fact for the determination of the proper accounting officers under the direction of the Secretary of the Interior.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

RECORDS OF COURTS-MARTIAL.

1. Any person having an interest in the record of a naval court-martial on file in the Navy Department, is entitled to have an exemplified copy of it after the proceedings are consummated by the action of the proper revisory authority.
2. Public justice and private right require that the Secretary of the Navy and his subordinate officers should not withhold their testimony in regard to the contents of such a record when required to give it by the summons of a State court.

ATTORNEY GENERAL'S OFFICE,

January 3, 1865.

SIR: I have the honor to state, as requested by you, my opinion upon the two questions propounded in your communication of the 29th ultimo.

The questions are as follows:

1. Whether the Secretary of the Navy, or any of his subordinates, is bound in law, on application of individuals, to furnish exemplified copies of records, or parts of records, of naval courts-martial on file in the Navy Department?

2. Whether the Secretary of the Navy, or any of his subordinates, is bound in law to answer to a commission of a State court directing the taking of his or their testimony as to the contents of records of naval courts-martial on file in the Navy Department?

It occurs to me that there can be no substantial difficulty in answering these inquiries, if the legal character of naval and other courts-martial and of their records is clearly apprehended.

Records of Courts-martial.

Courts-martial are judicial tribunals, constituted by statutory authority, and organized in pursuance of statutory regulation, for the administration of a great and an important department of jurisprudence, the law-military. They are, therefore, in the strictest sense courts of justice, having jurisdiction of a large and, in some respects, distinct community of our fellow-citizens, and taking judicial cognizance of the duties and obligations which the citizen assumes when he enters by enlistment or otherwise, into the military service of the country. The Supreme Court of the United States, speaking by Mr. Justice Wayne, in the case of Dynes *vs.* Hoover, (20 Howard, 82,) have given the following exposition of the jurisdiction of these courts, and of the character and effect of their judgments, in cases within their judicial cognizance:

"Courts-martial derive their jurisdiction and are regulated with us by acts of Congress, in which the crimes that may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms, or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that the legislature meant to subject to punishment one of a minor degree of a kindred character, which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial. * * * With the sentences of courts-martial, which have been convened regularly, and have proceeded legally, and by which punishments are directed not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation have been confided by the laws of the United States, and from whose decision no appeal, or

jurisdiction of any kind, has been given to the civil magistrates or civil courts."

Courts-martial are, then, not only legally constituted courts of justice, but also, according to this high authority, courts of justice, whose judgments in cases fitted for their consideration and determination, are as final, conclusive, and authoritative as those of any judicial tribunal of the country. In England the military courts are as free from the control and dictation of the sovereign as the highest civil courts of the realm. The extent and limitation of the authority of the English sovereign with respect to courts-martial are distinctly set forth in the following passage from Mr. Tytler's standard Treatise on Military Law: "The king," says Mr. Tytler, "can no more interfere with the procedure of courts-martial in the execution of their duty than he can with that of any of the fixed courts of justice; nor even after the court-martial has pronounced its sentence is it in the power of the sovereign to add to or alter that sentence in any particular, unless a recommendation to that effect shall be therein contained. The king, in virtue of his prerogative, mercy, may entirely remit the punishment which the court has awarded, or by disapproving of the sentence, he may order the court to sit again, and to review their procedure and judgment; but he can no more decree any particular alteration of their sentence than he can alter the judgment of a civil court or the verdict of a jury." (Tytler's Essay on Mili- Law, 130.) In this country it has been held that the President has power not only to pardon persons convicted in military courts, but also to commute, provided he mitigate and add nothing in the commutation of the punishment. (*Exparte* Wells, 18 How., 307.) After the sentence, however, has been approved and carried into effect, there is no revisory power by which it can be rescinded, annulled, or modified. It forever stands as the judgment of a court. (4 Opin., 514; 6 Opin., 514.) These considerations appear to me to be pertinent to the present inquiry; for, if they give a correct idea of the legal character of courts-martial,

of their proceedings and jurisdiction, it would seem to be clear that when their judgments become finalities—when their proceedings have been consummated by the action of the competent revisory authority—the records of those proceedings should be regarded as standing upon the same footing, so far as the parties affected and the community at large are concerned, as the records of the ordinary tribunals of civil and criminal jurisdiction. The opinion has been expressed, by an American author of high repute on the law of evidence, that any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would be repugnant to the genius of our institutions. (Greenleaf on Evidence, 524.) There are some cases of which the civil courts and the military courts have concurrent jurisdiction; but a party who has been tried, and either acquitted or convicted in a military court, cannot, I apprehend, be afterwards tried for the same offence in a civil court. Whether this be correct or not, (and I am aware that there exists a difference of opinion on the point,) certainly a former acquittal, or a former conviction, before any court-martial of competent jurisdiction, would be a good plea in bar of a prosecution before another court-martial for the same offence. In every case, however, in which such a plea were set up, the party would need and be entitled to receive a copy of the record on which he relied in making his defence, and it would be the duty of the officer charged with its custody to furnish the party, on his application, with a properly certified copy of the record. Again, the acts of Congress regulating naval courts-martial provide that "every person who shall commit willful perjury on examination on oath or affirmation before such court, shall and may be prosecuted by indictment in any court of justice in the United States." (Act of July 17, 1862.) In such a prosecution a copy of the charges, the specifications, and the pleas upon which the trial before the court-martial was had, showing the issue tried by the court, and also of the recorded testimony adduced on the trial, could not, under

many circumstances, be dispensed with either before a grand or a traverse jury. There are certain crimes, as is well known, which render the perpetrators of them infamous. A person convicted of, and sentenced for, such a crime is, in many of the States, rendered thereby wholly incompetent to testify in a court of justice, and in some of the States of the Union the credibility of a witness is seriously affected by the judgment of an infamous crime passed by a court of competent jurisdiction. Suppose that the record of a court-martial were required by a civil or a military court, in the case of such a witness, on the question of his competency or his credibility, I apprehend that the highest considerations of right and justice would enjoin upon the custodian of the desired record the duty of furnishing a copy of it for the inspection of any court who might signify a wish to receive it.

These and many other instances that could be enumerated, in which courts-martial records might be made available for the purposes of justice, clearly show that any rule by which the right to inspect and receive copies of the records of the proceedings of military tribunals would be limited and restricted, would operate to effect disastrously the administration of justice in cases in which the liberty, happiness, and life of the individual are often involved, and the safety of the State itself may be concerned.

The statutes regulating the course of procedure in military courts show that, in contemplation of Congress, these courts stand on the same footing as other judicial tribunals of the country. Their sittings, for example, are free to the attendance of the public, like those of other courts, and, as if to guard against improper secrecy in the case of courts-martial held in the army, the statute expressly provides that no proceedings or trials in such courts shall be carried on excepting between the hours of eight in the morning and three in the afternoon, except in cases which, in the opinion of the officer appointing the court-martial, require immediate example. The obligation assumed under oath by the members of a naval courts-martial, to

keep secret the sentence of the court, is entirely removed by the very terms of the oath when that sentence has been approved by the proper authority; and even the vote or opinion of any particular member of the court may be divulged without a violation of duty, when the party is required to disclose it before a court of justice in due course of law. (See form of oath, act of July 17, 1862, 12 Stats., 600.)

Such and similar considerations induce me to hold that the written record of the proceedings before a naval court-martial becomes, when the proceedings are consummated by the action of the proper revisory authority, the record of an adjudicated case, tried and determined by a legally constituted court of justice, and that any limitation of the right to an exemplified copy of such a record on file in the Navy Department, when properly applied for by any person having an interest in it, would be contrary to law.

The foregoing remarks seem to me to contain a sufficient reply to the first question you have propounded to me.

With respect to the second point submitted, I am of opinion that the Secretary of the Navy, and any of his subordinates, having knowledge of the contents of naval courts-martial on file in the Navy Department, after the proceedings have been consummated by the action of the proper revisory authority, are bound in law to answer to a commission of a State court directing the taking of his or their testimony as to the contents of such records.

Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence, and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as "privileged communications." The President of the United States, the heads of the great departments of the Government, and the Governors of the several States, it has been decided, are not bound to produce papers or dis-

close information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient. These are familiar rules laid down by every author on the law of evidence.

But, as has been seen, I am of opinion that when the proceedings of naval and other courts-martial are at an end through the action of the competent revisory power, the contents of the records of such proceedings are not state secrets; nor are the records of the courts to be regarded as the minutes of official, confidential transactions, within the meaning of the rule which has been stated, between the Executive Department of the Government, or any of its officers, and the parties accused.

The head or an officer of a department may properly have the custody of the records, but such custody does not involve any right of exclusive control over the documents, nor does it imply any right to withhold the contents of them. Such records, it is plain, must be deposited and remain somewhere. They cannot stay in the possession of the courts, because they have no existence after the trials. They are then dissolved *sine die*. Their respective duties have been performed. The most appropriate place of custody is undoubtedly the archives of the Department charged with the administration of the branch of the military service in which the courts were respectively convened. With respect to the records of naval courts-martial on file in the Department, the Secretary of the Navy, or the officer of the Department in whose peculiar care they may be placed, stands relatively in substantially the same attitude as the clerk or the prothonotary of a civil court with respect to the records of cases instituted and determined in the court of which he is an officer.

I am clearly, therefore, of opinion, as I have said, that public justice and private right alike require that the Secretary of the Navy and his subordinate officers should not withhold their testimony with respect to the contents of

the records in question, when required to give it by the summons of a State court.

I am, sir, very respectfully,

Your obedient servant,

JAMES SPEED.

The PRESIDENT.

RETIREMENT OF NAVAL OFFICERS.

The act of June 25, 1864, (13 Stats., 183,) has the effect of removing from the retired list, officers of the navy who were retired in pursuance of the act of December 21, 1861, but who are not liable to be retired by the provision of the act of 1864.

ATTORNEY GENERAL'S OFFICE,

January 6, 1865.

SIR: I have the honor to acknowledge the receipt of your letter of the 24th ultimo, propounding to me a question touching the operation of the act of June 25, 1864, "to amend the act of the 21st December, 1861, entitled 'An act to further promote the efficiency of the navy.'" This statute provides "that the first section of the act of the 21st December, 1861, entitled 'An act to further promote the efficiency of the navy,' shall not be so construed as to retire any officer under the age of sixty-two years, and whose name shall not have been borne upon the navy register for a period of forty-five years after he had arrived at the age of sixteen years." (13 Stats., 183.)

The question you submit is, whether the effect of this statute is to remove from the retired list an officer claiming the benefit of the act of December 21, 1861?

The 1st section of the act of 1861, retired from service two classes of naval officers: firstly, those whose names may have been borne on the naval register forty-five years, and, secondly, those who had arrived at the age of sixty-two years. (12 Stats., 329.)

The question, then, which you submit is, whether the act of 1864 is to be regarded as simply establishing a rule