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The Constitution and Prohibition Enforcement

George W. Wickersham
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GEORGE W. WICKERSHAM

SECOND LECTURE ON THE CUTLER FOUNDATION

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SECOND LECTURE ON THE
CUTLER FOUNDATION
THE CUTLER LECTURES

Established at the College of William and Mary in Virginia by James Goold Cutler of Rochester, N. Y.

The late James Goold Cutler, of Rochester, New York, in making his generous gift to the endowment of the Marshall-Wythe School of Government and Citizenship in the College of William and Mary provided, among other things, that one lecture should be given at the College in each calendar year by some person "who is an outstanding authority on the Constitution of the United States." Mr. Cutler wisely said that it appeared to him that the most useful contribution he could make to promote the making of democracy safe for the world (to invert President Wilson's aphorism) was to promote serious consideration by as many people as possible of certain points fundamental and therefore vital to the permanency of constitutional government in the United States. Mr. Cutler declared as a basic proposition that our political system breaks down, when and where it fails, because of the lack of sound education of the people for whom and by whom it was intended to be carried on.

Mr. Cutler was one of the few eminently successful business men who took time from his
busy life to study constitutional government. As a result of his study, he recognized with unusual clearness the magnitude of our debt to the makers, interpreters and defenders of the Constitution of the United States.

He was deeply interested in the College of William and Mary because he was a student of history and knew what great contributions were made to the cause of constitutional government by men who taught and studied here—Wythe and Randolph, Jefferson and Marshall, Monroe and Tyler, and a host of others who made this country great. He, therefore, thought it peculiarly fitting to endow a chair of government here and to provide for a popular "lecture each year by some outstanding authority on the Constitution of the United States."

The second lecturer in the course was Honorable George W. Wickersham, former Attorney-General of the United States, and now Chairman of the National Commission on Law Observance and Enforcement.

JNO. GARLAND POLLARD,
Dean of the Marshall-Wythe School of Government and Citizenship of the College of William and Mary.
THE CONSTITUTION AND PROHIBITION ENFORCEMENT*

The Constitution of the United States is one of those extremely rare products of statesmanship, the excellence of which has not been impaired by the vicissitudes of changing times, the criticism of scholars, or the resentment of political factions. The idea that it was struck off at a heat by the momentary inspiration of a man or a group of men, to which Mr. Gladstone, in an outburst of admiration, gave expression, has not stood the test of historical analysis. But the far-reaching wisdom of the framers has been emphasized by proof that the Constitution was a development of well known principles of English Government, modified and adapted to the requirements of the newly enfranchised American nation. The Constitutional Convention built a structure adapted to the needs of centuries, upon the deep and sure foundations of those principles of English liberty which had been achieved in six hundred years of struggle. None of its provisions ran counter to the funda-

*An address delivered at the College of William and Mary under the auspices of the James Goold Currier Foundation, on May 7, 1928, by George W. Wickersham, former Attorney-General of the United States.
mental political principles of any considerable number of the American people. It is true that "in order to form a more perfect union," the Federal Government was endowed with powers greater than some of the leading statesmen of the time thought wise or safe for the preservation of individual liberty. But the feebleness of the government of the Confederation had brought the country into such chaotic condition that the great majority of the people were quite ready to accept a central government strong enough to secure peace and justice at home and to command respect abroad. The fact is, that the Constitution was the product of the aristocracy of the American Democracy: not necessarily the aristocracy of birth or wealth, but the aristocracy of brains and character. It was framed by educated men, very largely lawyers, but all men who had studied deeply the history of governments in the past, and who were capable of deducing sound conclusions from the experience of other nations. The highest statesmanship consists in the ability to accurately read past history and apply its lessons to the advancement of the interests of one's own country, and in the avoidance of those mistakes which in the past have brought misfortune upon governments and the peoples dependent upon them.
To make a strong government, and at the same time to preserve the liberty of the individual citizen, and not so greatly to restrict the sovereignty of the States as to destroy local self-government, was the essential problem before the Convention of 1787. How wisely and how successfully they wrought, is demonstrated by the history of the one hundred and forty years succeeding the adoption of the Constitution.

In the framing of the Constitution the position and powers of the Judiciary were recognized to be of paramount importance. Under the Confederation, there were no separate national courts. As a matter of fact, there was no nation. The absence of courts of the Confederation constituted, perhaps, its greatest weakness. In the Constitution of 1787, framed in order to form a more perfect union and to establish justice, this deficiency in the existing government was necessarily to be dealt with, and by the Third Article, it was declared:

“The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

The second section of the same Article specifically declared:

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Consti-
tution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”

Chancellor Kent in his Commentaries, observes:

“The propriety and fitness of these judicial powers seem to result, as a necessary consequence, from the union of these states in one national government, and they may be considered as requisite to its existence. The judicial power in every government must be coextensive with the power of legislation . . . Were there no power to interpret, pronounce, and execute the law, the government would either perish through its own imbecility, as was the case with the articles of confederation, or other powers must be assumed by the legislative body, to the destruction of liberty.”

The same section 2 of Article III provides that in all cases affecting ambassadors, other public

(1) 1 Kent, Lecture 14. (Ninth Ed. p. 322.)
ministers and consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make. Paragraph 3 then provides as follows:

“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”

Probably nothing in the whole debates over the Constitution, says Mr. Charles Warren in a recent work (2) "The Making of the Constitution.

“...is more astonishing than the slight discussion reported by Madison as given to the Judiciary Article of the report of the Committee of Detail of August 6th. It is probable, however, that Madison considerably condensed his notes on this point owing to the technicalities of the subject.”

While Madison has not reported very much discussion over this subject, yet in the debates over the ratification of the Constitution in the

(2) “The Making of the Constitution.”
conventions of the various States, a great deal was said concerning the necessity of establishing independent courts, as contrasted with the expediency of vesting the Federal judicial power in State tribunals, subject only to the right of review in the Supreme Court of the United States. Mr. Hamilton dealt with the subject at length in at least four numbers of The Federalist (Nos. 78, 79, 80, 81). It would be inappropriate and wholly unnecessary here to review the succinct and convincing arguments employed by Hamilton in those papers, in showing the necessity for the establishment of independent courts of justice for the interpretation of legislative acts deriving their authority from, or purporting to infringe upon, powers conferred upon the Federal government or denied to the State governments by the Constitution.

"The interpretation of the laws is the proper and peculiar province of the courts," he says. "A constitution is in fact and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to a statute, the intention
of the people to the intention of their agents.” (No. 78.)

The argument in support of the exercise of the powers of the Federal judiciary to hold invalid an unconstitutional law has never been more succinctly, forcibly and satisfactorily put than in these words.

The necessity for the establishment of one court of supreme and final jurisdiction in the determination of questions arising under the Constitution, was conceded by almost all concerned in framing or discussing the Constitution, and scarcely ever has been disputed. Differences of opinion always have existed as to the provisions vesting the judicial power of the United States “in such inferior courts as the Congress may from time to time ordain and establish.” Hamilton said this power “is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of Federal cognizance. It is intended to enable the national government to institute or authorize in each State or district of the United States a tribunal competent to the determination of matters of national jurisdiction within its terms.” (Federalist, No. 81.)

He even thought there were substantial reasons against conferring Federal power upon the existing courts of the several States, for, he said:

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"The most discerning can foresee how far the prevalence of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; while every man may discover that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union."

The inevitable diversity of opinion in the different States would require an unrestrained course of appeals to the Supreme Court, which, even in 1787, Mr. Hamilton saw would be a source of public and private inconvenience, and which, in 1929, would be a sheer impossibility, for it would break down any single court with the sheer weight of business. Moreover, the character of the Federal judicial power, comprehending, as it does under the Constitution, controversies between citizens of different States and between citizens of a State and foreign citizens or subjects, peculiarly requires exercise by a tribunal independent of local influences.

The First Congress under the Constitution assembled at Philadelphia on March 4, 1789, although a quorum of both Houses was not present until April 6th. President Washington was sworn in to office on April 30th, and thereupon the new government proceeded to function.(3)

(3) Story on Const., Sec. 278.
One of the first duties to which the Congress addressed itself was the preparation of a Judiciary Act. Mr. Charles Warren, the historian of the Supreme Court, a few years ago published an interesting article in the *Harvard Law Review*, entitled “New Light on the History of the Federal Judiciary Act of 1789” (*). No adequate account of this famous legislation, Mr. Warren says, had ever been written, and Ellsworth’s latest able and careful biographer said in 1905 that “no complete history of the bill can now be written.” Mr. Warren, however, found among the archives of the United States not only the original draft of the Judiciary Act as it was introduced into the Senate, but also the original amendments to the draft bills submitted during the Committee and Senate debates, and a copy of the bill as it passed the Senate and went to the House. Those documents throw a new and constructive light upon the history of the measure, which dispels, among other things, the tradition that the bill was drafted by Oliver Ellsworth and not materially changed during its passage into law. Mr. Warren says it is clear now that very important, and, in some instances, vital changes were made in the bill before it became law. He states the fact to be that the final form of the

(*) 37 Harv. Law Rev., p. 49.
Act and its subsequent history cannot be properly understood unless it is realized that it was a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of the Federal Constitution tried, were insistent that the Federal courts should be given the minimum powers and jurisdiction.

"Its provisions completely satisfied no one, although they pleased the anti-Federalists more than the Federalists."

Compromise as it was, it remained almost unchanged for nearly a century. But Mr. Warren points out that the Judiciary Act was not only a compromise, but its final form was closely tied up with, and largely depended upon, the fate of the various amendments to the Judiciary Article of the Constitution, which were being debated in Congress during the discussion over the Judiciary Act. It is a matter of familiar knowledge that objection was made in many of the States to the absence from the new Constitution of a Bill of Rights, and that ratification of the Constitution was only secured by the promise of its friends to lend their influence and their best efforts to the immediate adoption of amendments to the Constitution which would supply this defect. It was particularly objected that the judicial power was not subject to reasonable restraint; that trial by jury in criminal
cases was not adequately secured, and was not at all required in civil cases.

Consideration of these proposed amendments proceeded in the First Congress at the same time that the Committee was drafting the Judiciary Act. After a long debate, the Senate voted to establish Federal District Courts, and after a struggle over the jurisdiction with which they were to be invested, the jurisdiction as specified in the bill was agreed to. The bill was laid aside in the House of Representatives, pending the discussion over the proposed amendments to the Constitution. There had been serious apprehension among many of the delegates to the various State Conventions lest the new Federal government should not only invade the jurisdiction of States, but that unless restrained by positive provisions in the fundamental law, it would encroach upon the very rights of the citizen to secure which the War of Independence had been successfully waged. Patrick Henry, in Virginia, Mr. Holmes, in Massachusetts, and many other delegates in those and other States complained of the inadequacy of the Third Article of the Constitution to fully ensure all the privileges of the citizen guaranteed by the great charters of English liberty—Magna Charta, the Bill of Rights and the Habeas Corpus Act. Mr. Henry declared:

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“My mind will not be quieted till I see something substantial come forth in the shape of a bill of rights.” (3 Eliot’s Debates, 462.)

His apprehensions were shared by many others. These objections did not prevent the adoption of the Constitution, but, as Judge Story says:

“They produced such a strong effect upon the public mind, that Congress, immediately after their first meeting, proposed certain amendments, embracing all the suggestions which appeared of most force; and these amendments were ratified by the several States, and are now become a part of the Constitution.”

Not until those amendments were passed by the House, was the consideration of the Judiciary Bill again taken up. As a result of the discussions in both Houses, the Judiciary Bill in its final form was signed by the President on September 24, 1789, and on the same day, the Senate and the House finally agreed on the form of twelve Amendments to the Constitution to be submitted to the States. Those amendments, of which ten subsequently were agreed to by the requisite number of States, included two of importance in their bearing upon the question here under discussion. The Fifth Amendment reads as follows:

(5) 1 Story on Const., 5th Ed., Sec. 1782.
“Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.”

The Sixth Article is as follows:

“Article VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.”

The Judiciary Act provided for a Supreme Court composed of a Chief Justice and five Associate Justices. It divided the United States into thirteen districts, and provided for the establishment in each of those districts of a District Court, consisting of one Judge, to
reside in the District for which he is appointed, and the allocation of those districts among three Circuits, in each of which was established a Circuit Court, to be holden by two Justices of the Supreme Court and the District Judge of such District, two of whom should constitute a quorum. The jurisdiction of the District Courts was prescribed in the ninth section as follows:

"That the District Courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.

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And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.\(^{(6)}\)

Section 11 defined the jurisdiction of the Circuit Courts. They were given original cognizance, concurrent with the courts of the several States,

"of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where

\(^{(6)}\) 1 Stats. at L. 77.
this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein . . .”

The Circuit Courts were also given appellate jurisdiction from the District Courts, under regulations and restrictions in the Act provided.

The unlimited power vested in Congress by Section 1 of Article III, to establish inferior courts, has been exercised only to a limited degree. The Judiciary Act of 1789, as we have seen, established District and Circuit Courts. The Circuit Courts established by the Act of February 13, 1801, followed by the appointment of the so-called “midnight Judges” by President John Adams, were promptly legislated out of existence when the Jeffersonian Administration came into power, on March 8, 1802. Although there was some modification in the Circuit Courts as established by the Judiciary Act of 1789, no radical change was made in the system of Federal Courts created by the Judiciary Act of 1789, until the establishment of the Circuit Courts of Appeal by the Act of March 3, 1891.

The Court of Claims, created by the Act of February 24, 1855 (10 Stat. 612), in the true sense of the term, is not a court. It passes upon claims against the government, but its judgments
are only advisory, and rest for their execution upon the will of Congress in its appropriation acts. But, as Chief Justice Taney said, in the opinion he prepared for the case of Gordon v. United States (117 U. S. 697, 702):

"The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it."

The Court of Private Land Claims, established by the Act of March 3, 1891 (26 Stat. 854) falls within the same category. Neither of them can properly be called "inferior courts of the United States" within the meaning of Article III of the Constitution.

The Court of Customs Appeals, created by the Tariff Act of August 5, 1909, has also been held to be merely a legislative court (Ex Parte Bakelite Corporation, U. S. Supreme Court, May 20, 1929), though its status has again been thrown into doubt by the recent enactment of Congress (March 2, 1929, No. 914) giving it jurisdiction in patent cases.

The Commerce Court, established by the Act of June 18, 1910, was abolished by the Act of October 22, 1913 (38 Stat. 219). The Board of General Appraisers, under the Tariff Acts, has in recent times been called a court, and now is
designated by legislation the Customs Court,(7) but the decision in the Bakelite case treats it as another legislative court.

The District Courts of the United States remain the only courts of first instance in criminal matters. From an early day it has been settled that the only crimes of which the Federal courts have jurisdiction are those created by Acts of Congress, and consequently the only acts which Congress may make punishable as crimes, are those within the legislative powers conferred upon Congress by the Constitution. With the adoption of the Eighteenth Amendment, on January 29, 1919, followed by the enactment of the Prohibition Enforcement Law, October 28, 1919, a totally new volume of criminal jurisdiction has developed upon these Courts. The Amendment, in succinct but comprehensive terms, prohibited, after one year from the ratification of the Article,

"the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

The Prohibition Enforcement Law put in legislative form meticulous prohibitions against

(7) Frankfurter and Landis, "The Business of the Supreme Court."
manifold acts which might come within the intent, if not the express language of the Amendment, and created a wide range of offenses, many of which are of a character that in almost all of the States, would be dealt with in courts of limited and inferior jurisdiction, but which, under the Federal system, have served to clog the dockets of the district courts, and cause infinite delay in the enforcement of civil remedies in those tribunals.

Prior to the enactment of the so-called Jones Law, on March 2, 1929, many of the prohibited acts were declared to be misdemeanors and punishable with fines of from $500.00 to $1,000.00 and by imprisonment for from thirty days to twelve months.

The Fifth Amendment declares that no person shall be held to answer for an infamous crime unless on a presentment or indictment of a grand jury. In a general way, any act punishable by law as being forbidden by statute, or injurious to public welfare, is denominated a crime, but commonly the word is used only with respect to grave offenses. Blackstone says: (8)

“A crime or misdemeanor is an act committed or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and mis-

(8) IV Commentaries. Ch. 1, p. 5.
demeanors, which, properly speaking, are mere synonymous terms; though, in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of 'misdemeanors' only."

By the United States Code (Criminal Code and Criminal Procedure), Title 18, Part 2, Section 541, all offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors. It is well settled that all felonies, as thus defined, are infamous crimes, for which no person shall be held to answer unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. It is said to be equally well settled that misdemeanors punishable by fine or by terms of imprisonment not exceeding one year, unless there should be coupled with the punishment or imprisonment some specific provision making the particular misdemeanor infamous, are not infamous crimes within the purview of the Fifth Amendment, and may be prosecuted by information.\(^\text{(*)}\) So it has been

\(^{(*)}\) Falconi v. United States, 280 Fed. 766.
held that prosecution for the first offense of selling liquor, which by Section 29 of the National Prohibition Act is punishable by imprisonment not exceeding six months, without provision for sentence at hard labor, and which, therefore, is a statutory misdemeanor, under the Criminal Code, may be by information, and need not be by indictment. (10)

The Court in the last cited case appears to make the test that if the offense is not a felony by the statute and can be punished only by imprisonment for twelve months or less, without hard labor, it is a misdemeanor and not an infamous crime, and may be prosecuted by information without indictment.

The convenience of prosecution by information is especially obvious in those communities where the Grand Jury meets at rare intervals, say quarterly or even semi-annually. As a commentator on the recent legislation says:

"The only way by which the court calendars have been kept reasonably clear of trials for liquor law violations has been by avoiding jury trial, as a result of defendants pleading guilty."

Rarely, says the writer, does an accused person plead guilty unless he has something to gain by the plea. The accused violator of the

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(10) Cleveland v. Mattingly (Court of Appeals, D. C.), 287 Fed. 948; certiorari denied, 262 U. S. 744.
National Prohibition Act has something to gain. He dickers and fences with the prosecuting attorney. He will plead guilty provided the punishment is only a fine of such and such an amount. The attorney agrees.\(^{(1)}\)

By the Act of March 2, 1929, known as the Jones Act, supplementing the National Prohibition Act, it is provided:

"Sec. 1. That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 1, Title II, of the National Prohibition Act, the penalty imposed for each such offense shall be a fine of not to exceed $10,000 or imprisonment not to exceed five years, or both: . . ."

"Sec. 2. This Act shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense now provided by the said National Prohibition Act."

Section 29 of the National Prohibition Act provides:

"Any person who manufactures or sells liquor in violation of this Chapter, shall for the first offense be fined not more than $1,000, or imprisoned not exceeding six months."

This establishes a *maximum*, but not a *minimum* penalty for a first offense and therefore is not saved by Section 29 of the Prohibition Act.

There are a number of offenses specified in the Prohibition Law which are denominated misdemeanors and punishable by a fine of not more than $1,000, or imprisonment for not more than one year, or both.\(^{(12)}\) Whether or not misdemeanors punishable by imprisonment for twelve months and by a fine of $1,000 as a minimum, would be considered misdemeanors, which may be prosecuted by information only, is perhaps doubtful. The decisions upholding prosecution by information uniformly deal with “*petty misdemeanors*,” “*petty offenses*”; “smaller faults or omissions of less consequence.”

A more serious question arises with respect to the right of trial by jury, secured by Article III, Section 2, Clause 3, of the Constitution, in the prosecution of all crimes, except in case of impeachment, supplemented by the provisions of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. That the framers

\(^{(12)}\) See Supplemental Act, November 23, 1921, Sec. 6; National Prohibition Act, Sec. 24; Same, Title 3, Sec. 15, Sec. 20.
of the Constitution meant to limit the right of trial by jury in the Sixth Amendment to those persons who are subject to indictment or presentment in the Fifth, was declared by the Supreme Court in the case of *Ex parte Milligan*, 4 Wall. 2, 123. On the other hand, as had been pointed out by the Supreme Court in another case:(13)

"According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily, and without a jury; and, in respect to other offenses, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused."

There seems to be an abundance of authority on the point that in England, it has been the constant course of legislation for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of minor statutory offenses, and the same has been the practice in Pennsylvania, New Jersey, Vermont, Georgia and other States.(13a)

The same principle was asserted by the Supreme Court of the United States in the case of *Schick v. United States*,(14) in sustaining a

conviction for the violation of the provisions of the Oleomargarine Law, punishable by a penalty of $50 fine, for each offense, which was tried on information and by a court, upon waiver of a jury trial by the parties. The Court held that so simple a penalty for violating a revenue statute, indicated only a petty offense, and not one necessarily involving any moral delinquency. Mr. Justice Brewer, writing the opinion of the Court, said:

"The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors. . . . In such a case there is no constitutional requirement of a jury."

The Court held that the body of the Constitution does not include a petty offense of the character described. It must be read in the light of the common law. The Convention, in framing Article III of the Constitution, employed the language, "the trial of all crimes," instead of, as originally drafted, "the trial of all criminal offenses," shall be by jury. There is no public policy which forbids the waiver of a jury in the trial of petty offenses, because there was no constitutional or statutory provision or public policy which required a jury in the trial of
petty offenses. Here the penalty was very light. All of the Court but Harlan, J., agreed to the judgment.

In the case of the United States v. Praeger,\(^{(15)}\) District Judge Maxey, in Texas, held that where the punishment provided by Congress for the act under consideration was a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the Court, the parties had the right, under the authority of Schick v. United States,\(^{(16)}\) by written stipulation, to waive a jury.

In Frank v. United States,\(^{(17)}\) a violation of a section of the Food and Drug Act, which provided for no imprisonment, but merely a fine not exceeding $200, was held to be a petty offense, which did not require trial by jury.

In Coates v. United States,\(^{(18)}\) defendant was indicted for a violation of the National Prohibition Act on five counts: (1) for the unlawful possession of intoxicating liquors; (2) the unlawful possession of property designated for the manufacture of such liquor; (3) the actual manufacture; (4) the sale; (5) the maintenance of a nuisance where intoxicating liquor was being manufactured, kept, bottled and sold. He was convicted on the first, second, third and

\(\text{\footnotesize\footnotesize\footnotesize(15) 149 Fed. 474.}\)
\(\text{\footnotesize\footnotesize\footnotesize(16) 195 U. S. 65.}\)
\(\text{\footnotesize\footnotesize\footnotesize(17) 192 Fed. 864 (C. C. A. 6th Circ.).}\)
\(\text{\footnotesize\footnotesize\footnotesize(18) 290 Fed. 134 (C. C. A. 4th Circ.).}\)
fifth counts. It was held by the Circuit Court of Appeals for the Fourth Circuit that these offenses were crimes which could only be tried by a jury, and that the defendants could not waive a jury. Citing *Thompson v. Utah*, 170 U. S. 343.

In *Callan v. Wilson*, 127 U. S. 540, the Court said that there are offenses which are not crimes, and in them a jury may be dispensed with by consent. They are of the kind which the common law classes as petty, as well from the prevailing consequences which conviction of them would entail upon the one committing them, as from the lack of any substantial moral worthiness necessarily implied in their commission.

The question then becomes one of relativity, depending upon the seriousness of the charge. A prosecution for a first offense under Section 29 of the National Prohibition Act could probably be initiated by information, and tried without a jury. Certainly a jury might be waived in such a case. But for any other offense under the Act, including second offenses under Section 29, it is quite clear that the prosecution must be by indictment, and trial must be by a jury.

Trial by jury, the Supreme Court has held, is not simply trial by a jury of twelve men before an officer vested with authority to cause them
to be summoned and impanelled, to administer oaths to them and to the officer in charge, and to enter judgment and issue execution on their verdict,

"but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."(19)

Mr. Justice Gray, in writing the opinion in this case, cited an earlier decision where the Court said:

"Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion on questions of fact, provided only he submits those questions to their determination." (U. S. v. Philadelphia & Reading R. Co., 123 U. S., 113, 114.)

The fact that the guarantee of trial by jury secured by the Constitution of the United States necessarily implies, not only that the facts shall be determined by a jury of twelve men, but that

the trial must be conducted by a judge, with authority, in his discretion, whenever he thinks it necessary to assist the jury in arriving at a just conclusion, to comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts, is not always realized in discussions about trial by jury. It is a part of the guaranty of justice to the citizen, but it is also an obstacle in the way of establishing an inferior Federal Court of Criminal Justice, such as exists in many States, for the trial of even serious misdemeanors by the Court without a jury.

Moreover, the judicial power of the United States can be exercised only by the Supreme Court, or an inferior court established under the terms of the Constitution, and this implies that the Court must be presided over by a judge appointed in conformity with that instrument. Section 1 of Article III of the Constitution provides:

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

In view of these provisions, the Supreme Court has held that justices of the peace in the Dis-
strict of Columbia are not judges of inferior courts of the United States, as they are not appointed to that office during good behavior; and that trial by a jury before a justice of the peace, having been unknown in England or America before the Declaration of Independence, was not within the contemplation of Congress in proposing, or the people in ratifying, the Seventh Amendment to the Constitution. Therefore, it may be taken as settled that no prosecution of any violation of an act of Congress, including the National Prohibition Act, for any offense more serious than a minor misdemeanor, could be tried without a jury, or could be tried in any tribunal which cannot be characterized as an inferior court of the United States, within the meaning of the Constitution construed as above mentioned.

These limitations constitute serious obstacles to the establishment of a Federal court of inferior criminal jurisdiction for the disposition of violations of the National Prohibition Act. Not only do the restrictions as to trial by jury and as to indictment interfere, but the provision requiring trials to be held in the State where the crime shall have been committed, probably would make necessary such an extensive multiplication of courts as to amount to a practical embargo upon dealing with minor offenses.
under the existing Prohibition Laws in any other way than through the existing District Courts.

The policy of the Jones Act, which seeks to compel observance of the Prohibition Law by extremely rigorous penalties, probably will defeat itself through the consequences which it entails in requiring prosecution by indictment, and not by information, and trial by jury for almost all violations. This will mean one of two things: either a very large increase in the number of Federal Judges, or the continued embarrassment of civil litigants in the delays caused by the swelling tide of criminal indictments and trials under the Prohibition Act. In the Jones Act itself there was interjected a proviso which can be effective only as friendly counsel to the judiciary. It reads as follows:

“That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.”

Far more effective than such a counsel of perfection to the judiciary would it be, if Congress should discriminate in its legislation by providing specifically for the punishment of “casual or slight violations” of the law, by denoting them as misdemeanors or petty
offenses, and affixing to such offenses penalties which would not raise them above the grade of petty misdemeanors which may be prosecuted by information, and tried by a court without a jury. This would result in a more speedy and effective enforcement of the law upon all except those engaged in "habitual sales of intoxicating liquor or attempts to commercialize violations of the law." The latter being serious offenses against the social body, in violation of the Constitution and statute law, may be dealt with as other serious offenses are, by indictment and trial by jury.

Such a policy as that recommended was actually adopted by Congress in the District of Columbia Prohibition Law of March 3, 1917, which prohibited any person from directly or indirectly, in the District of Columbia, manufacturing or importing for sale or gift, selling, offering for sale, keeping for sale, trafficking in, etc., etc., any alcoholic or other prohibited liquors, for beverage purposes, and made any persons who should violate the provisions of the Act guilty of a misdemeanor, and upon conviction thereof, subject to be fined not less than $300 nor more than $1,000 and to be imprisoned in the District jail or work-house for a period of not less than thirty days or more than one year, for each offense. Other offenses against different pro-
visions of the Act were denominated misdemeanors and made punishable by fines of not less than $50 nor more than $300, or imprisonment in the jail or workhouse of the District for not more than six months (Sec. 3); and in various sections, offenses against provisions in the Act are declared to be misdemeanors punishable by fines in amounts of $50, $100, $300 and $500, as the case might be, and imprisonment in the District jail or workhouse for terms, in no instance exceeding twelve months, and in many instances being limited to from thirty days to six months. The Act was obviously drawn with a view to providing for its enforcement through punishment before a local magistrate by small fines or limited terms of imprisonment in the District jail or workhouse.

The theory of the later legislation developed through the opposition to the enforcement of the law which has been encountered since its enactment, has been to increase penalties until they have reached almost the same importance as those attributed to the most infamous crimes. It is yet to be demonstrated that respect for this law or for law in general shall be achieved by such policy.

Lord Bryce, in the *American Commonwealth*, says:

"The American Constitution is no exception
to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown so much the more enduring is it likely to prove."

The results of efforts to compel observance of particular laws by the imposition of extreme penalties, generally have proved unsatisfactory and it would seem probable that with respect to a law concerning which there is as much difference of opinion as the Prohibition Law, the existing legislative policy probably will not realize the objects of its enactment. A legislative scheme of small penalties, easily enforced, which would not leave it merely to the discretion of a judge in imposing sentence to discriminate between casual or slight violations and habitual sales of liquor, and attempts to commercialize violations of the law, while at the same time empowering him to impose penalties of an extremely rigorous character for the more serious category of offenses, would be far more effective in bringing about general observance of the prohibitory provisions. The history of the law is replete with failure to compel respect and compliance by excessive penalties. Not the possibility of severe punishment, but swift and sure penalty for violation compels obedience to law.

(2a) I Am. Com. p. 29.