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The establishment of constitutional limitations governing the military represents one of the notable contributions of the English speaking peoples. Their known hostility to an unfettered military rule and their defense of the rights of man find particular expression in the development of procedures whereby the soldier who breaks the law may be justly punished.

The soldier in the United States occupies a paradoxical as well as unique position. On the one hand, entry into the armed services of the United States is not considered merely as a contract but as a change in status which insures the submission of the soldier to the authoritative control of the Congress, the President, and the laws and customs of the army. Such a conception is dominant for the dual purpose of regimenting the soldiery to that strict discipline essential to effective functioning of the army and to sustain the supremacy of the Federal government in matters military. On the other hand, under our constitutional form of government the citizen on entering the army does not, nor cannot, shed his obligations and responsibilities as a citizen. He is subject to all the liabilities of an ordinary citizen when violating the civil (as opposed to military) law. Equally important, he is at the same time assured of those fundamental securities of life and liberty which symbolize the democratic process. Thus, when the soldier breaks the law intricate and interesting problems arise with respect to the jurisdictions empowered to discipline him and the penalties which may be imposed.

The genesis of disciplinary control over the military is to be found during the Revolutionary War period. Articles of war were prepared by the Continental Congress at the outbreak of that war and much attention was directed to the problem of control in the constitutional convention of 1787. In consequence two embracive provisions were incorporated in the constitution: The Congress shall have power to make rules and regulations of the land and naval forces and to provide for the governing of such part of the militia as may be employed in the services of the United States.[2] By virtue of these broad authorities conferred[3] the Congress in 1806

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[2] Article 1, Sec. VIII.

[3] Respecting the powers granted to the National government to raise and support armies and to provide for the government and regulation thereof, the court in Tarble's case (13 Wall. 397) (1871) said: "This execution of these powers falls within the line of its duties; and its control over the subject is

provided a complete statutory code of laws governing the relations of members of the armed forces and their conduct as affecting the good of the service. With some modifications the articles of war of 1806 remained the basic law governing the United States military for 110 years. Comprehensive revisions of the Articles occurred in 1916 and again in 1920. The Articles of War (1920) with some changes subsequently made constitute the base upon which members of the land forces are governed.[4]

Persons subject to federal military law.

At the outset it is advisable to point out what persons are subject to federal military law since one of the fundamental tests of court-martial jurisdiction relates to the person of the accused.[5] Included are the "military" personnel, that is soldiers belonging to the regular army of the United States, volunteers from the date of their muster or acceptance into the military service, all other persons lawfully called, drafted, or ordered into, or to duty, or for training in the service,[6] cadets, and soldiers of the marine corps when detached for service with the armies of the United States. Military control likewise extends to all persons under sentence adjudged by courts-martial and military personnel retired from the service.[7] In addition, certain persons engaged in a quasi-military or in a civilian capacity come within the jurisdiction of military law. Among these are included officers and members of the army nurses corps, warrant officers, army field clerks and other persons accompanying or serv-

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plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which a soldier shall be received, and the period for which he shall be taken . . . And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service."

[4] The Articles of War will be found in Appendix 1 of A. Arthur Schiller's *Military Law and Defense Legislation.* (1941).

[5] In this study no reference will be made to persons outside the military service as, for example, spies; prisoners of war.

[6] Note that under section 11 of the *Selective Training and Service Act* (1940) no person shall be tried by any military or naval court-martial in any case arising under that act unless such person has been actually inducted for the training and service prescribed under the act or unless he is subject to trial by court-martial under laws in force prior to the enactment of that act. 54 Stat. 885. Under the *Articles of War* (article 2) persons are subject to military law from the date they are required to serve for duty or training as prescribed by the terms of the call, draft, or order to obey the same. Both acts will be found in the appendix of A. Arthur Schiller's *Military Law and Defense Legislation.*

[7] The case of *Closson v. United States ex rel.* Armes (7 App. D. C., 460) (1896) affirms jurisdiction of courts-martial over retired army personnel: "A retired army officer is subject to arrest and detention for court martial for an offense against the articles of war."

ing the army.[8] But it should be remembered that military rule does not extend beyond that conveyed by statute and consequently may not assume jurisdiction over persons not in the military service, either as a matter of convenience or public policy.[9]

As to the militia of the several states, federal military rule is by no means exclusive. As Judge Story pointed out many years ago, a free people are naturally jealous of the exercise of military power and the power to call the militia into active service is certainly felt to be one of no ordinary magnitude.[10] By virtue of their sovereignty, the states reserve the right to discipline their militiamen and not until they are employed in the services of the United States for the enumerated purposes of suppressing insurrection, repelling invasion and executing the laws of the United States do they become subject to federal military rule. Ordinarily, employment is not deemed to commence until arrival of the militia at the place of rendezvous after presidential call. Until that time disciplinary action is within the exclusive province of the respective states.[11]

Offenses punishable under federal military law

Offenses punishable under federal military law range from minor infractions of military discipline to those of the most serious nature, the penalty of which is death. Any act which tends to bring disgrace or reproach upon the military service subjects the violator to the penalties of military law. Nor are these acts restricted to those done in the performance of military duties. Acts arising from social relations, from private enterprise, or in a civil position subject the person to military discipline.[12] In the words of article 12 of

[8] Note, however, that retainers and camp personnel when within the jurisdiction of the United States in times of peace are not subject to military law. *Military Laws of the United States*, prepared in the office of the Judge Advocate General (8th Edition, 1939) sec. 359.

[9] *Ex parte* Wilson, 33 Fed. (2nd) 214 (1929).

[10] *Houston v. Moore*, 5 Wheat 1 (1820).

[11] Said Judge Scott in *Dunne v. People* (94 Ill. 120) (1879): "The power of State governments to legislate concerning the militia, existed and was exercised before the adoption of the constitution of the United States, and as its exercise was not prohibited by that instrument, it is understood to remain with the States, subject only to the paramount authority of acts of Congress enacted in pursuance of the constitution of the United States. The section of the constitution . . . does not confer on Congress unlimited power over the militia of the States. It is restricted to specific objects enumerated, and for all other purposes the militia remain as before the formation of the constitution, subject to State authorities. . . . And no reason exists why a State may not control its own militia within constitutional limitations. Its exercise by the States is simply a means of self-protection."

[12] Lt. Col. W. Winthrop in his volume *Military Law* (1886) relates: "...while the act charged will more usually have been committed in a military capacity, or have grown out of some military status or relation, it is by no means essential that this should have been its history. It may equally well have originated in some private transaction of the party, (as a member of civil society or as a man of business) which, while impeaching his personal honor, has involved such notoriety or publicity, or led such just complaint to superior military authority, as to have seriously compromised his character and position as an officer of the army and brought scandal or reproach upon the service." p. 1023.

the articles of war:

"General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals."[13]

Two important exceptions should be noted however: in times of peace no person shall be tried by court-martial for murder or for rape committed within the geographic limits of the United States.[14] If the offense charged is punishable under the articles of war and if the person charged is "subject to military law" he is triable under federal military law.

Concurrent jurisdiction in times of peace

It is a cardinal principle of American jurisprudence that the government of the United States and that of the several states are, within their respectives spheres of action, separate and distinct sovereigns. Each may provide for the punishment of offenses against its laws. Neither can, by merely providing for the punishment of offenders against its laws, deprive others of the right to punish offenders against their laws. Where a soldier violates the military law of the United States and that of a state as well, the offender is punishable both as a citizen subject to the laws of the state wherein the offense was committed and also as a soldier subject to military law.[15]

In times of peace certain well-defined policies are pursued with respect to the apprehension and prosecution of a violator. The articles of war require that upon application by civil authorities military officers shall use their utmost endeavor to deliver over the

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[13] Listed among the offenses cognizable under military law in the articles of war are the following: fraudulent enlistment, making a false muster, making a false return to the War Department concerning personnel, equipment, and the like, desertion, advising or aiding another to desert, entertaining a deserter, absence without leave, disrespect toward a superior officer and government officials, insubordinate conduct, mutiny or desertion, participating in quarrels, frays and disorders, misbehavior before the enemy, subordinates compelling a commander to surrender, improper use of countersign, neglecting to secure property captured from the enemy, aiding or corresponding with the enemy, spying, willful neglect, loss or wrongful disposition of government property, drunkenness on duty, misbehavior by a sentinel, intimidation of persons bringing supplies to the service, non-maintenance of good order, making provoking speeches and gestures, dueling, murder, committing murder, rape, manslaughter, mayhem, arson, burglary, housebreaking, robbery, embezzlement, perjury, forgery, sodomy, assault with intent to commit a felony or to do bodily harm, or assault with a deadly weapon, making or causing fraudulent claims against the government, conduct unbecoming an officer and gentlemen, leaving the service except in the manner permitted by law, and so on.

[14] Article 92, *Articles of War* (1920).

[15] One of the interesting cases to the point is *State v. Rankin*, 4 Cold. (Tenn.) 145 (1867). And as Judge Gilbert commented in *Neall v. United States*, 118 Fed. 699 (1902): "Forcible reasons may be suggested why courts-martial should be given exclusive jurisdiction of all offenses which are punishable under the articles of war, but we are not convinced that either in the constitution or in the acts of congress the intention has been expressed to except from the jurisdiction of the civil courts offenses committed by any persons or class of persons . . . "

accused person or to aid officers of justice in apprehending and securing the violator in order that he may be brought to trial.[16] But no delivery need be made of a person who is held by military authorities to answer, or who is awaiting trial or result of trial, or is undergoing sentence for a crime or offense punishable under the articles of war. Again, while civil courts may inquire by proceedings in *habeas corpus* by what authority the accused is held, such courts can proceed no further when apprised that the accused is properly under custody of the United States.[17] Finally there is the principle that if civil authorities do not take the proper steps to prosecute the offender, then it becomes the clear duty of the military to bring the offender to justice under military jurisdiction.[18]

These procedures call to mind the significant remark of Judge Brown made years ago to the effect that it was not the intention of the constitution or the Congress to abdicate that supremacy of the civil power which is a fundamental principle of the Anglo-Saxon polity.[19] Certainly in times of peace, the principle of comity now extent between the civil and the military authorities indicates that civil authorities shall be principal actors in the arrest of persons military who violate the civil law.

Jurisdiction in times of war and crisis

The principle that in times of war the rights of the individual must yield to those of the state is as old as the common law. On declaration of war the army's sphere of influence over its soldiery automatically enlarges. As Garrard Glenn has descriptively remarked:

> "The war powers of the executive, the wider scope of permissible legislation given Congress, may properly reach far beyond the landmarks which the Constitution fixes for our journey through the days of peace."[20]

The exclusiveness of federal military control over members of the armed forces is to be found in the seventy-fourth article of war which provides that *except in times of war* the commanding officer is required to use his utmost endeavor to delivery over the accused to civil authorities. From this issues the fact that in time of war the military is under no obligation to turn over the offender to civil authorities. As a tactical matter, however, military authorities have pursued a "middle of the road" policy. If the offense against

[16] Article 74, *Article of War* (1920). In construing this provision a Judge Advocate General stated: ". . . in the absence of special or peculiar circumstances warranting an opinion that the soldier might be deprived of a fair and impartial trial by the civil authorities, insistence upon military jurisdiction should be waived and the soldier surrendered to the civil authorities for trial, upon proper demand in due form." *Digest of Opinions of the Judge Advocate General of the Army*, (1912-1930) (1932), 1430.5.

[17] For further discussion see pp. 252-253.

[18] Garrard Glenn, *The Army and the Law* (1918), p. 60.

[19] *United States v. Clark*, 31 Fed. 710 (1887).

[20] Garrard Glenn, *The Army and the Law* (1918), p. 142.

the civil community is of such seriousness as to "serve to disqualify the offender for military service and association with upright and honorable men," as a judge advocate general opinioned, the offender will then be turned over to civil authorities.[21]

With respect to times of martial law, the same principle applicable to war times likewise applies. In the words of Judge Mitchell:

> " . . . while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible, for the first and overruling duty is to repress disorder, whatever the cost, and all means which are necesary to that end are lawful."[22]

Resort to the military arm of the government to preserve internal order requires that the sphere of influence of civil officials be subordinated and that the rule of force under military processes becomes the governing consideration. Martial law, as the offspring of necessity, transcends the ordinary course of civil law.

Location of the offense as a jurisdictional factor

Place where the violation occurs is always a vital factor in fixing the respective jurisdictions of military and civil authorities. Civil authority does not reach into areas over which the Congress is granted the exclusive right to legislate by the constitution. Areas listed are those purchased for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.[23] Where offenses of a civil nature (except murder and rape) are committed within such areas, the federal military retain complete jurisdiction over the offense. Contrarily, where the offense occurs outside of listed areas primary jurisdiction lies with civil authorities although both military and civil authorities have concurrent jurisdiction over the offense.[24] The rule of priority is frequently followed: this provides that the authority whose jurisdiction first attaches by reason of arrest or process retains jurisdiction until the case has been completely satisfied.

The many considerations which govern when a soldier breaks the law illustrate why civil and military authorities must establish and maintain the closest cooperation with one another. Otherwise conflict of interest can easily arise. Nature of the offense, where it was committed, whether occurrence was in time of war, during martial law, or in times of peace are all contributing factors. In the final analysis there is no general rule to fit all cases. Matters of public opinion, the character of local tribunals, adequacy of jail

[21] See the *Digest of Opinions of the Judge Advocate General of the Army* (1912-1930) (1932), 1431.

[22] *Commonwealth ex rel Wadsworth v. Shorthall*, 206 Pa. 165 (1903).

[23] Article 1, sec. VIII.

[24] *Ex parte* McRoberts, 16 Iowa 600 (1864).

facilities, temper of the times, and many other factors must likewise guide. If, in every locality civil and military authorities join hands in the control of this all important problem, a minimum of conflict could not but result.[25]

A final consideration remains: wherein lies jurisdiction over the soldier where an offense is committed in foreign lands? Jurisdiction of federal military authorities becomes exclusive the moment the army leaves our national boundaries. While marching through friendly lands or stationed within them, the soldiery is generally exempted from the civil or criminal jurisdiction of the place. The consent of the friendly government to such a proposition is assumed as a matter of course or is arranged by international agreement:

"The grant of a free passage . . . implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of this army may require."[26]

Likewise, where the army invades an enemy's country, the civil law of the invaded country can have no part in the disciplinary process. The law of war ranks supreme and constitutes the only guide for action.[27]

Disciplinary action by military authorities

A variety of agencies have been provided through which military jurisdiction is expressed. Courts of inquiry are provided for the examination of accusations and transactions against army personnel. Summary military commissions and provost marshal courts are available for a variety of purposes. Disciplinary action is accorded commanding officers. And comprehensive provision is made for disciplinary action through courts-martial.

Although broad authorities are conferred upon commanding officers for the discipline of persons under their command, the articles of war prescribe a number of limitations on these disciplinary authorities. Without intervention of court-martial (unless the accused demands trial by such court) the commanding officer of any detachment, company, or higher command may, for minor offenses, impose such disciplinary action on persons of his com-

[25] For an interesting discussion of the problem see the monograph of the American Municipal Association, "When a Soldier Breaks the Law," (1941) pp. 8-17.

[26] *Coleman v. Tennessee*, 97 U. S. 509 (1878); *The Schooner Exchange v. McFaddon and Others*, 7 Cranch. 139 (1812).

[27] Said Justice Field in *Dow v. Johnson*: "There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity, and as little likelihood of freedom from the irritations of the war, in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army." 100 U. S. 158 (1879).

mand as the following: admonition, reprimand, withholding of privileges not to exceed one week, extra fatigue duty not to exceed one week, and hard labor without confinement not to exceed one week. Such punishment cannot include forfeiture of pay or confinement under guard. There is the proviso, however, that in times of war or grave public emergency, a brigadier general or officer of higher grade may impose upon an officer of his command below the grade of major a forfeiture of pay of not more than one-half of the accused's salary for one month.[28] But if any person subject to military law is charged with crime or with a serious offense under the articles of war, he must be placed in confinement or in arrest as the circumstances may require.[29] But no arrest or confinement may occur except on personal knowledge of, or after inquiry into, the offense.[30]

Prerogatives of courts-martial

Courts-martial derive their validity from the authority of the Congress to make rules for the government and regulation of the land and naval forces. The courts are entirely independent of the judicial system as authorized in Article III of the Constitution and for this reason guarantees as to trial by jury and presentment or indictment by grand jury do not apply.[31] As the jurisdiction of courts-martial is fundamentally statutory, they are not essentially creatures of war and their jurisdiction to try offenses does not depend upon the fact of war or peace.

Well-defined limitations exist with respect to issuance of *habeas corpus* writs by civil courts relating to persons held in military custody. While a civil court may, of course, issue such a writ for purposes of ascertaining by what authority the accused is held, once the civil tribunal is apprized that the person is under custody of the United States the civil court can proceed no further.

"But after the return is made, and the State judge or court judicial apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the person is within the domain and jurisdiction of another Government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of divisions between the two sovereignties."[32]

[28] Article 104 of the *Articles of War* (1920).

[29] Articles 42 and 69 of the *Articles of War* (1920).

[30] *A Manual for Courts-Martial*, U. S. Army (1928 ed. corrected) (1936), secs. 19, 20.

[31] *Kahn et al. v. Anderson*, 255 U. S. I (1920). In this case it was contended that the Congress was without power to provide courts-martial inconsistently with the guarantees as to trial by jury and presentment or indictment by grand jury. Said Justice White: Such argument is without foundation "since it directly denies the existence of a power in Congress exerted from the beginning. . . . The constitutionality of the acts of Congress touching army and navy courts martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court."

[32] *Ableman v. Booth*, 21 How. 506 (1858).

In the conduct of trial and the verdict rendered by courts-martial it is clear that civil courts cannot enter upon a consideration of the evidence presented before the courts-martial, nor review errors committed in admitting evidence to court, nor question the procedural rules employed during trial, nor pass upon the severity of the sentence imposed by courts-martial so long as the imposed penalty is conformable to law.[33] In these respects the jurisdiction of a court-martial is exclusive and its supreme position is not challengable so long as the court-martial is appointed by an official empowered to appoint it, so long as membership of the court is in accordance with law with respect to the number and competency of members to sit on the court, and so long as the court is invested by act of Congress with power to try the person and the offense charged.

The limitations of courts-martial

Although courts-martial possess powers of strategic importance, one has no fear that the shadows of the Gestapo will find reflection here. The authority as well as the jurisdiction of courts-martial is expressly circumscribed by the Congress and to that body and to the citizenry the courts-martial owe their existence. Their jurisdiction is criminal only and they have no power to entertain civil suits. Their authority extends only to the military personnel, not to the citizenry at large.[34] As courts of special and limited juris-

[33] "It is not the office of a writ of *habeas corpus* to perform the functions of a writ of error in reviewing the judgment of a court-martial. Courts-martial are tribunals created by congress in pursuance of the power conferred by the constitution, and have as plenary jurisdiction of offenses committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offenses. The question of jurisdiction may be reached by such a writ; . . . but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine, and to render the particular judgment or sentence imposed; but, if this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally, or redressed by *habeas corpus*." *Rose ex rel Carter v. Roberts*, 99 Fed. 948 (1900). Again, the court in *ex parte* Dickey, 204 Fed. 322 (1913) stated: " . . . the only question before the civil court is whether or not the military court has the right to try and determine the cause; that the jurisdiction of the trial court cannot depend upon its decision on the merits of the cause, but upon the court's right to hear and decide it; that where a military or naval tribunal has the right to try the cause, even though a civil court had the concurrent right, the civil court cannot enter upon the consideration of the evidence adduced before the court-martial, or of the question whether the accused was guilty of the offense over which the military court has jurisdiction; that if the military court had jurisdiction to impose sentence authorized by the regulations of the army and navy, the civil court cannot pass upon the severity of such sentence; that errors in law, however numerous, committed by the trial court in a cause within its jurisdiction, can be reviewed only by appeal or writ of error in the court exercising supervisory jurisdiction; that it is only where the trial court is without the jurisdiction of the person or the cause, and the party is subjected to illegal imprisonment, that a writ of *habeas corpus* may be invoked, and the party discharged from imprisonment. Civil courts are not courts of error to review the proceedings and sentence of a court martial . . . ."

[34] Except as to persons who by the law of war are subject to trial by military tribunals.

diction, they are called into existence only for a special purpose and to perform a particular duty. When the object of their existence has been accomplished they are dissolved. Their decisions are by no means conclusive, merely advisory, and are subject to final opinion by the army service. Channels of appeal are supplied which may conclude in the presidential office wherein lies the power of pardon.

Flogging, branding, marking, and other cruel and unusual punishments are prohibited. Nor, except for desertion in time of war, repeated desertion in time of peace, and mutiny, may a court-martial punish the accused by confinement in a penitentiary unless the act or commission of which he is convicted is recognized as an offense of a civil nature and is punishable by penitentiary confinement for more than one year by some statute of the United States of general application within continental United States.[35]

Finally, despite the apparently insulated position of courts-martial and their independency of the civil judicial system, such courts are always open to collateral attack by civil courts. As courts of special and limited jurisdiction, courts-martial are viewed with a critical eye by civil tribunals, as a long series of decisions in both state and federal courts testifies. It should be remembered that the jurisdiction of every court-martial and hence the validity of its judgment is conditioned by five prerequisites each of which must be satisfied: (1) It must be convened by an officer empowered by statute to call it. (2) Officers commanded to sit upon it must be of the status authorized by the Articles of War. (3) The court thus constituted must be covered by an act of Congress with power to try the person accused. (4) The offense charged must be within the list of offenses prescribed by the Congress. (5) The sentence must be conformable to the law. Absence of any one of these indispensable conditions renders the judgment and sentence "*coram non-judice,* and absolutely void," in the words of a court, "because such a judgment and sentence is rendered without authority of law and without jurisdiction."[36]

Thus are the prerogatives of the democratic tradition guarded in the service military. Through the limitless channel of jurisdiction the fundamental safeguards of life and liberty are perpetuated. But within the broad authorities conferred upon the military in terms of disciplinary action, the military are given that requirable control over the soldiery without which the effective functioning of the armed forces would be imperiled.

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[35] For exceptions see article 42 of the *Articles of War* (1920). Note also limitations respecting confinement prescribed by articles 43-45.

[36] *Deming v. McClaughry,* 113 Fed. 639 (1902).