Jurisdiction of Military Tribunals in the United States over Civilians

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The object of the present inquiry is to discover the extent of the jurisdiction of tribunals of the land and naval forces of the United States and of the several states and territories thereof, over civilians, i.e., over persons engaged in civil pursuits as distinguished from those connected with the military and naval service. The jurisdiction over persons who by law constitute part of the Army, Navy, or Marine Corps of the United States, or of the Coast Guard (which, by Act of January 28, 1915, was made part of the military forces of the United States), or of the National Guard or other state forces, whether they belong to the permanent establishment or to a temporary force, and whether they are commissioned officers or enlisted men, or officers without commission such as warrant officers, cadets, army nurses, and paymasters’ clerks, is therefore excluded from consideration.

The jurisdiction of these tribunals is regulated by the following provisions of the Constitution of the United States:

"The Congress shall have power . . . to make rules for the government and regulation of the land and naval forces: . . . to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States . . . ."

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the crime shall have been committed; . . . ."

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury."
jury, except in cases arising in the land or naval forces, or in
the militia, when in actual service, in time of war or public
danger; nor shall any person . . . be deprived of life, liberty, or
property, without due process of law; . . .”

"In all criminal prosecutions, the accused shall enjoy the
right to a speedy and public trial, by an impartial jury of the
State and district wherein the crime shall have been committed,
which district shall have been previously ascertained by law . . .”

Our statutes conferring jurisdiction on military tribunals proceed
on the assumption that the exception as to cases “arising in the land
or naval forces, or in the militia, when in actual service” applies to
the Sixth as well as to the Fifth Amendment, and this view has never
been questioned. The expression “when in actual service . . .” relates
to the militia only. It appears, then, that Congress may, under
Article I, Section 8, erect tribunals separate from the Federal
judiciary, and endow them with criminal jurisdiction, without regard
to territorial limitations, and without the intervention of grand or
petit juries, in cases arising within the exception in the Fifth
Amendment. It seems equally clear that Congress cannot, under
the Constitution, give such tribunals jurisdiction over cases not
so arising.

From the foregoing it will be noted that while the Federal
Constitution limits the powers of military tribunals to cases arising
in the land or naval forces, or in the militia at certain times, it
does not specifically restrict their jurisdiction to persons in the mili-
tary or naval service.

The guarantees of the Fifth and Sixth Amendments do not
restrain the states. It is true that the Constitution also provides
“. . . nor shall any state deprive any person of life, liberty, or
property without due process of law,” but neither indictment by
grand jury nor trial by petit jury are necessary parts of “due process
of law”. However, most if not all the states, in their constitutions,
guarantee the right of trial by jury in criminal cases, and some

5 U. S. Const., Amend. V.
6 U. S. Const., Amend. VI.
9 Ex parte Milligan (1866) 71 U. S. (4 Wall.) 2, 18 L. Ed. 281.
10 U. S. Const., Amend. XIV, § 1.
specifically prohibit the trial of persons not in the militia by military tribunals. It will not be possible to consider here all the constitutional guarantees of all the states. By way of example, however, we may consider the Constitution of California. That document provides:

"The right of trial by jury shall be secured to all, and remain inviolate ..."\(^\text{12}\)

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment ..."\(^\text{13}\)

"No person shall . . . be deprived of life, liberty, or property without due process of law."\(^\text{14}\)

"The legislature shall provide, by law, for organizing and disciplining the militia, in such manner as it may deem expedient, not incompatible with the Constitution and laws of the United States."\(^\text{15}\)

We may now proceed to inquire into the jurisdiction of military tribunals under the Constitution. According to the definition of Mr. Chief Justice Chase, expressed in a dissenting opinion in Ex parte Milligan:

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion or civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under \textit{military law}, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as \textit{military government}, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President with the express or implied sanction of Congress; while the third may be denominated \textit{martial law proper}, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."\(^\text{16}\)

\(^{15}\) Cal. Const., Art. VIII, § 1.
\(^{16}\) (1866) 71 U. S. (4 Wall.) 2, 141, 18 L. Ed. 281.
This was not the decision in the case, and it cannot be assumed from the foregoing that the court decided that military tribunals might exercise jurisdiction in all, or indeed in any, of the above circumstances. However, as the distinction above set forth between military law, military government, and martial law in no way conflicted with the decision of the court and is generally accepted, we may take this opinion as a convenient basis for discussion. We will first consider jurisdiction under military law, i.e., under the rules enacted by Congress, under Article I, Section 8, of the Constitution, "for the government and regulation of the land and naval forces" both in peace and in war.

I. MILITARY LAW

Under military law, jurisdiction of military tribunals under the authority of the United States is conferred by express statutes on four sets of courts: (1) army tribunals (general, special, and summary courts-martial), (2) navy tribunals (general and summary courts-martial and deck courts), (3) coast-guard tribunals (coast-guard courts), and (4) tribunals of the national guard not in Federal service (general, special, and summary courts-martial). "The jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: 1. That it was convened by an officer empowered to appoint it; 2. That the persons who sat upon the court were legally competent to do so; 3. That the court thus constituted was invested by the acts of Congress with power to try the person and the offense charged; and 4. That its sentence was in accordance with law.”

The statutes now in force conferring jurisdiction on these different tribunals are found in the following acts of Congress: Army tribunals, June 4, 1920; Navy tribunals, Section 1624, United States Revised Statutes, June 23, 1874; March 3, 1893,

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17 Supra, p. 75.

It may be well to state here that the Act of June 4, 1920, and Section 1624, United States Revised Statutes, above cited contain the enactments known respectively as the Articles of War and the Articles for the Government of the Navy.

In addition to jurisdiction conferred on courts-martial, Congress, in certain of the Articles of War, has conferred jurisdiction in certain cases on another tribunal, the Military Commission, which properly, as will be noted later, is a court for the enforcement of military government.

Some, if not all, of the states, provide a system of military courts for the militia. It is an open question whether these courts are superseded, as to that part of the militia recognized as National Guard pursuant to Act of June 3, 1916, by the system of courts therein provided. The power of Congress to provide for disciplining the militia is not exclusive; further, the term "discipline" as used in the Constitution means "system of drill," and, except when the militia is in the service of the United States, the whole government of the militia is in the province of the state. This question will be considered infra.

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29 Supra, n. 19.
33 Supra, n. 32.
34 Houston v. Moore (1820) 18 U. S. (5 Wheat.) 1, 5 L. Ed. 19; Dunne v. People (1879) 94 Ill. 120, 130.
35 27 Cyc. 496.
Let us now consider in detail the jurisdiction over civilians conferred by statute on these tribunals.

A. Army Tribunals.

Investigating first the jurisdiction of army tribunals, we find that the second Article of War defines the persons "subject to military law" in the following language:

"The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: Provided, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

"(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

"(b) Cadets;

"(c) Officers and soldiers of the Marine Corps when detached for service with the Armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the Naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

"(e) All persons under sentence adjudged by courts-martial;

"(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia."

Under the Articles of War, special and summary courts-martial may try only certain specified classes of persons "subject to military law."37 General courts-martial, however, have power "to try any

37 Art. War 13, 14.
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." The latter jurisdiction falls within the domain of military government, as defined by Mr. Chief Justice Chase in Ex parte Milligan, and its discussion is therefore deferred. Nearly all of the so-called punitive Articles of War (denouncing offenses) refer by their express terms only to "any person subject to military law" or to specified classes of persons so subject. A few of the punitive Articles, however, relate to persons not otherwise "subject to military law," and there are some statutes not included in the Articles of War which purport to confer jurisdiction on army tribunals. Our immediate task is, then, to consider the jurisdiction of these courts, first, as conferred by the Articles of War, over "persons subject to military law;" second, as conferred by those Articles over other persons; and third, as conferred by other legislation.

1. THE ARTICLES OF WAR

a. Persons "Subject to Military Law"

Referring to the second Article of War it will be noted that paragraphs (a), (b), and (c) relate by their terms to persons connected with the military service, and consequently are not pertinent to this inquiry. The remaining paragraphs, however, bear on the subject under investigation, as the persons therein described do not, at any rate in part, have a military status.

Paragraph (d) refers to two classes of persons, viz., retainers to the camp, and persons accompanying or serving with the armies. "Retainers to the camp" means "officers' servants and the like, as well as camp-followers generally," whereas "persons serving," etc., include "civilians employed by the United States or serving in a quasi-military capacity in connection with troops." Jurisdiction has thus been assumed over teamsters, watchmen, telegraph operators, interpreters, guides, the crew of a river fleet operated by the army, persons employed by the government on army transports, on mine planters, and at the port of embarkation, contract surgeons,

38 Art. War. 12.
39 Supra, n. 16.
40 Supra, p. 80.
41 Davis, Military Law of the United States (2d ed.) 478.
42 Ibid.
post exchange employees, auditors in the office of a quartermaster.\textsuperscript{43} The assertion of jurisdiction over an automobile driver employed by a contractor\textsuperscript{44} appears to conflict with the decision in Ex parte Weitz,\textsuperscript{45} in which it was held that the scope of the Article does not include firms engaged in construction work nor their employees. It does not include persons held at camp involuntarily.\textsuperscript{46} Jurisdiction over prisoners of war is derived from another source.

In cases where jurisdiction under Article of War 2(d) is exercised outside the United States in hostile occupied territory, it may well fall within the domain of military government. Whether jurisdiction under the latter can properly extend to the soil of an associate in a common war,\textsuperscript{47} or to the soil of a nation in which our troops are operating without the existence of a formal state of war, is doubtful. Probably for the jurisdiction over these civilians in these cases, as in cases where it is exercised on the soil of the United States, we must seek justification in the fact that the cases arise within the land forces. The persons under consideration are either in government pay as civilian adjuncts to the military, or else they voluntarily attach themselves to the military for their own ends. Their offenses, while they are so situated, may reasonably be said to arise in the land forces.

Congress has not, however, seen fit to confer on courts-martial jurisdiction over such persons within the territorial limits of the United States at all times and places. Under the statutory restriction, the person must be so serving in time of war, and in the field. The jurisdiction must be exercised during the \textit{status belli}.\textsuperscript{48} The war may exist without a formal declaration,\textsuperscript{49} the courts will recognize a state of war if it is recognized by the political branches of the government.\textsuperscript{50} What constitutes service in the field is a question of some difficulty. Within the meaning of the Act of April 16,

\begin{footnotesize}
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\item \textsuperscript{43} Digest of Opinions of the Judge Advocate General of the Army—hereinafter cited as "Dig. Ops. J. A. G."—(1912) p. 151; Id. (Feb. 1918) p. 7; Id. (Apr. 1918) p. 14; Id. (May 1918) p. 53; Id. (Oct. 1918) p. 268; Id. (Dec. 1918) p. 362; Id. (1919) p. 92.
\item \textsuperscript{44} Id. (Oct. 1918), 242.
\item \textsuperscript{45} (1919) 256 Fed. 58; see also Ex parte Henderson (1878) Fed. Cas. No. 6349.
\item \textsuperscript{46} Dig. Ops. J. A. G. (1918) p. 325.
\item \textsuperscript{47} Id. (1919) p. 13.
\item \textsuperscript{48} Id. (1912) p. 151.
\item \textsuperscript{49} Ibid.
\item \textsuperscript{50} Hamilton v. McClaughry (1905) 136 Fed. 445; Alire v. U. S. (1865) 1 Ct. Cl. 233.
\end{itemize}
\end{footnotesize}
1918,51 and other acts relating to pay and allowances, service at a
training camp has been recognized as service in the field.52 On the
other hand, it is difficult to understand why Congress should have
drawn a jurisdictional distinction between service with troops train-
ing at a permanent post and service with troops similarly training
at a temporary cantonment. It would seem a reasonable construction
to hold that the expression "in the field" meant at the base of opera-
tions and in advance thereof; in other words, that this jurisdiction
was conferred in order to provide a tribunal capable of trying these
persons in places where the courts of the United States and the
states were not open. The War Department has disclaimed this
jurisdiction at civilian munitions works,53 but has claimed it on
transports54 and in divisional training camps.55 Court decisions are
as follows: A transport at sea is without the territorial jurisdiction
of the United States, and the words "in the field" do not refer to
land only, but to any place, whether on land or water, apart from
permanent cantonments or fortifications, where military operations
are being conducted.56 In Ex parte Jochen57 it was held that "field
service is defined to be service in mobilization, concentration, instruc-
tion or maneuver camps as well as service in campaign, simulated
campaign or on the march." However, in this case the petitioner
was serving on the Mexican border, where raids from Mexico were
frequent and where the troops were constantly on outpost duty. In
Ex parte Falls58 it was held that a transport at the port of embarka-
tion was in the field. In Hines v. Mikell59 it was held, overruling
Ex parte Mikell,60 that troops in a temporary cantonment for the
purpose of training preparatory for service in the actual theater of
war were in the field.

Part (e) of Article of War 2 extends the jurisdiction of courts-
martial over persons serving sentences imposed by such courts, who
have been separated from the service. It is customary for a sentence

53 Id. (1919) p. 47.
54 Id. (1918) p. 195.
55 Id. (1919) p. 268; Id. (1919) p. 377.
56 Ex parte Gerlach (1917) 247 Fed. 616.
57 (1919) 257 Fed. 200, 201.
58 (1918) 251 Fed. 415.
59 (1919) 259 Fed. 28; see also Mikell v. Hines (1918) 250 U. S. 645,
60 (1918) 253 Fed. 817.
of dishonorable discharge to be executed at the beginning of any period of confinement adjudged thereto. Jurisdiction over persons serving such sentences has been upheld.\textsuperscript{61}

Part (f) of Article of War 2 attempts to subject to the jurisdiction of courts-martial persons some of whom may be retired enlisted men, and hence in the military service,\textsuperscript{62} but many of whom are former soldiers whose connection with the service has been severed.\textsuperscript{63} The Judge Advocate General of the Army has held United States Revised Statute 4824, a former statute subjecting these persons to military law, unconstitutional.\textsuperscript{64} On the other hand, the Attorney General appears to have upheld this statute.\textsuperscript{65}

\textbf{b. Persons Not “Subject to Military Law”}

Certain Articles of War subject persons not otherwise subject to military law to the jurisdiction of military tribunals. It has already been noted that Article of War 12 subjects to trial by general court-martial “any other person who by the law of war is subject to trial by military tribunals.” This jurisdiction properly falls under military government, as does the concurrent jurisdiction of military commissions, provost courts, and other military tribunals, recognized by Article of War 15, “in respect of offenders or offenses that by statute or by the law of war may be triable by such . . . tribunals.” The only statutes now in force conferring jurisdiction on these unusual tribunals are Articles of War 80, 81, and 82, the former of which, by its terms, relates to persons subject to military law only.

Article of War 81 appears to grant jurisdiction over civilians to military tribunals. It provides:

“Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.”


\textsuperscript{65} 20 Ops. Atty. Gen. 516.
In so far as this relates to offenders in the theater of operations, it pertains to military government or martial law, and will be discussed below. It was held in Ex parte Milligan that on the soil of the United States, where the courts are open, a civilian cannot be tried by a military tribunal for these offenses, as he is entitled to trial by jury. The Manual for Courts-Martial, United States Army, 1921, says: "The word whosoever, as it is here used, subjects to the jurisdiction of courts-martial and military commissions all persons, either military or civil, who, in the theater of operations and during the continuance of war, traffic with the enemy in any of the ways herein denounced." The Judge Advocate General, referring to two earlier Articles of War containing in substance the same matter, says "... Persons not belonging to the military establishment may be proceeded against for the acts mentioned in the article, but it is by virtue of the power of another jurisdiction, namely, martial law; and martial law does not owe its existence to legislation but to necessity. The scope of these articles under the legislation of 1776, apparently extending their application to civilians, seems to have become modified upon the adoption of the Constitution."

Article of War 82 provides:

"Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

In Digest of Opinions of the Judge Advocate General of the Army, April, 1918, page 14, referring to this article, it is said, "In time of war a spy, whether he is in the military service or not, and whether his offense is committed within or without a fort or a camp or a five-mile zone, is triable before a general court-martial. The war power vested in Congress by the Constitution incidentally authorizes Congress to create military tribunals with the customary jurisdiction. In construing the Constitution it is possible and necessary to appeal to international law. In time of war, spies are within the jurisdiction of military tribunals... The context and history of Articles of War 12 and 82 show that the words 'or elsewhere' do not restrict the jurisdiction to the immediate neighborhood of
fortifications, posts, quarters, or encampments, but in modern conditions cover the entire area of the United States."

In so far as the foregoing opinion relates to persons in the military service, there can be no question as to the jurisdiction over offenses occurring anywhere within the area of the United States, though there may be some question as to just what offense Congress has denounced in this article. In so far as it refers, however, to persons not in the service, a jurisdictional question arises, as well as a question as to the intent of Congress.

The term "spy" is unknown to the common law. It is a term which pertains to the laws of war, which are a part of international law. The Hague Conventions are, generally, declaratory of the laws of war. Convention No. IV of October 18, 1907, to which the United States is a signatory, provides in the Annex (Article 29):

"A person can only be considered a spy when, acting clandestinely or under false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party."

Three questions are presented here. Has Congress, in denouncing the foregoing crime, intended to denounce the offense as understood by the laws of war? If so, has Congress intended, by the use of the words "or elsewhere" to recognize a widened field of warfare by extending the zone of operations, by fiat, to include the whole area of the United States? If so, to what extent is this article constitutional?

If we turn to the Dictionary, we find three definitions of the term "spy." These are: 1. Hague definition (supra), verbatim. 2. "A person who in time of peace secretly tries to obtain information about the forces, armaments, fortifications, or defenses of a country in order to supply it to another country." 3. "One who watches others secretly; a person who spies; often with a bad implication, as a spy and informer." It is quite obvious from the wording of the article that the first of these definitions must have been the one intended. To be found lurking or acting as a spy, then, the offender must have been found carrying on his activities in the zone of operations, and the places included in the term "elsewhere" must have been in that zone.

Did Congress intend, by the use of the term "elsewhere," to declare that the entire area of the United States should be included

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69 Funk and Wagnalls, New Standard Dictionary of the English Language, p. 2355.
in the zone of operations? And if not, can it be said as a matter of law that the entire area of the United States is so included?

The first enactment on this subject appears in a Resolve of the Continental Congress, under date of August 21, 1776, in the following language:

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

Though not specifically continued in force under the Constitution by any Act of Congress, this probably remained the law of the land until a new enactment was passed April 10, 1806. This was phrased in similar language, except that the words "in time of war" were inserted before the words "all persons"; for "members" was substituted "citizen"; the words "any of" were stricken out before "the United States," and the words "as described . . . of June last" and "or such other . . . shall direct" were omitted. This enactment was amended February 13, 1862, by inserting after the word "war" the words "or rebellion against the supreme authority of the United States," by striking out the words "not citizens . . . of America," by inserting after the word "spies" the words "or acting as such"; by inserting after the word "encampments" the words "posts, quarters, or headquarters"; by inserting after the word "them" the words "within any part of the United States which has been or may be declared to be in a state of insurrection by proclamation of the President of the United States," and by striking out the words "according to the law and usages of nations." By Act of March 3, 1863, it was provided:

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

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70 5 Journal of the Continental Congress, 693.
The latter enactment was continued as Revised Statute 1343. By Act of August 29, 1916,73 Article of War 82 in its present form was enacted as an amendment to United States Revised Statute 1342, and it was reenacted by the Act of June 4, 1920.74

It will be noted that the word "elsewhere" appears first in the Act of March 3, 1863. It will be further noted that Congress made no effort to extend military jurisdiction over the whole territory of the United States for any other offense. Yet if "elsewhere" was meant to include the whole territory of the United States, Congress must have proceeded on the theory that in 1863 the whole territory of the United States was within the zone of operations—a state of affairs which did not exist.75 Did not Congress rather mean "elsewhere in the theater of operations," under the principle of ejusdem generis? If so, the Article is undoubtedly constitutional as applied to civilians, as espionage within the theater of operations, even if not within the domain of military government, may reasonably to be held to arise in the land (or naval) forces. If not, then the Article in so far as it relates to civilians not in the theater of operations, would seem to be invalid under the Fifth and Sixth Amendments, and under Article III, Section 1 of the Constitution.76

As to what constitutes the theater of operations, some help is obtained from the Field Service Regulations, United States Army, 1914, which provide:

"In time of war the activities of the military establishment embrace: (a) The service of interior. (b) The service of the theater of operations."77

"The service of the theater of operations is carried on by the commander of the field forces. The theater of operations is divided into two zones: (a) the zone of the line of communications. (b) The zone of the advance."78

"The zone of the line of communications embraces all territory from and including the base to the point or points where contact is made with the trains of the combatant field forces . . ."79

It would appear, then, that this jurisdiction may be exercised over civilians from and including the base of operations forward, and

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74 Supra, n. 19.
75 Ex parte Milligan, supra, n. 9; Ex parte Benedict (1862) Fed. Cas. No. 1292, 4 West. Law Monthly, 449; Ex parte Field (1862) Fed. Cas. No. 4761, 5 Blatchf. 63.
78 Id., par. 249.
79 Id., par. 361.
probably also in the vicinity of any military activity. As to civilians spying in the zone of the interior, and not in the vicinity of any military post, etc., they can be amply taken care of by the Federal courts.

Article of War 94, which denounces certain frauds and thefts against the government, provides:

"... And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, 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 his discharge nor been dismissed . . ."

Similar provision is made in the same article for cases of embezzlement by officers from company funds, post exchange funds, or money intrusted to them by enlisted men.

This provision constitutes an exception to the general rule that persons who commit offenses while subject to military law cannot be tried by military tribunals for such offenses after they cease to be so subject,80 which rule follows from the fact that the jurisdiction given by statute to such tribunals is generally "to try any person subject to military law" (Articles of War 12, 13, 14). The corresponding exception contained in the Articles for the Government of the Navy has been upheld.81

Article of War 118 provides:

"No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof . . ."

With this must be considered Section 1230, United States Revised Statutes:

"When any officer, dismissed by the President, makes, in writing, an application for trial, . . . the President shall, . . . convene a court-martial to try such officer on the charges on which he shall have been dismissed, and if a court-martial is not so convened within six months from the date of making such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void."

81 In re Bogart, supra, n. 8.
It has been held that this statute, authorizing the trial of a civilian, is invalid as trespassing on the constitutional power of the President to appoint officers of the United States. It might, on the other hand, be maintained that there is no new appointment, the original dismissal being on condition subsequent imposed by Congress under its power to provide rules for the government of the land forces. The statute would not infringe the Fifth or Sixth Amendments, as the offense in question arises in the land forces. The statute appears to have been successfully invoked by a dismissed officer.

Article of War 32 provides:

“A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder.”

This is held to include civilians. It would appear that such offenses arise within the land forces.

2. OTHER STATUTES.

Certain statutes not included in the Articles of War purport to confer on courts-martial jurisdiction over persons not in the service. These are as follows: Act of March 21, 1866, inmates of the National Home for Disabled Volunteer Soldiers; Act of June 12, 1906, persons admitted to treatment in the General Hospital at Fort Bayard, New Mexico; Act of March 3, 1909, persons admitted to treatment in the Army and Navy General Hospital at Hot Springs, Arkansas; “but court-martial jurisdiction over them has rarely, if ever, been exercised”. With reference to the first class, the Judge Advocate General has “Held, that section 4835, R. S., . . . is unconstitutional, and that such inmates are not a part of the Army of the United States, but are civilians.” The Manual

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JURISDICTION OF MILITARY TRIBUNALS

for Courts Martial, United States Army, 1921, declares all of these statutes unconstitutional.91

Under the National Defense Act of June 3, 1916,92 as amended by Act of June 4, 1920, chapter 1, section 38,93 a Federal oath is required of each National Guardsman at the time of enlistment, and under this oath he becomes inducted into Federal service and subject to military law from the date on which he is required to obey the call, draft, or order for such service. Under former laws, however, there was no Federal oath until the militiaman appeared to obey the President's order, at which time he was inducted into Federal service by the ceremony of "muster in." This probably remains true in the case of members of the militia who do not constitute the National Guard.94 Any officer or soldier of militia refusing or neglecting to present himself for such muster is, consequently, not in Federal service; nevertheless he is subject to trial by court-martial as a deserter for such refusal or neglect.95 The jurisdiction so established is constitutional and is not dependent on the fact of war or peace.96 The states have concurrent jurisdiction under their own laws.97

B. NAVY COURTS-MARTIAL

The Articles for the Government of the Navy98 do not contain any specific enumeration of persons subject to naval law. In general, however, the punitive articles apply by their own terms to "any person in the naval service" or "in the Navy," or "any person belonging to any public vessel of the United States." There are, nevertheless, certain exceptions.

The fifth Article for the Government of the Navy provides:

"All persons who in time of war, or of rebellion against the supreme authority of the United States, come or are found in the capacity of spies, or who bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the Navy to betray his trust, shall suffer death, or such other punishment as a court-martial may adjudge."

91 Supra, n. 89.
92 39 U. S. Stats. at L. 208.
96 Martin v. Mott (1827) 25 U. S. (12 Wheat.) 19, 6 L. Ed. 537.
In so far as this may relate to persons in the naval service, or to
offenders in the zone of operations (including, doubtless, the high
seas), it may reasonably be held that the jurisdiction therein con-
ferred is constitutional. For reasons above stated in connection
with Article of War 82, however, it would appear that it is not
constitutional in so far as it relates to civilians whose activities take
place in the United States outside the zone of operations and not in
the vicinity of naval activities.

Article for the Government of the Navy 5 first appeared in the
Act of March 2, 1799,\(^9\) later in the Act of April 23, 1800\(^1\) as
Article for the Government of the Navy 12, and still later as Article
for the Government of the Navy 4 in the Act of July 17, 1862.\(^2\)
In these enactments the wording was somewhat different from that
of the present Article, but the effect was the same except that time
of war or rebellion was not mentioned. In none of these was any
restriction expressed as to locality. A case arose in 1920 under the
present article.\(^3\) One Wessels was alleged to have acted as a spy
in the city of New York during 1918. He was charged before a
naval court-martial with violation of Article for the Government of
the Navy 5. He petitioned for a writ of habeas corpus in the District
Court of the United States for the Eastern District of New York.
The writ was denied. The court held that the whole territory of
the United States was in the field of active operations; that the
offense of acting as a spy is not \textit{per se} a crime, first, because execu-
tion of a spy is a means of prevention after hostile entrance into the
country, second, because the spy cannot be tried after return to his
own lines even if subsequently captured,\(^3\) and third because "crime"
as used in the Fifth and Sixth Amendments means "offense against
the government as understood when the Constitution was adopted";
that hence the Fifth and Sixth Amendments do not apply to the
"offense" of being a spy. To this reasoning it might be urged, first,
that under the most advanced theories of penology, all punishment
of crime is by way of prevention; second, that the rule of interna-
tional law prohibiting trial after return to the spy's own lines is
simply a bar of trial, similar to the bar, in certain jurisdictions, to
prosecution for seduction, created by subsequent marriage; third,
that though "violation of the laws of war" was not, in any sense

9\(^9\) 1 U. S. Stats. at L. 712 (Art. 35), 3 Laws of U. S. p. 245 (Art. 35).
10\(^1\) 2 U. S. Stats. at L. 47 (Art 12), 3 Laws of U. S. 353, (Art 12).
10\(^2\) 12 U. S. Stats. at L. 602.
10\(^3\) U. S. ex rel. Wessels v. McDonald (1920) 265 Fed. 754.
different from spying, an offense against the government as understood when the Constitution was adopted, nevertheless it was held in Ex parte Milligan\(^\text{104}\) that a military tribunal had no jurisdiction over a civilian for that offense when not committed in the theater of operations; fourth, that spying was recognized as an offense against the government as early as August 21, 1776,\(^\text{105}\) eleven years before the adoption of the Constitution.\(^\text{106}\)

Article for the Government of the Navy 14, after denouncing frauds and thefts against the government, provides for trial and punishment after discharge of persons guilty thereof while in the service, in substantially the language of Article of War 94.\(^\text{107}\) Article for the Government of the Navy 14 was upheld in \textit{In re Bogart}.\(^\text{108}\)

Article for the Government of the Navy 37 provides for reinstatement of officers of the Navy dismissed by order of the President, in substantially the language of Section 1230, United States Revised Statutes.\(^\text{109}\) The remarks made in connection with that section are equally applicable here.

C. \textbf{COAST-GUARD COURTS}

The statutes above cited conferring jurisdiction on Coast Guard Courts do not confer power to try any person who is not in that service, which is made a part of the military forces of the United States by Act of January 28, 1915.\(^\text{110}\)

D. \textbf{COURTS-MARTIAL OF THE NATIONAL GUARD NOT IN FEDERAL SERVICE}

The jurisdiction of courts-martial of the National Guard not in the service of the United States is governed by the National Defense Act,\(^\text{111}\) which provides:

\textit{"... They shall. . . have cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the Army of the United States . . ."}\(^\text{112}\)

\(^\text{104}\) Supra, n. 9.
\(^\text{105}\) 5 Journals of the Continental Congress, 693.
\(^\text{107}\) Supra, p. 89.
\(^\text{108}\) Supra, n. 8.
\(^\text{109}\) Supra, p. 89.
\(^\text{110}\) Supra, n. 2.
\(^\text{111}\) Act of June 3, 1916, ch. 134, supra, n. 32.
\(^\text{112}\) Id. § 102, supra, n. 32.
“. . . In the National Guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power . . . to sentence for refusal to be sworn or to answer as provided in actions before civil courts . . .”

It is an open question whether these sections are constitutional. Congress has power to “provide for . . . disciplining the militia, and for governing such part of them as may be employed in the service of the United States . . .” But “disciplining” here means “system of drill,” and except when the militia are in Federal service the whole government of the militia is in the province of the State. The National Guard is part of the militia except when drafted into Federal service under authority of Congress and discharged from the militia. It is not in Federal service unless so drafted, or unless called into Federal service by the President to repel invasion, suppress insurrection, or enforce the laws of the Union. Even at a maneuver camp for peace time training, under Federal law the militia is not in Federal service. It is a question whence Congress derives power to provide for governing the militia when not in Federal service. Further, the militia is excepted from the protection of the Fifth Amendment only “when in actual service, in time of war or public danger”.

If the sections of the National Defense Act quoted above are constitutional, there is a further question how far courts appointed under the authority thereof have the jurisdiction assigned to courts-martial of the Army in the Articles of War. By section 104 of the same Act, the jurisdiction of special courts-martial of the National Guard not in Federal service is limited to persons subject to military law except commissioned officers. Ordinarily such persons would be in State service, but it has been already noted that certain civilians referred to in Articles of War 2(d), 2(e), and 2(f), are included in the term “persons subject to military law”. By section 105 the jurisdiction of summary courts-martial is limited to enlisted men. The jurisdiction of general courts-martial contained in section 103 is not limited as to persons by that section; it is perhaps a reasonable inference from section 102 that Congress intended

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113 Id. § 108, supra, n. 32.
115 27 Cyc. 496.
116 People v. Hill, supra, n. 36.
120 Act of June 3, 1916, ch. 134, § 102, supra, n. 32.
the jurisdiction to be as broad as that of general courts-martial of the Army. If this view be correct, then Congress has attempted to confer power on these courts to try persons under sentence adjudged by such courts-martial, discharged persons who prior to discharge were guilty of violation of Article of War 94,122 and persons guilty of certain contempts.123 The provisions of Article of War 2(f), of Section 4835 United States Revised Statutes, of the Act of June 12, 1906, and of the Act of March 3, 1909124 are in the nature of things inapplicable. The provisions of Article of War 82,125 if falling within the domain of military law, could be applied by these courts only in those rare instances in which a state may engage in war,126 and the same is true of Article of War 2(d).127 In so far as these courts derive their powers from Federal statute, the provisions of Article of War 81128 cannot be applied by them except under military government. Perhaps such courts might exercise the jurisdiction conferred by chapter 204, section 5, Act of May 27, 1908129 under the decision in Houston v. Moore130 to the effect that the Federal government and the states have concurrent jurisdiction. Since these courts are provided by Congress to govern forces in State service, perhaps additional powers may be conferred on them by the several states.131 Whether the power granted in Section 108,132 if applied to civilians, is constitutional presents a problem separate from the question of the constitutionality of the whole system; a case of this sort can hardly be said to arise in the militia when in public service, since the courts in question are those of the National Guard not in Federal service.

E. COURTS-MARTIAL IN THE MILITIA

There remains the question, what power remains in the states to provide military courts. Even if section 102 of the National Defense Act is constitutional, nevertheless it was held in Houston v. Moore133 that the power of the Federal Government and of the

121 See Art. War 2(e), supra, p. 80.  
122 Supra, n. 19.  
123 See Art. War. 32, supra, n. 19.  
124 Art. War. 2(f), supra, p. 80.  
125 U. S. Rev. Stats. § 4835, supra, n. 86.  
126 Act of June 12, 1906, supra, n. 87.  
127 Act of March 3, 1909, supra, n. 88.  
128 Supra, p. 85.  
129 U. S. Const., Art I, § 10.  
130 Supra, p. 84.  
132 Supra, n. 97.  
133 See Dunne v. People (1879) 94 Ill. 120, 34 Am. Rep. 213.
states to punish for refusal to obey the order into Federal service was concurrent, and in People v. Hill that the states have the sole power of governing the militia not in Federal service. Further, only part of the militia is in the National Guard, and the courts last discussed refer only to the latter organization. Congress has power to provide for organizing the militia. Under this power it has provided that the militia shall consist of all able-bodied male citizens and declarant aliens between the ages of eighteen and forty-five (under section 58 of the same Act, officers of the National Guard may be as old as sixty-four), and that it shall be divided into the National Guard, the Naval Militia, and the Unorganized Militia. No state may, without the consent of Congress, maintain troops or ships of war in time of peace; and Congress has withheld its consent to the maintenance of troops other than as authorized in the organization prescribed by the Act of June 3, 1916. The Unorganized Militia is not ordinarily subject to National Guard courts, yet it is recognized by Congress as part of the militia organization; and in view of the recognition of the Constitution of "A well-regulated militia being necessary to the security of a free State," it may be that a state may enroll and use in its own service persons whom Congress has placed in the Unorganized Militia so long as they do not constitute "troops" within the prohibition of Article I, section 10. Again, though a state may not create a militia different from that organized by Congress, it may, perhaps, raise other forces not within the prohibition of that section. Also, as above indicated, the Federal legislation for courts for the National Guard not in Federal service may be unconstitutional. There seems, then to be room for courts-martial organized under state authority.

It would be impracticable within the scope of this inquiry to investigate the jurisdiction of the courts-martial provided by each of the states. We may take as an example the system provided under the laws of California.

Until 1917 the Political Code of California provided for a system of courts-martial somewhat different from that provided by the laws of the United States. The jurisdiction of the courts of this system,
taken as a whole, was however, substantially the same as the jurisdiction of United States Army courts-martial under the Articles of War. These State courts-martial also had a power to punish contempts broader than that possessed by Federal courts-martial, and similar to the power which they now have under existing State law. Sections 1895 to 1917 inclusive provided for the calling forth by the governor of the Enrolled Militia, i.e., of the able-bodied male citizenry of the state. Section 1912 provided that "Every member of the militia ordered out . . . who does not appear at the time and place designated . . . shall be taken as a deserter and dealt with as prescribed in the Articles of War of the United States." On May 10, 1917, however, the existing system of courts-martial was abolished by an Act of the Legislature, and the system prescribed by Congress was adopted in its place. By section 2018 of the Political Code it is now provided that

"The military courts of this state shall be: (1) general courts-martial; (2) special courts-martial; (3) summary courts-martial; (4) courts of inquiry. The . . . jurisdiction of general courts-martial, special courts-martial, summary courts-martial, and courts of inquiry, . . . shall be governed by the terms of the Articles of War, the National Defense Act of June 3, 1916, and the amendments thereto, the laws and regulations governing the army of the United States, and the law and procedure of similar courts of the United States army, except as otherwise provided in this title."

This provision would appear to grant the same jurisdiction over civilians as is provided in Article of War 241 and in section 108 of the Act of June 3, 1916,42 so far as applicable to State courts; i.e., over persons serving sentence, persons guilty of violent direct contempts, spies, retainers to the camp, and persons accompanying or serving with the militia in the field.

Sections 2023 and 2025 provide a somewhat different jurisdiction over contempts than is provided by statutes of the United States. Section 2023 provides:

"Each military court shall have the same power to punish for contempt a witness duly subpoenaed for non-attendance, or refusal to be sworn or testify, or to produce books, papers, and documents, as is possessed by any superior court of this state."

Section 2025 provides:

"Any person who shall be guilty of disorderly, contemptuous, insolent behavior, or use insulting or contemptuous or indecorous

141 Supra, p. 80.
142 Supra, n. 32.
language to, or before, any military court, or any member of such court in open court, tending to interrupt its proceedings or to impair the respect due to its authority, or who shall commit any breach of the peace or make any noise or other disturbance directly tending to interrupt its proceedings, may be committed by warrant under the hand of the president of the court to the jail of the city, county, or city and county in which said court shall sit, there to be confined for a period of time not to exceed three days."

Though sections 1897 to 1902 inclusive, relating to enrollment of the militia, were repealed by Act of the Legislature approved May 27, 1921 (effective July 29, 1921), the other sections providing for enrollment and call into service still stand, as does section 1912 providing for military trial of persons disobeying the call. A person so ordered into service, however, appears to become automatically a member of the militia in active service under sections 1909 to 1911 inclusive, and hence the jurisdiction conferred by section 1912 is not within the scope of this discussion.

Section 2112 provides for summary and general courts-martial for the naval militia, to be "organized and conducted within the laws, regulations, and usages of the United States Navy, and the provisions of the section relating to the military courts in this chapter." As section 2018, referred to, provides for courts exercising jurisdiction in conformity with Acts of Congress which have no reference to the Navy or Naval Militia, the exact limits of the jurisdiction of the courts established by section 2112 are uncertain.

Whether the provisions of the Political Code relating to military trials conflict with the provisions of the State Constitution preserving the right of trial by jury is a question. The Constitution of California makes no exception in favor of cases arising in the militia. The Legislature has power to provide for "disciplining" the militia, but nothing is said in the Constitution about "governing" them. If it be held that, in the State Constitution, the power to provide for disciplining includes the power to provide for trials without a jury, it still seems difficult to understand how this power can be extended to include persons (for example, civilians guilty of contempt) who are not members of the militia.

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(To be concluded)