gress has classified the offense.[26] An act punishable by a fine of not more than $1,000 or imprisonment for not more than six months is a misdemeanor, which can be tried without indictment, even though the punishment exceeds that specified in the statutory definition of "petty offenses." [27]

A person can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument.[28] A change in the indictment that does not narrow its scope deprives the court of the power to try the accused.[29] Although additions to offenses alleged in an indictment are prohibited, the Court has now ruled that it is permissible "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it," as, for example, a lesser included offense.[30] There being no constitutional requirement that an indictment be presented by a grand jury in a body, an indictment delivered by the foreman in the absence of other grand jurors is valid.[31] If valid on its face, an indictment returned by a legally constituted, non-biased grand jury satisfies the requirement of the Fifth Amendment and is enough to call for a trial on the merits; it is not open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury.[32]

The protection of indictment by grand jury extends to all persons except those serving in the armed forces. All persons in the regular armed forces are subject to court martial rather than grand jury indictment or trial by jury.[33] The exception's limiting words "when in actual service in time of war or public danger" apply only to mem-

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[26] *Ex parte* Wilson, 114 U.S. 417, 426 (1885).

[27] Duke v. United States, 301 U.S. 492 (1937).

[28] *See* Stirone v. United States, 361 U.S. 212 (1960), which held that a variation between pleading and proof deprived petitioner of his right to be tried only upon charges presented in the indictment.

[29] *Ex parte* Bain, 121 U.S. 1, 12 (1887). *Ex parte* Bain was overruled in United States v. Miller, 471 U.S. 130 (1985), to the extent that it held that a narrowing of an indictment is impermissible. *Ex parte* Bain was also overruled to the extent that it held that it held that a defective indictment was not just substantive error, but that it deprived a court of subject-matter jurisdiction over a case. United States v. Cotton, 535 U.S. 625 (2002). While a defendant's failure to challenge an error of substantive law at trial level may result in waiver of such issue for purpose of appeal, challenges to subject-matter jurisdiction may be made at any time. Thus, where a defendant failed to assert his right to a non-defective grand jury indictment, appellate review of the matter would limited to a "plain error" analysis. 535 U.S. at 631 (2002).

[30] United States v. Miller, 471 U.S. 130, 144 (1985).

[31] Breese v. United States, 226 U.S. 1 (1912).

[32] Costello v. United States, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339 (1958); United States v. Blue, 384 U.S. 251 (1966). *Cf.* Gelbard v. United States, 408 U.S. 41 (1972).

[33] Johnson v. Sayre, 158 U.S. 109, 114 (1895). *See also* Lee v. Madigan, 358 U.S. 228, 232–35, 241 (1959).