8-1-1949

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JURISDICTION OF NAVAL COURTS
MARTIAL OVER CIVILIANS*

A. The Problem

The permissible scope of court-martial jurisdiction over civilians has long been a vague and uncertain matter which has been the subject of controversy inside and outside of the armed forces. A basic principle which aids in the solution of this problem was clearly enunciated by the United States Supreme Court in the recent case of Hirshberg v. Cooke. This principle, which many constitutional lawyers thought obvious, states that courts martial have only such jurisdiction as is conferred upon them by law, and that this jurisdiction cannot be altered or enlarged by the executive branch of the government. Specifically, the Supreme Court unanimously decided the Navy could not lawfully try an enlisted man for a non-fraudulent offense committed in a prior enlistment from which he had been honorably discharged, despite regulations of the Secretary of the Navy purporting to make such trial lawful, for the simple reason that Congress had not conferred such jurisdiction upon naval courts martial. It remains to be determined how far Congress can constitutionally go in conferring jurisdiction on courts martial, particularly with respect to civilians. And within this undefined limit it becomes a practical question as to how far Congress needs to go in order to cope with situations which might be expected to arise in a jet-propelled age.

*The opinions or assertions contained in this article are the private ones of the author and are not to be construed as official or as reflecting the views of the Department of the Navy or of the naval service at large. The author held the position of chief of the military law division of the Navy 1945-46, and was retired at his own request after 27 years of continuous active service. He is a brigadier general on the retired list of the U. S. Marine Corps and is now teaching law at the University of San Francisco, California.

1...U. S...., 69 S. Ct. 530 (1949).
B. The Sources of Power

Naval courts martial of the United States have only such jurisdiction as is conferred upon them by law. That law is the supreme law of the United States, which consists of the Constitution, the laws made in pursuance thereof, and the treaties made under the authority of the United States. It has been said that naval courts martial have only such jurisdiction as is conferred by statute, but this is not strictly true today. Jurisdiction over prisoners of war has been conferred by treaty, without the interposition of statute. It has, however, been correctly said that courts martial are courts of special and limited jurisdiction and not courts of general criminal jurisdiction.

The power of Congress to confer jurisdiction upon naval courts martial is derived from its express constitutional powers to provide and maintain a navy, to make rules for the government of the naval forces, and to make all laws

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2 U. S. Const. Art. VI.
4 International Convention Relative to the Treatment of Prisoners of War, signed at Geneva, Switzerland, July 27, 1929, Art. 63 of which provides that "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." (Translation from 47 Stat. 2021 (1929); Treaty Series No. 846; IV Malloy, Treaties 5224.
necessary and proper for carrying into execution the foregoing powers.\textsuperscript{7} In conferring jurisdiction, Congress may include offenses against the law of nations.\textsuperscript{8} The power to confer jurisdiction over persons is not, however, unrestricted. It is recognized in and limited by the exception in the Fifth Amendment to the requirement of presentment or indictment by a grand jury “in cases arising in the land or naval forces.”\textsuperscript{9} This same exception has been held, by judicial construction, applicable to the requirement in the Sixth Amendment of a jury trial in all criminal prosecutions.\textsuperscript{10}

The civilian may find himself subjected to naval jurisdiction in four situations: (1) under martial law arising from necessity in time of war or great public danger when the civil courts are unable to fulfill their functions; (2) under military government of occupied territories; (3) under the international law of war; (4) under naval law, including the Articles for the Government of the Navy. The problems discussed in this article fall within the last named category, in which only courts martial, as distinguished from extraordinary military tribunals like the military commission, are involved.

\textbf{C. The Exercise of Power}

Congress, in the exercise of its powers, has enacted legislation which brings within the jurisdiction of naval courts martial four classes of civilians. The first class includes

\textsuperscript{7} U. S. Const. Art. I, § 8, cl. 13, 14 and 18.
\textsuperscript{8} Id., cl. 10.
\textsuperscript{9} “No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces . . . .”
\textsuperscript{10} \textit{Ex parte} Henderson, 11 Fed. Cas. 1057, No. 6349 (C.C. Ky. 1878); \textit{Ex parte} Milligan, 4 Wall. 2, 123, 138, 18 L. Ed. 281 (U. S. 1866). The proposed Uniform Code of Military Justice specifically provides that a dismissed officer making application for trial “shall be held to have waived the right to plead any statute of limitations applicable” but fails to make any similar statement respecting a waiver of his rights to a grand jury indictment and to a jury trial. H.R. 2498, § 1, Art. 4.
persons found as spies, carriers of seducing messages from an enemy, and incitors of disloyalty. The second class includes persons accompanying or serving with naval forces, and persons in leased areas under naval control, beyond the reach of the federal courts. The third class is composed of officers dismissed by the President in time of war who demand trial. The fourth class is composed of discharged or dismissed members of the naval service subsequently charged with having committed, while in the service, certain pecuniary frauds against the government.

There is a fifth class, not expressly provided for by statute, over which naval authorities assert jurisdiction. This class is composed of discharged members of the naval service subsequently charged with having obtained their discharges by fraud. The class differs from the first four mentioned in that the status of civilian admittedly attaches to the persons of the first four classes, whereas the status of the persons of the fifth class is contested.

Jurisdiction over the first class is contained in the fifth article of the Articles for the Government of the Navy (hereafter cited as AGN). It reads:

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

The article covers "all persons," and civilians as well as others are included. Those who are found as spies are punishable under the law of war by the extraordinary military tribunals recognized by that law. Those who bring

\[\text{REV. STAT. } \S 1624 \text{ Art. 5 (1875), 34 U.S.C. } \S 1200 \text{ Art. 5 (1946).}
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\[\text{Martin v. Mott, 12 Wheat. 19, 6 L. Ed. 537 (U. S. 1827); U. S. ex rel. Wessels v. McDonald, supra note 12; Halleck, Military Espionage, 5 Am. J. Int.}
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seducing messages from an enemy, and those who endeavor to corrupt naval personnel to betray their trust have committed offenses which are generally recognized by the law of war under the heading of "war treason." 14 Such offenses are triable by extraordinary military tribunals. Naval courts martial have jurisdiction over civilians charged with these offenses only by virtue of the statutory authority quoted above,15 and this jurisdiction attaches when such offenders are formally charged with having committed one or more of these offenses.16 It is immaterial that prior to being so charged, the accused was not subject to naval law. Violators of the law of war are not within the protection of the Constitution, were not intended to be so protected at the time the Constitution was adopted, and therefore have no right to a jury trial.17 Under the proposed Uniform Code of Military Justice, prepared under the direction of and approved by the Secretary of Defense, and on February 8, 1949, introduced into the 81st Congress, as H.R. 2498, designed to unify, consolidate, revise, and codify the criminal law of the armed forces, this class was included in a broad jurisdiction conferred upon courts martial to try any person who by the law of war is subject to trial by a military tribunal.18

Jurisdiction over the second class is contained in the Act of March 22, 1943.19 It reads:

L. 590, 591 (1911); McKinney, Spies and Traitors, 12 ILL. L. REV. 591, 598-601 (1918). See Ex parte Quirin, 317 U. S. 1, 30-31, 63 S. Ct. 1, 87 L. Ed. 3 (1942).
17 Ex parte Quirin, 317 U. S. 1, 40-45, 63 S. Ct. 1, 87 L. Ed. 3 (1942).
18 Uniform Code, Art. 18. This jurisdiction had already been given to the Army (AW 12) but never to the Navy. A penal article relating to spies is included in the Uniform Code, Art. 106. A modified version of the Uniform Code was introduced on April 7, 1949, as H.R. 4080 by Mr. Brooks, a member of the House Committee on Armed Services.
19 57 Stat. 41 (1943), 54 U. S. C. § 1201 (1946). Because a technical state of war still exists, this provision was rendered inapplicable from July 25, 1947, until
In addition to the persons now subject to the Articles for the Government of the Navy, all persons, other than persons in the military service of the United States, outside the continental limits of the United States accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as a part of the Navy, including but not limited to persons employed by the Government directly, or by contractors or subcontractors engaged in naval projects, and all persons, other than persons in the military service of the United States, within an area leased by the United States which is without the territorial jurisdiction thereof and which is under the control of the Secretary of the Navy, shall, in time of war or national emergency, be subject to the Articles for the Government of the Navy except insofar as these articles define offenses of such a nature that they can be committed only by naval personnel: Provided, That the jurisdiction herein conferred shall not extend to Alaska, the Canal Zone, the Hawaiian Islands, Puerto Rico, or the Virgin Islands, except the islands of Palmyra, Midway, Johnston, and that part of the Aleutian Islands west of longitude one hundred and seventy-two degrees west.

It will be noted that since the personnel of the Army are excluded, and the persons included are in addition to naval personnel, this statute is aimed directly at civilians. It subjects to AGN in war or national emergency two classes: (1) civilians accompanying or serving with naval forces in places outside the territorial jurisdiction of existing federal courts; and (2) civilians physically within leased naval bases which are outside the territorial jurisdiction of existing federal courts. The power of Congress thus to subject such civilians to the jurisdiction of courts martial depends primarily upon whether such civilians have a constitutional right to trial by jury. The power of a court martial to try such a civilian further depends upon his status and the jurisdiction conferred over his person and over the particular act of omission charged. These questions will be discus-

the official end of World War II by Senate Joint Resolution 123, Pub. L. No. 239, 80th Cong., 1st Sess. (July 25, 1947), which by § 3 makes that date the date of termination of the war and national emergencies so far as this provision and 107 other statutory provisions are concerned. This action indicated that it was the sense of Congress that such jurisdiction over civilians should not be exercised after all hostilities had ceased.
sed later. The proposed Uniform Code of Military Justice extends jurisdiction over this second class of civilians by failing to restrict it to times of war or national emergency. 20

Jurisdiction over the third class is contained in AGN 37. 21 The pertinent part of the article provides:

When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court martial to try such officer on the charges on which he shall have been dismissed. And if such court martial shall not be convened within six months from the presentation of such application for trial, or if such court, being convened, shall not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void. . . .

This provision covers a class of civilians, since officers dismissed in time of war by order of the President are no longer in the naval service. 22 It apparently contemplates former commissioned officers, because the laws prohibiting the dismissal of an officer except by general court martial or in time of war by order of the President 23 have been held not to apply to warrant officers. 24 The court-martial jurisdiction over the persons of such dismissed officers was conferred subject to the application of such former officers for trial, and not against their will. The question of the power of Congress to confer such jurisdiction depends upon the right of a civilian to waive the guaranty of a jury trial in a criminal prosecution. This question will be discussed

20 H. R. 2498, § 1, Art. 2 (11) and 2 (12).
22 See United States v. Corson, 114 U. S. 619, 5 S. Ct. 1158, 29 L. Ed. 254 (1885); Wallace v. United States, supra note 21.
24 See DIGEST, JAG ARMY 49 (1922).
later. The proposed Uniform Code of Military Justice retains jurisdiction over this third class of civilians.25

Jurisdiction over the fourth class is contained in AGN 14.26 That article recites and makes punishable certain frauds by naval personnel against the government, relating to claims against the United States or to the security of public property. These are substantially the same crimes now provided for by the Federal Criminal Code.27 Then follows a general provision covering naval personnel who execute, attempt, or countenance “any other fraud” against the United States. The word “other” has been held, in reliance upon firmly established rules of statutory construction,28 to restrict the application of the provision to frauds of like nature to those enumerated in the preceding paragraphs.29 Finally, there is a provision (11th paragraph) which subjects to trial by court martial an alleged offender against AGN 14 after he had been separated from the naval service. It reads: 30

And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentenced by a court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

25 H.R. 2498 § 1, Art. 4.
29 190 CMO 24 (1918) (Navy court-martial orders).
30 The same provision is made for the military service by Article of War 94, the origin and theory of which is to be found in the congressional debates printed in the Cong. Globe, 37th Cong., 3rd Sess., 952-58 (1863). The original statute of March 2, 1863, was a war measure apparently intended to be but temporary in its operation (Davis, Military Law of the United States 456n, (3d ed. 1913)), and was inadvertently or blindly allowed to remain on the statute books in the compilation of the Revised Statutes in 1874. Winthrop, Military Law and Precedents 105 (2nd ed. 1896, reprinted 1920). For the Army, however, it was re-enacted in 1916 and 1920.
The word "guilty" is not used in its strict sense, but means, in effect, "charged with." Since by its express terms, this paragraph is limited to offenses committed while the accused was in the naval service, a court martial would have, within the period of the statute of limitations, jurisdiction over the particular act or omission charged. The dispute revolves around the jurisdiction over the person of the accused. The language of the statute tacitly admits the validity of the discharge or dismissal. But such a discharge or dismissal may operate as a severance of all connection with the naval service, and in that event the Navy ordinarily loses jurisdiction over the person. The jurisdiction conferred is based upon the theory that the case arose in the naval forces, that therefore the guaranty of a jury trial does not apply to such a person, and that trial by court martial is necessary and proper. The interpretation as to when a case arises and the evaluation of the practical necessity of trial by court martial are determinative of the jurisdictional problem. This will be discussed later. The proposed Uniform Code of Military Justice revises and rearranges in a shorter, more intelligible form the non-repetitious provisions of the substantive fraudulent offenses, but it wisely omits entirely the continuing jurisdiction clause above quoted.

Jurisdiction over the fifth class, that of discharged persons subsequently charged with having obtained their discharges by "fraud," is not expressly mentioned in AGN or other naval law. The offense does not fall under "any other fraud" covered by AGN 14, because this phrase refers to offenses of similar nature (pecuniary) to those previously enumerated in that article, and a misrepresentation which

33 H. R. 2498, § 1, Art. 132. The reason given for the omission was that the offenses are covered by the general criminal statutes and that discharged and dismissed persons are subject to prosecution in the federal courts for their violation.
34 Notes 28 and 29 supra.
induces the issuance of a discharge does not constitute the technical offense of fraud. Like the offenses covered by AGN 14, however, the alleged "fraud" in obtaining a discharge must perforce have been committed while the accused was in the naval service. If conduct of this nature is punishable under the statutory authority of naval law, a court martial has jurisdiction over the particular act or omission allegedly committed. Even if it could be said that the case arose in the naval forces, which would leave to Congress the power to bring it within court-martial jurisdiction, nevertheless Congress has not given to naval courts martial jurisdiction over such discharged persons. The discharge, if valid, operates to sever the person's connection with the naval service. So long as that connection remains severed, and so long as the discharge stands unrevoked, the person is a civilian and beyond currently effective naval jurisdiction. If the discharge is revoked or nullified by the orderly processes of law, the status of the person as a member of the naval service may be said never to have been legally changed. The dispute concerns his current status, and his status is determinative of jurisdiction. This question will be discussed later. The proposed Uniform Code of Military Justice provides a method for judicially resolving the question of status, by specifically conferring upon courts martial the power to try such an alleged offender and, in effect, restricting the issue to be tried to that of the accused's status.85

Outside of the classes mentioned, the only power which a naval court martial can exercise over civilians is that given by the statutory authority to issue a warrant of attachment and to have a civilian arrested in order to assure his presence as a witness.86 The contempt power over civilians not subject to naval law is incomplete, amounting only to a pre-

85 H. R. 2498, § 1, Art. 3 (b).
liminary finding of the fact of contempt, the final adjudication and the power of punishment resting with the federal courts.\textsuperscript{37}

\textbf{D. Scope and Effect of the Right to Jury Trial}

The right to a jury trial is not world-wide in its territorial scope. It applies only to the United States and those additional areas which have been incorporated into the Union. It applies only to the United States, the District of Columbia, and the Territories of Alaska and Hawaii.\textsuperscript{38} In other areas, Congress has the power to provide by law for the trial of civilians by means other than by jury, in peace or war.\textsuperscript{39} The means used must not, of course, result in a denial of due process of law.\textsuperscript{40} Granting the necessity and propriety,\textsuperscript{41} there is no constitutional objection to the use in these other areas of the instrument of court martial for the trial of civilians.

\textsuperscript{37} AGN 42(c).


\textsuperscript{39} See Dorr v. United States, 195 U. S. 138, 24 S. Ct. 808, 49 L. Ed. 128 (1904). Congress has provided that whenever any foreign country or territory is occupied by or under control of the United States, any person who there commits certain crimes \textit{malum in se} and later is found in the United States may be returned there to for a fair and impartial trial. Act of June 6, 1900, 31 Stat. 656 (1900), 18 U. S. C. 652 (1946), held constitutional in Neely v. Henkel, 180 U. S. 109, 21 S. Ct. 302, 45 L. Ed. 448 (1901). The trial might be by a court of the military government, or, under AW 2(d) or AW 12, by Army court martial.

\textsuperscript{40} Hammond v. Squier, 51 F. Supp. 227 (W. D. Wash. 1943).

\textsuperscript{41} Under the language of U. S. Const. Art. I, § 8, cl. 18.
Within the United States, the District of Columbia, Alaska, and Hawaii, the right to jury trial does not apply to:

1. Martial law or military government situations;\(^{42}\)
2. Cases arising in the land or naval forces;\(^{48}\)
3. Persons who violate the law of war;\(^{44}\) or
4. Petty offenses,\(^{45}\) or crimes which were not of a class traditionally triable by jury at common law.\(^{46}\)

The effect of this right to jury trial is to limit the legislative, executive, and judicial powers. The guaranty is for the individual and against the federal government.\(^{47}\) Any federal enactment, executive regulation, or judicial action which abridges the guaranty of a jury trial to a person or class of persons to whom such guaranty is applicable is unconstitutional.\(^{48}\)

E. Cases Arising in the Naval Forces.

The guaranty of a jury trial is coupled with an exception of "cases arising in the land or naval forces."\(^{49}\) Irrespec-

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\(^{42}\) See concurring opinion of Chief Justice Chase in Ex parte Milligan, 4 Wall. 2, 141-142, 18 L. Ed. 281 (U. S. 1866); Hyde, International Law § 688 (2nd ed. 1945); Weiner, A Practical Manual of Martial Law 6-7 (1940).

\(^{43}\) The exception in the Fifth Amendment applies also to the Sixth Amendment. Ex parte Henderson, 11 Fed. Cas. 1067, No. 6349 (C. C. Ky. 1878); Ex parte Milligan, supra note 42, at 123, 138.

\(^{44}\) Ex parte Quirin, 317 U. S. 1, 63 S. Ct. 1, 87 L. Ed. 3 (1942); In re Yamashita, 327 U. S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946); Cowles, Universality of Jurisdiction over War Crimes, 33 Calif. L. Rev. 117 (1945).


\(^{46}\) Ex parte Quirin, 317 U. S. 1, 40-45, 63 S. Ct. 1, 87 L. Ed. 3 (1942).


\(^{49}\) By judicial construction. See note 43 supra.
tive of this exception, however, the guaranty does not apply beyond the continental United States and its organized Territories, so that it is not violated by a statute subjecting civilians to courts martial beyond those areas. Neither the guaranty nor the exception, however, creates jurisdiction.

The exception leaves a broad field for occupation by court-martial jurisdiction, but the field is not occupied automatically. Its occupation must be expressly authorized by statute or by treaty.

The two questions posed by the exception are when and with respect to whom a case arises in the naval forces. In In re Bogart, the word "cases" was interpreted as meaning "events," and the phrase "cases arising in the land or naval forces" was held entirely synonymous with the phrase "offenses committed while the party is in the military service." Bogart was a paymaster's clerk in the Navy, a quasi-naval status which by regulations was then considered that of a staff officer in the same class with paymasters. One day he embezzled $10,000 of public funds and resigned. About three years later he was arrested and tried by court martial. He claimed that he was a civilian and that Congress had no power to subject him to court martial. The federal court held that he was a person in the Navy at the time of embezzlement, and that even if he was a civilian at the time of trial, the court martial had been given jurisdiction over him by AGN 14 for trial for embezzlement. The court said that there was no express limitation on the power of Congress to authorize trial by court martial for naval offenses

50 Note 38 supra.

51 For discussion of the right of civilians to be tried by civil courts, see John W. Curtin, Military Jurisdiction Over Civilians, 9 Notre Dame Lawyer 26 (1933).

52 3 Fed. Cas. 796, No. 1596 (C. C. Calif. 1873).

53 The Secretary of the Navy had in 1870 established a 3-year limitation, Orders, Regulations and Instructions for the Administration of Law and Justice in the U. S. Navy § 138 (1870), but there was no statute of limitations established for the Navy by Congress until 1895, when a 2-year period was prescribed. See AGN 61 and 62, 28 Stat. 680 (1895), 34 U. S. C. § 1200, Art. 61 (1946).
committed while in service of an offender whose connection with the service had ceased, and that if such a limitation existed, it must be implied from a strained and unnatural construction of "cases arising in the land or naval forces."

Winthrop, a recognized authority on military law, writing in 1886, took the view that a civilian, entitled as he is to trial by jury, cannot legally be made liable to military law and jurisdiction in time of peace. He believed that the term "land forces" did not embrace discharged soldiers or any other civilians, and the exception in the Fifth Amendment recognized no third class which is part civil and part military. He noted the decision in the Bogart case, and indicated his dissatisfaction. Trials of discharged persons were, however, very infrequent.

In 1922, the case of Ex parte Joly referred to the Bogart case as interesting, and upheld the validity of AW 94 giving to Army courts martial jurisdiction over discharged persons subsequently charged with fraud against the government committed while in the Army. Joly was an emergency lieutenant colonel when he committed fraud against the government, punishable after discharge under AW 94, and conduct unbecoming an officer and a gentleman under AW 95, which no express statute made punishable after discharge. He was honorably discharged, was a civilian for about five months, and then was commissioned as a major in the regular Army. Nine months later, he was convicted by court martial for those offenses. The federal court denied his contention that his discharge was a release from liability to trial by court martial "for offenses committed prior to discharge,"

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54 I WINTHROP, MILITARY LAW AND PRECEDENTS 127 (1886).
55 Id. at 129.
57 I WINTHROP, MILITARY LAW AND PRECEDENTS 130 (1886).
58 WINTHROP, MILITARY LAW AND PRECEDENTS 92 (2nd ed. 1896, reprinted 1920).
59 290 Fed. 858 (S. D. N. Y. 1922).
on the ground that AW 94 had stood for more than half a century and that Congress had deemed it necessary that a discharge not effect such release. Without citing any authority, the court said that there must be power to dismiss an officer whenever his offense is discovered, no matter when it was committed. By dictum, the court declared that the power of Congress extended to making punishable by court martial a person in the military service for an offense committed before he entered that service.

In Terry v. United States, 60 decided in 1933, the court cited the Bogart and Joly cases as authority for the denial of a jury trial. Terry was an Army enlisted man who had been honorably discharged. A month later, while he was a civilian, he was convicted by court martial of embezzlement under AW 94, committed prior to discharge. The federal court recognized the problem, and held that "cases arising in the land or naval forces" referred to the time that the offense is alleged to have been committed, rather than to the time that steps are taken looking to a trial for that offense. It treated as a conclusive answer an excerpt from dictum in Ex parte Milligan 61 which said that Congress provided courts martial "for offenses committed while the party is in the military or naval service."

The fallacious concept which the court derived from the excerpt may be readily seen by reading the entire paragraph from which it was drawn. 62

The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress had declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while

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60 2 F. Supp. 962 (W. D. Wash. 1933).
61 4 Wall. 2, 123, 18 L. Ed. 281 (U. S. 1866).
62 Ibid.
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thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. . . . (Emphasis supplied).

The first sentence alone was relied upon in the Terry case for the proposition that the power of Congress in "cases arising in the land or naval forces" extended to and embraced cases of "offenses committed while the party is in the military or naval service," without regard to the fact that such party may be a civilian when arrested, charged, or tried. The second sentence was relied upon in U. S. ex rel. Flannery v. Commanding General for the proposition that the surrender of the right to a trial by civil courts was effective only "while . . . serving" in some connection with the armed services. It is submitted that the two sentences are complementary. The first indicates the relationship between offense and time, by limiting the jurisdiction of courts martial over offenses to those committed while the offender was in the military or naval service. The second indicates the relationship between person and time, by limiting the jurisdiction of courts martial over persons to those connected with the land and naval forces while they are so serving. The first relates to the exercise of a constitutional power with regard to the jurisdictional functions of offense and time. The second relates to the scope of a constitutional power with regard to the jurisdictional function of person and time.64

64 Some further light is shed upon the intent of the exception, "cases arising in the land or naval forces," by the concurring opinion of Chief Justice Chase in the Milligan case:
"Now we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the Army and Navy and the Militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The states, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces. Thus Massachusetts pro-
The Flannery case involved a man who was on leave of absence from the U. S. Secret Service when inducted into the Army. While he was a sergeant in the Army, he applied for a New York retail liquor license, swearing that he would resign from the Secret Service upon discharge from the Army, a necessary oath because the law forbade members of the Secret Service to engage in that business. He requested discharge from the Army to return to the Secret Service, and for that reason was discharged. A discharge of this type gave no right to a separation allowance, but it was paid and accepted. He returned to the Secret Service, and was given three months’ leave, during the course of which he received a directive from the Secret Service telling him where to report for duty. The following day he was arrested by the Army, his discharge was cancelled, and he was held for court martial charged with defrauding the government of the separation allowance because his discharge was allegedly obtained by fraud in that he had no intention of returning to the Secret Service. The federal court held that Flannery's military status had been terminated by the discharge, that the determination of the conditions on which an individual may or must change status from civilian to military was for Congress, that the cancellation of a discharge for fraud presented a justiciable issue which, under Article III of the Constitution, only a court could decide, and that any asserted that 'no person shall be tried for any crime by which he would incur an infamous punishment or loss of life until he be first indicated by a grand jury, except in such cases as may arise in the government and regulation of the land forces.' The exception in similar amendments, proposed by New York, Maryland, and Virginia, was in the same or equivalent terms. The amendments proposed by the states were considered by the first Congress, and such as were approved in substance were put in form, and proposed by that body to the states. Among those thus proposed and subsequently ratified, was that which now stands as the fifth amendment of the Constitution. We cannot doubt that this amendment was intended to have the same force and effect as the amendment proposed by the states. We cannot agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by action of the state conventions. Ex parte Milligan, 4 Wall. 2, 138, 18 L. Ed. 281 (U. S. 1866).


66 As to the quality and effect of a discharge, see Part F, infra.
tion of arbitrary power to cancel was made nugatory by the requirement of due process. The court then considered the constitutionality of the law subjecting discharged persons to trial by court martial, which depended, in Flannery’s case, upon the meaning of “cases arising in the land or naval forces.”

Judge Clancey found that the word “cases,” which appears in the “cases and controversies” of Article III of the Constitution, had been held to mean a claim brought before a court by legal proceedings, and that whenever a claim takes such a form that the judicial power is capable of acting upon it, then it has become a case. These words were taken out of the mouth of Judge Field in In Re Pacific Railway Commission, who quoted Chief Justice Marshall as saying:

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States.

And Mr. Justice Story as saying:

It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the constitution, laws, and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and not till

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67 AW 94, similar to AGN 14.
68 32 Fed. 241, 256 (C. C. Calif. 1887).
70 2 Story, Commentaries on the Constitution of the United States § 1646 (5th Ed. 1891). This doctrine is applied in non-criminal law. There is a clear distinction between a “case arising under the patent laws” and a “question arising under the patent laws.” The former arises when the plaintiff in his opening pleading sets up a right under the patent laws as ground for recovery. Carleton v. Bird, 94 Me. 182, 47 Atl. 154, 156 (1900).
then, the judicial power attaches to it. A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law.

The conclusion reached in the Flannery case\(^71\) was that a case has not arisen in the land or naval forces until a complaint is framed or an arrest made. It denies that a case arises at the time of the commission of an offense. It rejects the Bogart case, and the language of the Joly and Terry cases.

If the time when a "complaint is framed" be taken in a broad sense, it includes the ordering of an investigation into the conduct of a person not yet formally accused. That criminal jurisdiction attaches at this point in time has been recognized in many cases.\(^72\) Such an investigation justifies the detention of a serviceman beyond the expiration of his term of enlistment and the withholding of his discharge certificate pending the exercise of appropriate court-martial action.\(^78\) The same sense is read into the guaranty in the Fifth Amendment against being compelled "in any criminal case" to be a witness against one's self, the Supreme Court holding that an investigation by a grand jury is a "criminal case" within the meaning of that Amendment.\(^74\) The "criminal prosecutions" in which there is a guaranty of trial by jury in the Sixth Amendment is a term much narrower than "criminal case,"\(^75\) and relates to a prosecution which is

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\(^71\) Noted and fully discussed with approval in 46 Col. L. Rev. 977-90 (1946).


\(^78\) 3 CMO 8 (1924).


technically criminal in its nature. The statute of limitations applicable to the Navy states that no person shall be tried by court martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial. The theory involved seems to imply that a case arises upon the issuing of such order for trial, and not upon the commission of the offense. In fact, the delay in investigating an offense is at the peril of losing criminal jurisdiction over that offense.

There are, then, conflicting views as to the time when a case arises. If the view be accepted that a case emerges full grown at the time of the commission of an offense, it follows that Congress has power to subject veterans to courts martial for any offense committed while in service, if the exercise of such power is necessary and proper in order to maintain a Navy. It also follows that on a trial for offenses committed while in service, an accused has no right to a jury trial. The exception of “cases arising in the land or naval forces,” however, does not mention courts martial. An interesting problem created by this view of a case arising upon commission of an offense, a problem never considered by a court, is whether, upon trial for fraud against the government in a federal court, a veteran could be denied a jury trial on the ground that his was a case within the exception. The fact is, however, that the federal courts have never denied such rights.

The more reasonable view seems to be that which holds that a case arises when some official action is taken which is indicative of embarkation upon the procedural steps leading to ultimate criminal prosecution. If this view be accepted, it follows that Congress has power to subject per-

78 It was termed "farcical and technical" by so eminent a scholar as Edmund M. Morgan, in an opinion based upon the Bogart case. Morgan, Court-
sons in the land and naval forces to courts martial for offenses committed prior to their entry into those forces. The Joly case asserts the existence of such power, but it has never been exercised. In time of war, when civilians may be hurriedly called to the colors in large numbers, its exercise could conceivably become necessary and proper in order to raise armies and maintain a Navy, to speedily dispose of complaints pending against draftees at the time of their induction, and thus, in the words of Dean Roscoe Pound, to free our agencies of defense from unnecessarily hampering interference of local legal authorities. It also follows that veterans whose connection with the service no longer existed could be made punishable by federal courts for acts or omissions committed while in service, but could not be subjected to courts martial.

The determination of the point in time when a case arises resolves only half of the meaning of the exception in the Fifth Amendment. The jurisdiction which courts martial exercise under statutory authority is a question secondary and subordinate to the question of the power of Congress to confer such jurisdiction. The power is granted by Article I, section 8, of the Constitution. The exception in the Fifth

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79 290 Fed. 858 (S. D. N. Y. 1922).
80 The AGN begin, "The Navy of the United States shall be governed by the following articles." Rev. Stat. § 1624 (1875), 34 U. S. C. § 1200 (1946). The AW begin, "The articles included in this chapter shall be known as the Articles of War and shall at all times and in all places govern the Armies of the United States." 41 Stat. 787 (1920), 10 U. S. C. § 1471 (1946). Acts or omissions committed by servicemen prior to their entry into the services are therefore not offenses against existing military or naval law. This fact was apparently overlooked in the Joly case dictum.

81 Foreword to Theodore Miller, Relation of Military to Civil and Administrative Tribunals in Time of War, 7 Ohio St. L. J. 188, 190 (1941).
Amendment relates to that power, and confers no jurisdiction. It says, in effect, that Congress may deny the guaranty of indictment and jury trial as to persons connected with the land or naval forces against whom military or naval authorities have embarked upon the procedural steps leading to ultimate criminal prosecution. Congress may or may not exhaust this power, but until its exercise courts martial have no jurisdiction whatsoever.

Who are these persons covered by the exception? "In the land or naval forces" does not necessarily restrict the application of the exception to the uniformed personnel of the armed services. This was recognized by the Supreme Court as early as 1895 in Johnson v. Sayre, holding that a paymaster's clerk in the Navy, though neither an enlisted man nor an officer, was nevertheless a person in the Navy subject to naval law. This position in the Navy had been established by statute, but the bonds of the connection need not be so tight. In Ex parte Quirin, the Court assumed without deciding "that a trial prosecuted before a military commission created by military authority is not one 'arising in the land or naval forces' when the accused is not a member of or associated with those forces." The addition of the words "or associated with" recognized the inclusion within the exception quoted of persons who are not members of the armed services but who have some connection with the armed forces. "Forces" is not synonymous with "military or naval services," and never has been. The early forces of England included the mariners of the merchant vessels in which the

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84 Ex parte Jochen, 257 Fed. 200 (S. D. Tex. 1919).
85 158 U. S. 109, 15 S. Ct. 773, 39 L. Ed. 914 (1895). The same view had been taken by a district court in the case of a paymaster's clerk employed by the Army. In re Thomas, 23 Fed. Cas. 931, No. 13, 888 (N. D. Miss. 1869).
86 317 U. S. 1, 41, 63 S. Ct. 1, 87 L. Ed. 3 (1942).
87 The same words are used in the last sentence of Hirshberg v. Cooke, ...U. S...., 69 S. Ct. 530 (1949).
88 The distinction was brought pointedly to the attention of Congress during the debate preceding the passage of the first law subjecting discharged and dismissed persons to courts martial for fraud against the government. Cong. Globe, 37th Cong. 3rd Sess. 955 (1863).
servicemen were transported. The ancient Court of Chivalry heard the cases of non-military persons connected with the armies. Noncombatants included in the land forces and accredited by military authority are recognized in international law. And today, there are many civilians who are a part of the body of our forces, but who are not members of the armed services.

Congress cannot, of course, nullify the constitutional guaranty of jury trial by the expedient of making all civilians in the United States a part of the land or naval forces. Civ-

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91 INTERNATIONAL CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMIES IN THE FIELD, Chap. III; INTERNATIONAL CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, Art. 61. Both conventions were signed at Geneva on July 27, 1929.

92 In the interesting debate in Congress, preceding the passage of the first law subjecting discharged and dismissed persons to courts martial for fraud against the government, the power of Congress as restricted by the exception in the Fifth Amendment was heatedly discussed. After amendment, the provision read: "And be it further enacted, That any person heretofore called, or hereafter to be called, into or employed in such forces or service who shall have committed any violation of this act, and shall afterwards receive his discharge or be dismissed from the service shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge or been dismissed."

Contractors had been deleted from this section of the bill, and the question as to whether, as amended, it applied to contractors was answered by Senator Howard of Michigan, who sponsored the bill.

"Mr. Howard. This does not apply to contractors at all now.

Mr. Cowan. But it applies to employees of the Government in the service.

Mr. Howard. No, sir; it applies to persons in the military service, and leaves to the courts the power to decide what persons are in the military service. It is a judicial question, as I remarked before." CONG. GLOBE, 37th Cong., 3rd Sess. 958 (1863). But contractors in the land or naval forces were left in the first section of the law, and a person who had a mere contract to furnish supplies to the Army was held for court martial under it. He was released on habeas corpus, the federal court holding that the contract did not put the accused in the land forces, and that the earlier law (Act of July 17, 1862, § 16) providing that such a contractor "shall be deemed and taken as part of the land or naval forces" with which he contracted to furnish supplies was unconstitutional. Ex parte Henderson, 11 Fed. Cas. 1057, No. 6349 (C. C. Ky. 1878).
ilians may be compelled to join the armed services, to whatever extent is necessary and proper to raise armies and maintain a navy. The same restrictions of necessity and propriety must apply to the placing of civilians, as such, in the land or naval forces. There must be a reasonable relationship between the legislative act and the constitutional power. For a civilian to be "in land or naval forces," it would seem that there must exist some connection or association with those forces which creates an obligation on the part of such civilians directed toward the military mission of the forces. One federal court describes the connection as arising from "alignment with a military enterprise." The commanders of such forces, under their duty to provide military security, have the power to prevent civilians from accompanying or serving with their forces. The power to prevent carries with it a concomitant power to permit. Civilians serving with naval forces are under a direct obligation to further, in line with their specialty, the mission of the forces. Red Cross representatives, radar technicians, scientists, contractors and subcontractors, and civil service employees, while serving under competent orders or authority, are "in the naval forces." Civilians accompanying naval forces are under an implied obligation to do nothing to impede or obstruct the mission of the forces. News correspondents, civilian observers, independent traders, etc., while thus accompanying with the permission of naval authorities, are "in the naval forces." The obligation, then, determines the status, and the status, in turn, determines the power of Congress to


provide, within continental United States and the organized Territories, a means of criminal prosecution other than by jury.

Upon this theory, all the decided cases can be reconciled. A civilian cook on a vessel under military control and engaged in the transportation of troops or supplies to the war zone is under a direct obligation to further the military mission, and Congress had, by AW 2 (d), conferred upon Army courts martial jurisdiction over such persons in time of war. A civilian merchant mariner on a ship which was not a part of the Navy or under naval control had no direct or implied obligation toward the naval mission. Congress had conferred no jurisdiction over such persons, and trial by military commission for an offense against AGN was not justified under the law of war. A civilian superintendent of an Army quartermaster corps patrolling the U. S.-Mexican border was under an obligation to further that mission, and Congress had, by AW 2, conferred upon Army courts martial jurisdiction over such persons while serving “in the field.” A civilian field auditor employed by the government in the quartermaster’s office of a temporary Army cantonment is under a military obligation, and Congress had, by AW 2, conferred upon Army courts martial jurisdiction over such persons while serving “in the field.” A civilian automobile driver employed by a civilian firm to transport civilian employees to and from work had no obligation toward the military mission, and the fact that the firm had a routine construction contract with the Army did not, of itself, create that obligation. An ex-serviceman, imprisoned under sentence of an Army court martial, is still connected with the Army, is under an obliga-

99 Hines v. Mikell, 259 Fed. 28 (C. C. A. 4th 1919), holding that meaning of the phrase “in the field” was not to be determined by the locality, but rather by the activity engaged in.
100 Ex parte Weitz, 256 Fed. 58 (Mass. 1919).
tion to serve such sentence under Army control, and Congress had, by AW 2(e), conferred upon Army courts martial jurisdiction over such persons. A civilian able to bear arms is under a moral obligation to serve his country in time of stress, and when he is lawfully called to the colors the obligation toward the military mission becomes a legal one. He is then sufficiently connected with the land or naval forces to come within the exception to the Fifth Amendment. Accordingly, Congress has power to subject him to courts martial from the time he is called, and, in World War I, did so. In World War II, Congress did not exercise its power to the full extent, subjecting the selectee to courts martial only after actual induction into the service.

Department opinions can be justified on the same theory. A civilian employed by the government to unload military supplies and munitions is under an obligation toward the military mission. A civilian employed by a private firm as master of a vessel chartered by the government to carry military supplies to the war zone is under a military obligation. Pilots of the Civil Air Patrol operating under military control are under a military obligation. A merchant seaman on board a vessel carrying a Navy Armed Guard crew is under obligation toward the naval mission. But a Canadian soldier at a U. S. Army school is under no obligation toward the U. S. military mission.

101 But not upon naval courts martial.
104 Ops. JAG Army 243 (1918).
105 Id. at 244.
106 1 JAG Army, Bull. 12 (1942).
107 1 CMO 42, 43 (1944).
108 2 JAG Army, Bull. 7 (1943).
Other frequently cited cases are those in which the Army initiated, at a time when the accused civilian was beyond the continental United States and its organized Territories, the regular processes looking toward a criminal prosecution.\footnote{Ex parte Gerlach, 247 Fed. 616 (S.D.N.Y. 1917); In re DiBartolo, 50 F. Supp. 929 (S.D.N.Y. 1943); In re Berue, 54 F. Supp. 252 (S.D. Ohio 1944); Perlstein v. United States, 57 F. Supp. 123 (M.D. Pa. 1944).} These cases do not depend upon the meaning of the exception "cases arising in the land or naval forces," because the power of Congress is not restricted under such circumstances. They depend upon the necessity and propriety\footnote{Under U. S. Const. Art. I, § 8, cl. 18.} of the provisions of law enacted by Congress to cover such situations. The purpose of subjecting all persons accompanying or serving with the Army in these external areas was to permit their disciplining "in places to which the civil jurisdiction of the United States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts...."\footnote{In re DiBartolo, 50 F. Supp. 929 (S.D.N.Y. 1943), quoting from congressional hearings on AW 2 (1916). The same purpose was implied in granting similar jurisdiction to naval courts martial. See Hearings before the Senate Naval Affairs Committee on S. 2899, 77th Cong., 2nd Session (1942). The scope of the jurisdiction as to offenses is the same in the Army and Navy. Snedeker, Developments in the Law of Naval Justice, 23 Notre Dame Lawyer 1, 5 and 17-18 (1947).} Congress has conferred upon naval courts martial jurisdiction over certain civilians in these external areas in time of war or national emergency, and its power to do so is in no way restricted by the meaning and effect of the exception in the Fifth Amendment. But the status of a person is the determinative factor in deciding whether he comes within the jurisdiction thus conferred. The words "accompanying or serving with" still import a connection or association with the naval forces, and the nature of the required status still demands the continuing existence of an obligation.

The connection or association, once made, is not disestablished, even when the order or permission is revoked, until
the obligation toward the naval mission of such forces is
terminated.\textsuperscript{112} Normally, such obligation is not terminated
until the civilian concerned has passed beyond the area in
which he may further, or impede or obstruct, the naval mis-
sion. The obligation may, however, be terminated without
physical movement on the part of such a civilian, by the
termination of the naval mission of the forces he is accom-
panying or serving. It is definitely terminated under exist-
ing naval law, upon the officially declared end of the war or
national emergency, because Congress has not occupied the
peacetime field of its power.

An obligation connecting a person with the land or naval
forces may be found in certain classes of civilians who were
formerly in the armed services. Congress may, where neces-
sary, make a discharge from the armed services conditional
or voidable upon a condition subsequent, and the obligation
of those given such a discharge subsists after other elements
of connection with the services have been severed. Thus a
person discharged as a result of the sentence of a naval court
martial has not severed all connection with the naval service
so long as the Secretary of the Navy retains a power, granted
by statute, to set the sentence aside and thereby to avoid all
actions resulting from it.\textsuperscript{118} Congress undoubtedly has power
to provide a proper means for avoiding a discharge obtained
by fraud, since a provision of this kind is reasonably neces-
sary to the maintenance of a Navy. If and when Congress
does so,\textsuperscript{114} a person discharged before the expiration of his
term of service will be under a contingent liability and suffi-
cient obligation will subsist to justify assigning to him a con-
nection with the naval forces.

An obligation may cease to exist and be revived by the act
of the obligor. When a person's connection with the naval

\begin{footnotesize}
\textsuperscript{118} 35 Stat. 621 (1909), 34 U.S.C. § 1200 Art. 54(b) (1946); U. S. ex. rel.
425, No. 1428 (Ore. 1871).
\textsuperscript{114} The proposed Uniform Code of Military Justice provides a constitutional
method. H.R. 2498, § 1, Art. 3 (b).
\end{footnotesize}
forces has been completely severed prior to the attachment of 
criminal jurisdiction, and his status has been changed, he is 
again, within the United States and its organized Territories, 
etitled to the benefits of the guaranty of a jury trial upon 
his prosecution for crime. This guaranty is the impediment 
to the existence of a power which would subject him to trial 
by court martial. But the guaranty is in the nature of a 
privilege, and, like the other guaranties contained in the 
Fifth and Sixth Amendments, may be waived by the person 
etitled to its benefits. A waiver removes the impediment, 
and a statute which subjects to court-martial jurisdiction 
only those civilians who waive the guaranty is free from con-
stitutional objection. Such a statute is that which provides 
for court-martial jurisdiction over officers dismissed by order 
of the President in time of war. To come within the scope 
of that statute, the former officer must make a written applica-
tion for trial. This constitutes a voluntary waiver, in the 
same manner that an appeal from a conviction for crime oper-
ates as a waiver of the constitutional protection against 
double jeopardy. The waiver alone would not confer jurisd-
diction upon a court martial, for such jurisdiction cannot be 
conferred by consent, but it may be said to revive an obliga-
tion and to re-establish a sufficient connection with the 
naval forces to bring the quondam officer within the scope of 
the power of Congress. The provision for his trial by court 
martial is a valid exercise of that power. The application 
for trial also has the effect of making the President's order 
of dismissal voidable. It is avoided upon the happening of 
either one of the conditions subsequent recited in the statute,

115 Barkman v. Sanford, 162 F. (2d) 592 (C.C.A. 5th 1947), and cases therein 
cited.  
116 See 12 Ops. Att'y Gen. 4 (1866); Street v. United States, 24 Ct. Cl. 230 
(1889), aff'd, 133 U. S. 299, 10 S. Ct. 209, 33 L. Ed. 631 (1890).  
118 Stroud v. United States, 251 U. S. 15, 18, 40 S. Ct. 50, 64 L. Ed. 103 
(1919); Pratt v. United States, 102 F. (2d) 275, 279 (App. D. C. 1939).  
119 See McLaughry v. Deming, 186 U. S. 49, 22 S. Ct. 786, 46 L. Ed. 1049 
(1902).  
120 See 12 Ops. Att'y Gen. 4 (1866); Street v. United States, 24 Ct. Cl. 230 
(1889).
and when so avoided, the original obligation and connection with the naval service are automatically restored with full force. The theory of the revival of an obligation to and connection with the naval forces at the time of the application for trial is the only theory which fully supports these subsequent effects of avoidance of the order of dismissal.

F. The Effect of Discharge

The most difficult problem of jurisdiction grows out of the cases of those persons who have been discharged from the armed services, and relates to the effect of a discharge. The problem is one of status. The status of an individual must be determined before we can arrive at any conclusion as to whether Congress has the power to subject him to court martial and as to whether Congress has done so.

A person in one of the armed services is subject to military or naval law solely by virtue of his status with respect to that service. The emphasis on status originally developed during the congressional debate at the time that Congress first attempted to give Army courts martial jurisdiction over discharged persons, Senator Howard saying, "A man's liability to punishment by court martial must necessarily depend upon his status, that is, whether he is in the military forces . . . or whether he is not. . . ." The contract analogy alone is of little value, especially since the adoption by this country of compulsory military service. In World War I, the draftee was subject to military law from the time he was ordered to report for induction, and he could be punished even if the order itself was unlawful. In World War II, the selectee was subject to military law only after

121  5 Ops. Atty. Gen. 569 (1876).
122  This theory is advanced in Underhill, Jurisdiction of Military Tribunals in the United States over Civilians, 12 Cal. L. Rev. 75, 90 and 93 (1924).
125  Selective Service Act of 1917, 40 Stat. 76 (1917).
126  Ex parte Romano, 251 Fed. 762 (Mass. 1918).
actual induction,127 but that induction could be lawfully consummated under the threat of criminal prosecution in the federal courts.128 The status, then, can be altered by statute rather than consent. Even in voluntary enlistments, status is the criterion. An enlistment induced by fraudulent representations of the enlistee serves to change the status from civilian to military.129 If an ordinary contract is made by a minor, he has power to disaffirm it, but if the contract is one of enlistment, he has no such power because his status has changed.130 The Supreme Court drew an analogy from cases involving marriage, a contract which changes status with respect to society. It is also analogous to cases involving naturalization, which changes status with respect to the government and involves fundamental rights of the citizen. In our discussion regarding persons who are admittedly civilians, we have seen that the status of being connected or associated with the land or naval forces is the governing factor in determining the applicability within the United States of the exception in the Fifth Amendment, and that the status of accompanying or serving with naval forces is determinative of the applicability of the 1943 law subjecting persons of that status to AGN. It is the status of discharged persons that is now in dispute.

An unconditional discharge from one of the armed services effects a change of status from military to civilian.131 It does not necessarily terminate the jurisdiction over the person discharged, because the question of jurisdiction is one

127 Selective Training and Service Act of 1940, 54 STAT. 885 (1940); Billings v. Truesdell, 321 U. S. 542, 64 S. Ct. 737, 88 L. Ed. 917 (1944).
129 In re Grimley, 137 U. S. 147, 11 S. Ct. 54, 34 L. Ed. 636 (1890).
which Congress may, within the limitations of the right to jury trial and the guaranty of due process, determine. A discharge may terminate the military or naval status and yet leave the discharged person in a civilian status, such as that of accompanying or serving with naval forces, which Congress had validly declared subject to military or naval law.\footnote{Mosher v. Hunter, 143 F. (2d) 745 (C.C.A. 10th 1944), cert. denied, 323 U. S. 800, 65 S. Ct. 552, 89 L. Ed. 638 (1945); 16 Ops. ATT'Y. GEN. 292 (1879); Id. 349 (1879).}

Or the discharged person may re-enlist or be thereafter inducted so that his status again changes by the action of the parties in accordance with law or by operation of law from that of civilian to that of military.\footnote{A discharge under any enlistment absolutely terminates any contractual relation between the government and the sailor, and the new relations assumed by each in connection with re-enlistment are entirely separate and distinct from the relations theretofore existing, except as they are altered by statute or regulation applicable to the new status arising from the re-enlistment. United States v. Smith, 67 F. (2d) 412, 414 (C. C. A. 9th 1933), aff'd, 292 U. S. 337, 54 S. Ct. 721, 78 L. Ed. 1295 (1934).} The jurisdiction of a court martial over the person of the accused depends upon the status of the accused at the time he is arrested or action leading to criminal prosecution is taken, whichever is earlier.\footnote{In re Bird, 3 Fed. Cas. 425, No. 1428 (Ore. 1871); United States ex rel. Flannery v. Comdg. Gen., 69 F. Supp. 661 (S.D.N.Y. 1946); See Ex parte Wilson, 33 F. (2d) 214 (E. D. Va. 1929). The question as to whether a person admittedly subject to court-martial jurisdiction may be tried under existing naval law for an offense committed prior to the issuance of an admittedly valid unconditional honorable discharge from an earlier period of service has been decided in the negative. A recent decision of the U. S. Supreme Court held that court-martial jurisdiction over non-fraudulent naval offenses does not survive such a discharge. United States ex rel. Hirshberg v. Cooke, ...U. S...., 69 S. Ct. 530 (1949). cf. 31 Ops. ATT'Y. GEN. 521 (1919); Myers and Kaplan, Crime Without Punishment, 35 Geo. L. J. 303, 313 (1947).}

A court martial has been given no power to determine with legal finality the status upon which its jurisdiction depends, and if its jurisdiction is challenged by habeas corpus on this ground, a federal civil court will determine from the circumstances the existence or non-existence of the essential status.\footnote{Ver Mehren v. Sirmyer, 36 F. (2d) 876 (C.C.A. 8th 1929); Billings v. Truesdell, 321 U. S. 542, 64 S. Ct. 737, 88 L. Ed. 917 (1944).} (It is true that the burden of establishing the jurisdictional facts rests upon the party asserting them.) The independent examination of these circumstances by the civil
court, without reliance upon the finding of facts by the court martial, is essential to the proper determination of the jurisdictional dispute. There is no basis for a view that the determination of a trial court as to its own jurisdiction is res judicata, least of all of a trial court of special and limited jurisdiction like that of a court martial.

Methods of separation from the armed services are prescribed under authority of law. Once this separation is validly accomplished, by discharge or otherwise, any attempted revocation or cancellation by the unilateral action of the executive branch of the government will be ineffective to restore the separated person to his former status.

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138 In 1944, in Billings v. Truesdell, supra note 135, the Supreme Court independently examined the Army's claim of jurisdiction, and found it invalid. This was in accord with the rule laid down by the Court in 1921 that evidence outside the record of proceedings of a court martial is admissible to show the existence of jurisdictional facts. Givens v. Zerbst, 255 U. S. 11, 20, 41 S. Ct. 227, 65 L. Ed. 475 (1921). But in 1945, a federal district court refused to make an independent examination of the facts found by a court martial to exist. Ex parte Potens, 63 F. Supp. 582 (E. D. Wis. 1945).

137 See Boskey and Braucher, Jurisdiction and Collateral Attack, 40 Col. L. Rev. 1006 (1940).


Generally: See Wintrobe, Military Law and Precedents 548-52 (2nd ed. 1896); Davis, Military Law of the United States 352-58 (3rd ed. 1913); 46 Col. L. Rev. 977, 981-3 (1946). It was held as early as 1830 that a discharge prior to expiration of the term of enlistment could not legally be issued without authority of law. 2 Ops. Atty'x, Gen. 353 (1830).


Revocation of acceptance of resignation ineffective: Mimmack v. United States, 97 U. S. 426, 24 L. Ed. 1067 (1878).


Revocation of discharge issued by mistake of fact ineffective: 4 Ops. Comp. Gen. 773 (1925); Ops. JAG Army, Digest 445 (1912).

discharge is viewed as a formal, final judgment passed by the
government on the record made by the person while in serv-
vice, so that not even the character or quality of the dis-
charge may thereafter be changed, except in a manner pro-
vided for by law. Congress has not authorized a change of
status from civilian to military except by the bilateral action
of the parties (enlistment or appointment) or by operation
of law (induction). Without compliance with the authorized
formalities, a military status cannot be assumed after the
change from military to civilian status has occurred.

Congress has power to provide, where necessary and prop-
er, that certain discharges shall not irrevocably change the
status from military to civilian. Congress has exercised
this power by providing that the sentences of courts martial
may be set aside by the Secretary of the Navy. The only
types of discharge which may be imposed by sentence of a

140 United States v. Kelly, 15 Wall. 34, 36, 21 L. Ed. 106 (1873), as explained
in United States v. Landers, 92 U. S. 77, 23 L. Ed. 603 (1876), and cited with
approval in Hirshberg v. Cooke, ... U. S. ..., 69 S. Ct. 530 (1949); Ex parte Drainer,
65 F. Supp. 410 (N. D. Calif. 1947), aff'd, on appeal 158 F. (2d) 981 (C. C. A.


142 Congress in 1944 authorized the Secretary of the Navy to establish boards
to review the type and nature of the discharges and dismissals of naval personnel
and conferred upon such boards the power "to change, correct, or modify any dis-
charge or dismissal" except in the case of a discharge or dismissal by reason of the
sentence of a general court martial, and "to issue a new discharge in accord with
the facts presented to the board." Servicemen's Readjustment Act of 1944, § 301,
58 STAT. 286 (1944), 38 U. S. C. § 693h (1946). It will be noted that Congress
did not authorize these boards to cancel a discharge and thereby restore a former
member of the armed services to his previous military status. 7 CMO 241 (1947).

Congress in 1946 authorized the establishment of a civilian Board for the Correc-
tion of Naval Records to change any naval record, to correct an error or remove
an injustice. 60 STAT. 932, 38 U. S. C. § 693h (1946). This authority is not restricted
by the fact that an error or injustice may have resulted from the sentence of a
general court martial. 40 Ops. Att'y. Gen. No. 119 (Feb. 24, 1947); CMO 221
(1947).


144 It has been suggested, as one solution to the problem of bringing to justice
discharged persons whose crimes committed while in service were not discovered
prior to their final separation from the service, that Congress make all separations
conditional for a period of one year from date of separation, and expressly give
to courts martial jurisdiction over individuals formerly subject to military or naval
law whose separations were conditional. Myers and Kaplan, Crime Without Pun-
ishment, 35 Geo. L. J. 303, 326 (1947). For an alternative solution, see note
170 infra.
court martial are bad conduct and dishonorable. The execution of such discharges prior to any action upon the court-martial sentences by the Secretary makes the change of status legally subject to a condition subsequent, and a subsequent setting aside of the discharge has the effect of nullifying it ab initio. In such a case the temporary and conditional de facto status of civilian is viewed as never having existed, and the military status as never having been interrupted. Whether this view is correct, or whether the status is again changed to military, there is now the authority of law for effecting the result. The provision in AGN 14 (and AW 94) subjecting discharged or dismissed persons to trial by court martial for fraud against the government committed while in service is not now, however, dictated by practical necessity. Such offenses are now triable in the federal courts as offenses against the Federal Criminal Code. The Navy in 1947 recommended the repeal of this provision, and the proposed Uniform Code of Military Justice omits it. The discharge is not made conditional by the statute conferring jurisdiction upon the courts martial, and is not revoked by a court-martial conviction of the discharged person.

145 U. S. ex. rel. Harris v. Daniels, 279 Fed. 844 (C. C. A. 2nd 1922), noting that whereas the Secretary of the Navy had been asserting and exercising such authority for years, in 1908 he asked for statutory authority and was granted it in the following year. For the same effect of a discharge imposed by an Army court martial, see In re Bird, 3 Fed. Cas. 425, No. 1428 (Ore. 1871).

146 When the original forerunner of AGN 14 (11) and AW 94, the Act of March 2, 1863, was passed, there existed no comparable federal law of general application, and the need of a fraud statute directed toward the armed services was then a practical necessity. See Cong. Globe, 37th Cong., 3rd Sess. 952-8 (1863).


148 In transmitting to the 80th Congress proposed amendments to AGN, the Secretary of the Navy wrote to the Speaker of the House of Representatives a letter dated May 22, 1947, in which he said, "By reason of their discharge or dismissal such persons become civilians and should be tried by Federal civil courts under 18 United States Code, chapter 5. Paragraph 11 of present article 14 is proposed to be repealed." H. R. Doc. No. 144, 80th Cong. 1st. Sess. (1947). See Snedeker, Developments in the Law of Naval Justice, 23 Notre Dame Lawyer 1, 14 (1947).

149 H.R. 2498, § 1, Art. 132.

150 It tacitly admits the validity of the discharge, and provides for the trial of the discharged person "in the same manner and to the same extent as if he had not received such discharge." (Emphasis supplied.)

151 See 7 CMO 4, 3 (1937), explaining the failure of the court martial to in-
Under existing law, a deserter who fraudulently re-enlists in the service from which he deserted and receives an unconditional discharge from that enlistment cannot be tried for his desertion from the prior enlistment because his status has changed to that of a civilian over whom no court-martial jurisdiction has been conferred. But an obligation toward the military mission subsists from the prior enlistment, and this connection with the armed forces is sufficient to justify subjecting him by law to court-martial jurisdiction. This the Navy in 1947 specifically requested Congress to do, and the proposed Uniform Code of Military Justice embodies such a provision.

A discharge which is not made conditional either by its terms or by operation of law may still be voidable because its issuance was induced by fraudulent representations. A discharge, in one aspect at least, is in the nature of a release from the obligations of a contract, in this case, the contract of enlistment. If the obligations have been fully discharged, the certificate of discharge is mere evidence of that fact. If they have not been fully discharged, the performance of the unfulfilled obligations is, by the discharge certificate, waived by the party to whom the performance is due. In ordinary contracts, fraud, in the inducement makes the

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154 H.R. 2498, § 1, Art. 3 (c).

155 Once standards governing the issuance of the various types of discharge have been established, a mandate may issue from a federal court compelling the issuance of the appropriate certificate. Lamb v. Patterson, 154 F. (2d) 319 (App. D. C. 1946).

156 The Army, under the 1940 draft law, granted outright discharges to thousands of enlisted men in order that they might enter essential industry. Such discharges were held absolute and unconditional. Parliman v. Delaware, L. & W. R.R., 163 F.(2d) 726 (C.C.A. 3rd 1947).

157 The word "fraud" in connection with the inducement to obtain a contract or a discharge is here and hereafter used to mean misrepresentations, and not used in the technical sense of fraud as a criminal offense, defined in Pence v. United States, 316 U. S. 332, 338, 62 S. Ct. 185, 86 L. Ed. 484 (1942).
contract voidable.\textsuperscript{158} If the fraud induced the release from the contract, the release is voidable.\textsuperscript{159} Voidable contracts are of two kinds. In one kind, the party having the power of avoidance need take no affirmative action, merely relying upon the defense of fraud if action is brought against him. In the other kind, he must take the affirmative action in order to prevent the contract from taking legal effect. The necessary action in some cases is merely a manifestation of intent to avoid; in others, it is the offer of return of the consideration received.\textsuperscript{160} The power of the United States to avoid for fraud is not conditional upon an offer of return of consideration.\textsuperscript{161} Reasonable notice is the action required where the government is the party with the power of avoidance. This power is lost if, after acquiring knowledge of the fraud the government unreasonably delays manifestation of its intent to avoid, and the delay is at its peril. The power is also lost if, after acquiring knowledge, the government manifests an intent to affirm.\textsuperscript{162}

If the instrument in question is one which has the effect of changing status, however, these contract rules are insufficient. In the case of marriage, the change is made through the bilateral agreement of the parties in a procedure prescribed by or recognized by law, but the marriage status cannot be annulled or dissolved without the intervention of a third party duly empowered by law, namely, the judge of a court. In the case of naturalization, citizenship, once acquired, cannot be divested by the unilateral action of the executive branch of the government, but may be divested on the plea of that branch in a proceeding prescribed by law and involving the intervention of a third party, namely, the judge of a court.\textsuperscript{163} The reasons for such intervention are

\begin{itemize}
\item \textsuperscript{158} \textit{Restatement, Contracts} § 476 (1932).
\item \textsuperscript{159} \textit{Id.} Illustration 4.
\item \textsuperscript{160} \textit{Id.} § 431d.
\item \textsuperscript{161} \textit{Id.} §§ 480, 487, 488; \textit{Pan American Petroleum and Transport Co. v. United States}, 9 F. (2d) 761, 771 (C.C.A. 9th 1926).
\item \textsuperscript{162} \textit{Restatement, Contracts} §§ 483, 484 (1932).
\item \textsuperscript{163} \textit{Baumgartner v. United States}, 322 U. S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525 (1944); \textit{Schneideman v. United States}, 320 U. S. 118, 63 S. Ct. 1333, 87 L.
that "new relations and new interests" flow from the status acquired, and that these "should not be undone unless the proof is compelling that that which was granted was obtained" by fraud. Obviously the compelling quality of the proof is not a matter to be determined arbitrarily by the party who alleges the fraud. Important rights dependent upon status are involved, and the dispute presents a justiciable issue for the determination of the courts.

In cases involving patents and land grants issued by the government, the proper procedure for cancellation has been suit by the government in the federal courts. The Supreme Court has refused to recognize the administrative revocation of a land grant on the ground of fraudulent pro-

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164 Mr. Justice Frankfurter in *Baumgartner v. United States*, *supra* note 163, at 675.

165 *U. S. ex rel.* Flannery v. Comdg. Gen., 69 F. Supp. 661 (S.D.N.Y. 1946). Judge Clancy in that case did not indicate the remedy or procedure by which the aggrieved party might present the justiciable issue. It seems, however, that the language of the Federal Declaratory Judgment Act, U. S. Code Cong. Serv., Unbound title 28 U.S.C. § 2201 (1948), would enable the government to apply for and obtain from a federal court a declaration of avoidance of a voidable discharge. It reads: "In cases of actual controversy . . . any court of the United States, upon the filing of an appropriate pleading, may declare rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." The two principal criteria for the use of this procedure are that a declaratory judgment (1) will serve a useful purpose in clarifying and settling legal relations in issue, and (2) will terminate and afford relief from uncertainty, insecurity, and controversy. Delno v. Market St. Ry. Co., 124 F. (2d) 965 (C. C. A. 9th 1942). A petition for a judicial construction of a contract made in reliance upon certain representations to determine whether the contract is terminated by the existence of facts contrary to those representations was held a proper remedy under the Act. Auto Mutual Indemnity Co. v. Dupont, 21 F. Supp. 606 (Del. 1937), petition being denied on ground of lack of jurisdiction over the person of an indispensable party defendant. Under this section, a complainant need only show that his position is jeopardized by a statute, regulation, or order, and thereupon the court will afford relief for any uncertainties with respect to his rights. Gordon v. Bowles, 153 F. (2d) 614 (1946), *cert. denied*, 328 U. S. 858, 66 S. Ct. 1350, 90 L. Ed. 1629 (1946). Constitutional questions are subjects for declaratory judgments. Mills v. Bd. of Education of Anne Arundel County, 30 F. Supp. 245 (Md. 1939).

curement as having any legal effect, holding that the courts of justice present the only remedy. If this be true when dealing with property rights, a fortiori, it must be true when dealing with fundamental liberties of the individual. There is a great public interest in the finality of an unconditional discharge from the armed services. Millions of our citizens have in the past few years been so discharged, and all connection between them and the land and naval forces severed. If Congress can validly subject such discharged persons to court-martial jurisdiction by the enactment of a statute which does not purport to call them again into military service, which requires of them the performance of no military duties, then its power is not restricted to those who had committed fraud against the government, but extends to all those who have committed any offense while in service. A discharge would have little value, and, at least during the running of the statute of limitations, could be scrapped at the will of the executive. Millions of citizens in the United States who had become established in civilian business and society would be liable to the loss of their personal freedom by the stroke of a military pen. Such a situation would be intolerable, and would make a mockery of the Bill of Rights. If Congress ever passed a statute of such scope, the Supreme Court in examining its validity would look for the reasonable relationship between the legislative act and constitutional authority. On comparison with pre-

168 See Note, 46 Col. L. Rev. 977, 984-5 (1946).
169 Id. at 990. See note 144 supra.
170 As an alternative solution to the problem of bringing to justice discharged persons whose crimes committed while in service were not discovered prior to their final separation from the service, it has been suggested that Congress give to the federal courts jurisdiction over all persons formerly subject to military or naval law for acts or omissions, committed while in service, which were violations of that law and of a nature not exclusively military, irrespective of the place where such acts or omissions were committed. Myers and Kaplan, Crime Without Punishment, 35 Geo. L. J. 303, 327 (1947). For another suggested solution, see note 144 supra.
cedents involving fundamental personal liberties, it would surely find a lack of such relationship. A reasonable relationship between a statute authorizing some judicial body, even a court martial, to pass judgment upon the status of a dischargee who allegedly obtained his discharge by fraud, and the constitutional power to maintain a Navy and to govern the naval forces might well be found. But Congress has not yet enacted such a statute. And it has not passed any law giving to the armed services authority arbitrarily to revoke a discharge for fraud, so that its power to do so is not immediately in issue. Yet without such an enactment, both the Navy and the Army assert such authority.

The contention that such executive authority exists relies upon two opinions of the Attorney General. In 1879, in the case of Prior H. Coleman, the revocation of an honorable discharge from the Army was upheld on the ground that the conditions under which it was legally possible to

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172 Hearings were begun in Congress in March 1949 on the Uniform Code of Military Justice, a proposed statute which contains a provision for judicially resolving such cases by conferring upon courts martial that power and restricting the issue to be tried to that of the accused's status. H.R. 2498, § 1, Art. 3(b).

173 JAG Navy, file MM/L16-4 (340613) of Jan. 14, 1939. See 151 CMO 10, 11 (1920). The Navy asserts the power to revoke a discharge in order that the alleged offender may be tried by court martial.

174 JAG Army, IV Bull. 237 (1945). War Department letter, file AG 220.8 (31 Aug. 1944) B-S-A-SPGAM-M of Sept. 10, 1944, directed commanding generals of service commands to make administrative determinations when questions arise regarding discharges alleged to have been procured by fraud. The Army asserts and exercises a power not only to revoke a discharge for fraud (file JAGA-1947/4691) but also, upon such revocation, to discharge the alleged offender under conditions other than honorable and without trial by court martial. Files JAGA-1946/6570 and SPJGA-1945/4523.

175 See NAVAL DIGEST 184 (1916).

176 16 Ops. ATTY. GEN. 349 (1879).
issue the honorable discharge did not exist. Coleman was under a death sentence imposed by a general court martial, and had escaped. Five years later, upon his application misstating the facts, the honorable discharge was issued. No citations of authority were given by the Attorney General, and the case is no parallel to that of a discharged person whose obligation to, and connection or association with, the Army do not exist at the time criminal jurisdiction is first asserted over him. In Coleman's case, the obligation and the jurisdiction never ceased to exist during the period he was a fugitive from justice. In 1910, an enlisted man of the Navy named James Hall was serving a sentence imposed by a general court martial. He made a fraudulent confession of murder. This offense, because it was allegedly committed in the United States, was beyond the jurisdiction of a naval court martial. Hall was delivered to the civil authorities and, prior to adequate investigation, was discharged with the dishonorable discharge included in his court-martial sentence. Subsequently, this discharge was revoked for fraud. The Attorney General upheld his action\textsuperscript{177} on the ground that it would be contrary to the most elementary principles of the law (without citing any law) to permit Hall to defeat the ends of justice and obtain his liberty by deceit. For authority, he cited only the prior opinion in the Coleman case, and a Pennsylvania state case which held that a pardon obtained by fraud was void. Hall's discharge was voidable, not void, and the problem of status and of legitimate methods of changing status was not discussed.

It might be contended that upon analogy to the administrative avoidance of an enlistment voidable for fraud, the authority to avoid a discharge for fraud exists. Such a conclusion would be a non sequitur. Congress has given to the armed services broad authority to change a military status to a civilian status through the medium of discharge.\textsuperscript{178} This

\textsuperscript{177} 28 Ops. Att'y. Gen. 170 (1910).
\textsuperscript{178} Note 138 supra.
authority applies as well to the enlisted man whose contract is not voidable as to the one whose contract is voidable for fraud. No additional authority is needed. Congress, however, has given to the armed services a very limited authority to change a civilian status to that of a military one. The methods of induction, voluntary enlistment, and voluntary appointment are the only methods authorized. \[179\] The recall to duty for disciplinary purposes has been authorized as to certain classes of persons who have continuing obligations as members of the reserve components of the naval forces, \[180\] but such recall has not been authorized as to any persons whose connection with the armed services has been finally and completely severed by a discharge subsequently alleged to have been fraudulently obtained. The obtaining of a discharge by fraud admittedly presents a close relationship to the power to maintain a Navy and to the power to make rules for its government. Other offenses committed while in service and discovered only after discharge present a more remote relationship. Congress might validly confer upon courts martial the power to determine in the first instance the issue of the status of a dischargee in a trial limited to the determination of the allegations of fraud in the inducement. The point here made is that Congress has not yet done so. \[181\]

The argument of the Flannery case that no executive authority could be given, because the justiciable issue pre-

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\[179\] Involuntary extension of enlistment, such as was effected by the Act of Dec. 13, 1941, ch. 570 § 1, 55 Stat. 799 (1941), 34 U. S. C. § 186 (1946), and Navy Alnav dispatch No. 155 of 1941, continued by operation of law an existing status. \textit{Ex parte Taylor}, 73 F. Supp. 161 (D. C. Calif. 1947).

\[180\] 52 Stat. 1180 (1938), 34 U. S. C. §§ 855, 855a (1946). The subjection of Fleet Reservists to court-martial jurisdiction at all times was recently upheld as a means reasonably adapted to maintaining a Navy without sole dependence upon large professional naval forces. The limits of the power of Congress, as restricted by the exception in the Fifth Amendment, were held not so narrowly drawn as to include only full-time active service forces, but extended to persons of military or naval status who, being trained, were sought to be kept in a state of readiness for immediate service. \textit{U. S. ex rel. Pasela v. Fenno}, 76 F. Supp. 203 (Conn. 1947), \textit{aff'd}, 167 F. (2d) 593 (1948). The opinion specifically refutes Winthrop's argument that the Constitution contemplates that status must be either wholly military or wholly civilian. See note 56 \textit{supra}.

\[181\] See note 172 \textit{supra}.
sented is one which only a court may determine, is a strong one against administrative action. The application of military law depends upon the status of the accused, and he must be given a judicial hearing of his contention that his status is not one to which military law applies. This hearing might conceivably be held before a court martial, provided (1) that express jurisdiction to determine this issue is given by Congress, (2) that no other charges are preferred and no other military proceedings are conducted until this issue is determined, and (3) that the determination of this issue by a court martial does not preclude an independent investigation of the jurisdictional facts by a civil court in a habeas corpus proceeding. The effect of avoidance of a discharge is to reinstate the military status and the unexecuted portion of the contract of enlistment. Obviously, a speedy determination is required, but the remedy is a problem for Congress, not for the Executive.

G. Conclusions

1. The jurisdiction of naval courts martial over spies, bringers of seducing enemy messages, and those who endeavor to corrupt naval personnel to betray their trust, conferred by AGN 5, is constitutional because (a) the guaranty of a jury trial does not apply to offenders against the law of war, (b) the offenses specified are violations of the law of war, (c) the instrument of courts martial is reasonably adapted to the trial of such offenses, and (d) Congress has expressly conferred such jurisdiction.

2. Jurisdiction of naval courts martial over persons accompanying or serving with naval forces in time of war or national emergency, beyond the reach of the federal courts,

182 Such a requirement is made in the statute conferring upon courts martial jurisdiction over a dismissed officer who applies for trial. His trial is limited to the offenses for which he had been dismissed. AGN 37. The same requirement in all cases of undetermined status would seem necessary to a compliance with due process See Snedeker, Developments in the Law of Naval Justice, 23 Notre Dame Lawyer 1, 16-17 (1947).

188 For suggested solutions, see notes 144 and 170 supra.
conferred by the Act of March 22, 1943, is constitutional because (a) the guaranty of a jury trial does not apply to such persons in such places, (b) there is no denial of due process in properly conducted court-martial proceedings, (c) the subjection of such persons to courts martial is necessary and proper to prevent their unlawful acts from going unpunished and to preserve military security, (d) there are no other restrictions upon the power of Congress to so legislate, and (e) Congress has so legislated.

3. Jurisdiction of naval courts martial over persons who, as officers, were dismissed by order of the President in time of war is constitutional because (a) it is conditional upon the voluntary application of such persons for trial by court martial, (b) such an application legally constitutes a waiver of the right to trial by jury and a revival of their obligation to and connection with the naval forces, (c) the only impediment to the existence of the power of Congress to subject them to court-martial jurisdiction is thereby removed, and (d) Congress has exercised that power.

4. Jurisdiction of naval courts martial over unconditionally discharged and dismissed persons whose connection with the naval service has ceased, and who are subsequently charged with a pecuniary fraud against the United States committed while in the naval service could be constitutionally conferred by Congress provided it was restricted to those persons who are beyond the boundaries of continental United States and of its organized Territories when so charged and tried because (a) such persons are beyond the territorial scope of the guaranty of a jury trial, (b) there is no denial of due process in properly conducted court-martial proceedings, (c) the subjection of such persons to courts martial is necessary and proper to prevent their unlawful acts from going unpunished, and (d) there are no other restrictions upon the power of Congress to so legislate. Jurisdiction extending to such persons who are within the boundaries of continental United States or of its organized Territories when so charged
and tried could not be constitutionally conferred because (a) they are not, in fact, persons in, connected with, or obligated to the land or naval forces, (b) the use of courts martial to try ex-servicemen for offenses against the Federal Code is unnecessary, and (c) the guaranty of a jury trial applies to them. The jurisdiction attempted to be conferred on naval courts martial by the eleventh paragraph of AGN 14 (and upon Army courts martial by AW 94) includes both the constitutional and unconstitutional aspects. The provision is penal in nature, is not separable into parts, and no reasonable interpretation of its language can produce the required limitation. The provision must therefore fail in its entirety.\textsuperscript{184}

5. Jurisdiction of naval courts martial over unconditionally discharged persons whose connection with the naval service has ceased, and who are subsequently charged with having obtained their discharges by fraudulent means does not exist because (a) such a discharge has the effect of changing status from naval to civilian, (b) the only civilians amenable to naval courts martial under existing valid law are officers dismissed by the President who demand trial, those persons accompanying or serving with naval forces, and certain offenders against the law of war, whereas the discharged persons here dealt with are neither dismissed officers, nor accompanying or serving, nor offenders against the law of war, (c) the discharges, although voidable on the ground of fraud in the inducement, have not been avoided by constitutional judicial action, and (d) Congress has not yet conferred jurisdiction over such persons upon naval courts martial.

\textit{James Snedeker}

\textsuperscript{184} The interpolation, by way of interpretation, of words of limitation into a federal act penal in nature which as an entirety is invalid as to part of its possible applications would create the spectre of judicial legislation, and is not within the judicial province. United States v. Reese, 92 U. S. 214, 23 L. Ed. 563 (1876); Trade Mark Cases, 100 U. S. 82, 25 L. Ed. 550 (1879); Chicago, M. & St. Paul R Co. v. Westby, 178 Fed. 619 (C. C. A. 8th 1910); Butts v. Merchants & Miners Transportation Co., 230 U. S. 126, 33 S. Ct. 964, 57 L. Ed. 1422 (1913); 2 Sutherland, \textit{Statutory Constitution} § 2413, 2414, 2416 (3rd ed. 1943).