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George Melling

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THE WAR POWER AND THE GOVERNMENT OF MILITARY FORCES.

[CONCLUDED]

GEORGE MELLING, LL. M., Office of Judge Advocate General,
U. S. Navy.

SECTION 8. The Congress shall have the Power.

[CLAUSE 14. Regulation of land and naval forces.] To make Rules for the Government and Regulation of the land and naval Forces;

- I. GENERAL POWERS OF CONGRESS AND PRESIDENT.
- II. POWER TO CREATE COURTS-MARTIAL.
- III. FINALITY OF COURT-MARTIAL PROCEEDINGS.
- IV. JURISDICTION OF COURTS-MARTIAL.
- V. JURISDICTION OF CIVIL COURTS.
- VI. APPLICATION OF CONSTITUTION TO THE NAVY.

I. GENERAL POWERS OF CONGRESS AND PRESIDENT.

Land and naval forces.—“Armies, divisions, brigades, regiments, companies, guards, sentinels; fleets, squadrons, separate vessels, boats, crews, are land and naval forces, integrally and independently, no less than when compounded in the general mass, and so is the individual soldier and seaman.” (U. S. *v.* Mackenzie, 30 Fed. Cas. No. 18313.)

Powers of Congress and of the President.—“The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President in war more than in peace intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people whose will is expressed in the fundamental law.” (Ex parte Milligan, 4 Wall., 139.)

“Congress may increase the Army or reduce the Army or abolish it altogether; but so long as we have a military force, Congress can not take away from the President the supreme command. It is true that the Constitution has conferred upon Congress the exclusive power ‘to make rules for the Government and regulation of the land and naval forces;’ but the two powers are distinct; neither can trench

upon the other; the President can not under the guise of military orders evade the legislative regulations by which he in common with the Army must be governed; and Congress can not in the guise of 'rules for the government' of the Army impair the authority of the President as Commander in Chief." (Swaim *v.* U. S., 28 Ct. Cls., 173, 221; *affirmed*, 165 U. S., 553.)

For other cases see note to Article II, section 2, clause 1; and see note to Article II section 2, clause 2, as to powers of Congress and of the President with reference to appointments and promotions in the Army and Navy.

Delegation of power to make regulations.—Congress can only legislate in a general way, and large powers are necessarily intrusted to the different departments. They really exercise in this way by delegation, and necessarily so, for the purpose of carrying on the vast affairs of the Government and its details, authority which in a strict sense pertains to Congress. (21 Op. Atty. Gen., 438, 439.)

While of course Congress can not constitutionally delegate to the President legislative powers, "it may, in conferring powers constitutionally exercisable by him, prescribe or omit prescribing, special rule of their administration or may specially authorize him to make the rules. When Congress neither prescribes them nor expressly authorizes him to make them, he has the authority, inherent in the powers conferred, of making regulations necessarily incidental to their exercise." (McCall's Case, 15 Fed. Rep., 1230.)

It is well settled that executive regulations when directly approved by Congress have the absolute force of law equally with other legislative acts. Regulations not approved by Congress have the force of law only when founded on the President's constitutional powers as Commander in Chief of the Army and Navy or when consistent with and supplementary to the statutes which have been enacted by Congress. (In re Smith, 43 Ct. Cls., 452, 459.)

Congress has approved regulations issued by the Secretary of the Navy with the approval of the President and authorized him to make changes therein in the same manner. (Sec. 1547, Rev. Stats.) The Navy Regulations so issued by the Secretary of the Navy have the force and effect of positive law. (27 Op. Atty. Gen., 257; *Ex parte Reed*, 100 U. S., 13; *Smith v. Whitney*, 116 U. S., 180.)

For full citation of decisions on subject of executive regulations, see note to sections 161 and 1547, Revised Statutes; see also Article II, section 2, clause 1.

Power of President to change established customs.—A custom which “has come down to us from the British Navy and which has been expressed in regulations sanctioned by Congress, has thus become, in effect, a national policy; it is believed that a change therein would involve matters more properly a subject for the exercise of the constitutional powers vested in Congress ‘to provide and maintain a Navy’ and ‘to make rules for the government and regulation of the land and naval forces.’ In other words, the regulation in this case did not prescribe the rule, but was merely declaratory of the preexisting rule based on established custom. Under such circumstances an amendment of the regulation would involve something more than occurs in the ordinary case; that is to say, it would involve not merely the change of a regulation but a radical change in previous custom which Congress has indicated should be continued. That the President’s power to make such changes is not without limitation is supported by the Attorney General’s opinion holding that the President was without authority to make radical changes in regulations prescribing in accordance with custom the duties to be performed by staff officers of the Marine Corps. (30 Op. Atty. Gen., 234.)” (File 3973-107, Feb. 16, 1915.)

II. POWER TO CREATE COURTS-MARTIAL.

- **Trials by jury not required in the Navy.**—Among the powers conferred upon Congress by the eighth section of the first article of the Constitution are the following: “To provide and maintain a Navy;” (“to make rules for the government and regulation of the land and naval forces;” and the fifth amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crimes expressly excepts from its operation “cases arising in the land or naval forces;” and by the second section of the second article of the Constitution it is declared that “the President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the several States when called into the actual service of the United States.”—“These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other.” (Dynes v. Hoover, 20 How., 65; see also U. S. v. Mackenzie, 30 Fed. Cas., No. 18313; Ex parte Henderson, 11 Fed. Cas., No. 6349; Ex parte Dickey, 204 Fed. Rep., 322.)

"Under these powers it has always been supposed that Congress may provide for the trial by court-martial of persons in the land or naval forces, or in the militia in service, for military offenses. This is the usual mode of trial for these offenses which had prevailed in England, the country from which we borrowed most of our laws, for more than a hundred years prior to the adoption of our Constitution, and, in fact, ever since England has had any standing army at all. It is also the mode which prevailed in the colonies at the time the Convention sat, and it has been a part of our code of laws relating to the government of the land and naval forces and of the militia in service ever since we had a Government. This mode of trial of military men for military offenses has become too well fixed in our system to now admit of question." (Ex parte Henderson, 11 Fed. Cas., No. 6349.)

"The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment or presentment before anyone can be held to answer for high crimes, *excepts* '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 framers of the Constitution doubtless meant to limit the right of trial by jury in the sixth amendment to those persons who were subject to indictment or presentment in the fifth. The discipline necessary to the efficiency of the Army and Navy required other and swifter modes of trial than are furnished by the common-law courts; and in pursuance of the power conferred by the Constitution Congress has 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. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government and while thus serving surrenders his right to be tried by the civil courts." (Ex parte Milligan, 4 Wall., 3, 123.)

"It is not denied that the power to make rules for the government of the Army and Navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time." (Ex parte Milligan, 4 Wall., 137, concurring opinion of four justices.)

In the exercise of this power Congress has enacted rules for the regulation of the Army, known as the Articles of War (sec. 1342, Rev. Stats.), and for the Navy, known as the Articles for the Government

of the Navy (sec. 1624, Rev. Stats.). Every officer before he enters on the duties of his office subscribes to these articles and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention of them. (*Carter v. McClaghry*, 183 U. S., 365.)

"The notion suggested by Sir Matthew Hale and repeated by Sir William Blackstone (Com., vol. 1, p. 213) that 'martial [military] law is built on no settled principles but is entirely arbitrary in its decisions and is in truth not law but something indulged rather than allowed by law' is an exploded absurdity. A court-martial is a lawful tribunal, existing by the same authority that any other court exists by, and the law military a branch of the law as valid as any other, and it differs from the general law of the land in authority only in this that it applies to officers and soldiers of the Army, but not to other members of the body politic, and that it is limited to breaches of military duty. * * * There is the less room for the superficial remark of Sir Matthew Hale to be applied in the United States, inasmuch as the Constitution expressly empowers Congress 'to make (special) rules for the government of the land and naval forces' and expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law." (6 Op. Atty. Gen., 413.)

III. FINALITY OF COURT-MARTIAL PROCEEDINGS.

Judgments of courts-martial acting within their jurisdiction not open to review by civil courts.—Courts-martial are lawful tribunals with authority to finally determine any case over which they have jurisdiction, and their proceedings when confirmed as provided are not open to review by the civil tribunals except for the purpose of ascertaining whether the military or naval court had jurisdiction of the person and subject matter and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced. (*Carter v. McClaghry*, 183 U. S., 365; see also *Grafton v. U. S.*, 206 U. S., 333; 348.)

"With the sentences of courts-martial which have been convened regularly and have proceeded legally and by which punishments are directed not forbidden by law or which are according to the laws and customs of the sea, civil courts have nothing to do nor are they in any way alterable by them." (*Dynes v. Hoover*, 20 How., 65.)

"Within the sphere of their jurisdiction the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort, and the only authority of civil courts is to inquire whether the military authorities are proceeding regularly within

their jurisdiction. If they are, they can not be interfered with no matter what errors may be committed in the exercise of their lawful jurisdiction." (In re McVey, 23 Fed. Rep., 878.)

"Undoubtedly errors are committed by courts-martial which a civil tribunal would regard as sufficient ground for a reversal of their judgments if it were sitting as an appellate court. But there is always this radical difference between an appellate court sitting for the correction of errors and a civil court into which the record of a court-martial is collateral—in the former there is not a failure of justice; the appellate court may reverse a judgment or prescribe another or award a new trial, in the latter the court must either give full effect to the sentence or pronounce it wholly void." (Swaim v. U. S., 28 Ct. Cls., 217; *affirmed*, 165 U. S., 553.)

An officer of the Army attacked the sentence of a court-martial on the ground, among other things, that it was void because in violation of the fifth amendment, declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. On behalf of the Government it was argued that the question was one within the power of the court-martial to decide, and must be held to have been waived or be assumed to have been ruled against the accused, in which case the decision would be conclusive on habeas corpus, since if incorrect it would be merely error and would not go to the jurisdiction. It had been held by the Supreme Court that the courts of the District of Columbia had jurisdiction to decide a similar question in cases tried by them, and that their decision would not be reviewed in that particular on habeas corpus. "It is difficult to see why the sentences of courts-martial, courts authorized by law in the enforcement of a system of government for a separate community recognized by the Constitution, are not within this rule. Its applicability would seem to be essential to the maintenance of that discipline which renders the Army efficient in war and morally progressive in peace and which is secured by the military code and the decisions of the military courts." (Carter v. McClaughry, 183 U. S., 365.)

Although error was committed by a naval court-martial in permitting the judge advocate to be present for a short time during a closed session of the court, this was an error of procedure only, and could not be corrected by a civil court in habeas corpus proceedings. "It is clear that the civil courts are in no sense appellate tribunals for the revision of proceedings in courts-martial. It has been decided that in such cases the civil courts should not interfere if it appears that the court-martial had jurisdiction of the person and of the subject

matter which was tried before it and that errors in procedure in military courts can be corrected only by the proper military authorities." (Ex parte Tucker, 212 Fed. Rep., 569.)

"We must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of courts-martial when affirmed by the military tribunal of last resort can not be revised by the civil courts save only when void because of an absolute want of power and not merely voidable because of defective exercise of power possessed." (Carter v. McClaghry, 183 U. S., 365; see also Dynes v. Hoover, 20 How., 65, 82; Keyes v. U. S., 109 U. S., 336; Swaim v. U. S., 165 U. S., 553; Smith v. Whitney, 116 U. S., 167.)

"The court-martial for the trial of Capt. Oberlin M. Carter was convened by orders issued by the President; and he was therefore the reviewing authority and the court of last resort." (Carter v. McClaghry, 183 U. S., 365, 385.)

"Where a court-martial had jurisdiction to try petitioner for an offense against the naval regulations and to impose sentence authorized thereby, a civil court in habeas corpus proceedings could only review the question of jurisdiction and could not pass on alleged errors of law committed by the court-martial or on the severity of the sentence imposed." Ex parte Dickey, 204 Fed. Rep., 322.)

"The case before me shows that the court-martial under which the petitioner was tried was properly constituted; that the charge and specification were in due form and authorized under the regulations for the government of the Navy; that the trial court had jurisdiction of the case and of the subject matter of the charge and acted within the scope of its lawful authority; that it also acted within its authority in imposing sentence; that such sentence was duly approved by the commander in chief of the Atlantic Fleet, by whom the court was convened; that it was also approved by the Secretary of the Navy, the final reviewing authority provided by law to act upon records of courts-martial in cases which do not extend to the loss of life or to the dismissal of a commissioned or warrant officer; that the sentence therefore, can not be revised by the civil courts. * * * If the petitioner was harshly dealt with and a sentence of undue severity was imposed, such sentence seems to have been within the powers of the courts-martial, and it is held by the Supreme Court of the United States that the remedy must be found elsewhere than in courts of law." (Ex parte Dickey, 204 Fed. Rep., 322.)

What is conduct unbecoming an officer and a gentleman, or con-

duct to the prejudice of good order and discipline, is a question exclusively within the jurisdiction of a court-martial to determine, and its decision is not subject to review by a civil court. (*Carter v. McLaughry*, 183 U. S., 400; *Swaim v. U. S.*, 165 U. S., 553; *Smith v. Whitney*, 116 U. S., 178; *Fletcher v. U. S.*, 26 Ct. Cls., 562, 563, reversed on other grounds, 148 U. S., 84.)

Neither the Supreme Court of the District of Columbia nor the Supreme Court of the United States has any appellate jurisdiction over a naval court-martial nor over offenses which such a court has power to try. Neither of these courts is authorized to interfere with the court-martial in the performance of its duty, by way of writ of prohibition or any order of that nature. (*Wales v. Whitney*, 114, U. S., 564, 570.)

Whether the Supreme Court of the District of Columbia has power to issue a writ of prohibition to a court-martial—*quaere*. (*Smith v. Whitney*, 116 U. S., 168.)

“Where an officer of the Army during the War with Spain, after having been acquitted by a court-martial of charges preferred against him, was, by direction of the commanding general, retried by the court-martial on the same charges and was convicted and dismissed from the service, and thereafter peace having been declared, and its term of enlistment having expired, his regiment was mustered out and discharged, it was held that mandamus would not lie on his relation against the Secretary of War to compel the respondent to cause the relator to be mustered out and discharged.” (*Brown v. Root*, 18 App. D. C., 239.) [In this case there was not a second trial, but a revision by the court of its finding, by order of the convening authority.] “The United States Court of Claims would probably have jurisdiction of an action by the relator to establish the validity of his claim to salary accruing after the date of his dismissal.” (Same case.)

“When the offense charged is trivial and the punishment is likewise trivial, a civil court should not be called upon to examine the legality of the sentence of a court-martial; and when called upon is not required by substantial justice to apply a stricter rule than that which prevails in ordinary criminal cases.” (*Weirman v. U. S.*, 36 Ct. Cls., 236, 239.)

IV. JURISDICTION OF COURTS-MARTIAL.

Persons subject to jurisdiction of Federal courts-martial.— Everyone connected with the military and naval service is amenable to the jurisdiction which Congress has created for their government and while thus serving surrenders his right to be tried by the civil

courts. (Ex parte Milligan, 4 Wall., 3, 123.) The jurisdiction of courts-martial includes:

Retired officers.—(Runkle v. U. S., 19 Ct. Cls., 396; 122 U. S., 543; Classon v. U. S., 7 App. (D. C.), 460; sec. 1256, Revised Statutes.)

Chiefs of bureaus in the Navy Department.—(18 Op. Atty. Gen., 176; see also Smith v. U. S., 26 Ct. Cls., 143; Smith v. Whitney, 116 U. S., 181; Wales v. Whitney, 114 U. S., 564.)

Judge Advocate General of the Army.—(Swaim v. U. S., 28 Ct. Cls., 173; 165 U. S., 553.)

Clerks to paymasters in the Navy, although neither officers (in a constitutional sense) nor enlisted men. (Ex parte Reed, 100 U. S., 13; Johnson v. Sayre, 158 U. S., 109; U. S. v. Bogart, 24 Fed. Cas. No. 14616; in re Reed, 20 Fed. Cas., No. 11, 636; In re Bogart, 3 Fed. Cas., No. 1596. But see Ex parte Van Vranken, 47 Fed. Rep., 888, reversed, 163 U. S., 694.) [Paymasters' clerks were not strictly officers of the Navy at the time these decisions were rendered (U. S. v. Mouat, 124 U. S., 303). Their status has since been changed and they are now officers of the Navy. (Naval appropriation act Mar. 3, 1915, 38 Stat., 942; 27 Op. Atty. Gen., 157; see also U. S. v. Hendee, 124 U. S., 309.)]

Army contractors, under a specific statutory provision subjecting them to jurisdiction of courts-martial (Holmes v. Sheridan, 12 Fed. Cas., No. 6644); but only for fraud or willful neglect of duty in connection with their contracts (Ex parte Henderson, 11 Fed. Cas., No. 6349).

Naval Militia men, when employed in the service of the United States in time of war or public danger (File 3973-107, Feb. 16, 1915; Johnson v. Sayre, 158 U. S., 109, 114); or for refusing to obey the order of the President calling them forth into the service of the United States (Martin v. Mott, 12 Wheat., 19; Houston v. Moore, 5 Wheat., 1; naval militia act, Feb. 16, 1914, sec. 5, 38 Stat., 285).

Civilians.—As to trials of civilians by military courts in time of war, see note to Art. I, sec. 8, clause 11, "Military jurisdiction over civilians in time of war."

De facto enlisted man.—Where a man without enlisting in the Navy served the full term of enlistment, he is entitled to an honorable discharge and on reenlistment to the benefits of his de facto enlistment. (File 5839, July 5, 1904; see also 26 Op. Atty. Gen., 319; Circular War Department, Mar. 18, 1901.)

A fraudulent enlistment is still an enlistment and a man so enlisting is de facto in the service and subject to the jurisdiction of a naval court-martial. (File 5624, Feb. 17, 1896; U. S. v. Reaves, 126 Fed. Rep., 127, file 152-04; Ex parte Rock, 171 Fed. Rep., 240; Dillingham v. Booker, 163 Fed. Rep., 696, file 5956-6; In re Scott 144 Fed. Rep., 79, file 2757-4; In re Lessard, 134 Fed. Rep., 305; Solomon v. Davenport, 87 Fed. Rep., 318; In re Morrissey, 137 U. S., 157; compare Ex parte Bakley, 148 Fed. Rep., 56, affirmed, Dillingham v. Bakley, 152 Fed. Rep., 1022, file 5506-5, and Ex parte Lisk, 145 Fed. Rep., 860, file 2757-8.)]

"It seems to me illogical to say that a man can commit a crime and when arrested obtain a discharge on the ground that the original enlistment was not regular or proper." (In re Hamilton and Carroll, Superior Court, Fulton Co. (Ga.) Atlanta Circuit, file 7969 and 7988-04; see also, In re McVey, 23 Fed. Rep., 878.)

Soldier whose enlistment has expired.—"The proceedings against the prisoner having been instituted while he was clearly within the jurisdiction of the military authorities, by the preferring of charges and by his arrest as well as by the forwarding of the charges to headquarters with an application for the appointment of a court-martial for his trial, the question for determination is, Did that jurisdiction cease and expire at the end of the prisoner's term of enlistment so that all proceedings after that date were void? The general rule is that when the jurisdiction of a court attaches in a particular case by the commencement of proceedings and the arrest of the accused, it will continue for all the purposes of trial, judgment, and execution. * * * The general rule is grounded in sound reason. Many of the greatest military offenses are not cognizable by the courts of common law. A soldier might be guilty on the eve of the expiration of his term of enlistment of the grossest insults to his officers or of disobedience of orders or of desertion in the face of an enemy; and if he could not be held for trial after the end of his term he would escape punishment altogether. To hold that in every case the jurisdiction of a court-martial would cease with the expiration of the term of enlistment would be to shield the guilty from punishment, to encourage crime, and to greatly demoralize the military service. The jurisdiction, therefore, in such cases is to be maintained upon the highest considerations of public policy. But such considerations are not alone sufficient to support the jurisdiction of a court which has power to deal with life, liberty, and property. The jurisdiction of a criminal court must rest upon sound principles of law and not merely upon considerations of public interest

and convenience. It frequently happens that the guilty go acquit because there is no lawful mode of trial and punishment provided. The jurisdiction in the cases named and in many others of like character must therefore be upheld upon the ground first mentioned, to-wit, that the court-martial acquired it by the proper commencement of proceedings and could not be divested of it by any subsequent change in the status of the accused; and this reason applies as well to a case where the crime is one known to the common or statute law, as to one in which the offense is purely military." (*Barrett v. Hopkins*, 7 Fed. Rep., 312; see also, *In re Bogart*, 3 Fed. Cas., No. 1596; *In re Bird*, 3 Fed. Cas., No. 1428; file 26251-5447; Dec. 8, 1911; 9 Comp., Dec., 229.)

If before the expiration of his term of service an enlisted man commits a military crime, for the purpose of trying such offense an arrest or restraint would be justifiable. (*U. S. v. Travers*, 28 Fed. Cas., No. 16537, Mr. Justice Story.)

The statute of limitations applicable to trials by court-martial for desertion from the Navy provides, "That said limitation shall not begin until the end of the term for which said person was enlisted in the service." (Art. 62, Articles for the Government of the Navy, sec. 1624, R. S., as amended by act Feb. 25, 1895, 28 Stat., 680.)

The statute authorizing detention of enlisted men in the Navy under certain circumstances beyond the expiration of the term for which they were enlisted provides "that all persons sent home or detained by a commanding officer, according to the provisions of this act, shall be subject in all respects to the laws and regulations for the government of the Navy until their return to an Atlantic or Pacific port and their regular discharge." (Sec. 1422, R. S., as amended by act Mar. 3, 1875, 18 Stat., 484.)

Officer dismissed from Army.—Where an accused is proceeded against as an officer of the Army or Navy and jurisdiction attaches in respect of him as such, this includes not only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a person held by authority of the United States as an offender against its laws, although pursuant to the sentence he had been dismissed before entering upon the period of imprisonment adjudged. The principle that where jurisdiction has attached, it can not be divested by mere subsequent change of status has been applied as justifying the trial and sentence of an enlisted man after expiration of the term of enlistment and the execution of sentence after many years and the severance of

all connection with the Army. (*Carter v. McClaughry*, 183 U. S., 365, citing *Barrett v. Hopkins*, 7 Fed. Rep., 312, *Coleman v. Tennessee*, 97 U. S., 509; 16 Op. Atty. Gen., 349; and *Ex parte Mason*, 105 U. S., 696; see also, *Rose v. Roberts*, 99 Fed. Rep., 948.)

Soldier discharged from the Army.—"Soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice." (Act June 18, 1898, sec. 5, 30 Stat., 484; *In re Craig*, 70 Fed. Rep., 969; *Ex parte Wildman*, 29 Fed. Cas. No. 17653a; *Carter v. McClaughry*, 183 U. S., 365.)

Persons discharged from the Navy.—"And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed." (Art. 14, Articles for the Government of the Navy, sec. 1624, Rev. Stat.; *In re Bogart*, 3 Fed. Cas., No. 1596.)

Persons in constructive custody of civil courts.—Where an officer of the Army is arrested by the civil authorities on the charge of felony and released on bail, he is amenable to the military authorities and may be tried by them for the military offense involved. However, "Although not necessary in the actual case, yet in deference to the spirit of our institutions and to the civil authorities, it may be expedient for the military authorities to suspend the trial of the military relations of the act of killing * * * until the civil relations of that act shall have been tried by the civil magistrate." (6 Op. Atty. Gen., 413.)

The fact that an enlisted man convicted by a civil court was turned over to naval jurisdiction, sentence being suspended, is deemed sufficient authority to proceed with his trial by general court-martial for unauthorized absence. (File 26524-36, Jan. 15, 1912.)

The naval authorities have jurisdiction to try by court-martial and confine an enlisted man paroled by the civil authorities where the governor of the State consents to such man's delivery to the Navy for disciplinary action. (File 26524-44.)

An enlisted man tried by court-martial while on parole by civil authorities can not obtain his release from Army jurisdiction by habeas corpus proceedings. The court officials in whose custody he belonged while on parole are the only ones who could raise the question. (Case

of John W. Pieper, Supreme Court, District of Columbia, 1912; see also *In re Fox*, 51 Fed. Rep., 427.)

See cases noted below under "Persons not subject to jurisdiction of Federal courts-martial."

Persons not subject to jurisdiction of Federal courts-martial.—

Civilians—Congress have no power, and never had, to subject a person not in the military or naval service of the United States to a trial by a court-martial for any crime, especially one that is capital and infamous. This is plain enough upon the face of the Constitution. (*Ex parte Henderson*, 11 Fed. Cas. No. 6349. As to trial of civilians by military courts in time of war, see note to Art. I, sec. 8, clause 11, "*Military jurisdiction over civilians in time of war*," see also *Holmes v. Sheridan*, 12 Fed. Cas. No. 6644, as to trials of Army contractors; *Martin v. Mott*, 12 Wheat., 19, as to trials of militiamen prior to entering service of United States; and *U. S. v. Travers*, 28 Fed. Cas. No. 16537, as to status of civilians visiting military posts.)

Officers discharged from Army.—A court-martial has no jurisdiction over an officer of the Army after he has left the service. (24 Op. Atty. Gen., 570; 5 Op. Atty. Gen., 55; *compare*, cases noted above, "Persons subject to jurisdiction of courts-martial.")

Officers resigned from the Navy.—Unless there be some act of Congress which prolonged his liability to military courts and military offenses after he had been allowed to leave the service, an officer is not subject to trial by naval court-martial on charges preferred after that date. (Gen. Order No. 143, Navy Department, Oct. 28, 1869; see *In re Bogart*, 3 Fed. Cas., No. 1596.

Marine whose enlistment has expired.—Where the enlistment of a marine has expired, and there is no legal authority for retaining him in the service, in point of law he is entirely discharged from the Marine Corps. "If, therefore, he had been restrained of his liberty, or prevented from leaving the navy yard, the detention would have been illegal. He might, by a habeas corpus to this court, have been liberated, and might well have sustained an action for damages. If under such circumstances he had attempted to depart from the navy yard and had been forcibly prevented, he would have had a right to repel force by force, and if necessary to have taken the life of his opponent. And if he had been killed in this attempt to recover his liberty it might under such circumstances have been murder in the perpetrator. But although the prisoner was thus in contemplation of law discharged, yet he might remain if he and the officers of the garrison pleased. He might remain in expectation of his pay or of a pension or of a certi-

ificate of discharge, which should be a voucher for his good behavior and of his having left the garrison without desertion. And if he chose to remain (however reluctantly), and to perform military service partially until he could obtain a regular discharge or receive his pay, although not a soldier, he was undoubtedly liable in a limited degree to the regulations necessary to the peace and subordination of a military garrison. And even if he was unlawfully detained or remained under an erroneous impression that he was bound so to do, this would not authorize him, in collateral things, to violate the laws. For even an unlawful detention will not authorize a man to perpetrate crimes against innocent persons, or on other occasions disconnected with his attempts to recover his liberty. * * * But suppose him to be in the most favored condition and entitled to all the rights of a stranger, still in a military post or garrison every person who is voluntarily there, either as a visitor or guest, is bound to observe peace and order and to conduct himself inoffensively. If he excite a riot, if he attempt to stab or wound or kill anyone within the lines, he is liable to be arrested and detained until he can be placed in the hands of the proper tribunals having jurisdiction to punish him. It is not competent for mere military officers in such cases to apply imprisonment by way of punishment, but it is their duty to apply it if necessary to prevent bloodshed and to restore peace and to keep the offender to answer over to a competent tribunal." U. S. v. Travers, 28 Fed. Cas. No. 16537, Mr. Justice Story.)

Naval Militia men participating in cruises with Regular Navy.— "Until they are called into the service of the United States, Naval Militia men are, and remain, civilians, and consequently are not subject to punishment as such. The captain is charged with the safety, discipline, and well-being of his ship. He is not charged by law with the discipline of the passengers, except in so far as it affects the safety or discipline of his ship, and he is not authorized to administer any punishments on them. He is clothed with full authority in virtue of his position to use necessary force toward Naval Militia men who jeopardize the safety or discipline of the ship or refuse compliance with general or special orders. In effecting this he is authorized to use such ordinary methods as may be necessary. He would be justified in limiting offenders to certain parts of the ship or exercising other forms of restraint, or even, if circumstances demanded, confining the offender to a room, but always with the object of preserving the safety and discipline of the ship and not at all in the sense of inflicting a punishment, as such. * * * The naval commanding officer has supreme

authority over all persons on board his ship, including members of militia organizations; and * * * while he can not try the latter by court-martial or impose punishments upon them under article 24 of the Articles for the Government of the Navy [sec. 1624, Revised Statutes], nevertheless he may, if necessary, place them in confinement or remove them from the vessel when circumstances demand, under lawful regulations to be adopted by the Department. It should, however, be distinctly understood that such action is not authorized as punishment, but only in so far as is necessary to maintain the discipline of the ship and the supreme authority of the commanding officer." (File 3973-107, Feb. 16, 1915.)

Persons in constructive custody of civil courts.—An enlisted man arrested as a deserter while on parole for a civil offense will not be tried by court-martial, because constructively in the custody of the civil authorities, but should be discharged from the Navy as undesirable as of the date of his conviction in the civil courts. (File 4495-02, May 27, 1902; see also File 26283-281; In re Wall, 8 Fed. Rep., 85.)

An enlisted man released by Federal civil authorities on bail should not be placed under restraint upon his return to the Navy, unless it should develop that he is not to be tried in the civil court, in view of the fact that the civil court has adequate power to cause his appearance when required. (File 26283-281, June 27, 1911.)

See cases noted above under "Persons subject to jurisdiction of Federal courts-martial."

Offenses triable by court martial.—It is not possible for an officer to do any act punishable by the known laws of the land, however foreign that act may be to his duties or immediate relation as a soldier, which shall not be cognizable by court-martial. To commit a crime of any sort is, to say the least of it, in general unofficerlike and ungentlemanly conduct. Undoubtedly cases may and do occur of assault or even homicide by an officer of the Army which constitute a technical crime at law, the facts of which when they come to be scrutinized by the eye of a court-martial would be held the reverse of criminal and highly honorable to the party accused. These are exceptional cases. The general proposition remains true, that it is the part of an officer and a gentleman to observe the laws of his country, and for not doing it he would in most cases be censurable and in all his conduct would be lawfully subject to military inquiry. His conviction or acquittal by the State court of the offense against the general law does not discharge him from responsibility for the military offense involved in the same facts. (6 Op. Atty. Gen., 413, cited with approval in

U. S. *v.* Clark, 31 Fed Rep., 710, 712. As to double jeopardy, see note to Amendments, Art. V.)

“Wherever our Army or Navy may go beyond our territorial limits, neither can go beyond the authority of the President or the jurisdiction of Congress.” (Ex parte Milligan, 4 Wall. 141.)

“When the act charged as ‘conduct to the prejudice of good order and military discipline’ is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally answerable to that jurisdiction.” (Ex parte Mason, 105 U. S. 696.)

“Under every system of military law, for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.” (Smith *v.* Whitney, 116 U. S. 168, 183.)

Court-martial can not convene in foreign jurisdiction.—“No naval general court-martial, or other assembly of a judicial character, shall be ordered or permitted to assemble or conduct any part of its proceedings in any place subject to foreign jurisdiction.” (Art. R-763, Navy Regulations, 1913.)

[Where naval court-martial was held in place subject to foreign jurisdiction, the proceedings were disapproved. (Harwood, p. 57; compare file 26504-254, Oct. 26, 1915, cmo. 42, 1915, p. 10.)]

Courts-martial other than naval can not convene on vessel of regular Navy.—Naval Militia officers can not convene State courts-martial on board a vessel of the regular Navy in the service of the United States; as the established policy of this Government, expressed in Navy Regulations which have been approved by Congress and are still in effect, does not permit any other than a naval court-martial to be held on board a naval vessel. (Citing Art. R-3845, Navy Regs. 1913; Art. 987, Navy Regs. 1870; sec. 1547, Revised Statutes.) This policy has its origin in the customs and regulations of the British Navy (citing McArthur on Courts-Martial, 1813, vol. 1, p. 205). (File 3937-107, Feb. 16, 1915.)

V. JURISDICTION OF CIVIL COURTS.

Jurisdiction of civil authorities over persons in military and naval service.—“When any officer or soldier is accused of a capital

crime, or of any offense against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery company or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service." (Art. 59, Articles of War, sec. 1342, Revised Statutes.) [No similar statute relating to the Navy; as to naval orders and practice, see note to Art. IV, sec. 2, clause 2.]

There can be no doubt of the power of Congress to govern the Army and Navy by bringing offenses committed in either under the cognizance of the courts of law. This power is fully executed in respect to the Army in the Rules and Articles of War [quoted above]. But no such expression of intention is introduced in the naval code. Whether, then, the courts of law are to take cognizance of offenses committed in the naval forces depends entirely upon the true intent of Congress in that behalf, as expressed in the Crimes acts and in the naval code. (U. S. v. Mackenzie, 30 Fed. Cas. No. 18313.)

There is no act of Congress authorizing a call by the governor of a State for the surrender of an officer of the Navy charged with having broken the peace of such State, nor any law authorizing an arrest by the executive with a view to the forcible surrender by him for the purposes of trial. However, advised that the accused be ordered by the Navy Department to surrender himself. 1 Op. Atty. Gen., 244; see also note to Art. I, sec. 8, clause 13, and Art. IV, sec. 2, clause 2. And see note to sec. 355, Rev. Stat.)

"Offenders in the land forces in certain cases were to be delivered over to the courts of law for trial and punishment. A similar provision is contained in the English mutiny act (2 McArthur, 229), without which it would seem to be thought that, under the general authority to try all cases not capital, courts-martial would have exclusive cognizance of that class of offenses when committed in the army * * *. But no such direction or authority is incorporated in the naval code, and the design of Congress, therefore, to give the entire jurisdiction over the offenses enumerated to the naval courts-martial would seem indubitable * * *. If Congress means its penal law shall apply to

ships of war, those vessels will be specifically named." (U. S. *v.* Mackenzie, 30 Fed. Cas., No. 18313.) [The Federal criminal code, approved Mar. 4, 1909, in terms extends to crimes committed upon the high seas or any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, on board any vessel "belonging in whole or in part to the United States." 35 Stat., 1142, 1148, secs. 272, 310.]

In the case of Commander Mackenzie "the act of killing an inferior by a superior, which came under inquiry charged as unlawful homicide, occurred on board a ship of war at sea; and the questions pertinent to the present subject were whether the act was cognizable exclusively by a naval court-martial or by that concurrently with the competent ordinary courts of the United States. The fact of the act having occurred on board a ship of war and at sea influenced materially the arguments on the question of jurisdiction. For this reason Ex-Chancellor Kent and Mr. Justice Betts of the Southern District of New York both inclined, the former positively, the latter less so, to the opinion that the jurisdiction of the naval authorities was exclusive, more especially as the act of Congress for the government of the Navy does not contain the same recognition of the civil authorities as that for the government of the Army * * *. At the same time each of those eminent juriconsults maintained confidently the competency and legality of a naval court-martial, at least as having concurrent jurisdiction with the civil courts." (6 Op. Atty. Gen., 413.)

"That a Government which possesses the broad power of war, which 'may provide and maintain a navy,' which 'may make rules for the government and regulation of the land and naval forces,' has power to punish an offense committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned in this court." The inquiry respects not the extent of the power of Congress, but the extent to which that power has been exercised. (U. S. *v.* Bevens, 3 Wheat., 336.)

A Federal statute providing for the punishment of murder committed on the high seas or on any river, haven, basin, or bay out of the jurisdiction of any particular State, does not apply to murder committed on board a warship while in waters within the jurisdiction of the State of Massachusetts. (U. S. *v.* Bevens, 3 Wheat., 336.)

A Federal statute providing "that if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or per-

sons, on being thereof convicted, shall suffer death," did not include murder committed on a United States warship, as the word "place," the same as the words with which it was associated, was intended to apply to objects which are "in their nature fixed and territorial." (U. S. v. Bevens, 3 Wheat., 336.)

"This construction [that the word "place" does not include a warship] is strengthened by the fact that at the time of passing this law the United States did not possess a single ship of war. It may, therefore, be reasonably supposed that a provision for the punishment of crimes in the Navy might be postponed until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark that afterwards, when a navy was created and Congress did proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States of any crime committed in a ship of war, wherever it may be stationed." (U. S. v. Bevens, 3 Wheat., 336.)

The word "place" within the Revised Statutes punishing homicide embraces a United States battleship moored at Cob Dock, in the waters of Wallabout Bay, in the East River, these waters being included in the cession of jurisdiction by the State of New York to the Federal Government. "In the Bevens case the defendant was indicted and convicted for murder on board the United States ship of war *Independence* while lying in the waters of Boston Harbor and while such vessel was in commission and in the actual service of the United States. In this case the Supreme Court held that it was not the offense committed but the place in which it was committed that determined the question of jurisdiction. It appeared that the United States had no jurisdiction over the waters of Boston Bay, in which the gunboat *Independence* was lying when the murder was committed, but that such waters were within the sole and exclusive jurisdiction of the State of Massachusetts. The very opposite is true in the case at bar * * *. While the facts of these two cases are very similar, yet they are entirely different and the direct opposite of each other in the matter of jurisdiction * * *. We must, therefore, hold that * * * the battleship *Indiana* was a 'place' within the meaning of the United States statutes." (U. S. v. Carter, 84 Fed. Rep., 622.)

The courts of the Philippine Islands have no jurisdiction over offenses committed on board a naval vessel at Cavite, notwithstanding the provision in act No. 1457 of the Philippine Commission that "the jurisdiction of the city of Manila for police purposes only shall extend to 3 miles from the shore into Manila Bay," etc. The laws for the

government of the Navy, the Navy Regulations, and lawful orders of superior naval authority, embody the only police regulations in force on board naval vessels. (File 26524-19, Oct. 26, 1910.)

Article 6 of the Articles for the Government of the Navy (section 1624, Revised Statutes) does not vest exclusive jurisdiction in a naval court-martial of the crime of murder. The general rule is that jurisdiction of civil courts is concurrent as to offenses triable before courts-martial. Accordingly, held that homicide committed on a naval hospital ship at Olongapo, Philippine Islands, by a civilian may be tried by a Federal court in the first judicial district of the United States to which the offender is brought. Courts of the Philippine Islands did not have jurisdiction in this case, as the offense, if any, was against the United States, and the Philippine courts only have jurisdiction of offenses against Philippine Government. (28 Op. Atty. Gen., 24.)

Public ships of war of the United States "are exempt even from a foreign jurisdiction; and when lying in the domains of another nation are not subject to its courts, but all civil and criminal causes arising on board of them are exclusively cognizable in the courts of the United States. This is a principle of public law which has its foundation in the equality and independence of sovereign States, and in the fatal inconveniences and confusion which any other rule would introduce. * * * Every argument by which this exemption is sustained as to foreign States applies with equal force as between the United States and every particular State of the Union; and it is fortified by other arguments drawn from the peculiar nature and provisions of our own municipal Constitution. (Argument of Attorney General, *U. S. v. Bevans*, 3 Wheat., 373, 374.)

"The principle that every power have exclusive jurisdiction over offenses committed on board their own public ships wherever they may be is also demonstrated in a speech of the present Chief Justice of the United States [Marshall], delivered in the House of Representatives in the celebrated case of *Nash alias Robins*, which argument, though made in another form and for another object, applies with irresistible force to every claim of jurisdiction over a public ship that may be set up by any sovereign power other than that to which such ship belongs (*Bee* 266 n). All jurisdiction is founded on consent; either the consent of all the citizens implied in the social compact itself, or the express consent of the party or his sovereign. But in this case, so far from there being any consent implied or express, that the State courts should take cognizance of offenses committed on board of ships of

war belonging to the United States, those ships enter the ports of the different States under the permission of the State governments, which is as much a waiver of jurisdiction as it would be in the case of a foreign ship entering by the same permission. A foreign ship would be exempt from the local jurisdiction; and the sovereignty of the United States on board their own ships of war can not be less perfect while they remain in any of the ports of the Confederacy than if they were in a port wholly foreign. But we have seen that when they are in a foreign port they are exempt from the jurisdiction of the country. With still more reason must they be exempt from the jurisdiction of the local tribunals when they are in a port of the Union." (Arguments for United States, *U. S. v. Bevens*, 3 Wheat., 352-355.) [In this case the Supreme Court held that it was "unnecessary to decide the question respecting the jurisdiction of the State court." The Attorney General argued that "if the offense in question be not cognizable by the circuit court [of the United States] it is entirely dispunishable," [the State courts being without jurisdiction, and the naval courts-martial's jurisdiction not including this crime, under the Articles for the Government of the Navy]. The Supreme Court, however, merely decided that the Federal circuit court did not have jurisdiction.]

Whether, if murder should be committed on board a ship of war lying within the body of any county, the courts of the State might not interpose, may well be doubted. (6 Op. Atty. Gen., 413; compare, *Ex parte Tatem*, 23 Fed. Cas. No. 13759; 16 Op. Atty. Gen., 647.)

A naval court-martial has jurisdiction to try an enlisted man of the Navy for fatally wounding another enlisted man on board a ship of war in the Thames River, opposite the city of New London, Conn. The civil authorities of Connecticut decided that the case "should be dealt with by the authorities of the United States." The Attorney General stated, among other things, that the State authorities "might probably" have tried the man for manslaughter. (16 Op. Atty. Gen., 578.)

Murder committed by an enlisted man on board a naval vessel at the navy yard, Philadelphia, may be dealt with by naval court-martial as manslaughter. (G. C. M. Rec. No. 16098; file 6674-10, Mar. 8, 1910.)

"The charge of Mr. Justice Betts [in *U. S. v. Mackenzie*, 30 Fed. Cas. No. 18313] is legal authority to the point that a court-martial having lawfully entered upon cognizance of a case, the civil magistrate can not lawfully interrupt or disturb its jurisdiction and right of complete and final action." (6 Op. Atty. Gen., 413.)

"In any case in which the delivery of a person in the Navy or Marine Corps for trial is desired by the civil authorities, Federal or State, and such person is a naval prisoner (which includes any person serving sentence of court-martial or in custody awaiting trial by court-martial or disposition of charges against him), he will not in general be delivered to the Federal or State authorities until he has served the sentence of the naval court-martial, or his case has otherwise been finally disposed of by the naval authorities." (General Order No. 121, Navy Department, Sept. 17, 1914.)

As to jurisdiction of civil authorities over persons in military service, see further, note to Article I, section 8, clause 11, "Jurisdiction over persons in military service during war," and note to Article I, section 8, clause 13, "Exemption of Federal officers and subordinates from arrest by State authorities."

VI. APPLICATION OF CONSTITUTION TO THE NAVY.

Whether constitutional limitations restrict Congress in legislating for Navy.—The requirement as to presentment or indictment by grand jury as a prerequisite to trial for criminal offenses, does not extend to "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." (Art. V of the amendments, *Runkle v. U. S.*, 19 Ct. Cls., 410, 411.) [As to trials by consular courts, see *In re Ross*, 140 U. S., 453.]

The right of trial by jury, guaranteed to persons accused of crime (Art. III, sec. 2, clause 3, and Art. VI, amendments) does not apply to persons in the Army and Navy, as this right was evidently intended to be limited to persons who were subject to presentment or indictment by grand jury, and also trial by court-martial was the mode which prevailed in England and in the colonies, at the time the Constitution was framed, for the punishment of persons in the military and naval service. (See note above, under this clause, "Trials by jury not required in the Navy.")

"The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former * * *. It is not denied that the power to make rules for the government of the Army and Navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time. Nor in our judgment does the fifth or any other amendment abridge that power * * *."

We think, therefore, that the power of Congress in the government of the land and naval forces and of the militia is not at all affected by the fifth or any other amendment" (Concurring opinion of Chief Justice Chase and three other justices in *Ex parte Milligan*, 4 Wall., 137; see also *In re Bogart*, 3 Fed. Cas., No. 1596.)

"Aside from constitutional provisions, it is a plain dictate of common justice that no person shall be deprived of life, liberty, or property without due process of law." Accordingly, the proceedings of a court-martial are illegal where one member was detached and another substituted by the Chief of the Bureau of Navigation without authority from the Secretary of the Navy who convened the court. (22 Op. Atty. Gen., 137.)

"If it be desirable or necessary that the prisoner in a civil court be present at every proceeding after indictment, it seems to be still more so that a prisoner before a court-martial should be present, for he ordinarily is not represented by counsel learned in the law and watchful of his interests, but (as in this case) by some naval officer acting from a humane motive." (*Weirman v. U. S.*, 36 Ct. Cls., 236. See further note to Amendments, Art. V, "Proceedings in absence of accused.")

"The Constitution does apply, and is universally admitted to apply, with the same force and effect to military courts as to other tribunals." (9 Op. Atty. Gen., 230.) [It was held by the same Attorney General that an article of war "authorized 'depositions taken in accordance with it to be read in cases not capital;' although the Constitution provides that the accused in criminal prosecutions shall have the right to be confronted with the witnesses against him." File 26260-1392, June 29, 1911, p. 30, citing 9 Op. Atty. Gen., 311, 312.)]

"Let us see if the sentence [of an army court-martial] was void because in violation of the fifth amendment. That amendment declares: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' The Government objects in the outset that the fifth amendment is not applicable in proceedings by court-martial. * * * Reserving, however, the determination of these questions, it is nevertheless clear that the system under which the accused was tried, and his status as an officer of the Army, must be borne in mind in deciding whether the amendment, if applicable, was or was not violated by this sentence. * * * The result is that we are of opinion that the sentence can not be invalidated on any of the grounds so far considered." (*Carter v. McClaughry*, 183 U. S., 365.) [It was not decided in this case whether the prohibition against

double jeopardy, in the fifth amendment, applies to Army courts-martial. But see *Grafton v. U. S.*, 206 U. S., 352, noted below.]

Courts-martial are "courts authorized by law in the enforcement of a system of government for a separate community recognized by the Constitution," and "it is difficult to see why" the finality of their sentences should not be determined by the same rule which has been applied to the courts of the District of Columbia. *Carter v. McClaghry*, 183 U. S., 365.)

For decisions as to whether constitutional limitations restrict Congress in legislating for the District of Columbia and for the Territories, see note to Article IV, section 3, clause 2.

The fact that Congress is given power by the Constitution "to make rules for the government and regulation of the land and naval forces" does not enable it to control the President's discretion in respect of those appointments which the same supreme law [Const., Art. II, sec. 2, clause 2] requires him to make. The general power to regulate such forces can not be taken to nullify the specific mandate to the President to appoint to offices where Congress has made no other provision. (30 Op. Atty. Gen., 177; see also note to Art. II, sec. 2, clause 2.)

"Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter." (*Grafton v. U. S.*, 206 U. S., 352.)

A board of officers organized under an act of Congress for the reduction of the Army is "not a court of any kind," and it is unnecessary to consider "how far its irregularities extended," although it is contented by an officer mustered out of the service pursuant to the board's finding that its proceedings "were in many respects irregular, illegal, and in violation of his constitutional rights." *Duryea v. U. S.*, 17 Ct. Cls., 24; see also file 26260-1392, June 29, 1911.)

See *In re Ross* (140 U. S., 453), holding that "By the Constitution of the United States a government is ordained and established 'for the United States of America,' and not for countries outside of their limits; and that Constitution can have no operation in another country"; and accordingly that Congress is empowered to authorize the trial of a capital offense by a consular court in China, etc., without indictment by grand jury, and without a jury on the trial.

[Clause 15. Calling forth of the Militia.] ¹⁶To provide for

calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

Naval Militia.—Congress has provided “that in the event of war, actual or threatened, with any foreign nation involving danger of invasion, or of rebellion against the authority of the Government of the United States, or whenever the President is, in his judgment unable with the regular forces at his command to execute the laws of the United States, it shall be lawful for the President to call forth such number of the Naval Militia of a State, or of the States, or Territories, or of the District of Columbia, as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through the governor of the respective State or Territory, or through the commanding officer of the Naval Militia of the District of Columbia, from which State, Territory, or District such Naval Militia may be called, to such officers of the Naval Militia as he may think proper.” (Sec. 3, act Feb. 16, 1914; 38 Stat., 284.)

“The authority to decide whether the exigencies contemplated in the Constitution of the United States, and the act of Congress * * * in which the President has authority to call forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions, have arisen, is exclusively vested in the President, and his decision is exclusive upon all other persons.” (*Martin v. Mott*, 12 Wheat., 19; *Luther v. Borden*, 7 How., 1.)

“It is obvious that there are two ways by which the militia may be called into service; the one is under State authority, the other under authority of the United States. * * * But the possession of this power, or even the passing of laws in the service of it, does not preclude the General Government from leaning upon the State authority, if they think proper, for the purpose of calling the militia into service.” (*Houston v. Moore*, 5 Wheat., 1, 36.)

“The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasions is to provide the requisite force for action, before the invader himself has reached the soil.” (*Martin v. Mott*, 12 Wheat., 19.)

“The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute

the laws of the Union, and hence the President has no authority to call forth the Organized Militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation." (29 Op. Atty. Gen., 322.)

"As 'insurrection' is necessarily internal and domestic, within the territorial limits of the Nation, this portion of the sentence can afford no warrant for sending the militia to suppress it elsewhere. And even if an insurrection of our own citizens were set on foot and threateningly maintained in a foreign jurisdiction and upon our border, to send an armed force there to suppress it would be an act of war which the President can not rightfully do." (29 Op. Atty. Gen., 322.)

"The term 'to repel invasion' may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term 'to repel invasion.' Then, too, if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling an invasion. But this is quite different from and affords no warrant for sending the militia into a foreign country in time of peace and when no invasion is made or threatened." (29 Op. Atty. Gen., 322.)

"The only remaining occasion for calling out the militia is 'to execute the laws of the Union.' But this certainly means to execute such laws where, and only where, they are in force and can be executed or enforced. * * * Outside of our own limits 'the laws of the Union' are not executed by armed force, either regular or militia. * * * What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsorily executed, much as a sheriff may call upon a posse comitatus to peacefully disperse a riot or execute the laws. Under our Constitution, as it has been uniformly construed from the first, the military is subordinate and subservient to the civil power, and it can be called upon to execute the laws of the Union

only in aid of the civil power and where the civil power has jurisdiction of such enforcement. Even the Regular Army can be thus called upon only on such occasions; and, certainly, the militia can not be thus called upon at any other." (29 Op. Atty. Gen., 322.)

Congress has provided that the Naval Militia, when called into the service of the United States, shall be required to serve "either within or without the territory of the United States." Act Feb. 16, 1914, sec. 4; 38 Stat., 284; Gen. Order No. 77, Feb. 25, 1914.) Such a provision "must be read in view of the constitutional power of Congress to call forth the militia only to suppress insurrection, repel invasions, or to execute the laws of the Union. Congress can not, by its own enactment, enlarge the power conferred upon it by the Constitution; and if this provision were construed to authorize Congress to use the Organized Militia for any other than the three purposes specified, it would be unconstitutional. This provision applies only to cases where, under the Constitution, said militia may be used outside of our own borders, and was, doubtless, inserted as a matter of precaution and to prevent the possible recurrence of what took place in our last war with Great Britain, when portions of the militia refused to obey orders to cross the Canadian border." (29 Op. Atty. Gen., 322.)

(Clause 16. Power over the militia.) ¹⁶To 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, reserving to the States, respectively, the Appointment of the Officers, and the authority of training the Militia according to the discipline prescribed by Congress.

Naval Militia.—Congress has made detailed provision for "organizing, arming, and disciplining" the naval militia and "for governing such part of them as may be employed in the service of the United States," by act February 16, 1914. (38 Stat., 283; Gen. Order No. 77, Feb. 25, 1914.)

"Congress is thus expressly vested with the power to * * * provide for governing such part only of the Militia of the several States as, having been called forth to execute the laws of the Union, to suppress insurrections, or to repel invasions, is employed in the service of the United States." (Johnson v. Sayre, 158 U. S., 114.)

"It is also too plain for argument that the power here given to Congress over the militia is of a limited nature and confined to the objects specified in these clauses and that in all other respects and for all other purposes the militia are subject to the control and govern-

ment of the State authorities." (Houston v. Moore, 5 Wheat., 1, 50, dissenting opinion of Mr. Justice Story.)

"Congress have no power and never had to subject a militiaman not in the military or naval service of the United States * * * to a trial by court-martial for any crime, especially one that is capital or infamous. This is plain enough upon the face of the Constitution." (Ex parte Henderson, 11 Fed. Cas., p. 1076.)

The purpose of the naval militia law of February 16, 1914, "is to encourage on the part of the Government the development of a source from which the Nation in time of war may be supplied with a body of men trained in the handling of the weapons of marine warfare that may immediately be added to the Regular Navy for the efficient handling of vessels of war." Naval vessels loaned to State militia organizations may be used only for the training and instruction of the militia. "While it may perhaps be said that in a certain sense the use by the State of Maryland of the *Montgomery* for the purpose of quelling 'riots, insurrection, or defiance of civil law within the State limits' is such a use as may tend to promote the efficiency of the naval militia that may be aboard, it is nevertheless considered that such a use of a naval vessel, her armament and equipment, for what is in reality a purely local police work is a use entirely foreign to the promotion of the efficiency of the naval militia as contemplated by the act of February 16, 1914 * * *." (File 4570-194, March 15, 1915.)

"So long as the militia are acting under the military jurisdiction of the State to which they belong, the powers of legislation over them are concurrent in the General and State Government. Congress has power to provide for organizing, arming, and disciplining them, and this power being unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress. But as State militia the power of the State governments to legislate on the same subjects having existed prior to the formation of the Constitution and not having been prohibited by that instrument it remains with the States, subordinate, nevertheless, to the paramount law of the General Government operating upon the same subject." (Houston v. Moore, 5 Wheat., 1, 16.)

"After a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the General Government over such detachment is exclusive. This is also obvious. Over the national militia the State governments never

had or could have jurisdiction. None such is conferred by the Constitution of the United States; consequently none such can exist." (Houston v. Moore, 5 Wheat., 1, 17.)

Congress is empowered to fix the period when a portion of the militia, called forth by the President, shall enter the service of the United States and change their character from State to National militia. "That Congress might by law have fixed the period by confining it to the draft, the order given to the chief magistrate or other militia officer of the State, to the arrival of the men at the place of rendezvous, or to any other circumstance, I can entertain no doubt. This would certainly be included in the more extensive powers of calling forth the militia, organizing, arming, disciplining, and governing them." (Houston v. Moore, 5 Wheat., 1, 17.)

Congress may provide for the punishment by court-martial of a militiaman who refuses or neglects to obey the order of the President calling forth the militia. "This flows from the power bestowed upon the General Government to call them forth, and consequently to punish disobedience to a legal order, and by no means proves that the call of the president places the detachment in the service of the United States. (Houston v. Moore, 5 Wheat., 1, 18.)

"Although a militiaman who refused to obey the orders of the President calling him into the public service under the act of 1795 is not, in the sense of that act, 'employed in the service of the United States' so as to be subject to the rules and articles of war, yet he is liable to be tried for the offense under the fifth section of the same act, by a court-martial, called under the authority of the United States." (Martin v. Mott, 12 Wheat., 19.) Under the same circumstances the militiaman might be tried by a court-martial of the State for refusing to respond to the call of the President. (Houston v. Moore, 5 Wheat., 1.)

Members of the naval militia, participating with the Regular Navy in cruises for the purpose of training and instruction, are not employed in the service of the United States, but remain civilians and consequently are not subject to punishment under the Articles for the Government of the Navy. The naval officer in command has, however, full authority to enforce any orders which affect the discipline, safety, and well-being of the ship or any part of the armament, equipment, or crew of the vessel under his command, and to this end may, if necessary, place militiamen in confinement or remove them from the vessel under lawful regulations issued by the Navy Department, not as punishment, but merely to maintain discipline.

(File 3973-107, Feb. 16, 1915; see note to Art. I, sec. 8, clause 14, concerning jurisdiction of Federal courts-martial.)

Naval militia officers can not impose punishments on men belonging to their organizations while cruising on board a vessel of the Regular Navy, nor can naval militia officers convene State courts-martial on such vessels. (File 3973-107, Feb. 16, 1915.)

Naval militia officers cruising with the Regular Navy for training and instruction are authorized by law to perform duty and to exercise authority over the naval personnel of inferior rank, but can not impose punishments upon persons in the naval service. (File 3973-107, Feb. 16, 1915.)

"A State statute providing that all able-bodied male citizens of the State between 18 and 45, except those exempted, shall be subject to military duty, and shall be enrolled and designated as the State militia and prohibiting all bodies of men other than the regularly organized volunteer militia of the State and the troops of the United States from associating together as military organizations or drilling or parading with arms in any city of the State without license from the governor, as to these provisions is constitutional and does not infringe the laws of the United States." (*Presser v. Illinois*, 116 U. S., 252.)

POWERS OF THE PRESIDENT UNDER ARTICLE II OF THE CONSTITUTION.

Section 2. [Clause 1. **Commander-in-Chief; authority over heads of departments; pardoning power.**] ¹The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

- I. POWERS OF COMMANDER-IN-CHIEF.
- II. EXECUTIVE DEPARTMENTS.
- III. POWER TO PARDON OFFENSES AGAINST UNITED STATES.

I. POWERS OF COMMANDER-IN-CHIEF.

Powers of Congress and of the President.—"Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on

war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions. The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President in war more than in peace intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law." (Ex parte Milligan, 4 Wall., 139; concurring opinion of four justices.)

"Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force, Congress can not take away from the President the supreme command. It is true that the Constitution has conferred upon Congress the exclusive power 'to make rules for the government and regulation of the land and naval forces'; but the two powers are distinct; neither can trench upon the other; the President can not, under the disguise of military orders, invade the legislative regulations by which he, in common with the Army, must be governed; and Congress can not, in the disguise of 'rules for the government' or the Army, impair the authority of the President as Commander-in-Chief." (Swaim v. U. S., 28 Ct. Cls., 173, 221; affirmed, 165 U. S., 553.)

"No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President." (7 Op. Atty. Gen., 465.)

An appropriation under the War Department was made "to be expended according to the plans and estimates of Capt. Meigs and under his superintendence: *Provided*, That the office of engineer of the Potomac waterworks is hereby abolished, and its duties shall hereafter be discharged by the chief engineer of the Washington Aqueduct." In answer to the contention that this appropriation was mandatory upon the President as to the character of duties to be performed by Capt. Meigs in connection with its expenditure, the Attorney General said: "As Commander-in-Chief of the Army it is your right to decide, according to your own judgment, what officer shall perform any particular duty, and as the supreme executive magistrate

you have power of appointment. Congress could not, if it would, take away from the President or in any wise diminish the authority conferred upon him by the Constitution. This clause of the appropriation bill was not intended to appoint Capt. Meigs chief engineer of the aqueduct, nor was it meant to interfere with your authority over him or any other of your military subordinates. * * * If Congress had really intended to make him independent of you, that purpose could not be accomplished in this indirect manner any more than if it was attempted directly. Congress is vested with legislative power; the authority of the President is executive. Neither has a right to interfere with the functions of the other. Every law is to be carried out so far forth as is consistent with the Constitution and no further. * * * You are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank." (9 Op. Atty. Gen., 462.)

"The first aspect in which this clause [see preceding paragraph] presented itself to my mind was that it interfered with the right of the President to be 'Commander-in-Chief of the Army and Navy of the United States.' If this had really been the case there would have been an end to the question. Upon further examination I deemed it impossible that Congress could have intended to interfere with the clear right of the President to command the Army and to order its officers to any duty he might deem most expedient for the public interest. If they could withdraw an officer from the command of the President and select him for the performance of an executive duty, they might upon the same principle annex to an appropriation to carry on a war a condition requiring it not to be used for the defense of the country unless a particular person of its own selection should command the Army. It was impossible that Congress could have had such an intention, and therefore, according to my construction of the clause in question, it merely designated Capt. Meigs as its preference for the work, without intending to deprive the President of the power to order him to any other Army duty for the performance of which he might consider him better adapted. * * *. Under these circumstances I have deemed it but fair to inform Congress that whilst I do not consider the bill unconstitutional, this is only because, in my opinion, Congress did not intend by the language which they have employed to interfere with my absolute authority to order Capt. Meigs to any other service I might deem expedient. My perfect right still remains, notwithstanding the clause, to send him away from Washington to any part of the Union to superintend the erec-

tion of a fortification or any other appropriate duty. * * * It is not improbable that another question of grave importance may arise out of this clause. Is the appropriation conditional and will it fall provided I do not deem it proper that it shall be expended under the superintendence of Capt. Meigs? * * * I desire to express no opinion upon the subject. Should the question ever arise, it shall have my serious consideration." (Messages and Papers of the President, vol. 5, p. 597. As to invalidity of the condition in this case, see Attorney General's opinion quoted in preceding paragraph.)

An appropriation was made for the support and maintenance of the Marine Corps, with a condition attached that "no part of the appropriation herein made for the Marine Corps shall be expended for the purposes for which said appropriations are made unless officers and enlisted men shall serve as heretofore on board all battleships and armored cruisers, and also upon such other vessels of the Navy as the President may direct, in detachments of not less than eight per centum of the strength of the enlisted men of the Navy on said vessels." It was held by the Attorney General [without citing authorities] that the condition attached to this appropriation was valid and constitutional, and that if the President as Commander-in-Chief desired to employ the Marine Corps he must comply with the condition expressed. "Inasmuch as Congress has power to create or not to create, as it shall deem expedient, a marine corps, it has power to create a marine corps, make appropriation for its pay, but provide that such appropriation shall not be available unless the Marine Corps be employed in some designated way." (27 Op. Atty. Gen., 259.)

When Congress created the office of adjutant and inspector of the Marine Corps, without specifying its duties or where they should be performed, it was intended that the office should be clothed with the functions and duties which by established custom had been performed by such an officer in a military service. The duties of an adjutant are such as require that they be performed at headquarters of his organization. Accordingly, a regulation approved by the President, purporting to authorize or permit the detail of the adjutant and inspector of the Marine Corps to duty away from headquarters, and placing the office at headquarters in charge of a subordinate officer of the adjutant and inspectors department, is contrary to law and of no effect. The President may have the right to detail this officer temporarily away from headquarters, but this can not be established as a permanent system. (30 Op. Atty. Gen., 234.) [In this case it had previously been held by the Navy Department that the law did

not specify that the adjutant and inspector of the Marine Corps should be permanently stationed at headquarters; and, following the Meigs case and others above cited, that Congress was not empowered to limit the authority of the President in this respect; and accordingly that the matter was properly a subject for regulation by the President. File 26836-7:35, Feb. 13, 1913.]

"It is * * * no degradation of the position of the President to say, through the forms of judicial construction in passing on his executive acts with reference to the retired list, that his power is regulated alone by acts of Congress * * * The retired list is of comparatively recent origin; and for years the Army endured through peace and survived in war, efficient in the hands of the President for the maintenance of the national honor, and the due enforcement of the law, without the existence of the retired list, so the regulation of that department of the service can in no wise interfere with the constitutional right and power of the President as commander-in-chief of the military forces of the United States. While the President is made commander-in-chief by the Constitution, Congress have the right to legislate for the Army, not impairing his efficiency as such commander-in-chief, and when a law is passed for the regulation of the Army, having that constitutional qualification, he becomes as to that law an executive officer, and is limited in the discharge of his duty by the statute." (*McBlair v. U. S.*, 19 Ct. Cls., 540, 541.)

"The power of the Executive to establish rules and regulations for the government of the Army is undoubted." (*U. S. v. Eliason*, 16 Pet., 291.)

Army regulations have the force of law "when founded on the President's constitutional powers as commander-in-chief of the Army." (*Smith v. U. S.*, 23 Ct. Cls., 459.)

For other cases, see Art. I, sec. 8, clause 14; see also note to secs. 161 and 1547, Revised Statutes..

Power of President over subordinates.—"A military officer can not be invested with greater authority by Congress than the Commander-in-Chief, and a power of command devolved by statute on an officer of the Army or Navy is necessarily shared by the President. The power to command depends upon discipline and discipline depends upon the power to punish; and the power to punish can only be exercised in time of peace through the medium of a military tribunal. If the President has no authority in matters pertaining to military tribunals unless it be 'expressly' granted by Congress, then Congress by the simple expedient of exclusively granting the authority to ap-

point courts-martial and approve sentences to a few officers of the Army, tacitly ignoring the President, could practically defeat the express declaration of the Constitution and strip the office of commander-in-chief of all real powers of command. The court can not ascribe any such purpose to the legislation of Congress." (*Swaim v. U. S.*, 28 Ct. Cls., 173, 221; affirmed, 165 U. S., 553; followed 28 Op. Atty Gen., 487.)

"As commander in chief the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain officers to assemble as a court, and when so assembled, to exercise certain powers conferred upon them by the articles of war." (*Runkle's case*, 19 Ct. Cls., 396, 409, approved in *Swaim v. U. S.*, 165 U. S., 553, 556, holding that "it is within the power of the President as commander-in-chief to convene a general court-martial," in the Army. In the Navy the President is expressly authorized by statute to convene general courts-martial. Sec. 1624 R. S., art. 28.)

"It is said that courts-martial are the creatures of statute law, but so also are regiments. There can be no standing army without statutory authority. Congress may place the command of a regiment in a colonel, a lieutenant colonel, a major, or any other officer; but when Congress so enact, they without words to that effect likewise place the command in the Commander-in-Chief. His name is to be understood as written in every statute which confers upon a military officer military authority." (*Swaim v. U. S.*, 28 Ct. Cls., 173, 224; affirmed, 165 U. S., 553.)

An order of the Secretary of War to an officer of the Army is the order of the President and should be obeyed as such. An appeal from such order to the President is no more than a remonstrance addressed to the President against himself. (9 Op. Atty. Gen., 463, 465. For other decisions, see note to Art. II, sec. 1, clause 1; see also note to sec. 158, Revised Statutes.)

Militia.—The President is the commander in chief of the Army and Navy at all times, and commander-in-chief of the militia only when called into the actual service of the United States. (*Johnson v. Sayre*, 158 U. S., 115; 10 Op. Atty. Gen., 17.)