amendment to make it clear that “lurking” meant “lurking as a spy.” When the bill had been reframed to meet this suggestion, Senator Collamer argued that it violated the constitutional right of trial by jury, but said that it would be unobjectionable if confined in its operation to those parts of the country declared by the president to be in a state of insurrection. Senator Hale answered the constitutional objection by saying that the fifth amendment excepted cases arising in the land and naval forces, and not persons employed therein. An amendment embodying Senator Collamer’s sugges-

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<sup>107</sup> *Elijah Clarke's Case, Maltby on Courts-Martial*, 35 (1813); *Smith v. Shaw*, (1814) 12 *Johns (N.Y.)* 257. Col. Winthrop seems to imply that even soldiers of the enemy, if citizens, were not punishable under this provision. 1 *Winthrop (op. cit.)* 1100. If this is true, they were still punishable under the common law of war.



tion was, however, adopted; and the bill as amended passed both Senate and House and became a law on February 13, 1862.<sup>108</sup>

A year later, when the Conscription Bill, which had already passed the Senate, was before the House, Mr. Olin of New York moved to amend it by adding a new section, as follows:

"Section 38. And be it further enacted, That all persons who in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the Armies of the United States, or elsewhere, shall be triable by a general court-martial or military commission and shall, upon conviction suffer death."

The amendment was adopted without debate, on February 25, 1863, and the bill passed as amended.<sup>109</sup> When the amended bill was before the Senate three days later, Senator Bayard moved to strike from section 38 the words, "or elsewhere," on the grounds that they made the section obscure and unconstitutional. He argued that the whole section was unnecessary because spies of the enemy may be punished with death by military tribunals under the laws of war; and that this section as framed might be used to try citizens by courts-martial for treason "which by the Constitution of the United States, you are bound to try by jury, and by a jury alone."<sup>110</sup> His motion was rejected. Thereafter, Senator Bayard announced his intention to vote against the amendment. Senator Davis declared that he would vote for it because he thought that the section in question merely stated the existing law of war. He believed the term "elsewhere" to be mischievous, but to be of "no legal effect whatever in the law." The amendment of the House was concurred in by a vote of 35 to 6; and the amended bill became a law on March 3, 1863.<sup>111</sup> This section 38, of course, superseded the corresponding provision in the Act of February 13, 1862. It was incorporated without change in section 1343 of the Revised Statutes, and remained in force until March 1, 1917, when section three of the Act of August 29, 1916, went into effect. This Act, for the first time,

<sup>108</sup> 12 Stat. 339, 340. The debate in the Senate is found in 57 Congressional Globe part 1, pp. 387-388, 411, 445. There was no debate in the House on this subject, though there was considerable discussion of other features of the bill. 57 Congressional Globe, part 1, pp. 549, 555, 557, 622, 719, 723.

<sup>109</sup> 55 Congressional Globe, pt. 2, pp. 1291-1293.

<sup>110</sup> Senator Bayard's argument was earnest and vigorous, but lacking in clearness upon the constitutional question.

<sup>111</sup> 12 Stat. 731, 737. The debate in the Senate is found in 55 Congressional Globe, part 2, 1560-1561.

makes the provision against spies an article of war. The present eighty-second article of war is substantially the former section 1343, Revised Statutes, except that it seems to make trial of spies by court-martial mandatory instead of permissive, by substituting "shall be tried" for "shall be triable."<sup>112</sup>

From the foregoing it is perfectly obvious that Congress intended from the first to subject civilians as well as soldiers to the jurisdiction of military tribunals for trial of the offense of spying. The distinction taken in the earlier legislation is between those owing allegiance and those not owing allegiance, and not between soldiers and civilians. And the military authorities are clear to the effect that a civilian may be tried for spying by court-martial. The recorded instances of trials of spies by military courts during the Revolution and the War of 1812 are few, but they include cases of civilians as well as of military men.<sup>113</sup> And

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<sup>112</sup> It is very doubtful whether this change was advisedly made. In the Comparative Print showing S 3191, Senate Committee Print, 64th Congress, 1st Session, prepared in the office of the Judge Advocate General for the purpose of showing the changes in then existing law which would be effected by the new article, it is said on page 48:

"The proposed article is an almost literal incorporation of this section of the Revised Statutes, the only change being in the substitution of the phrase 'in time of war, or of rebellion against the supreme authority of the United States' by the phrase 'in time of war' which latter phrase covers every state of hostility to which the article is applicable."

And General Crowder, in testifying before the House Committee on Military Affairs on May 25, 1912, said:

"That Article 82 is section 1343 of the Revised Statutes incorporated without any change whatever." See Senate Report 229—63rd Congress, 2nd Session, to accompany S 1032, Appendix pp. 93-94.

In this connection attention should be called to the Espionage Act of June 15, 1917 (40 Stat. 217), which denounces most of the offenses covered by the 81st and 82nd articles of war. Section 7 particularly saves the jurisdiction of general courts-martial and military commissions. The Espionage Act clearly contemplates a jury trial. It seems hardly possible that the jurisdiction of a court-martial would be held exclusive where the acts of accused constitute a violation both of the Espionage Act and of the 82d article of war.

<sup>113</sup> The cases of Major André, Lieutenant Palmer, and Thomas O. Shanks are cited by Col. Winthrop. 1 Winthrop (op. cit.) 1104-1106. The following from Principles and Acts of the Revolution, by Hezekiah Niles, page 140, is an interesting record of the trial of two civilians for spying. Incidentally, it shows General Sullivan's disregard of the principle forbidding double jeopardy.

#### "COURT MARTIAL

"Held at Providence, Rhode Island,

July 24, 1778.

"From the *Providence* (R. I.) *Patriot*.—A friend has handed us the following extract from the orderly book of general Sullivan in command here during the revolution, as being connected with a case somewhat analogous to one which occurred in the Seminole war. We have omitted names for obvious reasons.

there can be no doubt that civilians were thus tried during the Civil War.<sup>114</sup>

The really difficult question is, how far may the article be constitutionally applied to civilians. The contention that its unrestricted application is sanctioned under the war-making power of Congress is based upon exactly the same grounds and is to be met in precisely the same way as in the case of the eighty-first article. The appeal to history as compelling an interpretation of the constitution authorizing "military tribunals to exercise such jurisdiction and pursue such procedure as at the framing of the constitution were characteristic of military law"<sup>115</sup> is ineffective to justify the unlimited operation of the provision for two reasons: First, although the common law of war permitted military tribunals to exercise jurisdiction over civilians apprehended as spies, our legislation from June 24, 1776, to February, 1862, regarded spying by persons owing allegiance as triable by the civil courts and not by our military tribunals. Second, during the same period it considered such offense as constituting treason; and when the framers of the constitution provided for the trial of accusations of treason by a court organized under article III thereof, they manifested the intention of restricting the juris-

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'Headquarters, Providence,  
July 24, 1778.

'The sentence of the court martial whereof Colonel E—— was president, against M. A. and D. C. the general totally disapproves as illegal and absurd. The clearest evidence having appeared to the court, that the said A. was employed by the enemy, repeatedly, to come on the main as a spy, and that he enticed men to go on to Rhode Island, to enlist in the enemy's service, and his confessions from day to day being so different as to prove him not only a spy, but to be a person in whom the least confidence cannot be placed; the court having found him guilty of all this, nothing could be more absurd than to sentence him to be whipped one-hundred lashes, and afterwards to be taken into a service which he has long been endeavoring in the most malicious and secret manner to injure! The man who is found guilty of acting as a spy, can have but one judgment by all the laws of war, which is to suffer death; and the sentence of a man to be whipped when found guilty of this crime, is as absurd as for the common law courts to order a man to be set in stocks for wilful murder. The same absurdity appearing in the judgment against D. C. for the same reasons, (the general) disapproves them both, dissolves the court, and orders another court to sit for the trial of those persons, to-morrow morning, at 9 o'clock. The adjutant general to lodge a crime against A. for acting as a spy, and for enticing men to enlist into the enemy's service, and against C. for acting as a spy.'

"At the subsequent court, A. was found guilty as before, and sentenced to be hung, which sentence the general approved and executed."

<sup>114</sup> Dig. Ops. J. A. G. 1912 1057 I C 3d; 1 Winthrop (op. cit.) 1100-1101.

<sup>115</sup> See following note.

diction of military courts over this offense when committed by persons owing allegiance.

But, it has been very persuasively urged, the spy is not proceeded against as for a violation of any law, and the constitutional provisions regarding crimes and offenses are not applicable. The spy is destroyed simply as a menace to the army. This argument has been most effectively put by Colonel Eugene Wambaugh, thus:<sup>116</sup>

"The principles underlying the doctrine regarding spies are, so far as important for the present purpose, only two. One is that spying is not illegal (Heffter, par. 250; Bonfils, par. 1102), and the other is that spying is dangerous to military operations. (Bonfils, par. 1102). Spying certainly is not illegal from the point of view of either civilian law or military law, unless, indeed, there be a statute forbidding it. At common law spying cannot be punished in either a state or a federal court. Even in a court-martial, spying is not, in the strict sense, punishable. This is proven by the fact that if the spy escapes from within the military lines and is later captured, he cannot be punished for his past spying (Hague Regulations, Art. 31). The truth, then, is that spying, unless made a statutory crime, is not a crime at all, and that though through a military tribunal a spy can be sentenced to death, the sentence is really not punitive but is simply part of a system meant to protect the troops against danger. (Bonfils, par. 1102). Just as a sharpshooter outside the lines is to be shot, though certainly he is no criminal, so the spy within the lines is to be shot as merely a matter of protection; and the intervention of the court-martial in the latter case is requisite merely because there must be some artistic method of determining that the person in question really comes within the dangerous class. Neither the sharpshooter nor the spy is a criminal. Each of them is killed. The spy is treated in a leisurely way because there is no great necessity for haste and because there is great necessity to ascertain the facts (Bonfils, par. 1104; Hague Regulations Art. 30). The key to the whole matter of spies, let it be repeated, is that the spy is a danger—a danger to the forces.

"As it has been necessary to say that, independently of statute, spying is not a crime, it seems worth while to guard against possible misunderstanding. If a spy is a citizen, he probably is both

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<sup>116</sup> In a memorandum opinion re the Waberski-Witcke case. Colonel Wambaugh, who in civil life is Langdell Professor of Law at Harvard, was the chief of the Division of Constitutional and International Law in the office of the Judge Advocate General from October, 1917, to July, 1919. The quotation indicated by note 115 is from the same opinion. The opinion referred to in note 118 was drafted by Colonel Wambaugh. As he is a recognized authority on questions of constitutional and international law, these opinions are entitled to great weight; and it is with great deference that the remarks in the text with reference to them are submitted.

a spy and a traitor (Heffter, par. 250); and treason is a crime. Also, spying, whether treasonable or not, is at the present time a federal crime under the Espionage Act of June 15, 1917. Thus it happens that a spy may actually be a criminal; but, whether the spy be a criminal or not, his spying is from the military point of view an act which, though brave, and possibly in a sense deserving high honor, is so dangerous to the forces as to carry with it the penalty of death. This is not the only place in the law where a lawful act carries with it a risk which one is tempted to miscall a punishment. The carrying of contraband of war is not a crime, and the attempt to break a blockade is not a crime, but in each of these instances a risk is run; and the case of a spy belongs to the same class of acts which though lawful carry with them a danger to a belligerent country and conversely a danger to the person performing the acts. It will be found valuable from time to time to recall that the jurisdiction of the court-martial over the spy does not depend at all upon the fact—if in the particular instance it be a fact—that the spy is a criminal.”

This was written and must be construed, with reference to the facts in the Waberski case—wherein it was admitted that the accused owed no allegiance to the United States, even if he were not an alien enemy. So construed, and buttressed, as it was, by the historical argument, it is almost, if not quite, unanswerable. If attempted to be applied, however, to a case where the accused owes allegiance, its reasoning is not convincing, nor can it be fortified by the argument from history. The position of the spy of the enemy, so far as wrongdoing is concerned, is analogous to that of the sharpshooter. The latter is shot down without the lines; the former by the common law of war, may be summarily put to death if captured within the lines. Neither one is a criminal. But a person owing allegiance, who is guilty of spying, is not like the sharpshooter. He commits the crime of treason. To say that this may be overlooked and his act considered merely as a menace to military success, is to disregard distinctions established in the legislative history of the subject and to confer jurisdiction upon military tribunals by the subterfuge of changed phraseology.

If the civilian owing allegiance is to be subjected to trial by court-martial for spying, it must be because his case arises in the land or naval forces. Here, as under the eighty-first article, the test as to whether the case so arises is not exclusively the status of the offender. The place of the offense is equally important. And whenever that place is in the theatre of operations or any other area subject to the actual control and dominion of the military

forces, the case should be regarded as arising in the land forces. And to such a case the eighty-second article of war may constitutionally be applied even as against an accused owing allegiance to the United States. Since, then, the article makes no distinction as to persons and since it cannot be constitutionally applied without limitations to persons owing allegiance to this country, it is submitted that the word "elsewhere," as used therein, must be interpreted as meaning "in the zone of operations or any other place under actual control or dominion of the military forces."

Two theories have been advanced, by the application of either or both of which all cases of spying would, under this construction of the article, be triable by court-martial. The first narrows the definition of spying so as to make it cover only the case of a person who, "acting clandestinely or on false pretenses" "obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party." Whatever offense occurs outside the zone of operations is, by this definition, not spying, and therefore is without the scope of the eighty-second article. The other expands the signification of the term, zone of operations, so as to make it include the entire area of a belligerent country. It is impossible to confine the zone of operations to the battle front or the area of combat, for certainly the service of supply is quite as necessary and important a part of military operations as is the actual fighting force. And under modern conditions when a nation is at war, the service of supply includes all the sources of production not only of strictly war-like materials, such as arms and ammunition, but also of food, clothing and other necessities for waging modern warfare. It, therefore, covers most of the belligerent country. Furthermore, with modern means of transportation by water, land, and air and modern means of communication with and without wires, where the whole nation, except the members of its armies, are thus engaged in supplying and maintaining those armies, information with reference to these activities is of almost, if not quite, as much military value to the enemy as is intelligence concerning the actual disposition of troops. Under such circumstances, the zone of operations in truth and in fact comprehends the entire country. The former theory is expressed in article 29 of the Hague Convention of 1907, No. IV; but, assuming the formerly accepted definition of zone of operations,

it has not been approved by our military authorities.<sup>117</sup> The second theory has been adopted and announced in an opinion of the judge advocate general.<sup>118</sup> It has not received the sanction of the attorney general, nor has it ever been tested in the courts. It is doubtless contrary to the dicta of the majority justices in the Milligan case, for certainly the state of Indiana, under the conditions disclosed by the record in that case, was quite as much within the zone of operations at the time of Milligan's nefarious acts, as was, for example, the state of Minnesota or the state of Montana, during the recently ended war. The time may come, and may not be far distant, when this theory and none other will fit the facts, and necessity will compel its adoption. But it is believed that the term, reasonably construed in the light of present day conditions, should be confined to that area which comprehends the theatre of actual hostilities, the lines of communication, and the reserves and service of supply under actual military control, and that it cannot properly be enlarged to cover the farms, factories and workshops under exclusively civilian control, even though engaged in the production of supplies to be used ultimately by the army. With the term, zone of operations, thus understood, the eighty-second article of war may properly and constitutionally be applied not only to those civilians who are properly subject to military law under the second article, but also to those whose offenses are committed in the zone of operations, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States or in or about any other place which is under the actual control or dominion of the military forces.

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<sup>117</sup> Opinion of J. A. G. May 31, 1918, to the Chief of Military Intelligence Branch, Executive Division, General Staff. See also 1 Winthrop (op. cit.) 1100.

<sup>118</sup> Dig. Ops. J. A. G. April 1918, 14.

\*[During the war, Professor Morgan held the rank of Lieutenant-Colonel, Judge Advocate; he was Chairman of the General Board of Review and Acting Chairman of the Special Clemency Board, having been Chief of General Administration Division, of the War Risk Insurance Division and of the War Laws Division respectively.—Ed.]