Journal of Criminal Law and Criminology

Volume 9 | Issue 4 Article 12

1919

Separateness of Military and Civil Jurisdiction a Brief

Harvey C. Carbaugh

THE SEPARATENESS OF MILITARY AND CIVIL JURISDICTION—A BRIEF

HARVEY C. CARBAUGH[1]

The military powers given to Congress by the Constitution of the United States were intended to authorize and empower it to bring into existence and maintain for the Army such a system of military law as was then existing in England as a separate institution from the common law system existing there, and that this military system should, in a like manner, be a separate institution from the system of law by which the personal liberty and rights guaranteed by the amendments to the Constitution were to be enforced.

These principles were announced in the Esmond case (5 Mackay's Reports, 73), in which the Supreme Court of the District of Columbia, sitting as an appellate court, said:

"These provisions (of the Constitution) contemplate the establishment by Congress of two distinct systems of jurisdiction for the punishment of crimes and that each should be complete and sufficient. In other words, they import that the power of Congress to make rules for the government of the land and naval forces includes powers to establish institutions for the trial and punishment of crimes committed by persons in the land and naval forces, whose action and judgments shall be as conclusive for all purposes as the action and judgments of any other tribunals can be. If such tribunals have actually been established, their judgments must be treated precisely as the judgments of the court of the other system of jurisdiction are treated."

HISTORICAL DEVELOPMENT IN ENGLAND.

The constitutional history of England is a history of a struggle between the people and the Crown. The Crown sought to obtain or to exercise military law both as to the Army and as to civilians in time of peace. The people sought to enforce the common law and their victories are found in the Magna Carta, the Petition of Right, the Bill of Rights and the preservation of the rules of common law favoring individual liberty.

The dispute went to the very existence of military law in England in time of peace by the sovereign's prerogative as to members of the Army or anyone else, and even as to the possibility of its existence there in time of peace by the sovereign's prerogative.

[1]Colonel United States Army, retired.

It would appear that by the approval of the Petition of Right the Crown admitted that it was not in force and that it could not be brought into existence by prerogative of the Crown in time of peace as to the Army, or at all and, as a matter of fact, there was comparatively little contention thereafter that it could be. No one doubted, of course, that it could be brought into existence by Act of Parliament because Parliament was the law making body.

The Ipswich Mutiny in 1689 was the cause of bringing into existence military law in time of peace in order to preserve discipline in the Army. The common law gave the sovereign no power to control his troops. The deserter was treated as an ordinary felon and was tried at the assize by a petty jury on a bill found by a grand jury. At this time the King and the House of Commons were united and both were menaced by a great military power from the ports of Normandy and Britanny. They decided that regular soldiers were indispensable and that their efficiency must be maintained by keeping them under strict discipline. For the sake of public freedom they must, in the midst of freedom, be placed under a despotic rule. They must be subject to a sharper penal code and to a more stringent code of procedure than was administered by the ordinary tribunals.

A short bill was brought in the House of Commons which began by declaring in explicit terms that standing armies and courts-martial were unknown to the law of England, and it was then and there enacted that any man who deserted his colors or mutinied against his commanding officer should be subject to the pain of death or such lighter punishment as a court-martial should deem sufficient.

The first step was made without one dissentient voice in Parliament and without one murmur in the nation toward a change which had become necessary for the safety of the State, yet which every party in the State then regarded with an extreme dread and aversion. Six months after, the power necessary for the maintenance of military discipline was a second time entrusted to the Crown for a short term and by slow degrees finally reconciled the public mind to the names once so odius: viz., a standing army and courts-martial. Thereafter not a session passed without a mutiny bill.

The mutiny act was in the nature of a concession to the Crown. It was granting the sovereign a part of what he had for centuries been insisting upon under his prerogative.

The history of the English Army from the time the first Mutiny Act was passed, to the present, shows that the military law applicable to the Army was understood, and allowed by everyone that the

adoption of the Mutiny Acts authorized the King to enforce the whole body of the rules and principles in the Army, subject to certain exceptions made in the Mutiny Acts themselves.

When the American Revolution came on, the Articles of War were those made by the King under his prerogative so to do, expressly recognized by the Annual Mutiny Acts, and when the colonies began to act the part of absolute sovereignty, their Legislatures, assuming all powers exercised in England by both the King and Parliament, proceeded to enact Articles of War for the government of their respective armies, and thus to bring into existence, so far as their armies were concerned, that part of military law which had in England been applied to the Army in time of peace.

These enactments of the colonies have been followed by successive enactments of Articles of War for the government of the United States. These powers were vested in Congress by the Eighth Section of the Constitution of the United States. As Parliament and the Crown had in England in time of peace under the English Constitution, maintained a military law system which was necessary to secure discipline in the Army co-existent with the common law system and without improperly interfering with its principles relating to personal liberty, our Constitution was framed to secure the same end under the legislative authority of Congress.

Military Law of the United States Is a Departure from Civil Law.

In *Dynes* v. *Hoover,* 20 Howard, 65, the court said, p. 78:

"These provisions of the Constitution show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the 3rd Article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

Military law is founded on the idea of a departure from the civil law. They are two separate and distinct systems, each occupying its own sphere and having its own separate object in view and are each framed and constituted with reference to their particular objects. The fact that a given rule or principle obtains in one is no evidence that is will be found in the other. Within the civil sphere the rights of the accused are defined by the Federal Constitution which provides that he shall not be subject for the same offense to be twice put in

jeopardy of life or limb, or be compelled in a criminal case to be a witness against himself, or be deprived of life, liberty or property without due process of law; that he shall enjoy the right of a speedy and public trial by an impartial jury of the state or district wherein the crime was committed and shall enjoy the right to be informed of the nature and cause of the accusation; that he has the right to be confronted with witnesses against him; to use compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense.

Within that same sphere all people have the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and that no lawful and valid order for arrest or search shall be issued, except upon proper cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Within the military sphere, all are men obliged to obey one man. They are not entitled to any of the rights just enumerated by reason of their being guaranteed in the Federal Constitution or by their being a part of the common law. Whatever rights they enjoy in the military sphere, they have them by reason, alone, of acts of Congress or rules of unwritten military law giving them, for these are the only laws that take any cognizance of men in that sphere.

Under our systems of government, state laws are supreme within the states or sphere and Federal laws are supreme within the Federal government sphere. Likewise, in the military sphere, the Articles of War and special statutes enacted by Congress and the applicable unwritten military law are the supreme law therein.

Principles Established by Decisions of Federal Courts.

The power of the Federal Civil Courts in respect to the military courts has been the subject of repeated investigations, so that the principles of the separateness of the two systems have become well established. These principles may be stated as follows:

1. *Courts-martial are lawful tribunals existing by the same authority as a Federal Court.*

Judge Wallace, in delivering the opinion of the court in *Ex parte Davison* (21 Federal Reporter 620), said:

> "Courts-martial are lawful tribunals existing by the same authority that this court is created by, have as plenary jurisdiction over offenses by the law military as this court over controversies committed to its cognizance and within their special and more limited sphere are entitled to ask untrammeled an exercise of their powers."

See also *Rose ex rel. Carter* v. *Roberts* (C. C. A., Second Circuit), 99 Fed. 948; and *Carter* v. *Roberts,* 177 W. S. 496, and *Carter* v. *McClaughry,* 183 W. S. 365 (p. 380), in which Mr. Justice Fuller, in speaking for the Supreme Court of the United States, said:

"The Eighth Section of Article One of the Constitution provides that the Congress shall have power to make rules for the government and regulation of the land and naval forces, and in the exercise of that power Congress has enacted rules for the regulation of the Army known as the Articles of War (Revised Statutes, par. 1342). Every officer, before he enters on the duties of his office, subscribes to these Articles and places himself within the power of courts-martial to pass on any offense which he may have committed in contravention to them. Courts-martial are lawful tribunals with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed, as provided, are not open to review by the civil tribunal, except for the purpose of ascertaining whether the Military Court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its power in the sentence pronounced."[2]

2. *The power of a court-martial to arrive at a final determination is as inherent as that of any other court constituted under the Constitution in Acts of Congress.*

In re McVey (23 Federal Reporter, 878), the court said:

"It is not denied that within the sphere of their jurisdiction the judgments or sentences of military courts are as final and conclusive as those of civil tribunals of last resort."

In *Ex parte Henderson* (11 Federal Cases, 349), the court said:

"Courts-martial are lawful tribunals existing by the same authority that other courts exist. Their jurisdiction, it is true, is limited and special being confined to military persons charged with military offenses; over such persons charged with offenses defined by military law, their jurisdiction is complete. They are indeed liable to the controlling authority

[2]In *Swaim* v. *United States,* 165 U. S. 553, the sentence, being in the opinion of the reviewing authority not correct, was returned for revision, and it is contended that such proceedings are void. The court said:

"This court in *Ex parte Reed,* 100 U. S. 13, held that such regulations, to-wit, the Navy Regulations, have the force of law, but that as the court-martial had jurisdiction over the person and the case, its proceedings could not be collaterally impeached for any mere error or irregularity committed within the sphere of its authority; that the matters complained of were within the jurisdiction of the court-martial; that the second sentence was not void; and, accordingly, the application for a writ of habeas corpus was denied. We agree with the Court of Claims that the ruling in *Ex parte Reed,* in principle, decides the present question.

"As we have reached the conclusion that the court-martial in question was duly convened and organized, and that the questions decided were within its lawful scope of action, it would be out of place for us to express any opinion on the propriety of the action of that court in its proceedings and sentence. If, indeed, as has been strenuously urged, the appellant was harshly dealt with, and a sentence of undue severity was finally imposed, the remedy must be found elsewhere than in the courts of law."

which the civil courts have at all times exercised of preventing them from exceeding the jurisdiction given to them. * * * In respect to persons subject to their authority and charged with offenses subject to their jurisdiction, the civil courts do not sit as a court of error to review the regularity of their proceedings. Informality, therefore, in the proceedings of courts-martial cannot be remedied or inquired into by a civil court. The groundwork of the jurisdiction and the extension of the powers of courts-martial are to be found in the Articles of War * * * but these articles do not alone constitute the military code. They are, for the most part, silent on all that related to the procedure of military tribunals to be organized by them. This procedure is founded upon the usage and customs of war, upon the regulations prescribed by the President, upon the authority of Congress and upon old practices in the Army, as to all of which points common law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. It would, therefore, be most illogical, to say nothing of the impediments to military discipline, which would thereby be interposed to apply to the proceedings of courts-martial those rules which are applicable to another and different course of practice (Lord Denman's Opinion, *in re Poe*, 5 B. & A. 688)."[3]

3. *Federal Courts will only inquire to ascertain whether the Courts-martial had jurisdiction of the person and the subject matter and whether the judgment rendered and the sentence imposed were such as the court had power to render and impose under the law.*

Among the powers conferred upon Congress by the Eighth Section of the First Article of the Constitution, are the following:

"To provide and maintain a Navy," "To make rules for the government of the land and naval forces." The Eighth Amendment which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation "cases arising in the land and naval forces." And by the Second Section of the Second Article of the Constitution it is declared that "The President shall be commander-in-chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States."

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the Third Article of the Constitution, that the two powers are entirely independent of each other.

The sentence, when confirmed, is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or one in which, having jurisdiction over the subject

[3]See also Esmond's case (5 Mackay's Reports, 73).

matter, it has failed to observe the rules prescribed by the statute for its exercise. In such cases, as has just been said, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury. Courts-martial derive their jurisdiction and are regulated with us by an Act of Congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms; or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that the legislature meant to subject to punishment one of a minor degree of a kindred character, which has already been recognized to be such by the practice of courts-martial in the Army and Navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial. With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and custom of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court-martial has no jurisdiction over the matter of the charge it has been convened to try, or if it shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress. (*Dynes* v. *Hoover,* 20 Howe 65.)

In *Ex parte Reed* (100 U. S., 13), the court *held,* as to the proceedings of a naval court-martial,

"That 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. * * * Its judgments when approved as required, rest on the same basis and are surrounded by the same consideration which give conclusiveness to the judgment of other legal tribunals including as well the lowest as the highest under like circumstances."[4]

[4]See also *Rose Ex rel. Carter* v. *Roberts,* 99 Fed. 948, Circuit Court of Appeals for the Second Circuit and cases therein cited.

The court said, *in re Bogart,* (2 Sawyer, 396):

"If the court-martial has jurisdiction to try the offense charged, then the prisoner is lawfully held for trial. All else relates to the exercise of jurisdiction with which this court cannot interfere. We cannot enter into any examination of the merits of the charges. * * * Has the court-martial ordered, the power to hear and decide upon the charges and specifications made by the Secretary of the Navy? If so, that ends our inquiry."[5]

4. *Federal Courts exercise no supervisory corrective power over Courts-martial.*

The court said, *in re Grimley* (137 U. S., 147):

"Civil courts exercise no supervisory or correcting power over the proceedings of a court-martial and no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction; that being established, the habeas corpus must be denied and the petitioner remanded."

The court said *in re White* (17 Federal Reporter, 724):

"The jurisdiction is clearly conferred upon the courts-martial and it is exclusive. This covers the whole ground. Jurisdiction to determine whether a part is guilty of the offense necessarily involves the jurisdiction to determine what constitutes the offense under the statute; that is to say, jurisdiction to construe the statute and to adjudge what under the statute

[5]In *Barrett* v. *Hopkins* (Circuit Court for the District of Kansas), 7 Federal Reporter, p. 313, McCrary, Chief Justice, says:

"I take it to be very clear that the question of the jurisdiction of a general court-martial may always, upon the application of any party aggrieved by its judgment, be inquired into by the civil courts. Courts-martial are special tribunals, with jurisdiction limited to a particular class of cases. If such a court exceeds its authority, and undertakes to try and punish a person not within its jurisdiction, or to punish a person within its jurisdiction for an offense not within its jurisdiction, its judgment is void, and may be so declared by any court having jurisdiction of the proper parties and of the subject matter. The decision of such a tribunal, in a case clearly without its jurisdiction, does not possess that apparent validity which will protect the officer who executed it. 'The court and the officers are all trespassers.' *Wise* v. *Withers,* 3 Cranch, 331. The rule that civil courts may inquire into the jurisdiction of a court-martial in an action by a party aggrieved by its judgment, and give him redress is settled by the decision of the Supreme Court of the United States in *Dynes* v. *Hoover.*

"It is quite clear that this court has no authority to issue the writ of habeas corpus to bring up body of a person convicted and sentenced by a court of competent jurisdiction; but it is equally clear that it has jurisdiction to grant the writ, and discharge the prisoner, if it appears that an inferior court has transcended its powers. The true line of distinction between the two classes of cases will appear by reference to . . . authorities. . . .

"To say that in this case the court-martial had jurisdiction of the prisoner at the time the crime was committed, and therefore retained jurisdiction for the purpose of trying him after his term of enlistment expired, is only to state the main argument in support of the legality of the sentence; it is not to raise a question as to the jurisdiction of this court. I am, therefore, clearly of the opinion that this court has full powers to inquire into the jurisdiction of the court-martial, of whose judgment the prisoner complains."

constitutes a good defense, etc. * * * If the military authorities proceed regularly within their jurisdiction, we cannot interfere, no matter what errors may be committed in the exercise of its lawful jurisdiction."[6]

5. *Courts-martial have power to adjudicate finally and conclusively matters within their jurisdiction.*

In *Mullan* v. *United States* (212 U. S., 516), the court said:

"The civil courts are not courts of error to review the proceedings and sentences of courts-martial where they are legally organized, and have jurisdiction of the offenses and the person of the accused and have complied with the statutory requirements governing their proceedings."[6a]

6. *The writ of habeas corpus is not a writ of error nor can it be made a reviewer of facts.*

In *Ex parte Yarbrough* (110 U. S. 651), the court said:

"It is, however, to be carefully observed that this principle does not authorize the court to convert the writ of habeas corpus into a writ of error by which the errors of law committed by the court that passed the sentence may be reviewed here, for if that court had jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounces, this court can inquire no further."[7]

[6]In *Wales* v. *Whitney,* 114 U. S., p. 564, the Supreme Court, speaking through Mr. Justice Miller, says: "But neither the Supreme Court of the District nor this court has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try. Neither of these courts is authorized to interfere with it in the performance of its duty, by way of a writ of prohibition or any order of that nature. The civil courts can relieve a person from imprisonment under order of such court only by writ of habeas corpus and then only when it is apparent that it proceeds without jurisdiction. . . . The writ of habeas corpus is not a writ of error, though in some cases in which the court issuing it has appellate power over the court by whose order the petitioner is held in custody it may be used with the writ of certiorari for that purpose. In such a case, however, as the one before us it is not a writ of error. Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner."

[6a]See also *Dynes* v. *Hoover,* 20 Howard, 65; Ex parte Reed, 100 U. S., 13; *Swaim* v. *U. S.,* 165 U. S., 553.

[7]In *Johnson* v. *Sayre,* 158 United States, 109, at page 118, the court speaking by Mr. Justice Gray says:

"The court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of habeas corpus or otherwise."

In *Keyes* v. *The United States,* 109 U. S. 336, at page 340, the court by Mr. Justice Blatchford says:

"That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid when it is questioned in this collateral way. . . . This doctrine has been applied by this court to the judgment and sentence of a naval court-martial, which was sought to be reviewed on a writ of habeas corpus."

To the same effect it was held in *Ex parte Siebold* (100 U. S., 375): "That a writ of habeas corpus could not be used as a mere writ of error." (*Price* v. *McCarty*, 89 Federal Reporter, 84.)

"Moreover, it is a well settled rule that the writ of habeas corpus was not framed to retry issues of fact or to review proceedings of a legal tribunal." (Church on Habeas Corpus, 350.)

7. To overthrow the sentence of a courts-martial, it must be void ab initio.

In *United States* v. *Pridgeon* (153 U. S., 48 p. 58), the court *held*:

"Habeas corpus proceedings being a collateral attack of a civil nature, it must clearly and affirmatively appear that the indictment charged an offense over which the court had no jurisdiction, so that its sentence was void, or, in other words, the indictment must be so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence that the court pronounced thereon was void."

Mr. Justice Marshall, in delivering the opinion of the court in *Ex parte Tobias Watkins* (3 Pet., 193), *held*:

"That the question of whether an offense was committed, that is, whether the indictment did or not show that an offense had been committed, was a question which the district court was competent to decide. If its judgment was erroneous, still it is a judgment and until reversed cannot be disregarded."

In *Dynes* v. *Hoover* (20 Howard, 81), the court *held*:

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

In *Dynes* v. *Hoover* (supra), the court expressly *held*:

"It is in the nature of an appeal to the officer ordering the court who is made by the law the arbiter of the legality and propriety of the court's sentence; and when such sentence is confirmed, it is beyond the jurisdiction or inquiry of any civil tribunal whatsoever, unless it shall be shown that the court had no jurisdiction, or in which, having jurisdiction, it has failed to observe the rules prescribed by the statute for its exercise."[8]

[8]In *Grafton* v. *United States*, 206 United States, 333, the court by Mr. Justice Harlan, at page 345, says:

"We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged. It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance. In *Ex parte Reed*, 100 U. S., 13, 23, the court, referring to a court-martial, said: 'The court

8. *A Court-martial will judge as to whether an offense has been committed and will determine all collateral matters.*

In *Swaim* v. *United States* (165 U. S., 553), the court held:

"It is within the power of the President of the United States as Commander-in-Chief to validly convene a general court-martial even where the commander of the accused officer to be tried, is not the accuser. Where a civilian makes accusation against an officer and the President appoints a court of inquiry to examine the accusation and where upon the report of such court, the Secretary of War directs an officer to prepare charges against the accused and the President appoints a general court-martial to pass upon such charges, such routine orders which led to the trial of the accused cannot be construed as making the President his accuser or prosecutor. Where some of the members of the court were inferior in rank to the accused, the presumption must be that the President in detailing the officers to compose the court-martial acted in pursuance of law and the sentence cannot be collaterally attacked through inquiry as to whether the trial by officers inferior in rank to the accused was or was not avoidable. The decision of the court-martial in determining the validity of a challenge to a member for cause stated to the court cannot be viewed by a civil court in a collateral action.

"The action of a court-martial in permitting a person to act as Judge Advocate, who was not appointed by the convening officer of the court-martial, nor sworn to the faithful performance of his duties; in receiving oral and secondary evidence of an account when books of original entry were available; in receiving evidence to implicate the accused in signing false certificates relating to money, which formed no part of the subject matter of the charges on trial; in refusing to permit evidence as to the bad character of the principal witness for the prosecution; in refusing to hear the testimony of a material witness for the defense, cannot be

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. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court.'

". . . In *Carter* v. *Roberts*, 177 U. S. 496, 498, the court . . . said: 'Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.' This language was repealed in *Carter* v. *McClaughry*, 183 U. S. 365, 380.

"It thus appears to be settled that the civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier, if such court had jurisdiction to try the offense set forth in the charge and specifications; this, notwithstanding the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even one of higher grade arising out of the same facts."

reviewed collaterally and do not affect the legality of the sentence. Such questions are merely those of procedure, and the court-martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its proceedings and sentence cannot be reviewed or set aside by the civil court and the conclusions of a court-martial as to whether an offense has been committed cannot be controlled or reviewed by a civil court. It was within the authority of the President to twice return the record of the proceedings of the court-martial to the court-martial, urging a more severe sentence than the court had imposed.

"It is strongly urged that no offense under the Sixty-second Article of War was shown by the facts, and that the Court of Claims should have so found and have held the sentence void. If this position were well taken, it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial and of determining whether the accused was guilty of conduct to the prejudice of good order and military discipline in violation of the Articles of War.

"But, as the authorities heretofore cited show, this is the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed by the civil courts. As we said in *Smith* v. *Whitney* (116 U. S., 178), of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. * * * Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in a private business."

In *United States* v. *Fletcher* (148 U. S., 84), will be found observations to the same effect.

In re McVey (23 *Federal Reporter,* 878), the court said:

"The only authority of the civil courts is to answer whether the military authorities are proceeding regularly within their jurisdiction. If they are, we cannot interfere, no matter what errors may be committed in the case of a lawful jurisdiction."

In re Eckart (166 U. S., 481), it was *held*:

"That a Trial Court possessing general jurisdiction of the class of offenses within which is embraced the crime set forth in the indictment, is possessed of authority to determine the sufficiency of the indictment, and that in adjudging it to be sufficient, it acts within its jurisdiction and a that in adjudging it to be valid and sufficient, it acts within its jurisdiction and a conviction and judgment thereunder cannot be questioned on habeas

corpus because of a lack of certainty or other defect in the indictment of the facts averred to constitute a crime."

9. *The jurisdiction of a court-martial having attached it retains the same.*

The Supreme Court, in the case of *Coleman* v. *Tennessee* (97 U. S., 509), held, that a solder who had been convicted of murder and sentenced to death by a general court-martial in May, 1865, but the execution of whose sentence had been meanwhile deferred, by reason of his escape and the pendency of civil proceedings in his case, might at the date of the ruling (October Term, 1878), "Be delivered up to the military authorities of the United States, to be dealt with as required by law."

More recently in the same case (May, 1879, 16 Opinions, 349), it has been held by the Attorney General that a death sentence might legally be executed, notwithstanding the fact that the soldier had meanwhile been discharged from the service; such discharge, while formally separating the party from the army, being viewed as not affecting his legal status as a military convict. But in view of all the circumstances of the case, it was recommended that the sentence be commuted to imprisonment for life or a term of years. The sentence was finally commuted to imprisonment for twenty years.

In the case of *Bogart* (2 Sawyer, 397), who was detained for trial before a naval court-martial for embezzlement, in violation of the Act of March 2, 1863, it was held in the opinion of the court discharging the writ of habeas corpus granted for alleged illegal detention, that a person charged with embezzlement under the Act cited, committed while employed in the naval service and afterwards dismissed or discharged, was liable under the second section of said Act to be arrested and tried by court-martial in the same manner as if he had not been discharged or dismissed (see concluding portion of Article 14, Section 1624, Revised Statutes).

Said second section reads as follows:

"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 such discharge nor been dismissed."

In the case of *Barrett* v. *Hopkins* (7 Federal Reporter, 312), the court held that the jurisdiction of the court-martial having once attached by arrest of the prisoner, it retains jurisdiction for all

purposes of trial, judgment and execution. In delivering the opinion of the court, Circuit Judge McCreary said:

"That the prisoner was a soldier of the United States Army at the time he committed the offense, and that he was lawfully arrested and imprisoned by military authority, and remained lawfully in the custody of the military from September 6, 1878, to February 1, 1879, is admitted. But it is insisted that on the last named day he ceased to be a soldier, by the expiration of his five years' term of enlistment, and became a citizen and therefore entitled to trial by jury. * * *

'The general rule is that when the jurisdiction of a court attaches in a particular case by the commencement of proceedings and the arrest of the accused, it will continue for all the purposes of the trial, judgment and execution. * * * The general rule is grounded in sound reason. Many of the greatest military offenses are not cognizable by the courts of common law. A soldier might be guilty, on the eve of the expiration of his term of enlistment of the grossest insult to his officers, or of disobedience of orders, or of desertion in the face of an enemy, and if he could not be held for trial after the end of his term, he would escape punishment altogether. To hold that in every such case the jurisdiction of a court-martial would cease with the expiration of the term of enlistment, would be to shield the guilty from punishment, to encourage crime, to greatly demoralize the military service. The jurisdiction, therefore, in such cases is to be maintained upon the highest considerations of public policy. * * *

"The jurisdiction in the cases named, and in many others of like character, must therefore be upheld upon the ground first mentioned, to wit: that the court-martial acquired it by the proper commencement of proceedings, and could not be divested of it by any subsequent change in the statuts of the accused; and this reason applies as well to a case where the crime is one known to the common or statute law, as to one in which the offense is purely military. In both the jurisdiction is maintained, after the end of the term of the enlistment, upon the same ground. This conclusion is supported by judicial interpretation, in the only cases, so far as I know, in which the case has arisen."[9]

Upon establishing the military prison at Fort Leavenworth, Kansas, Congress, in the Act of March 3, 1873, Sec. 1361, R. S., provided that:

"All prisoners under confinement in said military prison undergoing sentence of courts-martial shall be liable to trial and punishment by courts-martial under the rules and Articles of War, for offenses committed during said confinement."

The statute was judicially passed upon by the United States District Court of Kansas, in the case of *Ira Wildman* (Federal Cases, 17653-a), who had been dishonorably discharged in connection with

[9]*U. S.* v. *Travers*, 2 Wheeler, 509; *In re Dew*, 25 L. R., 540; *In re Bird*, 2 Sawyer, 33; *In re Walker* 3 Am. Jurist 281.

the sentence of imprisonment and had been tried under the statute quoted by a court-martial for certain offenses and sentenced to additional imprisonment. Application for release on writ of habeas corpus was made, but denied on the ground that though no longer in service he was a military prisoner and for purposes of discipline and punishment connected with the military service, that his case is to be regarded as one arising in the land forces in the sense of the Constitution, and therefore one in regard to which Congress may exercise its power of regulation and government.

In re Craig (70 Federal Reporter, 971), a similar case, the court *held* that:

"Prisoners under confinment in military prisons undergoing sentence of courts-martial, although dishonorably discharged, are nevertheless liable to trial and punishment for offenses they may commit during their confinement, and the Act of Congress of March 3, 1873, permitting such trials is not in conflict with the fifth amendment to the Constitution."

10. *A Writ of Prohibition will not lie as to court-martial practice.*

In *Smith* v. *Whitney* (116 U. S., 167), the court said:

"If a court-martial has jurisdiction of the principal charge and some or all of the specifications under it, the addition of a second charge with its specifications affords no ground for a writ of prohibition. * * * This being the first application to a court of the United States for a writ of prohibition to a court-martial, to order its issue in the present case would be to declare that an officer of the navy, who, while serving by appointment of the President as chief of a bureau in the Navy Department, makes contracts or payments, in violation of law, in disregard of the interests of the government, and to promote the interests of contractors, cannot lawfully be tried by a court-martial composed of naval officers, and by them convicted of scandalous conduct, tending to the destruction of good morals, and to the dishonor of the naval service. This we are not prepared to do, being clearly of opinion that such conduct of a naval officer is a case arising in the naval forces, and therefore punishable by court-martial under the articles and regulations made or approved by Congress in the exercise of the powers conferred upon it by the Constitution, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces, without indictment or trial by jury.

"Whether the Supreme Court of the District of Columbia may issue a writ of prohibition to a court-martial is a question of great importance, not hertofore adjudged by this court and we are not inclined in the present case either to assert or deny the existence of the power, because, upon settled principles assuming the power to exist, no cause is shown for the exercise of it. In any event such a writ never can issue, unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or certiorari to correct mistakes of that court in deciding a question of law or fact within its juris-

diction, and this court has repeatedly recognized the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty cannot be controlled or reviewed in the civil courts by writ of prohibition or otherwise.[10]

"Under every system of military law for the government of either land or naval forces, the jurisdiction of courts-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service to which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business."

11. *The proceedings of a Court-martial will not be reviewed by a writ of Certiorari.*

In re Vidal (179 U. S., 126), the court said:

"The Supreme Court is not empowered to review the proceedings of a military tribunal by certiorari nor are such tribunals courts with jurisdiction in law or equity within the meaning of those terms as used in the Third Article of the Constitution and the question of the issue of the writ of certiorari in the exercise of inherent general power cannot arise in respect of them."[11]

12. *Courts-martial form no part of the judicial system of the United States and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts.*

In *Kurtz* v. *Moffit* (115 U. S., 487), the court said:

"In the United States, the line between civil and military jurisdiction has always been maintained. The Fifth Article of Amendment of the Constitution, which declares 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, expressly excepts cases arising in the land or naval forces, and leaves such cases subject to the rules for the government and regulation of those forces which, by the Eighth Section of the First Article of the Constitution, Congress is empowered to make. Courts-martial form no part of the judicial system of the United States and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts."[12]

---

[10]See also *Ex parte Reed* (100 U. S., 13); *Dynes* v. *Hoover* (20 Howard, 65, 82, 83); *Ex parte Mason* (105 U. S., 696); *Keyes* v. *United States* (109 U. S., 336); *Wales* v. *Whitney* (114 U. S., 564, 570); *Kurtz* v. *Moffit* (115 U. S., 487); *In re Bogart* (2 Sawyer, 396); *Wise* v. *Withers* (3 Cranch, 331); *Meade* v. *Deputy Marshal of Virginia* (1 Brock., 324); *In re White* (9 Sawyer, 49); *Barrett* v. *Hopkins* (2 McCrary, 129); and *Grant* v. *Gould* (2H. Bl. 69).

[11]See also *United States* v. *Sugar* (243 Federal Reporter, 423, p. 431).

[12]In *Mullan* v. *United States*, 212 United States, 516.

See also *Dynes* v. *Hoover* (20 Howard, 65); *Ex parte Mason* (105 U. S., 696); *Wales* v. *Whitney* (114 U. S., 564).

13. *The judgment of a Court-martial, in a case not within its jurisdiction, does not protect the officer who executes it.*[13]

[13]In *Dynes* v. *Hoover*, 20 Howard, 65, at page 78, by Mr. Justice Wayne, says:

"Among the powers conferred upon Congress by the 8th section of the first article of the constitution are the following: 'to provide and maintain a navy;' 'to make rules for the Government of the land and naval forces.' And the 8th amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation 'cases arising in the land or naval forces.' And by the 2d section of the 2d article of the constitution it is declared that . . . 'The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States.'

"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

". . . The court was lawfully constituted, the charge made in writing, and Dynes appeared and pleaded to the charge.

". . . In both cases, the law is, that an officer executing the process of a court which has acted without jurisdiction over the subject matter becomes a trespasser, it being better for the peace of society, and its interests of every kind, that the responsibility of determining whether the court has or has not jurisdiction should be upon the officer, than that a void writ should be executed. This court, so far back as the year 1806, said, in the case of Wise and Withers, 3 Cranch, 331, p. 337 of that case: 'It follows, from the opinion, that a court-martial has no jurisdiction over a justice of the peace as a militiaman; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers.'"

In *Hamilton* v. *McClaughry*, 136 Federal Reporter, p. 447, Pollock, District Judge, says:

"In approaching a consideration of this question, a few of the fundamental principles of law may be stated. It is the settled law that courts-martial are courts of inferior and limited jurisdiction. No presumptions in favor of their exercise of jurisdiction are indulged. To give effect to their judgments imposed, it must be made to clearly and affirmatively appear that the court was legally constituted, that it had jurisdiction of the person and offense charged, and that its judgment imposed is conformable to the law. . . . Again, so jealous are all English-speaking nations of the liberty of their subjects, where a respondent in habeas corpus admits the restraint charged against him, he must justify by basing his right of restraint upon the exercise of some provision of positive law binding upon him, or the writ must issue and the person restrained have his liberty. It follows, therefore, notwithstanding the judgment of conviction by the military court set forth in the return of respondent and admitted by petitioner, if, as claimed by counsel for petitioner, the facts essential to a valid exercise of the military power conferred by the fifty-eighth article of war, to-wit, the then existence of a state of war, insurrection or rebellion in China, the place where the offense was committed and the trial had, is not shown, the writ must go and petitioner be granted his liberty."

In *Noble* v. *Union River Logging R. R. Co.*, 147 United States, p. 173, the court, by Mr. Justice Brown, says:

"It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedigns, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common law action, . . .; or a court-martial proceeds and

14. *The reviewing officer approving or disapproving the sentence of a Court-martial acts in a judicial capacity.*

In *Runkle* v. *United States* (122 U. S., 543), the court said:

"Undoubtedly, the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of, and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights, which, in the very nature of things, can neither be exposed to danger, nor subjected to the uncontrolled will of any man, but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law."

"Accordingly in those cases in which the approval of the sentence is signed by the Secretary of War alone, and the personal action of the President in the matter is nowhere mentioned the authentication will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself and that it is not a mere departmental order which might or might not have attracted his personal attention."

---

sentences a person not in the military or naval service, *Wise* v. *Withers*, 3 Cranch, 331. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding."

In *Dow* v. *Johnson*, 100 United States, p. 189, the court, speaking by Mr. Justice Field, says:

"A soldier cannot justify on the ground that he was obeying the orders of his superior officer, if such orders were illegal and not justified by the rules and usages of war, and such that a person of ordinary intelligence would know that obedience would be illegal and criminal," citing *Wise* v. *Withers*, 3 Cranch, 331.

In the same case, the court says:

"It is not to be questioned, said Phelps, J., that, if a military officer transcend the limits of his authority and take cognizance of a matter not within his jurisdiction, his acts are void, and will afford no justification to those who act under him. (*Darling* v. *Bowen*, 10 Vt. 148.) (Mr. Justice Clifford in a dissenting opinion.)

In *Wise* v. *Withers*, 3 Cranch, 331 (1 Curtis p. 598), the Supreme Court of the United States, through Chief Justice Marshall, said:

"The law furnishing no justification for a departure from the plain and obvious import of the words, the court must, in conformity with that import, declare that a justice of the peace, within the District of Columbia, is exempt from the performance of militia duty.

"It follows, from this opinion, that a court-martial has no jurisdiction over a justice of the peace, as a militia-man; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers."