sented, and which was there considered as clearly not within the statute. In the case of the *Cleveland* the transportation came within the letter of the statute, since the tourists were actually transported from one port in the United States to another port therein, via a foreign port or ports. But that case was held not to be within the spirit of the statute, because the real object of the voyage was the trip around the world. In the present case the transportation referred to—from a domestic port to a foreign port or into foreign waters and return—is, in my judgment, neither within the letter nor the spirit of the law.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

AUTHORITY OF PRESIDENT TO SEND MILITIA INTO A FOREIGN COUNTRY.

The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, and hence the President has no authority to call forth the organized militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation.

DEPARTMENT OF JUSTICE,
February 17, 1912.

SIR: I have the honor to respond to your note of the 8th instant, in which you ask my opinion upon the following question:

"Whether or not, under existing laws, the President has authority to call forth the organized militia of the States and send it into a foreign country with the Regular Army as a part of an army of occupation, especially should the United States intervene in the affairs of such country under conditions short of actual warfare?"

From very early times, in both England and this country, the militia has always been considered and treated as a military body quite distinct and different from the Regular or standing army, governed by different laws and

rules, and equally different as to the time, place, or occasion of its service. One of the most notable points of difference is this: While the latter was in the continued service of the Government and might be called into active service at all times and in all places where armed force is required for any purpose, the militia could be called into the actual service of the Government only in the few special cases provided for by law. Their service has always been considered as of a rather domestic character, for the protection and defense of their own country, and the enforcement of its laws.

This has always been the English doctrine, and in some instances acts of Parliament have expressly forbidden the use of the militia outside of the Kingdom.

Our ancestors, who framed and adopted our Constitution and early laws, got their ideas of a militia, its nature, and purposes from this, and must be taken to have intended substantially the same military body, with the same limitations of the occasion and nature of their service. If they had intended to enlarge this they would have said so, just as they have when they intended to further limit or restrict the occasion or nature of their service.

When the Constitution gives to Congress the power "to raise and support armies," and to provide "for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and makes the President "the Commander in Chief of the Army and Navy of the United States, and the militia of the several States when called into the actual service of the United States," it is speaking of two different bodies—the one the Regular Army, in the continuous service of the Government, and liable to be called into active service at any time, or in any place where armed force is required; and the other a body for domestic service, and liable to be called into the service of the Government only upon the particular occasions named in the Constitution. And acts of Congress relating to the Army and the militia must have the same construction.

It is certain that it is only upon one or more of these three occasions—when it is necessary to suppress insurrec-

tions, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.

As "insurrection" is necessarily internal and domestic, within the territorial limits of the Nation, this portion of the sentence can afford no warrant for sending the militia to suppress it elsewhere. And even if an insurrection of our own citizens were set on foot and threateningly maintained in a foreign jurisdiction and upon our border, to send an armed force there to suppress it would be an act of war which the President can not rightfully do.

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose. This may well be held to be within the meaning of the term "to repel invasion."

Then, too, if an armed force were assembled upon our border, so near and under circumstances which plainly indicated hostility and an intended invasion, this Government might attack and capture or defeat such forces, using either the Regular Army or the militia for that purpose. This, also, would be but one of the ways of repelling an invasion.

But this is quite different from and affords no warrant for sending the militia into a foreign country in time of peace and when no invasion is made or threatened.

The only remaining occasion for calling out the militia is "to execute the laws of the Union." But this certainly means to execute such laws where, and only where, they are in force and can be executed or enforced. The Constitution or laws of the United States have no extra-territorial force and can not be compulsorily executed beyond or outside of the territorial limits of the United States.

It is true that treaties made in pursuance of the Constitution are, equally with acts of Congress, the supreme law of the land; but their observance, outside of our own

jurisdiction, can not be enforced in the same way. The observance and performance, outside of our own jurisdiction, of treaty stipulations and obligations are left much to the honor, good faith, and comity of the other contracting party, reenforced, at times, by a regard for the consequences of a breach. We can not send either the Regular Army or the militia into a foreign country to execute such treaties or our laws. Such an invasion of a foreign country would be an act of war.

Outside of our own limits "the laws of the Union" are not executed by armed force, either regular or militia.

The Constitution had already given to Congress the unlimited power to declare war, at any time and for whatever cause it chose. It did not, in this provision, attempt the useless thing of giving to Congress an additional power to declare war, or to afford an additional ground for doing so.

What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsorily executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.

Under our Constitution, as it has been uniformly construed from the first, the military is subordinate and subservient to the civil power, and it can be called upon to execute the laws of the Union only in aid of the civil power and where the civil power has jurisdiction of such enforcement. Even the Regular Army can be thus called upon only on such occasions; and, certainly, the militia can not be thus called upon at any other.

Then, as the civil power is without force in a foreign country, and as even the Regular Army can not be sent into another country to there execute the laws of the Union, it follows that the Constitution confers no power to send the militia into a foreign country for the purpose stated in the question here considered. On the contrary, by its specific enumeration of the only occasions for calling out the militia, it clearly forbids this.

In all this I am not unmindful that nations sometimes do make hostile demonstrations and use armed force to compel the observance by another nation of its treaty obligations, and sometimes send armed forces into another country to protect the lives and rights of its own citizens there.

I shall briefly notice these in their application to our own country, its Constitution and laws. It will be observed, and as controlling and conclusive of the present question, that in case of a hostile demonstration against or a forcible attack upon another nation to enforce its treaty obligations, or to punish their infraction, there is no question involved of executing the laws of the invading nation, for such laws have no force or existence there. While the Constitution makes itself and the laws and treaties, in pursuance thereof, the supreme law of the land, it is only in our own land where such laws are supreme or of any force. As to the other contracting party, a treaty is a mere compact, depending for its observance upon the good faith, comity, or other moral considerations. The Constitution can not make itself or the treaties or laws made under it the supreme law of any other nation, or give to either any force or existence beyond our own borders. So that, when an armed force is used to compel the observance of treaty obligations, or to punish or obtain compensation for their violation, there is no question of executing any law of the Union, for there is no such law there. It is but the forcible compelling of the observance of an agreement, or compensation for its breach. The provision referred to does not warrant the use of the militia for this purpose.

Just so it is when, in troublous times, an army of occupation, large or small, is sent into a foreign country to protect the lives and the rights of our own citizens. Here, too, no law of the Union is being executed by such invasion, for no law of the Union exists or can be enforced there.

While it is the duty of every nation to afford proper protection to foreigners who are lawfully within its borders, yet this is not because of any law of the nation of

which such foreigners are subjects, for no such laws exist or have any force there. No one can say, in such a case, that we are executing or enforcing any law of the Union. We are but aiding or compelling the foreign Government to execute its own laws and to perform its own duty. As no law of the Union is being executed by such invasion, the militia can not be called out, under this provision, to take part in it. As no law of the Union can exist or be in force in any foreign country, the militia can not be called out to enforce any such law there.

The plain and certain meaning and effect of this constitutional provision is to confer upon Congress the power to call out the militia "to execute the laws of the Union" within our own borders where, and where only, they exist, have any force, or can be executed by any one. This confers no power to send the militia into a foreign country to execute our laws which have no existence or force there and can not be there executed.

If authority is needed for the conclusion here reached, the following may suffice:

In Ordronaux, Constitutional Legislation, page 501, it is said:

"The Constitution distinctly enumerates the three exclusive purposes for which the militia may be called into the service of the United States. These purposes are: First, to execute the laws of the Union; second, to suppress insurrection; and third, to repel invasions.

"These three occasions representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or of its Territories. * * * In the history of this provision of the Constitution, there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the General Government, was intended as a distinct limitation upon their employment.

"Being the ministers of the law to enforce its commands, they can only be summoned by the law-making power to act within the extent of its jurisdiction, and in the manner prescribed by the Constitution. They can not consequently, be used to invade the territory of a neighboring country, or to enforce any public rights abroad. * * *

"The militia of the States restricted to domestic purposes alone, are to be distinguished therefore from the Army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack of foreign enemies."

And Von Holtz, Constitutional Law, page 170, it is said, "the militia can not be taken out of the country."

In *Kneedler* v. *Lane* (45 Pa. St. 238, 276), Judge Strong, speaking for the court, said:

"Apart from the obligations assumed by treaty, it was well known that there are many cases where the rights of a nation and of its citizens can not be protected or vindicated within its own boundaries. But the power conferred upon Congress over the militia is insufficient to enable the fulfillment of the demands of such treaties, or to protect the rights of the Government, or its citizens, in those cases in which protection must be sought beyond the territorial limits of the country."

And see *Houston* v. *Moore* (5 Wheat. 1), and *Martin* v. *Mott* (12 Wheat. 19, 27).

It is true that the act of January 21, 1903, as amended by the act of Mar. 27, 1908 (35 Stat. 400), provides:

"That whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia, to be employed in the service of the United States, he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President."

But this must be read in view of the constitutional power of Congress to call forth the militia only to suppress insurrection, repel invasions, or to execute the laws of the

Union. Congress can not, by its own enactment, enlarge the power conferred upon it by the Constitution; and if this provision were construed to authorize Congress to use the Organized Militia for any other than the three purposes specified, it would be unconstitutional. This provision applies only to cases where, under the Constitution, said militia may be used outside of our own borders, and was, doubtless, inserted as a matter of precaution and to prevent the possible recurrence of what took place in our last war with Great Britain, when portions of the militia refused to obey orders to cross the Canadian frontier.

I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

PUBLIC PRINTER—ACCEPTANCE OF ESTIMATES FOR SUPPLIES SUBSEQUENT TO FINAL DATE FOR THE RECEIPT OF PROPOSALS.

Estimates furnished by the Public Printer, as provided for by section 2 of the act of March 3, 1883 (22 Stat. 527), for supplying the money-order service with forms and blank books, may be accepted which are submitted subsequent to the final date for the receipt of proposals from private bidders.

There is a clear distinction between proposals made by private bidders and estimates submitted by the Public Printer, and there is no statutory requirement that the latter shall be submitted before or at the time the former are made.

DEPARTMENT OF JUSTICE,
February 19, 1912.

SIR: I have the honor to acknowledge receipt of your letter of the 10th instant, with inclosures, in which my opinion is requested as to whether you can lawfully ac-