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DOUBLE JEOPARDY AND THE POWER OF REVIEW IN COURT-MARTIAL PROCEEDINGS

Not the least interesting of the problems which are involved in the administration of military law is the question of former jeopardy.

The question has been brought to public notice by a widespread criticism of the present practice of sending cases back to courts-martial for revision even after findings of not guilty, and of allowing not only new and higher sentences to be imposed on the revision but an entire change of front and a verdict or finding of guilty, and in fact of recommending and almost ordering these sentences.

This practice prevails in spite of the constitutional provision:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." ¹

It prevails in spite of the 40th Article of War, which provides that:

"No person shall be tried a second time for the same offense." ²

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² The extent to which this practice has been carried is shown by the following exhibit which was filed by General Crowder in his testimony before the Committee on Military Affairs of the United States Senate, in February, 1919.

"From the commencement of the war to October 1, 1918, a total of approximately 2,500 cases were returned by reviewing authorities for revision. This number comprises all cases returned, including those returned for correction of clerical errors, revision upward of inadequate sentences, and acquittals.

"From these 2,500 cases, the first 1,000 records were examined for the purpose of securing the following data. That is to say, approximately 40 per cent of all cases returned by reviewing authorities for revision have been scrutinized.

"Out of the 1,000 cases thus examined, it appears that 95 of the cases were ones in which the court had returned a verdict of acquittal: 39 of these 95 cases were returned for the purpose of having the court make purely formal correction of the record, leaving a balance of 56 cases of acquittals returned by the reviewing authorities for a reconsideration of a verdict of acquittal."
DOUBLE JEOPARDY AND COURTS-MARTIAL

It prevails in spite of the statement in the Manual for Courts-Martial that “Where a person subject to military law has been once duly convicted or acquitted by a court-martial he has been ‘tried’ in the sense of the article [No. 40], and can not be tried again, against his will, for the same offense, or for any included offense, and it is immaterial whether the conviction or acquittal has been approved or disapproved.”

It exists in spite of the fact that the only reported opinions of the Judge Advocate General upon the subject, and which alone are cited by the text writers, hold conclusively that it is illegal.

“In 38 of these 56 cases the court adhered to its former finding of not guilty. That is to say, in 2 out of every 3 cases of acquittal returned for reconsideration the court adhered to its original finding. The remaining 18 cases of acquittal returned for revision are the subject matter of the following synopsis. Sixteen of these cases are those of enlisted men; 2 of officers.

“The case referred to above in which it was said that dishonorable discharge and a long period of confinement were inflicted after an acquittal is, without doubt, the case of Recruit David Cortesini. An analysis of that case appears in the attached synopsis marked (1). The final outcome of that case was a sentence of confinement for one month and forfeiture of one-third pay for a like period.

“An analysis of the 18 cases referred to discloses that the total confinement in all cases amounted to 27 months. In 2 cases confinement of 6 months was imposed, but in 11 cases no confinement whatever was imposed. The average confinement for the 18 cases was 1.5 months. This, of course, completely refutes the charge that long terms of confinement have been inflicted by courts in cases in which there was at first an acquittal.

“In 3 of the 18 cases discussed in this synopsis all punishment was remitted by the reviewing authority. It therefore appears that out of 1,000 cases returned by reviewing authorities, or 40 per cent of all cases returned to October 1, 1918, there were 14 cases of original acquittal in which the court in revision changed its finding, imposing an average confinement of 1.5 months.”

See page 68 of Manual for Courts-Martial which was revised in the Judge Advocate General's Office and published by authority of the Secretary of War in 1917. Italics are the writer's.

“Where the accused has been once duly convicted or acquitted, he has been ‘tried’ in the sense of the article, and can not be tried again against his will, though no action whatever be taken upon the proceedings by the reviewing authority (R. 31, 300. Apr., 1871); or, though the proceedings, findings (and sentence, if any) be wholly disapproved by him. R. 9, 611. Sept., 1864: 27.348. Nov., 1868, and 605, Apr., 1869: 38, 38. Apr., 1876: P. 60. 177. June, 1893: C. 16,814. Apr. 29. 1907. It is immaterial whether the former conviction or acquittal was approved or disapproved. P. 36, 259. Nov., 1889.” Howland. Digest of Opinions of Judge Advocates General of the Army. 167. CII A 1.

To this paragraph there is attached the footnote: Compare Macomh. Sec. 159: O'Brien. 277: Rules for Bombay Army, 45: McNaughton. 132. 133.
Upon this subject and in reviewing the popular criticisms upon the administration of military justice during the war, Judge Advocate General E. H. Crowder says:

"This power undoubtedly does exist; and it is occasionally exercised.

"The reviewing authority, i.e., ordinarily the commanding general who has convened the court, represents essentially a first appellate stage. No sentence of court-martial can be carried into execution until it has been approved by the reviewing authority, i.e., neither acquittal nor conviction is effective until the reviewing authority has scrutinized the record and given it approval. The very object of this institution is to secure the due application of the law, and to surround the accused with an additional protection independent of the trial court. This power to approve or disapprove a finding is given great flexibility by the Articles of War; it includes the power to approve a finding of guilty of a lesser offense and the power to approve or disapprove the whole or any part of the sentence. In this respect the military appellate code differs from the usual civil code. Incidentally, this power to disapprove includes the power to disapprove a sentence of acquittal and to return the record for reconsideration by the court. But, intrinsically, nothing more is here implied than that the court is to reconvene and reconsider its judgment freely and independently. It is in no sense a measure which subjects the court-martial to the command of the reviewing authority in framing the tenor of its judgment upon such reconsideration; for the court is, under the law, entirely at liberty to adhere to its original decision.

"That this power is a useful one, and that it is not in fact in any appreciable number of cases so exercised as to amount to an abuse of the commanding general's military prestige, will, I think, appear from the figures to be gathered from the records. In the first place, the power is exercised in the vast majority of cases solely for the purpose of making formal corrections of the record; for example, to enable the fact to be shown, if it was a fact, that a certain member of the court was present or was qualified or that a witness was sworn, or the like formal correction which will make the record of the trial correspond to the facts. In the second place, the exercise of the power in cases of an initial judgment of acquittal has been rare indeed; and in those few cases the trial court, far from exhibiting a supple obedience to the supposed hint of the commanding officer, has, in the great majority of cases, adhered to its original judgment." 5

5 Military Justice During the War, p. 32 (War Dept. pamphlet).

Colonel Beverly A. Read, Chief of the Military Justice Division of the Judge Advocate General's Department, testifying before the Committee of the American Bar Association in April, 1918, among other things, said:
In spite of his positive assertion that “the power undoubtedly exists,” even General Crowder does not claim that there is any express warrant for its exercise in the constitution or even in the Articles of War themselves. It is and can be asserted only on the theory that the jeopardy clause of the constitution is

“The idea about returning for retrial is based on the theory, I suppose, the belief, that after the court has concluded its labors that is the end of the trial, while the action of a court-martial is not final until it has been passed upon by the reviewing authorities. In other words, he is part of the judicial system. As has been frequently stated, the whole ..., and quoting the Supreme Court in the Runkle case, 122 U. S., where they held that the whole proceeding is judicial in character up through and including the President. That is a remarkable situation, that a great many people are not advised in regard to. A record which goes up to the President for review in case of death or dismissal under this provision of the 48th Article of War which refers to him—he acts there in a judicial capacity, not in an administrative capacity, but in a judicial capacity. You will find that squarely laid down in the Runkle case.

“Mr. Bruce: The Manual at one place seems to intimate that a man has been in jeopardy, when a judgment has been rendered by a court-martial whether confirmed or not—

“Col. Read (interposing): That is true. They have held that if the proceedings of the court have gone to a finding and sentence, or a finding and an acquittal, he could not be tried again, because that would violate not only the 40th Article of War, but the 5th Amendment to the constitution for that matter.

“Col. Hinkley: Let me read into the record a section of the court-martial that I think this has reference to: from page 68 of the ‘Manual for Courts-Martial’ and in the portion relating to pleas there, being paragraph 149, the subsection (3a), ‘the 40th Article of War’: ‘No person shall be tried a second time for the same offense.’ Then the explanatory section (b) goes on: ‘where a person subject to military law has been once duly convicted or acquitted by a court-martial he has been “tried” in the sense of the article, and can not be tried again, against his will for the same offense, or for any included offense, and it is immaterial whether the conviction or acquittal has been approved or disapproved.’

“Col. Read: It is not a trial de novo. The reviewing authority had simply found itself unable to concur in the action of the court and upon his reading of the record he is of the opinion for the reasons set out by him that the court erred in the findings and acquittal, and his endorsement returning the record directs a revision by the court, a reconsideration by the court, in view of these suggestions which he makes. Now, the court, as I said, is at perfect liberty to disregard the suggestions of the reviewing authority and to adhere to his prior action in the case, and I only spoke practically from my knowledge. In the regular army they almost uniformly decline to change their action. The form of action is usually respectfully returned with the endorsement ‘the court adheres to its former findings and acquittal’ and that is the end of it.”

Testifying before the Committee on Military Affairs of the United States Senate, in February, 1919, General Crowder said: “And this brings up the main question: Is it right, is the present rule right, the present rule authorizing the reconsideration of the verdict of acquittal? Let me say first, it is simply a regulation and there is no law under which it is done. The War Department could wipe out the regulation to-night, and could establish this very prohibition by
not binding upon the military branch of the government; that the "revision" is not "a new trial" within the meaning of Section 40 of the Articles of War, and that a court-martial is not a court or a judicial body but an administrative agency merely.

This theory is expressed in the Digest of the Opinions of the Judge Advocate General which was published in 1912, where we find a reference to an opinion which was filed in July, 1895, and which was probably never printed but has the card reference of 1495. This states that "the principle of the fifth amendment in the constitution, but not the amendment itself, applies to court-martial trials, as a part of our common law military. As Section 860, R. S., does not apply to courts-martial, it does not set aside the general principle which with courts-martial takes the place of the constitutional provision, but whether it applies or not an accused on trial before a court-martial cannot, when testifying as a witness in his own behalf, be compelled to criminate himself as to an offense in respect to which he has not testified."

It was expressed by General Bell in the case of the recruit David Cortesini, to which we shall afterwards refer, when in his order sending the matter back to the court-martial for a revision, after a verdict of "not guilty," he said:

"In the present case the accused was given every opportunity to obey the order, but nevertheless disobeyed it intentionally, in defiance of authority, and accordingly such disobedience was 'wilful' within the meaning of this section.

"The reviewing authority does not intend to give the impression that he personally believes that the accused must be required to serve a long period of confinement for this act, but rather he desires the court to understand that the commission of this act should be met by severe punishment, and then, if in this case there are reasons why the sentence should be reduced, such reduction should be ordered on the action of the reviewing authority rather than in the inadequate sentence awarded by a court appointed as an executive agency in the administration of discipline." 7

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7 See Hearings Before the Committee on Military Affairs of the United States Senate on Senate Bill 5320, published in 1919, p. 247, also record Judge Advocate General's Department, No. 116234.
The question to be determined is whether the officers and soldiers of our army are entitled to the protection of the constitution or whether they are not, and the position of the military authorities evidently is that they are not. In their opinion a court-martial is merely an agency “appointed” by the commanding officer for the training of the soldiers in discipline, and though one is sentenced by such a tribunal to death or to a long term of imprisonment, he is not deprived of life or liberty or in fact punished at all, but merely trained and educated and disciplined. A criminal sentence in the army, in short, serves the same purpose as the manual of arms or the setting up exercises, and must be cheerfully acquiesced in, no matter how severe it may be, as it is but a part of the school of the soldier. If this states the law and the military contention, we then have the situation of a military code and practice which, except where Congress has expressly spoken, is based on a military common law, that is to say, the usages of war, the opinions of the military commanders and of the judge advocates and military departments, and which is outside of and uncontrolled by the constitution. It presents a system which may recognize the constitutional provisions or the constitutional analogy, but considers itself not bound to do so.

This we believe can hardly have been the intention of the founders of our government, or even of the Congress which in 1916 passed the so-called Articles of War. Followed to its logical conclusion, the theory implies that the military law is not even subject to Congress, for what but the constitution gave to Congress the power to legislate at all? Can it be that a nation that was conversant with the Mutiny Acts and the determined efforts through the centuries of the English Parliament and of the English people to subordinate the Military to the Civil, when they solemnly adopted a series of constitutional amendments as an expression of fundamental rights and as an expressed limitation upon the powers of the new government which they were creating, ever could have intended that the only persons to be denied these constitutional rights should be the men who were called to the national colors to defend the nation thus created? It is true that Section 8 of Article I of the constitution gives to Congress the power “to raise and support armies, to provide and maintain a navy and to make rules for the government of the land and naval forces,” but surely it was the intention that these powers as well as all of the other powers granted by the article
should be exercised in conformity both with the spirit and the actual conditions and restraints of the constitution, and it is to be noticed that these powers are given to Congress and not to any military chief. The first ten amendments, indeed, were limitations and amendments to the whole of the constitution, and not to any particular part thereof. That they were intended to cover the military as well as the civil portion of the population is clear from Articles II and III, which limit the power of military control and the rules for the disposition and government of the military, by providing that the exercise of the powers conferred shall not deprive the states of the right to maintain their own militia, nor involve the right of quartering soldiers in time of peace. It is true that Article V of the amendments in express terms provides that the right to a presentment or indictment by a grand jury shall not extend to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, but this limitation is restricted to the presentment or indictment, and the language is explicit and unlimited which provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." It is noticeable indeed that this provision does not in terms refer to criminal prosecutions alone, and in order that it shall apply to the men in the army it is not necessary that a court-martial proceeding should be technically called a criminal proceeding or a criminal trial, for the words are merely: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

It may possibly be that if a court-martial is not a criminal prosecution, but merely a means of enforcing discipline, a defendant might be compelled to testify against himself, as the article provides: "Nor shall be compelled in any criminal case to be a witness against himself," but no such restrictive words are used when it comes to the question of jeopardy, and there is doubt even as to the first proposition, since the Supreme Court has held that a conviction in a court-martial is a bar to a prosecution in a civil court for the same offense.8

It also will be noticed that the Articles of War everywhere provide that the punishment shall be such as the court-martial and not the commanding officer may direct, and that the trial shall be had before the court-martial, and not the commanding officer, and that no person shall be twice tried for the same offense.

That the practice is anomalous, indeed, seems to be fully recognized by the military authorities, for they all appear to agree that on the review or rehearing no new evidence can be taken, and by this theory they attempt to meet the objection that Article 40 of the Articles of War expressly provides that no new trial shall be had. This quibble, however, does not meet the added objection that the constitution does not content itself with merely providing that no person shall be twice tried, but distinctly states that no person shall be twice placed in jeopardy.

It is also freely admitted that there is no express authorization for the practice to be found anywhere in the Articles of War, which, it may be observed, in so far at least as the clauses in regard to review are concerned, were enacted by Congress in 1916, and superseded any prior rules, regulations, or military practices upon the matter. It must, indeed, be

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9 See testimony of Colonel Read in note 5, ante.
10 See note 4, ante.
11 These Articles, among other things, provide:

Art. 14. " . . . Provided, That when the summary court officer is also the commanding officer no sentence . . . . shall be carried into execution, until the same shall have been approved by superior authority."

Art. 40. "No person shall be tried a second time for the same offense."

Art. 46. "No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

Art. 47. "The power to approve the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to approve or disapprove the whole or any part of the sentence."

Art. 48 requires the approval of the President in addition to that of the commanding officer in certain cases, but in no particular confers any greater powers upon the latter than are conferred by Article 47 upon the former.

Art. 49. "The power to confirm the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of
conceded that in America, at any rate, the military is subordinate to the civil authority, and that where Congress has acted its action is final and conclusive. It would also seem, though the military authorities appear to doubt the premise, that even in military matters Congress itself must act within and not outside of the constitution.

General Crowder, it is true, justifies the practice by saying that—

"the reviewing authority, ordinarily the commanding officer who has convened the court, represents essentially a first appellate stage. No sentence of a court-martial can be carried into execution until it has been approved by the reviewing authority, i.e., neither acquittal nor conviction is effective until the reviewing authority has scrutinized the record and given it approval. The very object of this institution is to secure the due application of the law and to surround the accused with an additional protection independent of the trial court." 12

But is not this true of the presiding judge in the ordinary criminal action? It is for him to receive the verdict and to render judgment upon it. Even where the jury is by statute given the power to fix the penalty, it is for him to announce it and to sentence the prisoner. In spite of an adverse verdict, he may still entertain a motion in arrest of judgment for the causes authorized by the law. Wherein does the commanding officer or reviewing authority exercise any other or different powers? Even if the commanding officer is a part of the appellate machinery, where in our criminal procedure or criminal history is an appellate court authorized or where has it assumed to possess the power to set aside a verdict of acquittal?

It is also true that in an opinion rendered in 1853 Attorney-General Cushing justified the practice on the theory that such a review was not a new trial, as no new testimony was taken; but this opinion, if authority at all, is practically the only authority in favor of the position, and its sophistry is of course apparent.

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12 See note 6, ante.
"A new trial," the Attorney General said, "is a rehearing of the case. A court-martial on revisal does not rehear the case: it only reconsiders the record for the purpose of correcting or modifying any conclusions thereon. The true analogy of such a revisal, . . . . is the case of a jury sent out by the court to reconsider its verdict." 13 But where, in the administration of the criminal law, has a judge been allowed to send back a jury to reconsider a verdict of not guilty? The revisal may possibly not be, technically speaking, a new trial, and perhaps is not forbidden by the 40th Article of War, but what of the constitutional provision in relation to former jeopardy? Did not the learned Attorney General confuse civil with criminal causes?

It is admitted also in the opinion referred to that the views expressed did not agree with the then prevailing practice nor with a former ruling of the Attorney General's department.


Attorney-General Cushing, among other things, said:

"It is laid down as a thing not open to controversy, in all the books of military law, that the superior authority may order a court-martial to reassemble to revise its proceedings and its sentence. (Hough on Courts-Martial, p. 29; i McArthur on Courts-Martial, p. 136; Griffith's Notes, p. 90; Kennedy on Courts-Martial, p. 229, 290; Anon., Observations on Courts-Martial, p. 38-65; Tytler's Mil. Law, p. 170-338; James' Collection, p. 556; Simmons' Practice, 389; De Hart on Courts-Martial, p. 203; O'Brien's Mil. Laws, ch. 23.)

"Revisal by court-martial is not a case of new trial. If it were, it would, in the present case, be unlawful. The 5th Article of Amendment of the Constitution, provides that 'No person shall be subject for the same offence, to be put twice in jeopardy of life or limb.' This provision is in accordance with a well-known doctrine of the law of England, to the same effect. That is to say, by the common law, as understood and administered both in England and the United States, there cannot be a new trial at the instance of the Government, in a case of treason or felony, though there may be in case of misdemeanor, where a party is alleged to be improperly convicted, but not where he has been acquitted. (i Chitty's Com. L. p. 664 and note.) We may admit for the argument's sake, that this doctrine applies to trials by court-martial, as well as by the civil judicature. Indeed, Mr. Attorney-General Wirt has given an official opinion, that though there may be a new trial by court-martial, on application of the party, yet it cannot be lawfully ordered in invitum. (Opinions, ante vol. i, p. 233, September 16th, 1818: see, also, United States v. Gibert and Others, ii Sumner, 19.)

"But the present, I repeat, is not a case of a new trial. A new trial is a rehearing of the case. A court-martial on revisal does not rehear the case: it only reconsiders the record for the purpose of correcting or modifying any conclusions thereon. The true analogy of such a revisal, to take an example from the practice of civil courts, is the case of a jury sent out by the court to reconsider its verdict. Such is the whole current of authorities, as well in the United States as in Great Britain."
The prior ruling was made by Attorney-General William Wirt, in 1818, in the case of Captain Nathaniel N. Hall. Among other things he said:

"The court, under the opinion of the judge advocate, refused to arraign Captain Hall, on the ground that he had been previously tried by a court-martial on the same charge, and that a new trial was forbidden by the 87th Article of War. The general order prefixed to this report shows that the sentence of the first court, which cashiered this officer, was disapproved by the President: and it appears by the proceedings that the new trial ordered, by a court composed of different members, was an act of mercy to the party accused, in consonance with his wishes, and at his own desire. . . . The question presented for my opinion is, whether a President of the United States has the right, under these circumstances, to order a new trial?

"The court, in this case, was a general court-martial; and its sentence one which extended to the dismissal of a commissioned officer: it could not, therefore, according to this law, be carried into effect until the sentence, with the whole proceedings which led to it, should be laid before the President, who was authorized by the law either to direct it to be carried into execution, or otherwise, as he should judge proper. To show the value of this appellate power, according to the spirit of this nation from the period of its earliest struggles for liberty, it is not unworthy of remark, that, by the 18th section of the rules and articles of war, established by the continental Congress, it was provided 'that the continental general commanding in either of the American States for the time being shall have full power of appointing general courts-martial to be held, and of pardoning and mitigating any of the punishments ordered to be inflicted for any of the offences mentioned in the aforesaid rules and articles for the better government of the troops, except the punishment of offenders under the sentence of death by a general court-martial, which he may order to be suspended until the pleasure of Congress can be known; which suspension, with the proceedings of the court-martial, he shall immediately transmit to Congress for their determination.' (1 Graydon's Digest, app. 156-7.) On the 27th May, 1777, the whole appellate power was given to the general or commander-in-chief, id. ib., confirmed by an order of 18th June, 1777. Some years after the close of the revolutionary war (to wit, on the 31st May, 1786), it was resolved by Congress, among other things that 'no sentence of a general court-martial, in time of peace, extending to the loss of life, the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, shall be carried into execution, until after the whole proceeding shall have been transmitted to the Secretary of War, to be laid before Congress for their confirmation or disapproval and their orders in the same.' (1 Graydon, app. 158-9.) The question may as
well be asked here as elsewhere, whether the appellate power of the continental Congress, in the resolution last quoted, was limited to the confirmation or disapproval of the sentence of the court-martial on which they were called to act? Had they not the power, not merely of disapproving that sentence, but of ordering a new trial? If they were so limited, why did not the resolution stop at giving them the power to confirm or disapprove? Why the additional words, after the disapproval, 'and their orders in the same'? These words obviously mean something; and what they do mean, we shall discover by turning our attention for a moment to the prototype from which we have chiefly drawn all our laws, both civil and military, and from which our then recent connexion with Great Britain rendered it most natural that we should draw them.

"The mutiny act of England, which annually passed, and which is the sole foundation and rule of courts-martial in that country, establishes a connexion between the martial and civil courts of the kingdom, and authorizes an appeal from the former to the latter. The 79th section of the mutiny act authorizes an appeal from the sentence of a court-martial to the Courts of King's Bench and Common Pleas in England and Ireland, and the Court of Sessions in Scotland. (Tytler's Essay on Military Law, &c., p. 167-8; Edinburgh edition 1800.) The causes for which the sentence of a court-martial may be brought under review of a superior judicature, are the same which in the civil courts of England authorize either the granting of a new trial, or an arrest of judgment; that is to say, if the sentence or verdict shall have been manifestly without or contrary to evidence, &c., &c.

"It appears, therefore, that in England the power to award a new trial does exist, by an appeal from the courts-martial to the civil courts of the kingdom. But there is something still more strong in this view of the subject: which is, that this appeal lies to the civil courts of the kingdom; and this power of awarding a new trial exists after the king shall have approved the sentence of the court-martial; for, never until then is the sentence complete and final, and never, therefore, until then, can there be an appeal; since an appeal lies from a final sentence only.

"It cannot be doubted that our Congress were in full possession, by painful experience, of the mutiny act, and of the whole laws of the British army, at the period of our Revolution. . . . Can it be believed that, acting in this spirit, and with these enlarged views of human liberty, they would have narrowed the rights and privileges of the American citizen, and surrendered him to a military despotism more severe than that which they were throwing off? And yet this must be supposed, if the peace resolution of the Congress of 1786, above quoted, is to be construed as limited to a cold rejection of the sentence of a court-martial, without the milder and more conciliating remedy of a
new trial, which they knew to exist under the British law; because the rejection would still leave the party under the ignominy of the sentence of his brother officer, without a hope of wiping out the reproach, and reduce the power of Congress to a power (most humiliating to the prisoner) of pardoning a condemned culprit. Looking on the subject in this light, I cannot doubt that, by the words of the resolution of 1786, above quoted, 'for their confirmation or disapproval, and their orders in the same,' it was the intention of Congress to lodge in that body all the conciliating powers, over sentences of courts-martial, which they must have known to exist in the different branches of the government of England. For if Congress did not intend by this resolution to reserve to themselves this power, among others, of awarding a new trial, no other tribunal of this country could then have possessed it. We had then no national courts, corresponding with the King's Bench, &c., to whom the power of awarding new trials is given in England; much less any connexion established by law between such courts and the courts-martial of the country.

"... Congress were forced by the emergency of the crisis to assume, in some instances, legislative, executive, and judicial power; or, in other words, to take care of the republic—in relation to the army particularly. Having no national court, they were forced to divide the government of that between the republican generals and themselves: and, in relation to an army composed of their fellow-citizens struggling for the common liberty, and alive, in every nerve, to all that concerned their honor, it cannot be doubted that every power, whose exercise was essential to that honor, was intended to be preserved by the broad expressions which have been quoted. That they could have done all, therefore, which the court of the King's Bench, &c., could have done for the relief of the injured honor of the army, I have no doubt.

"The power which Congress possessed before the formation of the present government was, obviously, intended to be transferred to the President after its formation. This will be evident by comparing the congressional resolution of 1786 with the language of the act of Congress first quoted. ... What answer can be given, but that the design was to comprehend, under this clause, all the power which had been long known to exist in England, over sentences of courts-martial pronounced in that country? and, among these, (as shown under the English mutiny act by Tytler,) the power of reviewing them and giving a new trial. And where is the injury, in any quarter, by the existence of such a power? The benefit of an appellate tribunal is obvious, while human nature shall remain as imperfect as it is: not so, I think, the final power of the tribunal first convened. On the contrary, the dangers of this latter principle are incalculable; it surrenders the victim, bound hand and foot, to the malice, revenge, and corruption of his enemies.
"The argument presented by the judge advocate and the court-martial at Plattsburg, against the new trial, strikes me as being founded rather on the letter than on the spirit of the 87th article of the rules and articles of war. That article is in the following words: 'No person shall be sentenced to suffer death, but by the concurrence of two-thirds of the members of a general court-martial nor except in the cases herein expressly mentioned; nor shall more than fifty lashes be inflicted on any offender, at the discretion of a court-martial; and no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence.' It is very apparent that the whole of this article is designed for the benefit of the party accused, not for his prejudice; and yet the constructive operation given to it, in this case, is for his prejudice only, and not for his benefit. There is no principle in law better settled than that a party has the right to waive a rule designed merely for his own benefit. The writers on martial law have labored, very laudably, to reconcile the principles of proceeding in this law with those of the common law of England; and there is not a lawyer who can read this article without seeing in it the common-law rule in criminal trials, from which it has flowed. . . . But do these maxims, which form the rule of the common law, (and consequently of the martial law, which is borrowed from it,) bar a new trial, on the motion, and in behalf, of the accused? Blackstone shall answer: 'Yet, in many instances, where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of King's Bench, &c. But there hath been, yet, no instance of granting a new trial, where the prisoner was acquitted on the first.' (4th Black., 361.) . . . It is enough for our purpose that the prisoner has long had this right, and that the rule which forbids a second trial, devised purely for his benefit, has never been considered as being infringed by granting such a new trial on his motion: that he has invariably had this new trial, whenever, in the estimation of those constituted to judge, the reason and equity of the case have required it. . . . It will be observed that the rule is altogether benignant to the party accused. It does not follow that, if acquitted, he can be arraigned anew; it is not (according to Blackstone) that the new trial can be ordered against him—it is only for him. What just ground of alarm, therefore, can there be to the officers of the army, that a principle, exclusively beneficent in its operation, should exist?—one which can operate in their favor; and never, by any possibility, can operate against them? . . .

"Upon the whole, I am of the opinion that the President of the United States is vested by the laws with the power of ordering a new trial for the benefit of the prisoner." 14

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14 Case of Nathaniel N. Hall, 1 Ops. Atty. Gen. 149.
This opinion clearly limits the new trial to one at the request of and for the benefit of the defendant, and to one which is granted at his request and at his request alone.

The practice also is expressly denied, not only by the only American writers upon the subject, but by writers whose authority the military have always recognized.

Colonel William Winthrop, in his work on military law, says: 15

"The Plea of Former Trial for the Same Offence. Similar at Military and at Criminal Law. This is the plea by which an accused party avails himself of the principle incorporated in the 102d Article of the military code, viz.:—‘No person shall be tried a second time for the same offence.’

“In the criminal procedure the defendant takes advantage of this principle by means of one of the two pleas of former acquittal, (autrefois acquit,) or former conviction, (autrefois convict). . . . The rulings thereupon by the civil courts will therefore be applicable to similar cases at military law.

“Former Trial and ‘Jeopardy’ Identical. That no man shall be liable to be twice tried or punished for the same offence, was an ancient maxim of the common law, . . . it was incorporated in the Constitution of the United States in a form similar to that in which it originally appears in the early cases and writings in criminal law, as follows—‘nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.’ . . . That it takes this form is explained by the fact that, at the period of its origin, all the considerable offences in regard to which this right of defence would be asserted were felonies punishable capitally or by dismemberment. In the present state of the law, indeed, the provision, as worded in the Constitution, applies, strictly, to but two or three crimes, as treason, murder, and piracy; but, construing it in the light of its original bearing and its manifest spirit, the U. S. courts generally have viewed it as covering in principle all other crimes, and have held the phrase ‘put in jeopardy’ to mean practically the same as tried, thus giving to such provision substantially the effect of the declaration expressed in the military statute.

“Meaning of ‘Tried’ and ‘Trial.’ In so ruling, these courts have further held that the ‘jeopardy’ or ‘trial’ means the prosecution of a case to a verdict; that unless the case has proceeded at least to an acquittal or a conviction, there has been no trial and therefore no jeopardy. Similarly the word ‘tried’ in Art. 102 is to be interpreted as meaning duly prosecuted before a court-martial to a legal conviction or acquittal. After such a conclusion the Article prohibits a further trial of the accused except,

15 Winthrop, 2nd ed., I, p. 387 et seq.
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(as will hereafter be indicated), by his own waiver and consent.

"Immaterial Whether There Has Been a Sentence Adjudged."
It is further held by the weight of authority that, to complete
the trial, no judgment or sentence is requisite. Thus, while in
the military procedure a sentence properly follows at once and
as a matter of course upon a conviction, a court-martial will
properly hold an accused to have been 'tried' in the sense of the
102d Article, when he has been duly acquitted or convicted,
without regard to whether, in a case of conviction, a sentence
or a legal sentence has been adjudged.

"Immaterial Whether Any or What Action Has Been Taken
on the Proceedings by the Reviewing Officer."
Further, where
the accused in a military case has been once duly acquitted or
convicted, he has been 'tried' in the sense of the Article, although
no action may have been taken upon the finding or proceedings
by the reviewing authority. Nor has he been any the less 'tried'
where the finding has been formally disapproved, by such author-
ity. For the finding is no less a consummation in law of the
trial, though, from a cause beyond the control both of the accused
and the court, such finding has been rendered ineffectual."

In the same connection, and in speaking of Section 40 of the
Articles of War, which provides that no person shall be tried a
second time for the same offence, Major General George B.
Davis says: 16

"The Constitution declares that 'no person shall be sub-
jected for the same offense to be twice put in jeopardy of life
or limb.' The United States courts, in treating the term 'put
in jeopardy' as meaning practically tried, hold that the 'jeopardy'
indicated 'can be interpreted to mean nothing short of the acquit-
tal or conviction of the prisoner and the judgment of the court
thereon.' So it has been held that the term 'tried', employed
in this Article, meant duly prosecuted, before a court-martial, to
a final conviction or acquittal; and therefore that an officer or
soldier, after having been duly convicted or acquitted by such
a court, could not be subjected to a second military trial for
the same offense, except by and upon his own waiver and consent.
For that the accused may waive objection to a second trial was
held by Attorney-General Wirt in 1818, and has since been
regarded as settled law.

"Where the accused has been once duly convicted or acquit-
ted he has been 'tried' in the sense of the Article, and cannot be
tried again, against his will, though no action whatever be taken
upon the proceedings by the reviewing authority, or though the
proceedings, findings (and sentence, if any), be wholly disap-
proved by him. It is immaterial whether the former conviction
or acquittal is approved or disapproved.

"Where an officer or soldier has been duly acquitted or convicted of a specific offense, he cannot, against his consent, be brought to trial for a minor offense included therein, and an acquittal or conviction of which was necessarily involved in the finding upon the original charge. Thus a party convicted or acquitted of a desertion cannot afterwards be brought to trial for an absence without leave committed in and by the same act.

"That an accused has been, in the opinion of the reviewing authority, inadequately sentenced, either by a general or an inferior court, cannot except his case from the application of this Article; though insufficiently punished, he cannot be tried again for the same offense."

Nor has the Supreme Court at any time sustained the constitutionality of such a practice. All that it has ever done has been to say that the practice prevails, and that the point cannot be raised or inquired into in a collateral proceeding or on a habeas corpus.

The case of Swaim v. United States 17 was one in which a claim was filed in the Court of Claims for the allowance of the pay of a Brigadier General in spite of a judgment of a court-martial suspending the officer from his rank and forfeiting his

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17 (1897) 165 U. S. 553, 41 L. Ed. 823, 17 S. C. R. 448. The court in its opinion and in reviewing prior authorities also said:

"It was said by this court in Dynes v. Hoover, 20 How. 65, 82, that 'with the sentences of courts-martial which have been convened regularly, and have proceeded regularly, and by which punishments are directed, not forbidden by law, or which are according to the law and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. . . .'

"Keyes v. United States, 109 U. S. 336, was, like the present, a suit in the Court of Claims to recover back pay alleged to have been wrongfully retained by reason of an illegal judgment of a court-martial, and the rule was laid down thus: '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 must be held valid when it is questioned in this collateral way,' but where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment."

That such judgments may not be collaterally attacked, see Dynes v. Hoover, (1859) 20 How. (U.S.) 65, 82, 15 L. Ed. 839; Ex parte Mason, (1882) 105 U. S. 696, 26 L. Ed. 1213; Smith v. Whitney, (1886) 116 U. S. 167, 177, 179, 29 L. Ed. 601, 6 S. C. R. 570; Ex parte Kearney, (1822) 7 Wheat. (U.S.) 37, 3 L. Ed. 391; Ex parte Watkins, (1829) 3 Pet. (U.S.) 193, 7 L. Ed. 650; Ex parte Milligan, (1866) 4 Wall.
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pay. Nowhere in this opinion was the constitution referred to. Mr. Justice Shiras in speaking for the court said:

"It is claimed that the action of the President in thus twice returning the proceedings to the court-martial, urging a more severe sentence, was without authority of law, and that the said last sentence having resulted from such illegal conduct was absolutely void. This contention is based upon the proposition that the provision in the British Mutiny Act, which was in force in this country at the time and prior to the American Revolution, and which regulates proceedings in courts-martial, is applicable. This provision was as follows: 'The authority having power to confirm the findings and sentence of a court-martial, may send back such findings and sentence, or either of them, for revision once, but not more than once, and it shall not be lawful for the court on any revision to receive any additional evidence, and when the proceedings only are sent back for revision the court shall have power, without any direction, to revise the sentence also. In no case shall the authority recommend the increase of a sentence, nor shall the court-martial, on revival of the sentence, either in obedience to the recommendation of the authority or for any other reason, have the power to increase the sentence awarded.'

"Even if it be conceded that this provision of the British Mutiny Act was at any time operative in this country, the subject is now covered by the Army Regulations, 1881, Section 923, relied upon by the Attorney General in his letter to the President and cited by the Court of Claims, which is as follows:

"When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a consideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, proceed to remedy the errors pointed out, and may modify or completely change its findings. The object of reconvening the court in such a case is to afford it an opportunity to reconsider the record for the purpose of correcting or modifying any conclusions thereupon, and to make any amendments of the record necessary to perfect it.'

"This regulation would seem to warrant the course of conduct followed in the present case. In Ex parte Reed, 100 U. S. 13, a somewhat similar contention was made. There a court-martial had imposed a sentence which was transmitted with the


That a writ of prohibition will not lie, see Smith v. Whitney, supra.

That an appeal, writ of error, or habeas corpus will not lie, see Ex parte Kearney, supra.
record to Admiral Nichols, the revising officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court revised the sentence and substituted another and more severe sentence, which was approved. The accused filed a petition for a writ of habeas corpus in this court; and it was claimed that the court had exhausted its powers in making the first sentence, and, also, that it was not competent for the court-martial to give effect to the views of the revising officer by imposing a second sentence of more severity. The Navy Regulations were cited to the effect that the authority who ordered the court was competent to direct it to reconsider its proceedings and sentence for the purpose of correcting any mistake which may have been committed, but that it was not within the power of the revising authority to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it, nor directly or indirectly to enlarge the measure of punishment imposed by sentence of a court-martial.

"This court held that such 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 Court of Claims that the ruling in Ex parte Reed, in principle, decides the present question."

The case of Ex parte Reed was also one in which the Supreme Court refused relief, but merely on the ground that a writ of habeas corpus would not lie. The case was one where a sentence had been increased on the revision. The constitution was not commented upon or even mentioned in the opinion.

Nor is there any justification or support for the practice to be found in the case of Runkle v. United States, to which Colonel Read referred in his testimony before the American Bar Association. That case, indeed, is opposed to, rather than supports, the position of the military authorities. It took the

18 Note 17, ante.
19 See note 17, ante.
20 (1887) 122 U. S. 543, 30 L. Ed. 1167, 7 S. C. R. 1141. Nor is there any justification for it in the case of Ex parte Milligan, (1866) 4 Wall. (U.S.) 2, 18 L. Ed. 281, which is sometimes referred to.
21 See note 5, ante.
position that court-martial proceedings are judicial and not administrative, and, if judicial, one would naturally infer that judicial principles should ordinarily prevail. All that the case held was that until the President had acted in the manner required by Article 65 of the Articles of War, contained in the Act of April 10, 1806, the judgment of a court-martial was inoperative and that, there being no sufficient evidence that the action of the court-martial which dismissed Major Runkle from the service was approved by the President, it followed that he was never legally cashiered or dismissed from the army. The Article of War provided that "neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case." It was held that the action required by the President was judicial in its character and not administrative, and had to be performed by him and by him alone, and that in order that the sentence might be operative, his approval must be authenticated in a way to show otherwise than argumentatively that it is the result of his judgment, and not a mere departmental order which may or may not have attracted his attention, and that the fact that the order is his own must not be left to inference only.

"Here, however, [the court says] the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he himself is to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another."

If this be true of the action of the President in reviewing the judgment of a court-martial and in determining whether the judgment shall be carried into execution or not, much more
must it be true of the action of the court-martial itself, before which alone the defendant may be tried and which alone is intrusted with the power of determining the guilt of the accused and of fixing his penalty. The Articles of War either expressly impose the penalty or provide that it shall be such "as the court-martial may direct." When it comes to the matter of review and to the question whether the sentence shall be put into execution, the determination of this question is, it is true, conferred upon the reviewing officers alone. They to this extent are members of the court-martial and a part of the military judicial system. Further than this we believe we cannot go. The proceedings have been declared by the Supreme Court to be judicial and not administrative. The court-martial is not merely a subordinate ministerial body. It is the only forum before which the prisoner can be tried. It is the only forum which can pass upon his guilt. When before it, the prisoner is in jeopardy. Under every principle of law and of the constitution, its decision should be followed.

Nor is there any historical basis for the assumption of the power complained of. Article 5 of the amendments itself negatives it, for its limitations are confined merely to the indictment or presentment by a grand jury, which are of course inapplicable to military proceedings, but whether inapplicable or not are denied to the military offender by express terms, while the protection of no other clause of the constitution is so denied him.

It is quite clear that the states were jealous of the new government which they were creating and above all determined that it should have no powers which were greater than the exigency demanded. Everywhere they showed a peculiar solicitude for personal liberty and for the guaranties of Magna Charta. It is true they did not go to the extent of the Mutiny Act and provide that all regulations for the conduct of the army should be yearly enacted by the legislative body, and should thus be taken from the control of the monarch, but they certainly hedged constitutional limitations around the powers granted to the new sovereign, the United States, which took the place of the English sovereign. In England it was perhaps necessary that the Mutiny Act should be yearly enacted as a constant reminder that the right to maintain a standing army was not a royal prerogative, and, as there is in England strictly speaking no written constitution, such a reminder may be necessary. Here, however, we have a written constitution and a federal govern-
ment of delegated and not original powers. Even Congress has no powers except those which are expressly delegated to it or which are necessary to the exercise of those delegated. Here we have no royal prerogative. The constitution is the source of all power and its limitations are all-controlling. Here indeed the law of the land which is mentioned in the Mutiny Act, but which in England is more or less indefinite, is made clear and certain by the first ten amendments, or the so-called American declaration of rights.

The military authorities, in short, in acting contrary to the opinion of their own text writers and in following the opinion of Attorney-General Cushing instead of that of Attorney-General Wirt, and Judge Advocate General Crowder in coming to his conclusion, have utterly failed to recognize the fact that the military law of the United States has always been under the control of Congress and of the constitution and has known no royal or presidential prerogative and that to Congress and not to the President or any commanding officer is given the power to make rules for the government and regulation of the land and naval forces. It is as the law now is in England since the passage of the Mutiny Act of 1879 and not as it was in England before or even after the passage of the Mutiny Act of 1689.

“The history of English military law up to 1879 may be divided into three periods, each having a distinct constitutional aspect: (1) that prior to 1610, when the army, being regarded as so many personal retainers of the sovereign rather than servants of the state, was mainly governed by the will of the sovereign; (2) that between 1689 and 1803, when the army, being recognized as a permanent force, was governed within the realm by statute and without it by the prerogative of the crown, and (3) that from 1803 to 1879, when it was governed either directly by statute or by the sovereign under an authority derived from and defined and limited by statute.”

Our forefathers, indeed, were fresh from the English revolutions and the English experiences. They chose to repudiate the theory of the Mutiny Act of 1689 and to anticipate that of 1879.

Even if we accept the theory that the spirit and not the words of the amendments apply, then surely the spirit is not

22 Art. I, Sec. 8.
complied with by the practice that is adopted. Is not the whole history of the development of English law, at any rate as far as criminal trials are concerned, a struggle for the independence of the jury and freedom from executive and even judicial restraint? Would the people who had built bonfires and held popular celebrations in honor of the acquitted bishops and of the jury that acquitted them, have tolerated for a moment a system which should have made those juries subordinate to the royal power and put it into the hands of the judges or royal representatives to call them together again, tell them that they disapproved of the acquittal, that they, the summoners, were satisfied of the guilt of the accused, that the jury was remiss in its duty, and allowed them to send the jury back to reconsider their verdict? Attorney-General Cushing in his opinion in the case of Captain Voorhees 24 suggests that the practice adopted by the military authorities is not different from that which would prevail if a judge sent back a verdict to a jury in a criminal case. But when, at any rate since the English revolution, has there been an instance of any case in which this has been tolerated in a criminal action when a verdict of not guilty has been rendered? It may be that an uncertain verdict may be made certain. If, for instance, a jury should return a verdict of "guilty on some of the counts of the information and not guilty on others," they might be required to state definitely those on which the guilt had been determined, but we find no instance where the law has gone any further.

The question is, is the man to be tried by the members of the court-martial or by the commanding officer alone? If by the latter, why the rigid requirements as to members, oaths, and challenges? The commanding officer is a superior officer. The prospects and chances of preferment of the inferior officers who sit on the courts-martial are largely in his hands. His recommendations to the war department are the only recommendations of record. It is he alone who can usually mention a man in the dispatches. Is such a jury or tribunal free and untrammeled and unbiased in its second review, when the case is sent back to it with the comment that the commanding officer disapproves of its decision and of its sentence and is displeased with its action? It is true that its members need not alter their former judgment. There is, however, every temptation to them to do so.

24 See note 13, ante.
The military authorities, in short, ignore the constitution and insist upon looking upon the courts-martial as executive agencies rather than courts of justice; the administration of the military criminal law as a means to enforce discipline, and the law itself as a compilation of military rules, rather than a declaration of primary rights, duties, and obligations. This is clear from the comment and order of General Bell in the case of the recruit David Cortesini, which we have before referred to and which was approved by General Crowder in his testimony before the Senate committee, and which was as follows:

"In the present case the accused was given every opportunity to obey the order, but nevertheless disobeyed it intentionally, in defiance of authority, and accordingly such disobedience was 'willful' within the meaning of this section.

"The reviewing authority does not intend to give the impression that he personally believes that the accused must be required to serve a long period of confinement for this act, but rather he desires the court to understand that the commission of this act should be met by severe punishment, and then, if in this case there are reasons why the sentence should be reduced, such reduction should be ordered on the action of the reviewing authority rather than in the inadequate sentence awarded by a court appointed as an executive agency in the administration of discipline."

The case was one where an ignorant Italian refused to sign an enlistment and assignment card. He pleaded guilty to refusing to obey the order, but claimed that the same was unlawful. The court-martial acquitted him. On the revision which was ordered, he was found guilty and sentenced to a dishonorable discharge and to confinement for five years. This sentence was, it is true, reduced by the commanding officer to confinement for one month and forfeiture of one-third of his pay for that period. It may be that the punishment was richly deserved. It was a case, however, where the court-martial was treated as an agency subject to the commands of its superior, and not as a court of justice, and the prisoner was not tried by the court-martial but by the commanding officer, and this in spite of Article 64 of the Articles of War, which expressly provides that such an offender shall "suffer death, or other such punishment as a court-martial [not the commanding officer] may direct." Will the American people ever be willing that their sons who, in the

25 See note 2, ante.
future, shall volunteer out of sheer patriotism in the cause of their country shall be deemed to have relinquished all constitutional rights and be subject to be punished or acquitted for every offense merely as their commanding officers may direct? We realize that the system of a jury of one's peers can hardly exist in the army, though the old British system recognized a right to an appeal to such a jury in extreme cases. We are, however, stretching the strict language of the constitution when we deny that right, for the restriction of the first ten amendments is only made expressly to cover the presentment or indictment by a grand jury; but surely the ordinary rules of jeopardy and due process of law were intended to apply. It is inconceivable that a people who had cognizance of the bloody assizes and of a Judge Jefferies who was told by his monarch how to judge and how to rule, and in turn forced his juries to do likewise, would ever consent to such a practice even under the pressure of military exigency.

Nowhere in speaking of the reviewing power do the Articles of War suggest that a rehearing may be ordered, nor that any resubmission or recommendation may be made to the court-martial. Nowhere even is the word "recommendation" used. The articles merely provide that no sentence shall be carried into execution unless approved. Is there anywhere any intimation that a new trial may be ordered or a revision of the record by the court-martial may be suggested, and a verdict of guilty substituted for that of not guilty? The practice is nothing but an arbitrary assumption of power.

It may do no great harm. It may be that in the great majority of cases the courts-martial adhere to their former decisions. In some cases, however, they do not. At any rate, it shocks the legal sense of the practicing lawyer; it is violative of basic constitutional rights; it furnishes grounds for the charge that the constitution protects all except those who fight beneath our flag, and this charge we cannot allow to be made. If in the future we would raise armies and hope to have men volunteer, we must make it clear that the country's "uniform is not the soldier man's disgrace," and that, though while in the army he must submit to restrictions not encountered in civil life because not there necessary to the public weal, his basic constitutional rights

26 See Opinion of Atty-Gen. Wirt, ante.
will nevertheless be respected. The practice should definitely
be declared unlawful and should be discontinued.

The sense of fair play is bred into the bone and sinew of
the Anglo-Saxon, and the Anglo-Saxon is, above all things, a
sportsman. He will submit to anything if he thinks it is accord-
ing to the rules of the game. When, however, "the Anglo-Saxon
shakes his head like an ox in the stall and says it is not fair,
then, my son, it is time to beware."

A bald fact is apparent and that is that a practice has been
allowed to prevail in the army of the United States which is
fundamentally unjust and fundamentally and unquestionably
unconstitutional, and has been recognized by the military authori-
ties and enforced by them, and believed by them to be legal,
merely because our rules of judicial procedure were such that
its validity could not be properly inquired into by the civil courts.
The military courts in the cases passed upon were properly
organized and had jurisdiction of the person and of the subject
matter, and therefore the point raised could not be raised in
habeas corpus or in any other collateral proceeding. It could
not be raised on appeal or by writ of error because in America
(though not in England) no appeal or writ of error from or to
the civil courts from the judgments of courts-martial is provided
for, and the right to an appeal is not a constitutional right.
The Supreme Court of the nation has conceded that such a
practice prevails. It has never decided that it is constitutional.
It is not.

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