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THE CONSTITUTION AND THE STANDING ARMY: ANOTHER PROBLEM OF COURT-MARTIAL JURISDICTION

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With the emergence of the Soviet menace after World War II, the United States has, for the first time in its history, found it essential to maintain, both here and abroad, a large standing armed force in what is technically peace-time. That has in turn brought to the fore important and novel questions concerning the jurisdiction which courts-martial may constitutionally exercise. With millions of Americans serving and likely to serve in the armed forces, it is to be expected that the Supreme Court will scrutinize, with more care than ever before, legislation which purports to strip from these "citizen soldiers" fundamental rights guaranteed to civilians under the Constitution.

One constitutional problem which seems never to have been squarely presented to the Court is whether Congress may authorize courts-martial to try, in time of peace, a capital or non-capital crime committed by a serviceman within the United States, where the nature of the crime is exclusively "civil" in the sense that its commission does not have any substantial adverse effect upon the maintenance of military discipline. Before turning to that problem, however, it will be helpful to review the recent decisions of the Supreme Court in which it has refused to permit enlargement of the peace-time jurisdiction of courts-martial over civilians.

I. JURISDICTION OF COURTS-MARTIAL OVER CIVILIANS

In 1955 the Supreme Court decided *United States ex rel. Toth v. Quarles*.[1] There, the Court struck down the attempt of the Air Force

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1. 350 U.S. 11 (1955).

to try by court-martial a former airman who had received an honorable discharge five months prior to his initial arrest on charges of murder and conspiracy to commit murder while serving as an airman in Korea. Two years later, a majority of the Supreme Court, reversing its prior decision in the same case, held in *Reid v. Covert*[2] that courts-martial lacked jurisdiction to try, in time of peace, civilian dependents of servicemen for *capital* crimes committed outside the United States while such dependents were "accompanying the armed forces." In each of those cases, the Court, dwelling at length on the sixth amendment's guarantee of trial by jury,[3] declared unconstitutional a statute enacted by Congress which expressly authorized the exercise of the very jurisdiction which the court-martial had attempted to invoke.[4] And in *Toth,* the Court observed that: "It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians."[5]

On January 18, 1960, the Supreme Court handed down its decisions in four cases which raised questions left unanswered in *Covert, i.e.,* whether overseas court-martial jurisdiction could be sustained with respect to (a) non-capital offenses committed by civilian dependents or (b) capital or non-capital offenses committed by civilian employees

2. 354 U.S. 1 (1957), *reversing on rehearing* 351 U.S. 487 (1956), and Kinsella v. Krueger, 351 U.S. 470 (1956). Justices Frankfurter and Harlan voted to deny court-martial jurisdiction but wrote separate concurring opinions limiting their view to capital cases only. Chief Justice Warren and Justices Douglas and Brennan joined in Justice Black's opinion which extended to both capital and noncapital cases.

3. See United States *ex rel.* Toth v. Quarles, *supra* note 1, at 17-19; Reid v. Covert, note 2 *supra,* at 7-11, 21-23, 29-32, 37.

4. Both of these statutes formed part of the Uniform Code of Military Justice, which was adopted in 1950. In the *Toth* case, the relevant statute provided as follows:

> "Subject to the provisions of article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States . . . , shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status." UCMJ, Article 3(a), now codified in 10 U.S.C. § 803(a) (1958).

In Reid v. Covert, the statute in question provided:

> "The following persons are subject to this code
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> . . . .
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> "(11) Subject to the provision of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States." UCMJ, art. 2(11), now codified in 10 U.S.C. § 802(11) (1958).

The former statute represented an innovation, but the grant of jurisdiction found in the latter had traditionally appeared in American articles of war.

5. United States *ex rel.* Toth v. Quarles, *supra* note 1, at 22.

of the armed services.[6] In each instance (though by differing votes), the Court held that courts-martial cannot constitutionally exercise such jurisdiction over persons who do not have a "status" as members of the armed forces.

All these decisions can be viewed as logical, albeit far-reaching, extensions of basic constitutional doctrine that persons who are not actually "in" the armed forces are not to be deprived of the rights guaranteed to them by the Constitution. That doctrine was first announced in *Ex parte Milligan*,[7] where the Supreme Court held that a military commission convened in Indiana was without jurisdiction under martial law[8] to try a civilian resident of that State for various offenses in the nature of treason. It found later expression in *Duncan v. Kahanamoku*,[9] holding that trial of civilians by military tribunals in Hawaii could not be sustained under an executive proclamation of martial law pursuant to authority granted by Congress. The rationale of the *Toth* and *Covert* line of cases, however, departed from that relied on in both *Milligan* and *Duncan*, where the Court had noted that the crimes alleged could have been tried, in accordance with civil procedures, in loyal civilian courts whose doors remained open. In the *Toth* and *Covert* group, Congress had not provided any means, other than trial by court-martial, for the punishment of crimes committed abroad by civilian dependents, civilian employees or discharged servicemen.[10] As a consequence, the holdings there neces-

6. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (civilian dependent charged with a non-capital offense); McElroy v. United States *ex rel.* Guagliardo and Wilson v. Bohlender, 361 U.S. 281 (1960) (civilian employees charged with non-capital offenses); Grisham v. Hagan, 361 U.S. 278 (1960) (civilian employee charged with a capital offense). In these cases, Mr. Justice Clark, who had dissented in *Covert*, joined with the four justices who comprised the majority in *Covert*. Justices Whittaker and Stewart, who had not participated in *Covert*, joined with the majority in *Kinsella v. Singleton* but dissented in the other three cases involving civilian employees. Justices Frankfurter and Harlan adhered to the capital-noncapital dichotomy which they presented in *Covert*.

7. 71 U.S. (4 Wall.) 2 (1866). *Cf. Ex parte* Merryman, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

8. At the time of Milligan's trial by military commission in 1864, there was still in effect a presidential proclamation (without statutory authority) of 1862 which prescribed such trials for "all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging voluntary enlistments resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to enemies of the United States." See *Ex parte* Milligan, *supra* note 7, at 15-16. The Court did not, however, specifically address itself to the effect of this proclamation.

9. 327 U.S. 304 (1946).

10. Congress may constitutionally provide, however, that such persons be tried by the federal district courts. See, *e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 21 (1955). See also Skiriotes v. Florida, 313 U.S. 69, 73-74 (1941); United States v. Bowman, 260 U.S. 94, 97-98 (1922); Jones v. United States, 137 U.S. 202, 211-212 (1890). For a discussion of the practical difficulties inherent in such a solution, see dissenting opinion of Justice Clark in Reid v. Covert, 354 U.S. 1, 87-89 (1957); Grisham v. Taylor, 161 F. Supp. 112 (M.D. Pa. 1958); Note, 71 HARV. L. REV. 712 (1958); 56 MICH. L. REV. 287 (1957); Note, 107 U. OF PA. L. REV. 270 (1958).

sarily meant that the crimes in question would go unpunished by American courts.[11] In short, the Supreme Court held that constitutional rights do not depend on the availability of a civil forum for the trial of crimes.

II. THE SUPREME COURT AND THE SERVICEMAN'S RIGHT TO A FAIR TRIAL

Whether or not justified by proper construction of the Constitution, the blunt fact is that the Supreme Court's solicitude for those not actually serving in the armed forces has not been matched by comparable concern for servicemen charged with criminal offenses. In a number of early decisions, the Court developed the rule that, in a collateral proceeding brought in the federal courts by a soldier or sailor convicted by court-martial, the inquiry would be restricted to the issues of whether (a) the court-martial had jurisdiction over the person of accused[12] and over the offense charged[13] and (b) the sentence imposed was within the power of the court-martial.[14] The Court shut its eyes to all questions bearing on the fairness of the proceedings resulting in the accused's conviction.[15] This restrictive view of its control over courts-martial led the Court to declare in dicta that not only did the Bill of Rights not apply to persons in the military service, but also that "to those in the military or naval service of the United States the military law is due process."[16]

Since those decisions the Supreme Court has greatly expanded the area of permissible collateral attack against criminal convictions by state, as well as federal, courts.[17] In addition to relaxation of pro-

11. Americans who commit offenses on foreign soil may be tried by the courts of the country in which the offense is committed. See Reid v. Covert, *supra* note 1. *Cf.* Wilson v. Girard, 354 U.S. 524 (1957).

12. *Ex parte* Reed, 100 U.S. 13 (1879); *In re* Craig, 70 Fed. 969 (C.C.D. Kan. 1895); United States *ex rel.* Viscardi v. MacDonald, 265 Fed. 695 (E.D.N.Y. 1920).

13. Smith v. Whitney, 116 U.S. 167 (1886); Dynes v. Hoover, 61 U.S. 65 (1857).

14. Swaim v. United States, 165 U.S. 553 (1897); *Ex parte* Mason, 105 U.S. 696 (1881). Additionally, the Court would consider the question of whether there had been an illegal delegation of the power to pass on sentence. Bishop v. United States, 197 U.S. 334 (1905).

15. In *Ex parte* Reed, *supra* note 12, at 23, Mr. Justice Swayne stated the general rule: "The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority."

16. Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

17. The original view was that "mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for the writ of error." McMicking v. Schields, 238 U.S. 99, 106-07 (1915). To the same effect, see, *e.g.*, Henry v. Henkel, 235 U.S. 219, 229 (1914); Markuson v. Boucher, 175 U.S. 184 (1899); Tinsley v. Anderson, 171 U.S. 101, 105 (1898). Commencing with

cedural rules, the concept of "due process" itself has been further refined, with the result that persons charged with crimes have enjoyed the benefit of new safeguards against arbitrary exercise of governmental power.[18] While these developments have been taking place in the civilian sphere, the Supreme Court has given only faint indications of changes in the rules applicable to military accused.[19] In its most recent decision involving a collateral attack on a serviceman's conviction by court-martial, the Supreme Court went no further than to annonnce that it will require the military reviewing authorities to give "fair consideration" to the accused's claims with respect to matters (such as brutality, coerced confessions and the like) affecting the fairness of the trial.[20] Beyond this, *Reid v. Covert* suggests that four members of the Supreme Court apparently now regard the applicability of the Bill of Rights to courts-martial as an unsettled

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Johnson v. Zerbst, 304 U.S. 458, 468 (1938), the Supreme Court enlarged the meaning of the term "jurisdiction" far beyond formal requirements, with the result that jurisdiction was held to have been lost through denial of the defendant's constitutional rights. Moreover, the Court has granted the writ in cases where the alleged denial of constitutional rights had been raised at the trial and decided adversely to the defendant. See Leyra v. Denno, 347 U.S. 556 (1954); Brown v. Allen, 344 U.S. 443 (1953); Pollak, *Proposals to Curtail Federal Habeas Corpus For State Prisoners: Collateral Attack On the Great Writ*, 66 YALE L.J. 50 (1956); Note, 55 COLUM. L. REV. 196 (1955); Note, 61 HARV. L. REV. 657 (1948).

18. For example, the Supreme Court has held the following to constitute denials of fundamental rights guaranteed by the United States Constitution: (1) The court and jury were subject to mob domination, Moore v. Dempsey, 261 U.S. 86 (1923); (2) the prosecution knowingly used perjured testimony, Mooney v. Holohan, 294 U.S. 103 (1935); (3) the defendant did not intelligently waive counsel in a prosecution before a federal court, Johnson v. Zerbst, *supra* note 17; (4) the defendant's plea of guilty was coerced, Waley v. Johnston, 316 U.S. 101 (1942); (5) the defendant did not intelligently waive the right to trial by jury in a prosecution before a federal court, United States *ex rel.* McCann v. Adams, 320 U.S. 220 (1943); and (6) the defendant was denied the right to consult with counsel, Hawk v. Olson, 326 U.S. 271 (1945); House v. Mayo, 324 U.S. 42 (1945).

19. As late as 1950, the Supreme Court in Hiatt v. Brown, 339 U.S. 103, reaffirmed the traditional doctrine concerning the scope of inquiry of civil courts in habeas corpus proceedings involving military tribunals. See notes 14-16 *supra*. *Cf.* Whelchel v. McDonald, 340 U.S. 122 (1950).

20. Burns v. Wilson, 346 U.S. 137, 144 (1953) (opinion by Vinson, C.J. in which Justices Reed, Burton and Clark concurred). In Easley v. Hunter, 209 F.2d 483, 487 (10th Cir. 1953), *Burns v. Wilson* was interpreted as holding "that a military court must consider questions relating to the guarantees afforded an accused by the Constitution and when this is done, the civil courts will not review its action." *Accord*, Dickenson v. Davis, 245 F.2d 317 (10th Cir. 1957); Dixon v. United States, 237 F.2d 509 (10th Cir. 1956); Suttles v. Davis, 215 F.2d 760 (10th Cir. 1954), *cert. denied*, 348 U.S. 903 (1954). It is possible, however, to interpret *Burns v. Wilson* as laying the groundwork for future review by federal courts of the basic fairness of military procedures. Thus, in Day v. Wilson, 247 F.2d 60, 63 (D.C. Cir. 1957), the Court of Appeals held, citing *Burns v. Wilson*, that the federal courts have jurisdiction to hear and determine a claim that petitioner was denied basic constitutional rights. *Cf.* Day v. Davis, 235 F.2d 379, 384 (10th Cir. 1956), *cert. denied*, 352 U.S. 881 (1956). Note, 70 HARV. L. REV. 1043, 1053 (1957); Note, 67 HARV. L. REV. 479, 483 (1954); Comment, 65 YALE L.J. 413, 422, n. 48 (1956).

question.[21] The Court has also held, in *Lee v. Madigan*,[22] that an Article of War making the capital crimes of murder and rape punishable by court-martial only in time of war was entitled to a liberal reading in favor of the accused.

It should not, of course, be supposed that the serviceman, having been abandoned by the federal courts, has been left to the mercies of his military commander. The Uniform Code of Military Justice, enacted by Congress in 1950, cloaks the military accused with protections which compare very favorably with those accorded the civilian defendant in the federal courts.[23] Whether the military accused should regard himself as more fortunate than his civilian counterpart is, however, beside the point for present purposes. The fundamental question to be explored here is whether Congress may, consistently with the Constitution, grant to courts-martial the power to try servicemen for exclusively "civil" offenses committed in time of peace within the United States.

III. THE CONSTITUTIONAL BASIS FOR COURTS-MARTIAL JURISDICTION

Several provisions of article I of the Constitution confer on Congress the power to legislate with respect to the armed forces. Section 8, clause 14, of that article provides expressly that Congress may "make Rules for the Government and Regulation of the land and naval Forces." Clauses 12 and 13 empower Congress to "raise and support Armies" and to "provide for the common Defense and general Welfare." Finally, clause 18—the necessary and proper clause—provides that Congress may "make all Laws which shall be necessary and proper" to carry into execution those and other powers granted to it. Clauses 12 and 13, however, have never been thought to support the assertion, in peacetime, of court-martial jurisdiction over members of the armed forces. On the other hand, the necessary and proper clause seems plainly applicable in determining the permissible limits of such jurisdiction over servicemen.[24]

21. 354 U.S. 1, 37. See note 2 *supra*.
22. 358 U.S. 228 (1959).
23. For an excellent summary of the rights which a serviceman has today under the Uniform Code of Military Justice, see Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 266, 294-98 (1958).
24. In the *Covert* line of cases, *supra* notes 2 and 6, the Court took the position that the necessary and proper clause was not available to support peacetime jurisdiction over persons who were not actually "in" the land or naval forces within the meaning of clause 14, reasoning that the necessary and proper clause was available only in aid of jurisdiction exercised within the permissible limits of clause 14. The necessary implication of this reasoning is, of course, that, as to the persons "in" the armed forces, clause 14 must be read in the light of the necessary and proper clause. *Cf.* Mr. Justice Clark's observation in *Kinsella v. Singleton*, *supra* note 6, that "if civilian dependents are included in the term 'land and naval forces' at all, they are subject to the full power granted the Congress to create capital as well as noncapital offenses." 361 U.S. at 246.

The Bill of Rights contains only one reference to the armed forces. The Fifth Amendment provides that

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . . .

None of the other guarantees of the Bill of Rights is expressly made inapplicable to the armed forces. That apparent gap has recently given rise to a spirited controversy with regard to the original intent of those who prepared the Bill of Rights.[25] Although ordinary rules of construction readily permit an argument that the rights set forth in the sixth amendment (trial by petit jury, assistance of counsel, etc.) extend to cases arising in the land or naval forces,[26] it seems quite clear that the practice following the adoption of the Bill of Rights never conformed to that construction.[27] The legislative history of the adoption of the Bill of Rights reflects, if nothing else, a failure to grapple with the fundamental problem of reconciling the rights of the individual with the special requirements of the military establishment. As previously noted, the problem may still remain open for judicial consideration despite prior decisions suggesting that servicemen could claim none of the guarantees found in the Bill of Rights.[28]

In any case, putting the Bill of Rights to one side, the power granted by clause 14 seems on its face to be plenary with respect to the trial and punishment of offenses committed by persons who are actually members of the armed forces. Yet, there is, to put it mildly, grave doubt whether the constitutional convention ever believed that courts-martial could be allowed to displace American civil courts as the instrument for punishing offenses having no special relationship to enforcement of military discipline. The evolution of the court-martial and the eighteenth century understanding of its proper jurisdictional sphere support that view.

1. *The Court-Martial in England.*—Although the precise origin of the court-martial in England is obscure, it is clear that at a very early

25. See Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957), for the position that the Bill of Rights was intended to apply to those in the land and naval forces. For the opposite position, see Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 266 (1958).

26. The argument is expounded at length in Henderson, *supra* note 25. Among other things, it is hard to construe the explicit exception in the fifth amendment as being applicable to the sixth amendment, which commences with a reference to "all" criminal prosecutions. Yet even Henderson concedes that military trials were not to be subject to the petit jury requirements.

27. This is made clear in Colonel Weiner's exhaustive survey of the procedures used in trials by court-martial in the three decades following the adoption of the Bill of Rights. See Weiner, *supra* note 25, at 27-36.

28. See text at notes 20-21 *supra*.

date the Kings of England commenced the practice of promulgating ordinances of war to govern the troops raised to fight foreign and domestic wars.[29] These ordinances—the forerunners of the articles of war—were *ad hoc* in nature, being limited in duration to the particular war then being fought.[30] Although the traditional view has been that originally the Court of Chivalry (also known as the Court of the Constable and the Marshall) had jurisdiction over military offenses,[31] it now appears rather more likely that military justice was dispensed in summary fashion by various officers (including the Lord High Constable and the Earl Marshall) of the army whom the Crown commissioned for the purpose.[32] At all events, by the seventeenth century it had become well-established that in time of war the Crown had the prerogative power to adopt articles of war governing the army.[33]

29. BRITISH WAR OFFICE, MANUAL OF MILITARY LAW 7 (7th ed. 1929); DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 339-41 (2d ed. 1901).

30. SQUIBB, HIGH COURT OF CHIVALRY 3-5 (1959).

31. "The Court of the Constable and the Marshall was concerned primarily with the discipline of the army, and matters related thereto." 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 573 (3d ed. 1922). See also ADYE, A TREATISE ON COURTS MARTIAL 11 (8th ed. 1810); HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 34 (4th ed. 1792); MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 266 (1908); BRITISH WAR OFFICE, MANUAL OF MILITARY LAW 7-8 (7th ed. 1929). This view was recently echoed in Reid v. Covert, 354 U.S. 1, 25 n. 44 (1957).

Holdsworth's belief that military discipline was enforced by this court was predicated on Sir Matthew Hale's statement that "the constable and marshal had . . . a judicial power, or a court wherein several matters were determinable: . . . Thirdly, the offenses and miscarriages of soldiers contrary to the laws and rules of the army; for always preparatory to an actual war, the Kings of this realm, by advice of the constable and marshal were used to compose a book of rules and orders, for the due order and discipline of their officers and soldiers." HALE, *op. cit. supra* note 31, at 34.

32. See SQUIBB, *op. cit. supra* note 30, ch. 1. The author (who was counsel in a case actually decided by the Court of Chivalry in 1954, after it had fallen into desuetude for nearly two centuries) concludes that the court's jurisdiction mainly embraced various non-criminal matters, some of which were contractual in nature while others involved rights in the use of coats of arms. Moreover, the court's procedure, like that of the admiralty courts, followed the rules of the civil law. Although at one time the court did exercise jurisdiction over certain crimes committed by Englishmen abroad, none of the surviving records of the court indicates that it had any disciplinary powers over soldiers, either in England or elsewhere. Apparently the confusion arose in part because of a faulty translation of "Curia Militaris" and in part because of the mistaken assumption that the Lord High Constable and the Earl Marshall exercised, through the Court of Chivalry, the disciplinary powers which they unquestionably had under various articles of war. *Cf.* Hale's statement that "the military court held before the Constable and Marshal anciently, as the Judices Oridinarrii in this case, or otherwise before the King's Commissioners of that jurisdiction as Judices Delegati," which indicates that many officers other than the Lord High Constable and Earl Marshall dispensed military justice. HALE, *op. cit supra* note 31, at 33.

33. See An Act Declaring the King's Sole Right over the Militia, 1661, 13 Car. 2, c. 6; Barwis v. Keppel, 2 Wilson's Rep. 314, 95 Eng. Rep. 831 (1766). This prerogative power was an incident of what Blackstone called the King's position "as the generalissimo, or the first in military command within the kingdom." 1 BLACKSTONE, COMMENTARIES *262. Blackstone explicitly stated that "the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land . . .

Until the reign of Charles I, the practice of trying soldiers before military tribunals seems to have passed without objection by Parliament, presumably because these trials were for the most part held in time of war.[34] Charles I, however, issued commissions for the enforcement of military law against soldiers and sailors in time of peace. This promptly drew Parliamentary fire, for in its famous Petition of Right addressed to the Crown in 1627, Parliament complained that soldiers and mariners had been tried by military commissions, proceeding under martial (i.e., military)[35] law, for "murder, robbery, felony, mutiny or other outrage or misdemeanor" and prayed that the practice be halted "lest . . . your Majesty's subjects be destroyed, or put to death contrary to the laws and franchise of the land."[36]

The standing army which had first been established during the Protectorate continued in existence after the Restoration.[37] Both Charles II and James II, relying on the prerogative power, issued articles of war for the government of their troops.[38] It is worth noting that the articles issued by James II in 1686 prohibited the infliction, in time of peace, of any punishment amounting to loss of life or limb.[39] The articles of James II did, however, punish by court-martial the commission by soldiers of various civil crimes, such as theft.[40]

Contemporaneously with the accession of William and Mary to the throne in 1689, Parliament adopted the Declaration of Right, which later that year was revised and enacted as the Bill of Rights.[41] One

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ever was and is the undoubted right of his majesty, and his royal predecessors, kings and queens of England . . . ." *Ibid.* Blackstone's observations were, of course, made on the assumption that a standing army in peace-time would be subject to Parliamentary control.

34. Attempts were made from time to time, especially during the reigns of the Tudors, to enforce military law under the prerogative power of the crown in time of peace, but these attempts were never countenanced by the law of England. See generally 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 574-75 (3d ed. 1922); MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 266-67 (1908); HALE, *op. cit. supra* note 31, at 35.

35. In the seventeenth century the term "martial law" referred to what is now called "military law." That usage is reflected in Hale's discussion of the subject.

36. Petition of Right, 1627, 3 Car. 1, c. 1.

37. Taxation, 1660, 12 Car. 2, cc. 9, 10; Disbanding of the Army, 1660, 12 Car. 2, c. 15; Taxation, 1660, 12 Car. 2, cc. 20, 27-28. Under these statutes Charles II was enabled to maintain not only garrisons in certain fortified places but also some of the regiments which had aided in his restoration. See generally MANUAL OF MILITARY LAW 10-11 (7th ed. 1929).

38. BRITISH WAR OFFICE, MANUAL OF MILITARY LAW 10-11 (7th ed. 1929).

39. Articles of War of James II, art. LXIV, reprinted in WINTHROP, MILITARY LAW AND PRECEDENTS appendix V, 1434, 1445 (1896).

40. Articles of War of James II, art. XVIII, reprinted in WINTHROP, *op. cit. supra* note 39, at appendix V, 1434, 1437. Similarly, the articles previously issued by Charles II in 1662 expressly reserved from the jurisdiction of courts-martial offenses involving the death penalty. BRITISH WAR OFFICE, MANUAL OF MILITARY LAW 10 (7th ed. 1929).

41. Bill of Rights, 1688, 1 W.&M., c. 2. The Declaration of Right had been agreed to by Parliament on February 12, 1689, and was presented to William and Mary the next day, when they were proclaimed King and Queen of

of the most striking features of this famous document was the bold pronouncement that standing armies in peace-time were unlawful without the consent of Parliament. Thus, at one stroke the royal power to raise peace-time armies was severed and control over the army passed into the hands of Parliament.

In the same year, with its adoption of the first Mutiny Act,[42] Parliament extended its newly-won control over the army by legislating with respect to the punishment of military offenses—an area previously reserved to the Crown. The preamble of that act contained this ringing declaration of the supremacy of civil procedures over military law:

> Whereas the raising or keeping a standing Army within the Kingdome in time of peace unless it be with the consent of Parlyament is against Law . . .
>
> And whereas noe man may be forejudged of Life or Limbe, or subjected to any kind of punishment by Martiall Law, or in any other manner than by the judgement of his Peeres and according to the Known and Established Laws of this Realme . . .

The act went on to provide for trial by court-martial, in time of peace, of the three offenses of mutiny, sedition and desertion, and authorized the death penalty for soldiers committing any of those offenses. Parliament was, however, careful to make clear that in other respects soldiers remained subject to "the ordinary processes of Law."

The Mutiny Act did not supersede the Crown's prerogative power to adopt, in time of war, articles of war which prescribed the death penalty or lesser punishments.[43] Moreover, in 1712 Parliament authorized the Crown, in time of peace, to adopt articles of war applicable in the dominions or elsewhere outside England and to constitute courts-martial "in such manner as might have been done by Her Majesty's authority beyond the seas in time of war."[44] It was not, however, until 1803 that the Crown obtained statutory authority to promulgate articles of war applicable in peace-time to troops stationed in England, as well as abroad.[45] Ultimately, in 1813 the royal prerogative was

England. Sections IV-XIII of the Bill of Rights did not appear in the Declaration. The most important change was the addition of section XII which related to the dispensing power. HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 549 (5th ed. 1847); MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 304-05 (1908).

42. Mutiny Act, 1688, 1 W.&M., c. 4 reprinted in WINTHROP, *op cit. supra* note 39, appendix VI. For a statement of the circumstances which led up to the passage of the first Mutiny Act, see BRITISH WAR OFFICE, MANUAL OF MILITARY LAW 10, 11 (7th ed. 1929).

43. See Barwis v. Keppel, 2 Wilson's Rep. 314 95 Eng. Rep. 831 (1766), where the Court of King's Bench held, in effect, that the articles of war there in question had been promulgated under the Crown's continuing prerogative power with respect to the army when engaged in war and to troops in active service in foreign countries.

44. Mutiny Act, 1712, 12 Anne, c. 13.

45. Mutiny Act, 1803, 43 Geo. 3, c. 20.

completely superseded by the enactment of statutory articles which were applicable, in time of war, in England and elsewhere.[46]

2. *The Eighteenth Century Articles of War.*—In light of this history of stubborn Parliamentary opposition to the extension of peace-time court-martial jurisdiction, it is not surprising that the British articles of war in effect at the outbreak of the American Revolution[47] reflect the plain purpose to confine the scope of courts-martial jurisdiction to the trial and punishment of military offenses, and in other respects to give precedence to the civil authorities. Thus, the British articles provided:

> Whenever any Officer or Soldier shall be accused of a capital Crime, or of having used Violence against the Persons or Property of Our Subjects, such as is punishable by the known Laws of the Land, the Commanding Officer and Officers of every Regiment, Troop, or Party, to which the Person or Persons so accused shall belong, are hereby required, upon Application duly made by or in behalf of the Party or Parties injured, to use his utmost Endeavours to deliver over such accused Person or Persons to the Civil Magistrate; and likewise to be aiding and assisting to the Officers of Justice, in apprehending and securing the Person or Persons so accused, in order to bring them to a Trial . . . .[48]

Any commanding officer who failed to heed that requirement was subject to dismissal from the service.[49]

More to the point, the American articles of war adopted by the Continental Congress in 1776 contained an almost identical provision.[50] Substantially the same provision also appeared in the articles of war of 1806[51]—the first completely new articles enacted by Congress after ratification of the Constitution.[52]

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46. Mutiny Act, 1813, 53 Geo. 3, c. 17, § 146.

47. British Articles of War of 1765, reprinted in WINTHROP, *op. cit supra* note 39, appendix VII, 1448. Winthrop states unequivocally that the British Articles of War of 1765 were in force at the beginning of the American Revolution. *Ibid.* It is to be noted, however, that General Davis has stated that the British Articles of War of 1774, reprinted in DAVIS, *op. cit. supra* note 29, at 581, were probably those from which our own articles derived. DAVIS, *op. cit. supra* note 29, at 340-41. An examination of the British Articles of 1765 and 1774 reveals that the two sets of articles were substantially the same concerning matters of discipline.

48. British Articles of War, 1765, § 11, art. 1, reprinted in WINTHROP, *op. cit. supra* note 39, at 1446; British Articles of War, 1774, § 11, art. 1, reprinted in DAVIS, *op. cit. supra,* note 29, at 589.

49. *Ibid.*

50. Rules and Articles for the Better Government of the Troops, 1776, § 10, art. 1, reprinted in WINTHROP, *op. cit. supra* note 39, at 1494. These Articles were adopted on September 20, 1776. 5 JOUR. CONT. CONG. 788 (1776).

51. Act of April 10, 1806, c. 20, § 1, art. 59, 2 Stat. 366.

52. The following is the history of the 1776 Articles: On May 31, 1786, section XIV of the 1776 articles was repealed and replaced by a new section. See 30 JOUR. CONT. CONG. 316 (1786). In 1789, Congress continued in force the 1776 articles, as amended. Act of Sept. 29, 1789, c. 25, § 4, 1 Stat. 96. On three occasions prior to 1806, the 1776 articles were re-enacted "as far as the same may be applicable to the constitution of the United States." Act of April 30, 1790, c. 10, § 13, 1 Stat. 121; Act of March 3, 1795, c. 44, § 14, 1 Stat. 432; Act of May 30, 1796, c. 39, § 20, 1 Stat. 486. There were unsuccessful

Of course, the objection might be raised that these provisions of the articles of war did no more than grant to the civil authorities priority of prosecution of civil crimes and that courts-martial could exercise concurrent jurisdiction over them.[53] The fact is, however, that neither the British nor the American articles of war contained any provision which in terms denounced common-law crimes such as murder, robbery and the like.[54] It is true that those articles did contain the so-called "general article" which gave to courts-martial the power to punish all crimes *not capital,* and all disorders and neglects, "to the prejudice of good order and military discipline," that were not elsewhere proscribed in the articles.[55] In his treatise, however, Colonel Winthrop, the leading nineteenth century authority on American military law, pointed out that the accepted construction of the general article had been to regard the qualification "to the prejudice of good order and military discipline" as applicable to "crimes not capital" as well as to "disorders and neglects."[56] He went on to state that, in order for any offense to be cognizable under the general article, the offense must have a "reasonably direct and palpable" impact upon good order and military discipline.[57] In support of that view, Colonel Winthrop cited many instances where the findings and sentence of courts-martial were overturned by higher military authorities because the offense in question was exclusively one against the civil law.[58] Furthermore, in *Ex parte Mason,*[59] the Supreme Court

attempts made to have Congress completely revise the 1776 articles. For example, Secretary of War Knox in 1789 stated that it was necessary "that the articles of war be revised and adapted to the constitution." AMERICAN STATE PAPERS MILITARY AFFAIRS 6 (Lowrie & Clarke 1832).

53. It must be noted, however, that in seventeenth and eighteenth century England soldiers, as well as civilians, were tried in time of peace by the civil courts. 2 CAMPBELL, LIVES OF THE CHIEF JUSTICES 91 (1849). The general rule was "that no crime for which the common or statute laws of the county have provided a punishment is cognizable before a court-martial." TYTLER, MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 154 (3d ed. 1814). The army was considered amply protected by the rule that "upon proof being brought of his conviction of a crime before the civil court which renders him unfit for, or unworthy of, the honorable profession of a soldier, he may on that ground be cashiered." *Id.* at 156.

54. See generally British Articles, 1765, reprinted in WINTHROP, *op. cit. supra* note 39, at appendix VII, 1448; British Articles of War, 1774, reprinted in DAVIS, *op. cit. supra* note 29, at 581.

55. British Articles of War, 1765, § XX, art. III, reprinted in WINTHROP, *op. cit. supra* note 39, at 1469; British Articles of War, 1774, § XX, Article III, reprinted in DAVIS, *op. cit. supra* note 29, at 581.

56. WINTHROP, *op. cit. supra* note 39, at 1123, n. 82; DAVIS, *op. cit. supra* note 29, at 475.

57. WINTHROP, *op. cit. supra* note 39, at 1123. See also 16 OPS. ATT'Y GEN. 578 (1880) (dictum).

58. WINTHROP, *op. cit. supra* note 39, at 1124, M. 88; DIG. OPS. JAG 68-69 TT 3 (1895). Winthrop noted, however, that in practice the general rule was somewhat perverted by a commander's sustaining courts-martial jurisdiction "whenever the offense can be viewed as affecting, in any material though inferior degree, the discipline of the command." WINTHROP, *op. cit. supra* note 39, at 1125.

59. 105 U.S. 696 (1881).

implicitly recognized the distinction between civil and military offense in holding that a court-martial had jurisdiction under the general article to try a soldier for the offense of assault with intent to kill. The Court stated: "[T]he crime charged, and for which the trial was had, was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill a prisoner confined in a [federal] jail over which he was standing guard."[60]

It should also be noted that the general article in terms excluded from its scope all capital crimes, which were, of course, considerably more numerous in the eighteenth century than at the present time.[61]

3. *The Historical Background of Clause 14.*—The constitutional power of Congress to make rules for the government and regulation of the land and naval forces, as set forth in article I, section 8, clause 14, had its counterpart in the Articles of Confederation, which conferred on Congress "exclusive right and power of . . . making rules for the government and regnlation of [the] land and naval forces, and directing their operations."[62]

It will be observed that, by vesting power of command in the legislative branch, the Articles of the Confederation departed radically from the contemporary practice in England.[63] After the Revolution of 1689, Parliament had undertaken to control the establishment of standing armies in peace-tiine,[64] but it had not attempted to usurp the power of the Crown to exercise command and direction over the army.[65]

The express grant of power in clause 14 seems to have been designed to accomplish two objects. First, the omission of any reference to power of command, in conjunction with the express grant of authority to the President to act as Commander-in-Chief of the armed forces, made it clear that Congress was not to retain the power of command which it had enjoyed under the Articles of the Confederation. Second, clause 14 reflected the plain intent to give to Congress, not the President, the power to provide for the government and

60. *Id.* at 698.

61. At the end of the eighteenth century all felonies committed in England with the exception of petty larceny and maiming were punishable by death. *Report of the Select Committee on Capital Punishment* 25 (1930), reprinted in MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1940).

62. Articles of Confederation, art. IX (1781), reprinted in 2 CROSSKEY, POLITICS AND THE CONSTITUTION 1218 (1953).

63. See 1 BLACKSTONE, COMMENTARIES *262-63.

64. Bill of Rights, 1688, 1 W.&M. c. 2; Mutiny Act, 1688, 1 W.&M. c. 4.

65. The Preamble of the Act of 1661, temporarily legalizing the militia under Charles II, declared that the "government, command, and disposition of the militia, and of all forces by sea, . . . is, and bye the lawes of England ever was, the undoubted right of His Majesty." An Act Declaring the King's Sole Right over the Militia, 1661, 13 Car. 2 c. 6. That act, with the exception of part of the Preamble, was repealed by the Statute Law Revision Act, 1863, 26 and 27 Vict. c. 125.

regulation of the armed forces, including, of course, the punishment of military offenses.[66]

Professor Crosskey has demonstrated, convincingly and at length, that the purpose in enumerating certain powers in article I, section 8, was to remove the possibility that the executive branch might later be held to possess powers which in England had been associated with the royal prerogative.[67] It cannot be seriously disputed that the Constitutional Convention relied heavily on Blackstone as the source for determining those areas in which questions concerning the distribution of powers between the executive and legislative branches might arise.[68] In the *Commentaries*, Blackstone pointed out that the Crown retained certain prerogative powers with respect to promulgating rules governing the army and navy.[69] Clause 14 represented the judgment of the Convention that control over such rules was better reposed in the hands of Congress than the President.[70] In this respect, the Constitution's grant of power to Congress can be regarded as an acceleration of the British constitutional development that culminated in 1813 with Parliament's drawing to itself the right to enact articles of war governing all British troops at all times and wherever located.[71]

What has been said above shows that clause 14 was not expressed in unqualified terms in order that Congress might legislate at will

66. It should be noted, however, that one authority in the field of military law has recently contended that the intent of the Constitutional Convention was to confer power upon both Congress and the President (in cases where Congress had not acted) to make rules for the government and regulation of the armed forces. See Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861-62 (1959). This view is difficult to sustain once it be conceded that the drafting of the Constitution was done in the light of Blackstone's *Commentaries*. In essence, Blackstone states that the King had "the sole supreme *government* and *command* . . . of all forces by sea and land," and "the sole power of *raising* and *regulating* fleets and armies." 1 BLACKSTONE, COMMENTARIES *262. In the Constitution, however, the President is only given the "*command* of the Army and Navy." Art. II, § 2. By art. 1, § 8, cl. 14, however, Congress is given the power "to make Rules for the *Government* and *Regulation* of the land and naval Forces" of the United States, and by art. I, § 8, cl. 12, Congress is given the power "to *raise* and support Armies." In commenting on this constitutional dichotomy, Professor Crosskey states that "the almost slavish following, throughout all the provisions, of Blackstone's words —'command,' 'regulate,' 'govern'—can hardly leave a doubt as to what the Convention was doing." 1 CROSSKEY, *op. cit. supra* note 62, at 425.

67. With particular reference to military powers of Congress, see 1 CROSSKEY, *op. cit. supra* note 62, at 413-14, 424-25.

68. Thus, Justice Brewer stated that "Blackstone's *Commentaries* are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." Schick v. United States, 195 U.S. 65, 69 (1904). See also THE FEDERALIST No. 69, at 430-31 (Lodge ed. 1888).

69. 1 BLACKSTONE, COMMENTARIES *262-63.

70. See text at note 65 *supra*.

71. Mutiny Act, 1813, 54 Geo. 3, c. 25.

with regard to members of the armed forces. The strong probability is that the Constitutional Convention never conceived that Congress could, much less would, attempt to grant to the military the power to try and punish civil crimes committed in time of peace.[72] Apart from the fact that Parliament had never ventured to make such a grant of power,[73] the Convention could hardly have been unaware of Blackstone's strong condemnation of criminal justice administered under military procedures. He said:

> When the nation was engaged in war . . . some rigorous methods were put in use for the raising of armies, and the due regulation and discipline of the soldiery; which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the Kingdom. . . . The necessity of order and discipline in any army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land.[74]

In view of the unhappy experience of the Colonies with British martial law during the Revolution,[75] it is even more likely that Blackstone's views met with the whole-hearted agreement of the Constitutional Convention.

IV. The Erosion of Civil Jurisdiction over Civil Offenses

We have noted that the 1806 articles of war faithfully reproduced the original limitations on peace-time court-martial jurisdiction over civil offenses.[76] It will now be instructive to trace the disappearance of those limitations, a process which was so gradual that comparatively little attention was focused on each succeeding step.

The 1863 Statute

The first step came in 1863, when Congress, as part of a statute to enroll and call out the national forces, expressly authorized courts-martial to try various civil crimes, regardless of whether the circum-

72. The narrow jurisdiction which the military originally exercised in peacetime has previously been discussed. See text at notes 47-59 *supra*.

73. Thus, when the first Mutiny Act was passed, only the military offenses of mutiny, sedition, and desertion were proscribed. Mutiny Act, 1688, 1 W. & M. c. 4. For a general discussion of the narrow scope of the various Mutiny Acts, see British War Office, Manual of Military Law 11-13 (7th ed. 1929).

74. 1 Blackstone, Commentaries * 413.

75. Morison, The American Revolution 1764-1788, at 91-96 (2d ed. 1929). In his dissenting opinion in *McElroy v. Guagliardo*, *supra* note 6, Mr. Justice Whittaker quoted Hamilton's statement in The Federalist No. 23, at 136 (Lodge ed. 1888), to the effect that the military powers granted to Congress (*i.e.*, clauses 12, 13 and 14) "ought to exist without limitation." Apart from the fact that Hamilton was not attempting specifically to construe the scope of clause 14, the burden of his argument in Nos. 23-29 of The Federalist was addressed to the proposition that the Congress, not the state legislatures, should have the powers conferred by clauses 12, 13 and 14.

76. See note 50 *supra*.

stances of their commission prejudiced good order and military discipline. That authority was, however, applicable only "in time of war, insurrection or rebellion," although it did have the effect of permitting imposition of the death penalty.[77]

The 1863 statute was brought before the Supreme Court in *Coleman v. Tennessee*,[78] where the defendant, following his conviction by court-martial of the murder of a girl in Tennessee, argued that his subsequent conviction by the Tennessee courts of the same offense could not be sustained because the statute was intended to vest in courts-martial exclusive jurisdiction over civil offenses committed in time of war or rebellion. Although the Court avoided any suggestion of constitutional restriction on congressional power to make such jurisdiction exclusive, it nevertheless flatly rejected the defendant's argument, in stating:

> Previous to its enactment, the offenses designated were punishable by the State courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.[79]

The Court also noted the particular problem which the statute was designed to correct:

> It was enacted not merely to insure order and discipline among the men composing those forces, but to protect citizens not in the military service from the violence of soldiers. It is a matter well known that the march even of an army not hostile is often accompanied with acts of violence and pillage by straggling parties of soldiers, which the most rigid discipline is hardly able to prevent. The offenses mentioned are those of most common occurrence, and the swift and summary justice of a military court was deemed necessary to restrain their commission.[80]

It will be observed that the Court did not intimate that *peace-time* jurisdiction over civil crimes could be entrusted to courts-martial.

The 1874 Articles of War

The provisions of the 1863 statute were formally incorporated in the articles of war of 1874.[81] At the same time, the provisions of the 1806 articles requiring delivery of military offenders to the civil authorities

77. Act of March 3, 1863, c. 75, § 30; Rev. Stat. § 1342, art. 58 (1875).
78. 97 U.S. 509 (1878).
79. *Id.* at 514; 6 OPS. ATT'Y GEN. 413, 419 (1854).
80. 97 U.S. at 513.
81. Rev. Stat. § 1342, art. 58 (1875).

were brought into line by making that requirement inapplicable in time of war or rebellion.[82] Thus, the 1874 articles made it clear that in such times the military authorities having custody of an accused were entitled to priority in prosecuting him for civil crimes.

The 1916 Articles of War

The erosion became more pronounced with the enactment of the 1916 articles of war.[83] These articles represented the first serious attempt to revise the articles of war of 1806, to eliminate obsolete material and to incorporate the experience gained from the administration of military justice during the nineteenth century.[84] The 1916 articles made four important changes in the rules applicable to jurisdiction over civil crimes committed in peace-time within the United States. In the first place, court-martial jurisdiction was extended to specified non-capital civil offenses (such as larceny, robbery and assault), whether or not committed in time of war.[85] General Crowder, the then Judge Advocate General,[86] explained to the Senate Subcommittee on Military Affairs that this extension was designed to eliminate the confusion in pleading which had resulted from the requirement that civil crimes be charged under the general article in peace-time and under the specific article in wartime.[87]

Second, the general article was radically altered by excising the qualification that "crimes not capital" be to the prejudice of good order and military discipline.[88] Relying on a dictum in *Grafton v. United States*,[89] which actually involved the murder of two Filipinos while the accused was performing military duties as a sentry on post, General Crowder frankly stated that the amendment of the general article was intended to sweep within court-martial jurisdiction all non-capital civil crimes, not elsewhere expressly denounced by the articles.[90] Although recognizing that there had been "some argument"[91] about the construction of the prior general article, General Crowder neither discussed the *Grafton* case nor brought to the subcommittee's attention Winthrop's unequivocal view that only non-capital crimes prejudicing good order and military discipline could be prosecuted under the prior general article.[92] Also, General Crow-

82. Rev. Stat. § 1342, art. 59 (1875).
83. Articles of War, 1916, c. 418, 39 Stat. 650.
84. See S. REP. No. 130, 64th Cong., 1st Sess. 17, 28 (1916).
85. Articles of War, 1916, art. 93, 39 Stat. 664.
86. Major General Enoch B. Crowder was The Judge Advocate General of the Army from February 15, 1911, to February 23, 1923. See 1 C.M.R. vii (1951).
87. S. REP. No. 130, *supra* note 83, at 89.
88. Articles of War, 1916, art. 96, 39 Stat. 666.
89. 206 U.S. 333, 348 (1907).
90. S. REP. No. 130, *supra* note 84, at 91.
91. *Ibid.*
92. See WINTHROP, *op. cit. supra* note 39, at 1123, 1124 n. 82.

der did not even advert to the reasons for enlarging the general article to cover "all conduct of a nature to bring discredit upon the military service."[93] Obviously, the commission by a serviceman of any serious offense may, in a sense, bring discredit upon the armed forces.

Third, the 1916 articles expressly provided that murder or rape committed outside the United States could be tried by court-martial in time of peace.[94] Prior to the 1916 articles, courts-martial had no peace-time jurisdiction over any civil capital offense. In connection with this amendment, General Crowder, with the support of the Secretary of War, disclosed his disagreement with the recommendation of the Army General Staff to the effect that courts-martial also be empowered to try murder and rape committed within the United States.[95] Congress ultimately rejected the recommendation of the General Staff.[96]

Fourth, the 1916 articles further eroded the requirement for delivery of offenders to civil authorities, notably by eliminating that requirement in cases where the soldier was being held by the army to answer to it for a crime punishable under the articles of war.[97] In effect, therefore, the 1916 articles gave to the army priority of prosecution with respect to soldiers who were in its custody awaiting trial by court-martial for any peace-time civil crime other than murder or rape committed within the United States.

It is interesting that, in broadening the scope of court-martial jurisdiction, the 1916 articles provided the basis for the contention, previously considered and rejected in *Coleman v. Tennessee*,[98] that courts-martial had exclusive jurisdiction over civil crimes committed in war-time.[99] The contention met with the same lack of success before the Supreme Court.[100] However, none of these cases involved the constitutional limits of congressional power to authorize courts-martial to try civil crimes committed in peace-time. And, of course, even the 1916 articles stopped short of permitting courts-martial to

93. Articles of War, 1916, art. 96, 39 Stat. 666.
94. Articles of War, 1916, art. 92, 39 Stat. 664.
95. S. REP. No. 130, *supra* note 83, at 22, 87-89. The then Secretary of War, Lindley M. Garrison, stated that "it ought never to be embarrassing to the military service to have exclusive jurisdiction of civil capital offenses committed within the states of the Union and the District of Columbia, by persons subject to military law, vested in the civil courts." *Id.* at 22.
96. See Articles of War, 1916, art. 92, 39 Stat. 664.
97. Article of War, 1916, art. 74, 39 Stat. 662.
98. 97 U.S. 509, 514 (1878).
99. This contention was advanced and rejected in United States v. Hirsch, 254 Fed. 109 (E.D.N.Y. 1918); People v. Denman, 179 Cal. 497, 177 P. 461 (1918); *Ex parte* Koester, 56 Cal. App. 621, 206 P. 116 (1922); Funk v. State, 84 Tex. Cr. 402, 208 S.W. 509 (1919). The contention was upheld in *Ex parte* King, 246 Fed. 868 (E.D. Ky. 1917).
100. Caldwell v. Parker, 252 U.S. 376 (1920).

try the only two capital civil crimes—murder and rape—when those crimes were committed in peace-time within the United States.[101]

The 1950 Uniform Code

Although the 1916 articles were extensively revised after World War I,[102] the provisions of those articles relating to jurisdiction over civil crimes remained substantially unchanged[103] until the enactment of the Uniform Code of Military Justice in 1950.[104] The Code, with its attempt to approximate the rules and procedure applicable in the federal courts, was rightly hailed as a significant advance in the administration of military justice.[105] Nevertheless, the Code did elide the one remaining limitation on court-martial jurisdiction over civil crimes, for it provided, in effect, that in peace-time courts-martial could try and impose the death penalty with respect to murder and rape committed within the United States.[106] In view of the previously expressed reluctance on the part of the military to undertake the punishment of capital civil crimes, it is indeed astonishing that at the prolonged congressional hearings on the Uniform Code, only one voice seems to have been raised in objection to this novel provision.[107]

V. The Present Practice

At the present time, courts-martial and civil courts exercise concurrent jurisdiction over crimes committed by servicemen within the United States.[108] That is, where a soldier's conduct constitutes at the same time an offense against military discipline, punishable by court-martial, and a crime cognizable in a civil tribunal, the court whose jurisdiction first attaches is generally entitled to proceed.[109] And it is

101. Articles of War, 1916, art. 92, 39 Stat. 664.
102. See Act of June 4, 1920, 41 Stat. 787.
103. 41 Stat. 803, 805.
104. 10 U.S.C. § 551 (1958).
105. See, *e.g.*, Brosman, *Uniform Code of Military Justice, Some Problems and Opportunities*, 25 Okla. B.A.J. 1605 (1954); Landman, *One Year of the Uniform Code of Military Justice; A Report of Progress*, 4 Stan. L. Rev. 491 (1952); White, *Has the Uniform Code of Military Justice Improved the Court-Martial System*, 28 St. John's L. Rev. 19 (1953).
106. UCMJ, arts. 118, 120, 10 U.S.C. §§ 712, 714 (1958).
107. Statement of Richard H. Wels, Chairman, Special Committee on Military Justice of the New York County Lawyers' Association, *Hearings on the Uniform Code of Military Justice Before the House Subcommittee of the Committee on Armed Services*, 81st Cong., 1st Sess., at 644 (1949).
108. Caldwell v. Parker, 252 U.S. 376 (1920); Franklin v. United States, 216 U.S. 559 (1910); Grafton v. United States, 206 U.S. 333 (1907); *Ex parte* Mason, 105 U.S. 696 (1881); 6 Ops. Att'y Gen. 413 (1854).
109. *E.g.*, *Ex parte* Mason, 105 U.S. 696 (1881). The two jurisdictions also have the alternative of deciding between themselves which one of them shall proceed first. *E.g.*, *Ex parte* Dunn, 250 Fed. 871, 873 (D. Mass. 1918); Op. J.A.G. of November 11, 1911, Dig. Ops. J.A.G., 1912-40, § 432(2). At the present time the matter of delivery of a military offender to the civilian authorities is left to regulation. UCMJ, art. 14(a), 10 U.S.C. § 814(a) (1958).

no defense in the first proceeding that the other jurisdiction could have tried the accused.[110] Moreover, the plea of a previous conviction or acquittal by court-martial does not constitute a defense to subsequent state court proceedings.[111] This result stems from the constitutional dogma that the state and federal governments are separate "sovereigns" and, therefore, each is entitled to punish the luckless offender whose single act happens to transgress a law enacted by each "sovereign."[112] On the other hand, since courts-martial and federal courts are said to derive their powers from the same authority, *i.e.*, Congress, a serviceman who has been tried by one of them cannot thereafter be tried by the other for the same offense.[113] Thus, if a serviceman commits an assault on a military or other reservation over which the federal government has exclusive jurisdiction, he could be tried and convicted either by the federal courts or by court-martial, but not by both.

Dual state-federal jurisdiction over civil crimes committed by members of the armed forces has resulted in a situation that does little credit to the orderly administration of criminal justice. The rule is, to put it bluntly, that whichever authority first catches the accused is entitled to the first crack at him. It does not matter whether the particular offense had a substantial impact upon military discipline or whether the victim was a civilian rather than another member of the armed forces. Indeed, the only protection afforded the serviceman is the right to have an action against him removed to the federal district court in a case where the offense was committed under color of office.[114] In other respects, however, neither Congress nor the

110. Franklin v. United States, 216 U.S. 559 (1910); *Ex parte* Mason, 105 U.S. 696, 699 (1881).

111. *E.g.*, Coleman v. Tennessee, 97 U.S. 509, 513 (1878) (conviction); United States v. Cashiel, 25 Fed. Cas. 318 (No. 14,744) (D. Md. 1863) (acquittal). Conversely, prior trial in a state court does not bar subsequent trial by court-martial. *In re* Stubbs, 133 Fed. 1012 (C.C. Wash. 1905) (acquittal).

112. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. United States, 359 U.S. 121 (1959); United States v. Lanza, 260 U.S. 377 (1922).

113. Grafton v. United States, 206 U.S. 333 (1907); United States v. Block, 262 Fed. 205 (D. Ind. 1920). See United States v. Bayer, 156 F.2d 964, 960 (2d. Cir. 1946), *rev'd on other grounds*, 331 U.S. 532, *rehearing denied*, 332 U.S. 785 (1947); Crane, *Double Jeopardy and Courts-Martial*, 3 MINN. L. REV. 181 (1919).

114. 28 U.S.C. § 1442(a) (Supp. V, 1958) provides that:

> "A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof . . . may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States . . . ."

Prior to the enactment of this statutory authority, the lower federal courts upheld the accused's right to obtain his discharge from state custody in those cases where the offense was committed in carrying out a lawful order of his military superiors. Lima v. Lawler, 63 F. Supp. 446 (E.D. Va. 1945); Brown v.

Supreme Court has seen fit to protect the serviceman from the shabby consequences that can flow from the actual exercise of concurrent jurisdiction.

The Departments of Justice and Defense have found it desirable to establish ground rules for determining the forum for trying a serviceman charged with a civil offense in violation of both military and federal law.[115] In general, these rules, which were established by agreement between the Departments in 1955, give to the military department concerned the responsibility of investigating and prosecuting offenses committed by persons subject to the Uniform Code of Military Justice and involving as victims only those persons or their civilian dependents residing on the military installation in question.[116] The military departments may also investigate and prosecute "extraordinary" cases involving special factors relating to the administration and discipline of the armed forces. Offenses committed outside the military installation or involving persons not subject to the Uniform Code are normally to be investigated by the Federal Bureau of Investigation and prosecuted in the civil courts.

It is, in a sense, ironic that the executive branch alone has given some recognition to the desirability of trying certain kinds of offenses in accordance with established civil procedures, including trial by jury. Furthermore, by relinquishing the right to have these offenses tried by court-martial, the Defense Department seems implicitly to have conceded that good order and military discipline do not require the full exercise of the jurisdiction over civil offenses which Congress granted to courts-martial under the Uniform Code.

VI. The Proper Interpretation of Clause 14

History is not the controlling, much less the sole, guide to constitutional interpretation.[117] An inquiry directed exclusively to the question of whether or not the Constitutional Convention believed that courts-martial should exercise jurisdiction over civil crimes misses the mark by a wide margin; the solutions reached in one century may

Cain, 56 F. Supp. 56 (E.D. Pa. 1944); *In re* Wulzen, 235 Fed. 362 (Ohio 1916); *In re* Fair, 100 Fed. 149 (C.C. Neb. 1900).

115. Army Reg. 22-160, Oct. 7, 1955, implementing *Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction*, signed July 19, 1955.

116. *Ibid.*

117. The Supreme Court has, however, stated that "the interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." Smith v. Alabama, 124 U.S. 465, 478 (1888). See also *Ex parte* Quirin, 317 U.S. 1, 41-42 (1942). For an extended discussion of the importance of history in the constitutional area, see Goebel, *Constitutional History and Law*, 38 Colum. L. Rev. 555 (1938).

not even be relevant in another.[118] Yet the momentous issues which wracked seventeenth century England have more than mere historical interest. The principle of civilian supremacy remains firmly embedded in our concept of democratic govenment;[119] and trial by jury, as the Supreme Court has recently reminded us, is a right not lightly to be disregarded.[120]

The principal constitutional problem here is whether clause 14, either alone or in conjunction with the necessary and proper clause, gives to Congress the power to entrust courts-martial with jurisdiction over both capital and non-capital civil crimes (*i.e.*, crimes having no substantial adverse effect upon the maintenance of good order and military discipline) committed by servicemen in time of peace within the United States. The historical material which we have outlined shows that clause 14 was not inserted in the Constitution with the objective of granting to Congress plenary authority to prescribe procedures for trying and punishing members of the armed forces. It also seems reasonably clear that the Constitutional Convention did not contemplate that Congress would actually permit courts-martial to try and punish such civil crimes. That does not, in itself, require the conclusion that Congress was never to have the power to delegate to courts-martial jurisdiction over such civil crimes; constitutional interpretation has not been thought to depend upon the insight of the Constitution's drafters into all the ways in which power granted might subsequently be used.[121] Moreover, as Mr. Justice Harlan suggested in his concurring opinion in *Reid v. Covert,* the Constitutional

118. For example, Mr. Justice Hughes states that "when we are dealing with the words of the Constitution . . . we must realize that [the framers] . . . have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1933).

119. Thus, Mr. Justice Field stated that the "military should always be kept in subjection to the laws of the country to which it belongs, and . . . he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." Dow v. Johnson, 100 U.S. 158, 169 (1879). The Englisli have long been proud of "the very singular subjection in which the military is kept in regard to the civil power." 2 DE LOLMÉ, THE ENGLISH CONSTITUTION 981 (1838). See also Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955); Duncan v. Kahamoku, 327 U.S. 304 (1946); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 128 (1866).

120. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14-19 (1955).

121. In 1816, Justice Story observed: "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which these powers should be carried into execution. . . . Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

Convention was probably less concerned with limiting congressional power than it was with precluding the executive branch from later laying claim to various powers which were once embraced within the royal prerogative.[122]

The contemporary understanding of court-martial jurisdiction is nonetheless important for the light it sheds on the proper construction of the words used in clause 14 itself. To begin with, it will be observed that the terminology of clause 14 is far different from that used in clause 10 authorizing Congress to "define and punish Piracies and Felonies committed on the high Seas." Clause 14 does not, for example, speak of definition and punishment of crimes committed by members of the land and naval forces. Congress is instead given power to make "rules," not to define and punish "Crimes." Furthermore, those "Rules" must be "for" a specified purpose—the "Government and Regulation" of the land and naval forces. The fair import of clause 14 is, therefore, not to authorize general criminal jurisdiction over servicemen, but to make rules prescribing punishment for offenses having some special relationship to the armed forces.[123] As we have pointed out, this interpretation is not only justified by the evolution of the court-martial in England, but is also consistent with the articles of war in force between 1776 and 1863 and with their construction by the American military services and the Attorney General.[124]

The necessary and proper clause does not lend constitutional support to the peace-time exercise by courts-martial of jurisdiction over civil crimes. The most that clause would seem to authorize is the trial and punishment of those crimes which, although known to the common law, also adversely affect good order and military discipline in the armed forces. Thus, the use of the court-martial to try and to punish a barracks thief can hardly meet with serious constitutional objection. On the other hand, consider this hypothetical case: Private Jones, a young draftee who is stationed in California, is on leave in New York City where he has been living at his parents' home. A few hours after a violent family quarrel, Private Jones deliberately

122. See Reid v. Covert, 354 U.S. 1, 68 (1957).

123. *But see* Mr. Justice Clark's dictum in *Kinsella v. Singleton, supra* note 6, that "the power to 'make Rules for the Government and Regulation of the land and naval forces' bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of the punishment therefor." 361 U.S. at 246.

Mr. Justice Whittaker, however, was careful to qualify the power to make "Rules" to those which are "necessary and proper." 28 U.S.L. WEEK at 4086. He also referred to "the practical necessities and the lack of alternatives" with respect to overseas court-martial jurisdiction over civilian employees. *Ibid.* Of course, neither is a consideration applicable to the problem discussed in this article.

124. See notes 56-59 *supra.*

stabs his sleeping father with a kitchen knife and kills him. Jones is then charged with premeditated murder—a capital crime—and brought to trial before a general court-martial. Here is a crime whose only substantial relationship to the military service lies in the fact that Private Jones happened at the time to be a soldier. Apart from the Army's desire to rid itself of persons who have committed serious offenses—which can easily be done without resort to court-martial proceedings,[125]—Jones's crime plainly does not have any substantial bearing on the maintenance of good order and *military* discipline, nor can it reasonably be suggested that amenability to trial by court-martial is likely to have any deterrent effect with respect to an act of this kind. May it fairly be argued, then, that court-martial jurisdiction over Jones can be based on "Rules for the Government and Regulation" of the armed forces and that Congress may, in consequence, deprive Private Jones of civil procedures merely because he was serving "in" the Army?

It is true that for more than forty years courts-martial have, apparently without objection, exercised jurisdiction over non-capital civil offenses.[126] Acquiescence is not, however, equivalent to approval;[127] and the fact remains that the Supreme Court has never decided the basic constitutional issue. Furthermore, as we indicated at the outset, the peace-time armed forces can no longer be regarded as a professional elite living according to their own customs in near-isolation from the civilian world.[128] Judicial attitudes developed under the far different conditions then prevailing are almost totally irrelevant

125. Army Reg. 635-206, April 8, 1959, provides for the administrative separation of enlisted personnel who have committed an act of misconduct. Normally, an undesirable discharge will be effected pursuant to the approved findings of a board of officers where the soldier involved has been convicted by a civil court (domestic or foreign).

126. See text at note 104 *supra*.

127. *Cf.* Mr. Justice Rutledge's statement concerning supposed congressional acquiescence in Supreme Court action: "Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments. . . . But it would be going even farther beyond reason and common experience to maintain . . . that in legislation any more than in other affairs silence or nonaction always is acquiescence equivalent to action." Cleveland v. United States, 329 U.S. 14, 22 (1946). See Girouard v. United States, 328 U.S. 61 (1946).

128. Thus the authorized military strength of the United States in 1789 was only 840. 1 AMERICAN STATE PAPERS MILITARY AFFAIRS 6 (Lowrie & Clarke 1832). In 1792 the authorized total was only 5,120. *Id.* at 40. At the outset of the War of 1812 the American Army consisted of less than 7,000 men. THE R.O.T.C. MANUAL FOR ESSENTIALLY MILITARY SCHOOLS (7th ed. 1942). At the outbreak of the Civil War the Army only had a strength of some 16,000, and these were scattered all over the country and had the primary task of guarding lines of travel against the Indians. Throughout the period from the close of the Civil War to the Spanish American War, the Army was employed chiefly as a constabulary and a police force. *Id.* at 656. For a general discussion of our previous conception of the army's role, see HUIDEKOPER, THE MILITARY UNPREPAREDNESS OF THE UNITED STATES (1915).

to the standing army of today.

VII. The Need for Legislative Reform

Apart from the constitutional issues, the problems considered above deserve searching legislative study. Lacking any realistic prospect of elimination of cold war pressures, the continued maintenance in peace-time of a sizable military establishment consisting in large part of civilian soldiers should be recognized as calling for discriminating adjustment of traditional civil processes to justifiable claims of military necessity. Given these conditions, there seems little excuse for granting wider court-martial jurisdiction than is reasonably required by demands of good order and military discipline.[129] As Mr. Justice Black remarked in *Reid v. Covert,* the "business" of soldiers is to fight and to prepare to fight.[130] Trial by court-martial of military personnel in time of peace within the United States for civil crimes contributes little to the needs of this "business."

A decision to revest in the civil courts jurisdiction over civil crimes could be implemented in several ways. It would, of course, be possible to permit the state courts to punish all such crimes committed within their borders.[131] In fact, at the present time state courts have jurisdiction concurrent with courts-martial over most of these

129. "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955).

130. Reid v. Covert, 354 U.S. 1, 35 (1957).

131. H.R. 3455, 86th Cong., 1st Sess. (1959). This draft bill (supported by the American Legion), among other things, would amend article 14(a) of the Uniform Code (relating to delivery of offenders to the civil authorities) as follows:

> Section 814, Article 14, Delivery of Offenders to Civil Authorities. (a) A member of the armed forces accused of an offense against the laws of the United States or of a State . . . shall, except in time of war, be delivered, upon proper request, to the civil authority for trial. No person shall, except in time of war, be tried for any offense committed within the United States punishable by sections 918-932 (articles 118-132), inclusive, if, prior to arraignment before a court-martial, the civil authority having jurisdiction to try him for a substantially similar offense under the laws of the United States or of a State . . . requests delivery of that person for trial.

It would seem, however, that peacetime limitation of military jurisdiction requires an approach different from that found in H.R. 3455. Many localities lack the funds and facilities necessary to handle the numerous felony trials which can result from the location in their midst of a large military installation. Sectional feelings with regard to certain types of crime may also deny accused persons a fair trial in the local courts. Jurisdictional difficulties will almost certainly arise when the crime is committed on a reservation subject solely to the control of the United States. Finally, the proposed revision of article 14 leaves to judicial construction the question of what constitutes a "substantially similar offense," as well as the question of whether an accused may be tried by court-martial after a proper demand for delivery to civil authorities has been made and the accused returned without trial to military control.

crimes.[132] An alternative, and much preferable, solution would be to grant to the federal district courts primary jurisdiction over civil crimes committed by servicemen. Congress should adopt legislation defining each of the crimes punishable by the district courts. Where the accused has committed one of those crimes, he should have the right to demand trial in the federal district court in the district where the crime was committed, subject to removal to some other district if required to assure a fair trial. It will ordinarily be quite easy for a federal district court to determine, at a preliminary hearing, whether the offense is civil in nature or bears a substantial relationship to maintenance of military discipline. Moreover, conviction or acquittal after trial by court-martial or in the federal courts should preclude subsequent criminal proceedings in any state court for substantially the same crime. Legislation of this kind would not only guarantee to servicemen accused of essentially civil crimes the full benefits of the Bill of Rights and ordinary civil procedures, but it would also protect them from the distasteful consequences of the notion of "dual sovereignty" as applied to the administration of criminal justice. Such protection is peculiarly appropriate in the case of servicemen whose subjection to both federal and state law arose only because of the direct or indirect compulsion of the Universal Military Training and Service Act—a federal statute. The least that can be asked of Congress is that it afford protection to those whom it has swept within the orbit of federal laws.

Having in mind that the Supreme Court has already erected constitutional bulwarks to protect both former servicemen and civilian dependents who have voluntarily accompanied servicemen abroad, it seems strange indeed that Congress and the courts should quietly acquiesce in depriving the serviceman himself of basic constitutional rights in cases where overriding military needs cannot be plainly demonstrated. The time is ripe for appropriate legislative response to the novel problems created by the existence of a large standing armed force.

132. See text *supra* notes 108-12.