

1916

## War Power and the Government of Military Forces

George Melling

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

George Melling, War Power and the Government of Military Forces, 7 J. Am. Inst. Crim. L. & Criminology 406 (May 1916 to March 1917)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## THE WAR POWER AND THE GOVERNMENT OF MILITARY FORCES.<sup>1</sup>

GEORGE MELLING, LL.M., OFFICE OF JUDGE ADVOCATE  
GENERAL, U. S. NAVY.

### [Clause 12. Raising and Support of Armies.]

To raise and support armies, but no appropriation of money to that use shall be for a longer period than two years.

### [Clause 13. Provision for a Navy.]

- I. POWER TO PROVIDE NAVY.
- II. FREEDOM FROM STATE INTERFERENCE.
- III. JURISDICTION OF CIVIL AUTHORITIES.
- IV. RESPONSIBILITY OF MILITARY AUTHORITIES FOR ILLEGAL ACTS.
- V. PROTECTION OF MILITARY OFFICERS FOR ACTS DONE IN PERFORMANCE OF DUTY.

#### I. POWER TO PROVIDE NAVY.

Distinguished from power to govern Navy.—“The power to formulate Articles for the Government of the Navy and punish individual officers for violation thereof is conferred upon Congress by the clause of the Constitution authorizing it ‘to make rules for the government and regulation of the land and naval forces;’ [Art. I, sec. 8, clause 14.] The power to provide what persons may be appointed or enlisted in the naval service, the qualifications they must possess, and the total number of the entire force, is conferred by the clause authorizing the Congress ‘to provide and maintain a Navy.’ Statutes passed under the first clause mentioned are penal and are to be enforced by courts-martial; those passed under the second clause are enacted in the interest of the Navy at large and are to be administered by the President either alone or with the aid of examining boards or such other instrumentalities as may be determined upon by Congress. Persons excluded from appointment for lack of any required qualifica-

<sup>1</sup>Continued from last number, pp. 245 ff.

(By an error of publication, in the previous installment of this digest, the minority opinion in *Ex parte Milligan* (4 Wall. 2, 132) was referred to as a “dissenting opinion” instead of a “separate concurring opinion.”—*Ed.*)

tion—health, age, nationality, height, temperament, or any other condition that Congress might see fit to impose—are not being punished under penal laws for their failure to measure up to the necessary requirements, but are merely incidentally affected by the Government's policy \* \* \* ." (File 26260-1392, June 29, 1911, pp. 24-25.)

**Acquiring and manning ships of war.**—This clause authorizes the Government to buy or build any number of steam or other ships of war, to man, arm, and otherwise prepare them for war, and to dispatch them to any accessible part of the globe; and to establish a naval academy to prepare young men for the naval service. (U. S. *v.* Rhodes, 27 Fed. Cas. No. 16151.) Similar authority might be implied in the power to "declare war." (U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. Rep., 340.)

**Allowance of pensions.**—Congress is empowered to give or withhold a pension, to prescribe who may receive it, and to determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension; the whole control of the matter is within the domain of congressional power. (Frisbie *v.* U. S., 157 U. S., 166; see also U. S. *v.* Van Lengen, 62 Fed. Rep., 56.)

## II. FREEDOM FROM STATE INTERFERENCE.

**State interference with Federal instrumentalities.**—The principle that no State has the right to interfere with the instrumentalities of the Federal Government has been recognized from the earliest days of our Government. (File 6769-21, July 19, 1911, and 26524-54, Feb. 12, 1914.)

"Such is the law with reference to all instrumentalities created by the Federal Government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers." (Fort Leavenworth, etc., R. Co. *v.* Lowe, 114 U. S., 525.)

"Such being the distinct and independent character of the two Governments within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws and mode of enforcement neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion,

and whether any at all, shall be vested in their officers, are matters subject to their own control, in the regulation of which neither can interfere with the other. Now, among the powers assigned to the National Government is the power to raise and support armies and the power to provide for the government and regulation of the land and naval forces. \* \* \* No interference with the execution of this power of the National Government in the formation, organization, and government of the armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service." (U. S. v. Tarble, 13 Wall., 397.)

"A building on a tract of land owned by the United States, used as a fort, or for other public purposes of the Federal Government, is exempted, as an instrumentality of the Government, from any such control or interference by the State as will defeat or embarrass its effective use for those purposes," [although such land may not be under the exclusive jurisdiction of the United States.] (Chicago, etc., R. Co. v. McGlinn, 114 U. S., 545, explaining Ft. Leavenworth, etc., R. Co. v. Lowe, 114 U. S., 525.)

"If any particular State had it in its power to intermeddle with the police and government of an Army or Navy \* \* \* upon any pretext, there would be an end of the exclusive authority of the United States in this respect. Wars and other measures unpopular in particular sections of the country might be impeded in their prosecution by the interference of the State authorities. Such a conflict of jurisdictions must terminate in anarchy and confusion." (Argument of Attorney-General, U. S. v. Bevans, 3 Wheat., 374.)

"National banks are instrumentalities of the Federal Government. \* \* \* It follows that an attempt by a State to define their duties, or control the conduct of their affairs is absolutely void whenever such attempted exercise of authority expressly conflicts with the laws of the United States and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created." (Davis v. Bank, 161 U. S., 275.)

**Taxation of Federal instrumentalities.**—"If the States may tax one instrumentality employed by the Government in the execution of its powers, they may tax any and every other instrumentality. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the customs-house; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of government. This

was not intended by the American people. They did not design to make their government dependent on the States." (*McCulloch v. Maryland*, 4 Wheat., 432, *per* Chief Justice Marshall.)

**Taxation of Federal property.**—"It is familiar law that a State has no power to tax property of the United States within its limits. This exemption of their property from State taxation—and by State taxation we mean any taxation by authority of the State, whether it be strictly for State purposes or for more local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency." (*Wisconsin C. R. Co. v. Price County*, 133 U. S., 496; *Van Brocklin v. Tennessee*, 117 U. S., 151.)

**State taxation of Federal salaries.**—"The powers of the National Government can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. \* \* \* The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to determine what shall be given. \* \* \* Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect." (*Dobbins v. Commissioners*, 16 Pet., 435.)

**Taxation of Federal telegrams.**—A State tax upon telegraph messages could not be collected upon messages sent by officers of the United States on public business. (*Western Union Tel. Co. v. Texas*, 105 U. S., 460.)

**Taxation of Federal contractors.**—"Can a contractor for supplying a military post with provisions be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing or of conveying the articles purchased can be under State control." (*Osborn v. United States Bank*, 9 Wheat., 867.)

**Taxation of passenger transportation.**—"A special tax on railroad and stage companies for every passenger carried out of the

State by them is a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel and is inconsistent with objects for which the Federal Government was established and with rights conferred by the Constitution on that Government and on the people. An exercise of such a power is accordingly void." (*Crandall v. Nevada*, 6 Wall., 35.)

"The Federal power has a right to declare and prosecute wars and as a necessary incident to raise and transport troops through and over the territory of any State of the Union. If this right is dependent in any sense, however limited, upon the pleasure of a State, the Government itself may be overthrown by an obstruction to its exercise. Much the largest part of transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the Treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory." (*Crandall v. Nevada*, 6 Wall., 35.)

"The United States has a right to require the services of its citizens at the seat of Federal Government in all executive, legislative, and judicial departments, and at all points in the several States where the functions of the Government are to be performed \* \* \*. The citizens of the United States have the correlative right to approach the great departments of the Government, the ports of entry through which commerce is conducted, and the various Federal offices in the States. The taxing power, being in its nature unlimited over the subjects within its control, would enable the State governments to destroy the above-mentioned rights of the Federal Government and of its citizens if the right of transit through the States by railroad and other ordinary modes of travel were one of the legitimate objects of State taxation." (*Crandall v. Nevada*, 6 Wall., 36.)

**Inspection of powder.**—The powder officer for the harbor of Norfolk, appointed under the laws of Virginia to superintend the handling of all powder to and from vessels in the harbor, has no authority over powder belonging to the Federal Government, and the United States is not liable for any charge for services performed by him under the authority of that law. (25 Op. Atty. Gen., 234.)

"It is not open to question that such a law is the legitimate exercise by the State of its police power so far as its provisions do not affect the agencies of the Federal Government or impair their efficiency in performing the functions which they are designed to per-

form. No police regulation of a State, however, can be permitted to interfere with the instrumentalities of the Federal Government \* \* \*. If the State of Virginia has authority to control the shipment through the State of powder belonging to the Government and impose a charge therefor, it may stop such powder at its borders on the ground that it is improperly boxed, or that it is not boxed in accordance with regulations of the State. It is obvious that such a proceeding would seriously interfere with and impede an agency of the Government. If Virginia may make and enforce such a police regulation, it follows that every other State may do the same \* \* \*. If the State may control the transfer of powder belonging to the Government, it may inspect a regiment of Cavalry under a police regulation providing for the inspection of all horses coming within its borders. If one State may inspect a regiment of Cavalry and impose a charge therefor, it follows that every other State may do the same. If a regiment of Cavalry may be inspected and turned back—for, of course, the power to inspect includes the power to stop—an army of Cavalry and Artillery may be inspected and stopped at the borders of a State \* \* \*. If a State under the exercise of its police power may prevent the Federal Government from sending its troops and munitions of war to different parts of the country, the Constitution did not in fact 'provide for the common defense.' " (25 Op. Atty. Gen., 234.)

**Inspection of battleships.**—"The health laws of a State do not extend to agencies of the Federal Government, and as battleships belonging to the United States are agencies of the Federal Government, the charges by a health officer of a State for the inspection of such battleships are not a legal claim against the United States." (13 Comp. Dec. 672, *followed*, file 6118-3, Nov. 22, 1907.)

"Quarantine charges have been allowed in some instances where naval vessels, particularly colliers which have no medical officers on board, arrive from a foreign port, or from an infected port in the United States. In such instances it is always assumed that actual services are rendered by the inspecting officer, and that such services are necessary in defense and protection of the public health, and the payment is for such services. The case reported \* \* \* is entirely different. No services were rendered, and the charge is in the nature of a quarantine fee or tax. While the department desires to afford all reasonable facilities to quarantine officers in making inspections, it cannot undertake to pay fees of this character every time a war vessel enters a port of the United States. Such charges are unneces-

sary and would become onerous if made at every port entered by naval vessels. The bill referred to \* \* \* should, therefore, not be paid." (File 3983, Mar. 5, 1906; *followed*, file 6118-2, Dec. 29, 1906.) [This decision was prior to the decision of the Comptroller of the Treasury quoted in preceding paragraph. See also 23 Op. Atty. Gen., 299, noted in following paragraph.]

**Toll for property of United States passing over wharves.—**

"The State harbor commissioners of California are charged by the laws of that State with the supervision and control of the wharves and landings of the harbor of San Francisco, with the right to collect dockage, wharfage, rent, or toll. The imposition of a toll or charge by such commissioners on merchandise, being the property of the United States, passing to or over the wharves at San Francisco, is constitutional and valid, the charge being for a service rendered; the Government is not entitled to such services free of toll." (23 Op. Atty. Gen., 299.)

"It has been adjudged that the United States Government is not entitled to have property or troops transported free over a railroad, even where a land grant provided that the road shall remain a public highway for the use of the Government free from all toll or other charges for transportation, since that act did not include free use of rolling stock (*Lake Superior & M. R. Co. v. U. S.*, 93 U. S., 442.) This principle fairly includes the Government use of State or municipal wharf and harbor facilities. That is to say, the different kinds of Government property affected in this case, while used for public service and in sovereign and important operations of the Government such as required this shipment, are not instrumentalities or agencies which are necessarily free from local charges for services or facilities generally legitimate. Indeed, from *Railroad Co. v. Peniston* (18 Wall., 5, 36), showing that a tax upon property of agents of the United States does not necessarily hinder the efficient exercise of their powers or discharge of their duties, it seems to be a consequence that the same distinction would apply to the Government itself, and that a charge upon Government property which was not a tax upon operations of the Government or a direct obstruction to the exercise of Federal powers would not necessarily be invalid. This is also the conclusion to be drawn from *Railroad Co. v. United States* (93 U. S., 442); so that, while Government property may not be *taxed* nor Government instrumentalities or agencies nor the operations of the Government be obstructed or burdened in any such way, if the Government is properly liable to pay charges for transportation, a charge



for services or facilities analogous to transportation and connected with it would not be a tax and would not be invalid on that score." (23 Op. Atty. Gen., 299.)

**Exemption from compulsory personal services under State laws.**—"The salary of a Federal officer may not be taxed; he may be exempted from any personal services which will interfere with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties." (*Bank v. Commonwealth*, 9 Wall., 353.)

Persons connected with the military service of the United States are exempt from performing road duty upon order of the county authorities when compliance with such order would interfere with their duty to the Federal Government. The land for a military post having been purchased by the United States with the consent of the State, neither the State nor other local authorities have power to interfere with any instrumentalities necessary to the proper use of such location as a military post. This would be true even if the land had been acquired within the State without any consent whatever on the part of the legislature of the State. It is certainly true that the county authorities would have no right to interfere in any way with the troops located at the post. It is not claimed that the officers and enlisted men of the Army stationed at the fort are subject to road duty in the county. The same is true of teamsters employed and regularly used by the quartermaster's department at the fort. A military post could not be properly maintained without teamsters. The character of an Army teamster's service and his duties are such that it would be impossible for him to perform them properly and be at the call of the road commissioners to work public roads of the county outside of the Government's property. The State and county have no right to call on him to be absent from the fort when such absence would interfere with the proper discharge of his duties as a necessary and important, even if an humble, part of the Army of the United States. The necessary conclusion is that the detention of the petitioner in jail for failure to perform road duty is in violation of his rights under the Constitution and laws of the United States, such laws including the Articles of War and the Army Regulations, the latter made in pursuance of the statutes of the United States and therefore for present purposes considered as a part of the statutes. (*Pundt v. Pendleton*, 167 Fed. Rep., 997.)

As to the exemption of civil employees under the War Department from jury duty in a State court where such exemption is not allowed

by the court, the Attorney General is reluctant to render an opinion, as to do so might bring him in conflict with a judicial tribunal. In this case the State judge in refusing the claim notified the War Department that he would excuse the men from such duty if in the department's opinion not to do so would seriously prejudice the public interest. Under these circumstances no such serious occasion has as yet arisen as would justify the Attorney General in reviewing the ruling of the State judge. "If the claim of right to jury duty from Government workmen shall in the future be so far pressed as to cause serious inconvenience in your [Secretary of War's] judgment, of course I can not then hesitate to meet the question." (20 Op. Atty. Gen., 618; see also file 21090-3, Sept. 3, 1908.)

**Limitation upon exemption from State interference.**—"These agencies [of the Federal Government] are exempt from State control by police regulation, or by the exercise of the taxing power, so far only as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the Government." (Bank *v.* Commonwealth, 9 Wall., 353; Railroad Co. *v.* Peniston, 18 Wall., 5; Western Union Tel. Co. *v.* Mayor, 38 Fed. Rep., 560.)

### III. JURISDICTION OF CIVIL AUTHORITIES.

**Exemption of Federal officers and subordinates from arrest by State authorities.**—"An officer of the United States army, in the discharge of his duty, acting in obedience to commands by the Secretary of War, who in turn is executing an act of Congress, is not subject to arrest on a warrant or order of a State court, and \* \* \* such arrest is wholly illegal." (In re Turner, 119 Fed. Rep., 231).

"It is begging the whole question, and it is idle, to say that any and all Federal officers are amenable and subject to the laws, civil and criminal, of Iowa when within the State. Of course they are. The Secretary of War, the general of the Armies, the Chief Justice, and even the President, perhaps, are subject to all laws of Iowa when in Iowa. No one disputes this. But that is not the question. Can any one of those officers, or any subordinate, in the discharge of his duties as a Government officer, be subject to the laws of the State while in the State? That is the question and the only question. The State is not greater than the Nation, but, on the contrary, the State is but a part, and a small part, of the Nation. And, if I am wrong, then instead of the President, and the Secretary of War, and the general of the Army, being in control, we will have army com-

mands given by and through the courts, and an officer like Major Turner cashiered and dismissed from the service if he refuses to obey the commands from his superiors, and if he does obey them, thrown into a county jail for contempt of court." (In re Turner, 119 Fed. Rep. 231.)

"The arrest, under authority of a State, of a Federal officer, and that officer one of the Federal Army in the performance of a command by a superior which he dare not disobey, presents a matter of urgency, and it is within the discretion of the Federal court to at once take cognizance of the case, and act at once, rather than allow the case to be carried through three courts, taking two or three years of time." (In re Turner, 119 Fed. Rep., 231.) [In this case an officer of the Army was enjoined by a State court from obeying the orders of the Secretary of War. He disregarded the injunction and was attached and imprisoned for contempt. His release was ordered by the Federal court upon writ of habeas corpus.]

There is no act of Congress authorizing a call by the governor of a State for the surrender of an officer of the Navy charged with having broken the peace of such State, nor any law authorizing an arrest by the Executive with a view to a forcible surrender by him for the purposes of trial. However, advised that the accused be ordered by the Navy Department to surrender himself. (1 Op. Atty. Gen. 244. See further, note to Art. IV, sec. 2, clause 2, and Art. I, sec. 8, clause 14; see also note to sec. 355, Revised Statutes.)

The State authorities are not empowered to arrest persons, either in the naval or the civil service of the United States, within the limits of a navy yard, whether on shore or on board vessels at the yard, without first obtaining the permission of the commandant, to the end that such service of process shall not interfere with or obstruct operations of the United States Government. (File 6769-21, July 19, 1911.)

However, where a police officer, holding a warrant for the arrest of an enlisted man upon a charge of misdemeanor, persuaded the man to leave his vessel on liberty and accompany the police officer outside the limits of the navy yard, there making the arrest, it was held by the Attorney General that while there are authorities which indicate that an application to the commanding officer is a necessary condition precedent to the State's acquiring jurisdiction (especially *Ex parte McRoberts*, 16 Iowa, 600, 604), yet the better view, as held in the case of *In re O'Connor* (37 Wis., 379), is that application to the commanding officer is not jurisdictional, the matter being one that does

not go to the jurisdiction of the civil court issuing the process; that there is no doubt that the members of the military forces of the United States are subject in times of peace to the criminal laws of the States; and, accordingly, that want of an application to the commanding officer would be a mere informality which might make the warrant of arrest irregular but would not make it void or liable to be attacked upon a habeas corpus proceeding. (File 7657-261:1, Nov. 14, 1914.)

"If the civil magistrate has become *de facto* seized of a case of murder, if indictment is pending, if the accused is thus in the actual jurisdiction of the law of the land, it is not material to the validity of the proceedings at law and the right of the magistrate to go on according to the *lex loci*, whether the party passed into the hands of the magistrate regularly, by the act and with the consent of his commanding officer, or whether by breach of arrest of the party, desertion, or any other violation of military duty." (6 Op. Atty. Gen., 413.)

A mail carrier, although on duty, is subject to arrest by the State authorities upon a charge of murder. (U. S. v. Kirby, 7 Wall., 482, holding specifically that the police officer making such arrest was not subject to criminal proceedings for violation of the Federal Statute against delaying the mails.) From this decision of the Supreme Court it would appear that the well-established principle, that the State authorities can not interfere with an instrumentality of the Federal Government, is subject to an exception in a case where a person of the Federal Government is arrested in good faith, upon a charge of felony. However, it would seem that the charge upon which such an arrest is made would require a very clear *prima facie* case to warrant such action, as otherwise the Federal Government might be seriously interfered with and embarrassed in its official functions. In the case presented, an enlisted man was arrested upon a charge of felony while traveling through a State under orders; was acquitted, and has been released and proceeded to carry out his orders. This would have been a good case in which to test the question, in view of the fact, as now appears, that the charge was wholly without foundation. In its present status it does not appear that there is any action which can be taken by the Government. Should another case of this character arise, and the department be promptly informed thereof, consideration might be given to the feasibility of having the legality of the arrest tested in habeas corpus proceedings instituted in behalf of the United States. (File 26524-70, Aug. 12, 1914.)

The imposition of a sentence of imprisonment for 60 days on a soldier by the authorities of a city for a violation of a city ordinance,

where the act charged did not result in nor threaten any injury to person or property, is unwarranted, and the soldier will be discharged by the Federal court and restored to the custody of his commanding officer, on petition of the latter in habeas corpus proceedings. (*Ex parte Schlaffer*, 154 Fed. Rep., 921.)

While an enlisted soldier in time of peace may be subjected to arrest and punishment for violation of a municipal ordinance, the same as a civilian, yet where any punishment is sought to be inflicted which will interfere with the performance of the duties which he owes to the United States, the utmost good faith is required from the civil authorities and any unfair or unjust discrimination against the offender because he is a soldier, or departure from the strict requirements of the law, or any cruel or unusual punishment, can be as justly inquired into by the Federal courts in proceedings instituted by his commanding officer as it can be in protecting the interests of the United States in any matter where its necessary governmental agencies are involved. (*Ex parte Schlaffer*, 154 Fed. Rep., 921.)

"A court or judge of the United States has power to issue a writ of habeas corpus on petition of the United States for the purpose of an inquiry into the cause of detention of a prisoner held by a State to answer to a criminal charge, where it is alleged by the petitioner that the act charged as a crime was committed by the prisoner in the performance of his duty as a soldier of the United States; and it has authority to determine summarily as a fact whether or not such allegation is true, and if found to be true to discharge the prisoner on the ground that the State is without jurisdiction to try him for such act." (*U. S. v. Lipsett*, 156 Fed. Rep., 65.)

"It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a State court, and subject to its laws, may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the State court of an indictment found under the laws of that State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued." (*Drury v. Lewis*, 200 U. S., 1, quoting from *Baker v. Grice*, 169 U. S. 284. In the *Drury* case the court remanded the accused for trial to the State court, the evidence being conflicting as to whether or not he had in fact exceeded his Federal authority.)

"We are of opinion that while the circuit court has the power to do so, and many discharge the accused in advance of his trial, if

he is restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such a power immediately upon application for the writ. We can not suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The Federal courts should exercise their discretion in the light of the relations existing under our system of Government between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to regard and protect rights secured by the Constitution. (Ex parte Royall, 117 U. S. 241; see also Tinsley v. Anderson, 171 U. S., 101; Ex parte Wood, 155 Fed. Rep., 190.)

In the absence of express statutory authorization, the general authority of the President to see that the laws of the United States are faithfully executed empowered him to appoint a deputy marshal to protect a Federal judge whose life was threatened in consequence of the conscientious and faithful discharge of his duties. Where such deputy was arrested and brought to trial in a State court upon a charge of murder, for a homicide committed while acting within the line of duty thus assigned him, he was entitled to release on habeas corpus issued by a Federal judge. (In re Neagle, 135 U. S., 1.)

It is recognized that during times of peace the military power in the United States is subordinate to the civil and that an enlisted man is amenable to the statutory law and under proper circumstances and on necessary occasions may be subject to arrest and detention for the violation of municipal ordinances the same as any civilian. The relations existing between the police force and the enlisted men and the peace and welfare of the community demand consistent and harmonious action, both by the officers in command on the one side and the higher municipal authorities on the other, in checking and controlling the forces under each. The enlisted man should be as obedient and subservient to civil law when called upon as he is to military law, and the municipal authorities should recognize his peculiar condition and responsibilities and act in harmony and accord with his officers. It is not considered that enlisted men should be treated and held in any detention or attempted punishment the same as though they were answerable to no other power. Their position and the requirements of

their constitutional duty demand in behalf of the National Government from the municipal authorities such a recognition of its rights as would accomplish a preservation of the peace and the observance of the city ordinances without in any way affecting their duties as soldiers. (Ex parte Schlaffer, 154 Fed. Rep., 921.)

Where persons in the Navy or Marine Corps are arrested by the Federal or State authorities while on leave for criminal offenses and return to duty under bail, they may be granted leave of absence by their commanding officer in order to appear in the civil court for trial. (File 5322; Gen. Order No. 121, par. 17, Navy Dept., Sept. 17, 1914.)

By enlistment a person is not absolved from liability to arrest for taxes on property due previous to his enlistment. (*Webster v. Seymour*, 8 Vt., 135.)

State courts cannot order release of persons held by authority of United States.—“No State, judge, or court, after they are judicially informed that a party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of the State, in form of judicial process or otherwise, should attempt to control the marshal or other authorized officer of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of the law against illegal interference.” (*Ableman v. Booth*, 21 How., 506.)

“We do not question the authority of the State court, or judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. But after the return is made, and the State judge or court is judicially apprised that the party is in custody under the authority of the United States, they can proceed no further.” (*Ableman v. Booth*, 21 How., 506; see also *United States v. Tarble*, 13 Wall., 397.)

In the event that a writ of habeas corpus should be issued by a State court to a commanding officer of the Navy or Marine Corps, afloat or ashore, the latter will communicate with the Secretary of the Navy; and if instructions are not received by the commanding officer from the Secretary of the Navy by the return day of the writ,

the officer upon whom the writ is served will make return thereto, showing that the party is held by authority of the United States, but without producing the body of the party in court. (Gen. Order No. 121, Sept. 17, 1914.)

**State courts cannot punish perjury committed before Federal court.**—"The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the Government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the Nation that witnesses should be able to testify freely before them, unrestrained by legislation of the State or by fear of punishment in the State courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a Member of Congress, were liable to prosecution and punishment in the courts of a State upon a charge of perjury preferred by a disappointed suitor or contestant or instituted by a local passion or prejudice. A witness who gives his testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the Nation or of the State) designated by act of Congress for that purpose, is accountable for the truth of his testimony to the United States only; and perjury committed in so testifying is an offense against the public of the United States, and within the exclusive jurisdiction of the courts of the United States." (Thomas v. Loney, 134 U. S., 372.)

**Mandamus against Federal officers.**—See note to Article II, section 1, clause 1, "Mandamus against heads of departments."

**Habeas corpus proceedings in Federal courts to discharge persons from the Navy.**—Where a person is being held for trial by court-martial he will not be discharged from the jurisdiction of the court and from the military service even though his original enlistment was fraudulent. (In re Morrissey, 137 U. S., 157; Ex parte Rock, 171 Fed. Rep., 240; Dillingham v. Booker, 163 Fed. Rep., 696, file 5956-6; In re Scott, 144 Fed. Rep., 79, file 2757-4; In re Lessard, 134 Fed. Rep., 305; U. S. v. Reaves, 126 Fed. Rep., 127, file 152-04; Solomon v. Davenport, 87 Fed. Rep., 318; see also, file 5624, Feb. 17, 1896; compare Ex parte Bakley, 148 Fed. Rep., 56, affirmed, Dillingham v. Bakley, 152 Fed. Rep., 1022, file 5506-5; and Ex parte Lisk, 145 Fed. Rep., 860, file 2757-8, in which latter cases the court ordered the petitioner's release from naval custody.)



For other decisions, see note to Article I, section 8, clause 14, "Judgments of courts-martial acting within their jurisdiction not open to review by civil courts," and see note to sec. 761 *Revised Statutes*.

#### IV. RESPONSIBILITY OF MILITARY AUTHORITIES FOR ILLEGAL ACTS.

**Civil responsibility of persons in military service.**—"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of Government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to the supremacy and to observe the liabilities which it imposes upon the exercise of the authority which it gives." (U. S. v. Lee, 106 U. S., 196.)

A person making an illegal arrest, even when the privilege of the writ of habeas corpus is suspended, is liable to damages in a civil suit for such arrest, and to punishment in a criminal prosecution. (Griffin v. Wilcox, 21 Ind., 372.)

Although martial law exists, "no more force \* \* \* can be used than is necessary to accomplish the object. And if the power is exercised for the purpose of oppression and any injury willfully done to person or property, the party by whom or by whose order it is committed, will undoubtedly be answerable." (Luther v. Borden, 7 How., 1.)

At the close of the War of 1812, Gen. Jackson was sentenced to pay a fine of \$1,000 for contempt of court, in refusing obedience to a writ of habeas corpus, which fine he paid. (See Dow v. Johnson, 100 U. S., 158, 194, noted under Art. I, sec. 8, clause 11, "Effect of martial law.")

**Captain of a ship.**—"No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship." (Moyer v. Peabody, 212 U. S., 78.)

A commanding officer in the Navy "is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury, either from malice, cruelty, or any species of oppression founded on considerations independent of public ends. The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong as well as the highest in office." Wilkes v. Dinsman, 7 How., 89.) [In this case suit was brought by a marine against the

commanding officer of a squadron, the marine alleging that he was illegally detained on board after the expiration of his term of enlistment, and that he was illegally punished by the commanding officer. Judgment was given against the squadron commander, but was reversed by the Supreme Court, which, while making the above statement as to the responsibility of commanding officers, held that in this case the detention was legal, and that the commanding officer had the legal right to inflict punishment; that "the commander was acting as a public officer, invested with certain discretionary powers and cannot be made answerable for any injury when acting within the scope of his authority and not influenced by malice, corruption, or cruelty. His position is quasi judicial. Hence the burden of proof that the officer exceeded his powers is upon the party complaining; the rule of law being that the acts of a public officer on public matters within his jurisdiction, and where he has a discretion, are to be presumed legal until shown by others to be unjustifiable. It is not enough to show that he committed an error in judgment, but it must have been a malicious and willful error." See also, *Dinsman v. Wilkes*, 12 How., 389.]

**Members of a court-martial.**—Members of a duly constituted and organized naval court-martial "are collectively and individually responsible in civil courts for abuse of their power or illegal proceedings." (Art. R-722, Navy Regs., 1913.) [On general subject of responsibility of judges of civil courts see *Spalding v. Vilas*, 161 U. S., 483, and *Bradley v. Fisher*, 13 Wall., 335.]

"If a court-martial has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict a punishment forbidden by law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may on an action of a party aggrieved by it inquire into the want of the court's jurisdiction and give him redress." (*Dynes v. Hoover*, 20 How., 65.)

"In such cases, as has just been said, all of the parties of 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." (*Dynes v. Hoover*, 20 How., 65.)

"According to our laws, all military courts are under a constant subordination to the ordinary courts of law. Officers who have abused their powers, though only in regard to their own soldiers, are liable to prosecution in a court of law, and compelled to make satisfaction. Even any flagrant abuse of authority by members of a court-martial, when sitting to judge their own people and determine in cases entirely

of a military kind, makes them liable to the animadversion of the civil judge." (*Johnson v. Duncan*, 6 Am. Dec., 679; 3 Martin (La.), 530.)

**Judge Advocate General of the Navy.**—In 1904 suit was entered by Paymaster Robert B. Rodney, retired, against Capt. Sam C. Lemly, Judge Advocate General of the Navy, based upon action alleged to have been taken by Captain Lemly in his official capacity. The United States attorney for the District of Columbia was instructed by the Department of Justice to appear in behalf of the Judge Advocate General in response to the summons upon the latter. June 23, 1904, an order was entered by the chief justice of the Supreme Court of the District of Columbia dismissing the suit. (At law, No. 46683, Supreme Court of the District of Columbia; file 204-04.)

**Illegal order not a defense.**—"It can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate but it cannot justify." (*Mitchell v. Harmony*, 13 Wall., 115.)

"Neither the Secretary of the Treasury nor the President could nullify the statute, and though the defendant [collector of the port of New York] may have thought himself bound to obey the instructions of the former, his mistaken sense of duty could not justify his refusal of the clearance, and these instructions afford him no protection unless they were authorized in law." (*Hendricks v. Gonzales*, 67 Fed. Rep., 351; see also *Kilbourn v. Thompson*, 103 U. S. 168.)

A naval officer is liable in an action of trespass for seizing the plaintiff's ship in obedience to an order of the President based upon a misinterpretation by him of an act of Congress. "I confess the first bias of my mind was very strong in favor of the opinion that, though the instructions of the Executive could not give a right they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between the acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. The implicit obedience which military men usually pay to the orders of their superiors, and which indeed is indispensably necessary to every military system appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. \* \* \* But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in the opinion of my brethren, which is that the instructions

cannot change the nature of the transaction or legalize an act which without them would have been a plain trespass." (*Little v. Barreme*, 2 Cranch, 170, opinion of Chief Justice Marshall.) [In this case the Supreme Court affirmed the judgment of the lower court against the officer, in the sum of \$8,504 damages and costs.]

"In time of peace, at least, an officer is not obliged to obey an illegal order. \* \* \* It becomes his duty, at once or within a reasonable time, to appeal to the highest authority for revocation, modification or correction of the illegal order." (*Ide v. U. S.*, 25 Ct. Cls., 407, 150 U. S., 517; see also, *C. M. O.* 37, 1915.)

"Captain Gambier, of the British Navy, by the order of Admiral Boscawen, pulled down the houses of sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed." (See *Mitchell v. Harmony*, 13 How., 115.)

An officer of the Army was sued for seizing property of plaintiff during the war with Mexico under the order of his superior officer. Judgment was rendered against defendant and affirmed by the Supreme Court, amounting to \$104,562.23. Plaintiff was a trader and went from the United States into the adjoining Mexican provinces, which were in possession of the military authorities of the United States, for the purpose of carrying on a trade which was sanctioned by the executive branch of the Government (as a means to conciliation of the provinces bordering on the United States) and also by the commanding military officer. "It is certainly true as a general rule that no citizen could lawfully trade with a public enemy; and if found to be engaged in such illicit traffic his goods are liable to seizure and confiscation. But the rule has no application to a case of this kind; nor can an officer of the United States seize the property of an American citizen for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done." Accordingly held that "it was improper for an officer of the United States to seize the property upon the ground of trading with the enemy;" and that "the officer who made the seizure cannot justify his trespass by showing the orders of his superior officer. An order to commit a trespass can afford no justification to the person by whom it was exe-

cuted;" that "if the power exercised by Col. Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act, to commit a trespass upon the property of another, and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question." (*Mitchell v. Harmony*, 13 How., 115.)

"The willful killing of a soldier by a guard may be as clearly murder as the willful killing of one citizen by another. Nor will any order of a superior officer to an inferior in rank justify the willful killing of a person under the peace and protection of the law. A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime. For instance, an order from an officer to a soldier to shoot another for disrespectful words merely would, if obeyed, be murder both in the officer and soldier." (*U. S. v. Carr*, 25 Fed. Cas., No. 14732; see below, "Order not clearly illegal may be defense," and "Extenuating and aggravating circumstances.")

Order not clearly illegal may be defense.—"The law is that an order given by an officer to his private, which does not expressly or clearly show on its face its illegality, the soldier is bound to obey; and such order is his full protection. The first duty of an officer is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the precious moment for action would be wasted. Its law is that of obedience. No question can be left open of the right to command in the army, or of the duty of obedience in the soldier." (*In re Fair*, 100 Fed. Rep., 149; *U. S. v. Lipsett*, 156 Fed. Rep., 71.)

An order illegal in itself and not justifiable by the rules and usages of war, so that a man of ordinary sense and understanding would know when he heard it read or given that the order was illegal, would afford a soldier no protection for a crime committed under such order;

but an order given by an officer to his private which does not expressly and clearly show on its face or body thereof its own illegality the soldier would be bound to obey and such order would be a protection to him. (*Riggs v. State*, 43 Tenn. (3 Cold.), 85; *U. S. v. Clark*, 31 Fed. Rep., 710, 717.)

"Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I can not but think that the law should excuse the military subordinate when acting in obedience to the order of his commander. Otherwise he is placed in the dangerous dilemma of being liable for damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto \* \* \*. The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the Army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions." (*McCall v. McDowell*, 15 Fed. Cas. No. 8673; quoted with approval, *U. S. v. Clark*, 31 Fed. Rep., 710, 716; *U. S. v. Lipsett*, 156 Fed. Rep. 71.)

"A military subordinate is not liable in damages for making an illegal arrest if he acted in pursuance of an order from his superior which was legal on its face; the liability for the false imprisonment is confined to the officer who gave the order." (*McCall v. McDowell*, 15 Fed. Cas. No. 8673.)

"The defendant does not stand in the situation of an officer who merely obeys the command of his superior," if "it appears that he advised the order and volunteered to execute it when according to military usage that duty more properly belonged to an officer of inferior grade." (*Mitchell v. Harmony*, 13 How., 115.)

"Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field

of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds." (2 Willoughby Const. 1195, quoting 1 Stephen's Hist. Cr. L. Eng., 205.)

"An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." (In re Grimley, 137 U. S. 153, see also, 6 Op. Atty. Gen., 357, 365.)

**Extenuating and aggravating circumstances.**—"In respect to those compulsory duties, whether in re-enlisting or detaining on board or in punishing or imprisoning on shore, while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country rather than his own personal designs, a public officer invested with certain discretionary powers never has been and never should be made answerable for any injury when acting within the scope of his authority and not influenced by malice, corruption, or cruelty \* \* \*. The officer being intrusted with a discretion for public purposes is not to be punished for the exercise of it, unless it is first proved against him either that he exercised the power confided to him in cases without his jurisdiction or in a manner not confided to him, as, with malice, cruelty, or willful oppression, or in the words of Lord Mansfield, that he exercised it as if 'the heart is wrong.' In short, it is not enough to show that he committed an error in judgment, but it must have been a malicious and willful error." (U. S. v. Clark, 31 Fed. Rep., 710, 716; Wilkes v. Dinsman, 7 How., 89.)

"In an action of false imprisonment the defendant [plaintiff], by his gross and incendiary language on the news of the assassination of Abraham Lincoln, the President of the United States, having provoked his arrest, though the same was illegal, such provocation must be taken into account in mitigation of damages." (McCall v. McDowell, 15 Fed. Cas. No. 8673.)

"In an action for false imprisonment, where the arrest complained of was illegal but was caused by the defendant while acting as commanding officer of a military department of the United States, without malice or intention to injure or oppress the plaintiff, but from good motives and considerations involving the public peace and safety,

the plaintiff is only entitled to recover compensatory damages." (*McCall v. McDowell*, 15 Fed. Cas. No. 8673.)

"The move upon Chihuahua was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed and contributed to the successful issue of the war. But it is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights. That question belongs to the political department of the Government." (*Mitchell v. Harmony*, 13 How., 115.)

In *Beckwith v. Bean* (98 U. S. 266) a judgment for \$15,000 against two Army officers for arresting a civilian during the Civil War on the charge of aiding and abetting deserters from the Army, was reversed on the ground that certain evidence in mitigation had been erroneously excluded by the trial court; and that, if the officers acted in good faith, as the evidence excluded was intended to show, "they were entitled by every consideration of justice to stand before the jury in a more favorable light upon the question of damages than they would or should have stood had they been actuated by ill-will or sought to oppress one whose conduct had not justified the conclusion that he had violated any law."

"If a homicide be committed by a military guard without malice and in the performance of his supposed duty as a soldier, such homicide is excusable unless it was manifestly beyond the scope of his authority or was such that a man of ordinary sense and understanding would know that it was illegal." (*U. S. v. Clark*, 31 Fed. Rep., 710.) [In this case it was held that the finding of an Army court of inquiry was entitled to great weight as showing that guard was not to blame:]

"In charging the jury in *U. S. v. Carr*, 1 Woods, 484 [25 Fed. Cas. No. 14732], Mr. Justice Woods instructed them to 'inquire whether at the moment he fired his piece at the deceased, with his surroundings at that time, he had reasonable grounds to believe and he did believe that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened speedily to ripen into a mutiny. If he had reasonable ground so to believe, and did so believe, then the killing was not unlawful \* \* \* But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable



discretion is all that is required." (U. S. v. Clark, 31 Fed. Rep., 716.)

"A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake. A contrary principle would, indeed, be pregnant with the greatest mischiefs." (Kendall v. Stokes, 3 How., 87; see also Spalding v. Vilas, 161 U. S., 483.)

"The defendant having caused the arrest and imprisonment of the plaintiff, who was a civilian and not amenable to military law, it was his duty to make provision against his being treated with undue harshness and severity or subjected to any treatment or discipline not necessary and proper to restrain him of his liberty for the time being; and having failed to do so and suffered the plaintiff to be confined in the guardhouse with drunken soldiers and to be compelled to labor in common with military culprits, the damages for the false imprisonment must be enhanced on account of such treatment." (McCall v. McDowell, 15 Fed. Cas. No. 8673.)

"But in this case the defendant does not stand in the situation of an officer who merely obeys the command of his superior. For it appears that he advised the order and volunteered to execute it when according to military usage that duty more properly belonged to an officer of inferior grade." (Mitchell v. Harmony, 13 How., 115.)

---

#### V. PROTECTION OF MILITARY OFFICERS FOR ACTS DONE IN PERFORMANCE OF DUTY.

**Congress may protect officers against civil or criminal responsibility.**—"Congress has power to protect officers and persons engaged or concerned in making arbitrary arrests and imprisonments, or arrests or imprisonments without ordinary legal warrant or cause, under the authority or in pursuance of an act suspending the writ of habeas corpus, by the passage of laws indemnifying such officers and persons against the ordinary legal consequences thereof or declaring that they shall not be liable to an action or other legal proceeding therefor." (McCall v. McDowell, 15 Fed. Cas. No. 8673.)

"It is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country and in the excitement of military operations, has tres-

passed on private rights. That question belongs to the political department of the Government." (*Mitchell v. Harmony*, 13 How., 115.)

An act of Congress passed during the Civil War (Mar. 3, 1863, 12 Stat., 756) provided that any order of the President during the existing war should be a defense to any prosecution, civil or criminal, "for any search, seizure, arrest or imprisonment, made, done, or committed, or acts omitted to be done," under authority of such order. This act was upheld, the court saying: "That an act passed after the event which in effect ratifies what has been done and declares that no suit shall be sustained against the party acting under color of authority is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires." (*Mitchell v. Clark*, 110 U. S., 633. See also *O'Reilly De Camara v. Brooke*, 142 Fed. Rep. 858, 209 U. S. 45.)

Referring to acts of March 3, 1863 (12 Stat., 756), and March 2, 1867 (14 Stat., 432), it was held by the Supreme Court that "these statutes were enacted among other things to protect parties from liability to prosecution for acts done in the arrest and imprisonment of persons during the existence of the rebellion, under orders or proclamations of the President or by his authority or approval, who were charged with participation in the rebellion, or as aiders or abettors, or as being guilty of disloyal practices in aid thereof, or any violation of the usages or the laws of war"; that said statutes do not "cover all acts done by officers in the military service of the United States, simply because they are acting under the general authority of the President as commander in chief of the armies of the United States"; that, assuming that they are not liable to any constitutional objection, they only cover acts done under orders or proclamations issued by the President or by his authority"; that "they do not dispense with the exhibition of the order or authority upon which a party relies"; and, accordingly, that "where certain military officers of the United States, being sued for the arrest and imprisonment of a person in Vermont, not connected with the military service of the United States, alleged in their pleas that the arrest and imprisonment were made under the authority and by the order of the President, whose orders as commander in chief of the armies of the United States by the rules and regulations of the Army they were bound to obey, without setting forth any order, general or special, of the President directing or approving of the acts in question, \* \* \* the pleas were defective and insufficient." (*Bean v. Beckwith*, 18 Wall., 510.) [In the case of *In*

re Murphy, 17 Fed. Cas. No. 9947, it was held that the act of March 2, 1867, validating arrest of citizens by military under acts of Congress and proclamations and orders of President or by his authority and approval was void as *ex post facto*. In *Griffin v. Wilcox* (21 Ind. 370) the act of March 3, 1863, was held to violate the fourth amendment.]

"When an officer of the United States is sued for the performance of his duty the Government is bound to protect him by paying the costs of his defense. If he defends himself, and proves upon his trial that he was executing the law, or the orders of his superior, his expenses ought to be reimbursed to him." (9 Op. Atty. Gen., 51, case of Capt. Wilkes; compare 22 Comp. Dec., 264.)

"This is required by the plain principles of justice as well as by sound policy. No man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits which he must carry on at his own expense. For this reason it has been the uniform practice of the Federal Government, ever since its foundation, to take upon itself the defense of its officers who are sued or prosecuted for executing its laws. The following are some of the cases in which this has been done: *Mitchell v. Harmony*, 13 How., 115; *Elliot v. Swartwout*, 10 Pet., 80; *Lawrence v. Allen*, 7 How., 785; *Same v. Caswell*, 13 Howard, 488; *Greely v. Thompson*, 10 How., 225; *King v. Maxwell*, 17 How., 147; *The United States v. Guthrie*, 17 How., 284; *The United States v. Booth*, 18 How., 476; *Greely v. Burgess*, 18 How., 413; *Stairs v. Peaslee*, 18 How., 521; *Gelston v. Hoyt*, 3 Wheat., 247; *Fleming v. Page*, 9 How., 603; *Kendall v. The United States*, 12 Pet., 51; *Marbury v. Madison*, 1 Cr., 137. In *Little v. Barreme*, 2 Cr., 170, the Government took no part in the defense but it afterwards assumed the judgment and paid it with interest and all charges." (9 Op. Atty. Gen., 51; see also, 12 Comp. Dec., 208, and 12 Comp. Dec., 191.)

**Civil responsibility for seizure of private property during war.**

—See note to Art. I, sec. 8, cl. 11, "Jurisdiction over persons in military service during war."

(To be concluded.)