

1941

# Civil Safeguards before Courts-Martial

Stanley Law Sabel

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Sabel, Stanley Law, "Civil Safeguards before Courts-Martial" (1941). *Minnesota Law Review*. 2331.  
<https://scholarship.law.umn.edu/mlr/2331>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## CIVIL SAFEGUARDS BEFORE COURTS-MARTIAL

By STANLEY LAW SABEL\*

THE United States is now facing a military effort which will result at least in an enlarged army composed in the main of conscripts. The Selective Training Service Act of 1940<sup>1</sup> fairly insures that men called into the armed forces through its operation will represent a cross section of the population.<sup>2</sup> Those called will thus be average Americans accustomed to civil life and to the protection afforded by democratic processes; they will not necessarily be those most suited by temperament to military discipline. The need from this point of view of applying the military law, to which they will be subject from the time they are inducted into service,<sup>3</sup> in such a way as to take away as few as possible of their civil safeguards is apparent.

On the other hand there are forces in the world today that increase greatly the tempo of warfare. The speed of modern invasion is not entirely a matter of mechanical process. The blitzkrieg preys on decreased resistance by making use of every possible device to undermine the will to fight. Effective discipline is more necessary than ever to prevent such destruction of morale.

The needs of an effective fighting force on the one hand and the essential elements of democracy on the other are thus the interests which must be balanced by our military law. This law is the subdivision of military jurisdiction which deals with the internal control of the military establishment.<sup>4</sup> The other two subdivisions,<sup>5</sup> namely military government of occupied territory,<sup>6</sup>

---

\*Although the writer is a Reserve Officer in the United States Army the views herein expressed are in all respects his own and do not necessarily represent those of the Army.

<sup>1</sup>54 Stat. at L.

<sup>2</sup>Idem sec. 10.

<sup>3</sup>Idem sec. 11.

<sup>4</sup>1 Kent, *Commentaries on American Law* (14th ed. 1896) 341 note (a). *Frazier v. Anderson*, (C.C.A. 8th Cir. 1924) 2F. (2d) 36; *Crouch v. United States*, (C.C.A. 9th Cir. 1926) 13 F. (2d) 348.

<sup>5</sup>See a discussion of the three classifications in *Hatcher, Martial Law and Habeas Corpus*, (1940) 46 W. Va. L. Q. 187, and *Ex parte Milligan*, (1866) 4 Wall. (U.S.) 2, 127, 18 L. Ed. 281.

<sup>6</sup>Such government generally makes broad use of the existing civil courts reserving to the military tribunals the government of the military forces and authority over those acts by civilians which affect or impair the success of the military objective. Jones, *Military Occupation of Alien Territory in Time of Peace*, in *Problems of Peace and War*, 9 Transactions of the Grotius Society (1923) 149.

and control by martial law of the civil population<sup>7</sup> are outside the scope of this article, except in so far as civilians do some acts affecting the armed forces, such as committing certain types of contempt of military tribunals,<sup>8</sup> or are charged with a wartime offense, such as acting as a spy.<sup>9</sup> Courts-martial administer military law, and in the case of the army<sup>10</sup> are governed by the Articles of War<sup>11</sup> and the Manual for Courts-Martial prescribed by executive order.<sup>12</sup> The former, codified in 1920<sup>13</sup> in substantially their World War I form, and the latter, practically unchanged since its issuance in 1927,<sup>14</sup> should be reconsidered in the light of present-day conditions.

As we shall see, courts-martial apply most of the safeguards with which we are familiar in Anglo-American common criminal law. These safeguards in many cases balance the interests of the innocent against the future victims of the guilty.<sup>15</sup> Are our traditional views justified when whole nations may be the victims of the Quislings, Petains and Mosleys? Yet in streamlining our military procedure we must not lose sight of the essential rights of the individual.

Of the fifteen main safeguards surrounding civilian criminals, which we shall take up, only two need no discussion; the rest

---

<sup>7</sup>Ex parte Milligan, (1866) 4 Wall, (U.S.) 2, 18 L. Ed. 281; Pollock, What Is Martial Law?, (1902) 18 Law Q. Rev. 157. Its constitutional justification is necessity. Luther v. Borden, (1849) 7 How. (U.S.) 1, 12 L. Ed. 581.

<sup>8</sup>This is so in peace as well as war time but only as to certain types of direct contempt; the statute limits a court-martial's power to punish for contempt to punishment of one "who uses menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder . . ." 41 Stat. at L. 793, 10 U. S. C. A. sec. 1503, 10 F. C. A. sec. 1503, Article of War No. 32. cf. United States v. Praeger, (D. Tex. 1907) 149 Fed. 474 and, 41 Stat. at L. 791, 10 U. S. C. A. sec. 1494, 10 F. C. A. sec. 1494, Article of War No. 23 as to punishment as a federal crime for a civilian to refuse to testify before a court-martial.

<sup>9</sup>United States v. McDonald, (E.D. N.Y. 1920) 265 Fed. 754 appeal dismissed per stipulation (1921) 256 U. S. 705, (1921) 41 Sup. Ct. 535, 65 L. Ed. 1180.

<sup>10</sup>Similar articles providing for the government of the Navy are found in 12 Stat. at L. 600, 34 U. S. C. A. sec. 1120, 34 F. C. A. sec. 1200.

<sup>11</sup>Set forth by 41 Stat. at L. 787 et sequi and amendments thereto as chapter 36 of Title 10 of the U. S. C. A. (secs. 1472 to 1593), 10 F. C. A. secs. 1472 to 1593. Hereinafter cited: A. W. No. — their statute and code citations are readily determined.

<sup>12</sup>Prescribed by President Coolidge November 29, 1927, pursuant to chapter II of 41 Stat. at L. 759. Hereinafter cited: M. C. M. par —.

<sup>13</sup>See note 11 supra.

<sup>14</sup>See note 12 supra.

<sup>15</sup>So, too, reform of the individual is often placed above protection of society. See for example, Cohen, Moral Aspects of the Criminal Law, (1940) 49 Yale L. J. 987.

have been or we think might be modified as they are applied by military courts.

### 1. NOTICE AND OPPORTUNITY TO BE HEARD

The twin requirements of all judicial process,<sup>16</sup> notice of the proceedings and an opportunity to be heard, are substantially the same as in civil courts.<sup>17</sup> No one would advocate courts-martial without notice and hearing. Even the Russian trials had as much.<sup>18</sup>

### 2. CONFRONTATION

The requirement that one be confronted by his accusers in the case of courts-martial is subject to one large exception. Depositions, in cases where a witness is absent due to certain stated causes, may be used by the prosecution in cases "not capital."<sup>19</sup> The phrase "not capital" has been interpreted as meaning not only cases where capital punishment is not authorized by law, but also cases where crimes capital by law are not so punishable by present regulations.<sup>20</sup> Thus most cases in time of peace are triable by deposition. Yet in wartime, when it becomes more important not to remove witnesses from important commands or duties, the use of the deposition would be less because of the greater number of crimes which become capital. This can be illustrated by taking a simple case of a soldier assaulting or willfully disobeying his superior officer. Under the applicable Article of War this is punishable by death or such punishment as a court-martial may direct.<sup>21</sup> It is thus a capital offense. However punishment which may be applied under present regulations is limited to a maximum of

<sup>16</sup>Notice and hearing are viewed as essential attributes of administrative action when such action partakes of a judicial nature. McDermott, *To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts*, (1939) 25 A. B. A. J. 453.

<sup>17</sup>M. C. M. pars. 55, 75c, 76.

<sup>18</sup>Such defendants as reached trial were present and allowed to address the court. Mann, *Totalitarian Justice: Trial of Bukharin, Rykov, Yagoda, et al*, (1938) 24 A. B. A. J. 970. If as contended by some writers (See Gunther, *Inside Europe* (War ed. 1940) 553) the real trial in the U. S. S. R. is the proceeding preliminary to the indictment, in form similar to that followed by the former French Republic, even then the accused is notified and allowed to be present at this type of inquisitorial procedure. See Keedy, *The Preliminary Investigation of Crime in France*, (1940) 88 U. of Pa. L. Rev. 385, 692. (Part V Investigation by the Juge D'Instruction).

<sup>19</sup>A. W. 25. Although there is no constitutional objection thereto only a few states have statutes authorizing depositions to be taken and used by the prosecution. Wigmore, *Evidence* (3d ed. 1940) sec. 1398.

<sup>20</sup>M. C. M. par. 119.

<sup>21</sup>A. W. 64.

five years confinement at hard labor, dishonorable discharge and forfeiture of all pay and allowances due and to become due.<sup>22</sup> Thus while this maximum limitation is in effect depositions may be used by the prosecution at a trial involving this offense. Upon the outbreak of war or grave public emergency, the maximum limitation no longer would be in effect;<sup>23</sup> the offense would thus become capital and not properly triable by deposition on the part of the prosecution over the objection of the accused. We do not believe that decreasing the use of depositions in emergencies is the way to deal with the problem. It would be better to allow the prosecution to use depositions when necessary in all cases in time of war.

### 3. PROTECTION AFFORDED BY THE OATH

An oath is administered to witnesses in the usual manner.<sup>24</sup> Likewise a witness who does not believe in the sanctity of an oath may affirm.<sup>25</sup> Each witness takes the oath<sup>26</sup> or affirmation<sup>27</sup> separately from the others. In this respect the practice differs from that prevailing in some states of swearing witnesses en masse.

Oaths or affirmations are required in each case of the members of the court and the personnel of the prosecution as a requisite to service.<sup>28</sup> This is in addition to any oath that may have been taken on voir dire examination as to their competency.<sup>29</sup> It is like renewing an oath of office. This repetition of the official oath, especially when the same court tries several cases, seems needlessly time consuming. As pageantry it may make the accused not only get but also feel that he is getting a fair trial. To thus assuage feeling at the expense of time, though possibly trivial, is waste which should be eliminated.

The final aspect of the oath as one of the pillars of the hearsay rule we reserve for treatment in the next sub-topic in which we touch on this exclusionary rule of evidence.

### 4. OPPORTUNITY TO CROSS-EXAMINE

The technical federal rule<sup>30</sup> which limits cross examination, except such as seeks to discredit the witness, to matters having

<sup>22</sup>M. C. M. par. 104 c.

<sup>23</sup>M. C. M. par. 104. The provision prescribing the maximum punishment so provides.

<sup>24</sup>A. W. 19.

<sup>25</sup>A. W. 19.

<sup>26</sup>M. C. M. Appendix 6.

<sup>27</sup>M. C. M. Appendix 6.

<sup>28</sup>A. W. 19; M. C. M. par. 95.

<sup>29</sup>A. W. 19; M. C. M. par. 95.

a bearing upon the testimony of that particular witness on direct examination is followed by courts-martial.<sup>31</sup> Without wishing to engage in a detailed discussion of conflicting rules of evidence, we nevertheless prefer the more liberal rule which allows cross-examination as to all matters relevant to the case.<sup>32</sup> It does away with such questions as when does a witness become artificially a witness for the side not calling him so as to "bind" that side by his answer, and its tactical corollary of when to open up certain issues on direct.<sup>33</sup> In short it favors bringing out all pertinent facts regardless of which side has the cleverer advocate. These thoughts seem especially pertinent in trials military. Purely military offenses are apt to have two main issues, one the applicable orders, and two, what was done. Technical questions as to the extent that witnesses on one issue may be cross-examined on the other are apt to arise. Though this question, like others relating to the admissibility of evidence, is decided for the court by the law member thereof<sup>34</sup> it offers opportunity for delay, and the law member, though preferably a member of the Judge Advocate General's Department, is not necessarily so.<sup>35</sup> It makes one more question to be kept in mind by the reviewing authority. Furthermore the trial judge advocate and the defense counsel, especially the latter, and especially when in combat zone, are not necessarily skilled military or civil lawyers. Without further laboring the point we feel the simpler rule allowing cross-examination as to any relevant issue in a case should be adopted.

The safeguard afforded by cross-examination in testing the credibility of testimony is generally viewed as the main foundation of the hearsay rule.<sup>36</sup> The hearsay rule and its exceptions are fully applicable before courts-martial.<sup>37</sup> Yet the rationale of the exclusionary rules has been placed on broader grounds than cross-examination; "the admissibility of evidence varies directly with its probative force and the absence of better evidence on the point, and inversely with its prejudicial effect and tendency to occupy

<sup>30</sup>6 Wigmore, Evidence (3d ed. 1940) sec. 1886.

<sup>31</sup>M. C. M. par. 121b.

<sup>32</sup>Wigmore, Evidence (3d ed. 1940) sec. 1888; Note, (1937) 5 U. of Chi. L. Rev. 116.

<sup>33</sup>Wigmore, Evidence (3d ed. 1940) sec. 1888; Note, (1937) 5 U. of Chi. L. Rev. 116.

<sup>34</sup>A. W. 31; M. C. M. par. 51d.

<sup>35</sup>A. W. 8.

<sup>36</sup>Wigmore, Evidence (3d ed. 1940) sec. 1362.

<sup>37</sup>M. C. M. par. 113.

time."<sup>38</sup> This broad recognition of the necessity as an important reason for the exceptions<sup>39</sup> might well be extended to wartime conditions.

The chance, greatly magnified by war, that death will make a witness unavailable should be recognized. The same condition, such as a sudden disorganization of the lines, as causes the demise of the witness may make the need for enforcing discipline the more imperative. Elsewhere in the combat zone, even though outside of the actual theatre of operations, casualties will occur with a frequency that is bound to affect the availability of witnesses. A rule that would make admissible in evidence all hearsay statements by witnesses since deceased should be adopted.<sup>40</sup> The circumstances surrounding the utterance would of course affect its weight. Possibly some limit should be made as to how far capital punishment should follow convictions based on uncorroborated hearsay. Nevertheless hearsay evidence is probative,<sup>41</sup> and in many cases might be corroborative evidence determinative of the outcome. Once the rule admitting such testimony became generally known throughout the armed forces, it might even make for greater care in at least official extra-judicial assertions.

## 5. GRAND JURY INDICTMENT AND JURY TRIAL

The exemption of "cases arising in the land and naval forces" from the requirement as to presentment and indictment by a grand jury together with proceeding without petit jury are probably the chief characteristics of military law.<sup>42</sup>

---

<sup>38</sup>Chafee, Jr., *The Process of the Law, 1919-1922 Evidence II*, (1922) 35 Harv. L. Rev. 428, 433. See James, *The Role of Hearsay in a Rational Scheme of Evidence*, (1940) 34 Ill. L. Rev. 788.

<sup>39</sup>5 Wigmore, *Evidence* (3d ed. 1940) sec. 1421.

<sup>40</sup>Massachusetts, *General Laws* (Ter. ed. 1931) ch. 233, sec. 65 provides: "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." See critical analysis approving this provision based upon questionnaires sent practicing attorneys, *The Law of Evidence, Some Proposals for Its Reform* (Commonwealth Fund, 1927).

<sup>41</sup>James, *The Role of Hearsay in a Rational Scheme of Evidence*, (1940) 34 Ill. L. Rev. 788.

<sup>42</sup>The exception in the case of the grand jury is in the fifth amendment of the United States constitution. In the case of the petit jury guaranteed in the sixth amendment for all "criminal prosecutions" it has been held that "the right of trial by jury guaranteed by the sixth amendment is limited to persons who were subject to indictment under the fifth, which does not apply to cases arising in the land and naval forces." *In re Waidman*, (D. Maine 1930) 42 F. (2d) 239, 240; *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 Sup. Ct. 224, 65 L. Ed. 469.

Just as some states have substituted information of the state's attorney for indictment,<sup>43</sup> there is an army substitute, namely an impartial investigation.<sup>44</sup> The accused is allowed to be present at such investigation,<sup>45</sup> and is given a chance to cross-examine witnesses against him and present evidence in his own behalf.<sup>46</sup>

It is largely this dispensing with grand and petit jury action that prevents military law from extending to civilians outside of the actual combat zone within the continental United States.<sup>47</sup> Some progress was made during World War I in getting away from this restriction as to purely military offenses.<sup>48</sup> Further liberalization of this restriction in cases of purely military offense or recognition of a broader combat zone wherein civilians are subject to military law will be necessary if war comes to our shore.<sup>49</sup>

As the constitution does not extend in toto to occupied terri-

<sup>43</sup>Lem Woon v. Oregon, (1913) 229 U. S. 586, 33 Sup. Ct. 783, 57 L. Ed. 1340; People v. Bird, (1931) 212 Cal. 632, 300 Pac. 23.

<sup>44</sup>A. W. 70; M. C. M. par. 35.

<sup>45</sup>A. W. 70; M. C. M. par. 35; cf. practice before grand jury in civilian criminal law where it is held that the person under investigation has no right to appear and testify. United States v. Bolles, (D. Mo. 1913) 209 Fed. 682.

<sup>46</sup>A. W. 70.

<sup>47</sup>While these privileges exist martial law with the suspension of the writ of habeas corpus is the only way they can be abridged. This is normally "confined to the locality of actual war." Ex parte Milligan, (1866) 4 Wall, (U.S.) 2, 127, 18 L. Ed. 281.

<sup>48</sup>United States v. McDonald, (E.D. N. Y. 1920) 265 Fed. 754). (Spying—the defendant, however, was a German naval officer who had come to the United States in November, 1916), cf. (1918) 31 Ops. Atty. Gen. 356:

"A person apprehended upon United States territory not under martial law, who had not entered any camp, fortification, or other military premises of the United States and who had not come through the fighting lines or field of military operations, cannot be tried by a military tribunal, and to such a case sec. 1343 of the Revised Statutes and A. W. 82 cannot constitutionally be applied."

<sup>49</sup>One of the lessons taught by this [World War I] war is that the ocean is no longer a barrier or an insurance against America's being involved in European wars. She cannot now become an asylum of safety for spies. This War was not carried out by naval and military forces only. Intrigues played a large part. New and useful methods of communication with the enemy were devised and in existence which did not exist in any other wars. Wireless telegraphy, signaling by light, the successful use of carrier pigeons, were found to be useful instruments of warfare by the Germans. These methods of operation and assistance created a greater danger flowing from the activities of spies. Their existence in our midst helped propaganda for unrest, suspicion, created doubts of victory, and made it possible to place bombs on ships sailing from this port" reasons advanced by Manton, J. in United States v. McDonald, (E.D. N.Y. 1920) 265 Fed. 754, appeal dismissed per stipulation, (1921) 256 U. S. 705, 41 Sup. Ct. 530, 65 L. Ed. 1180, for holding New York within the field of active operations in World War I.



tory,<sup>50</sup> dispensing with the jury will not affect necessary application of military law incidental to military government.

Realistically considered, a general court-martial consisting of at least five members has some of the characteristics of a petit jury. They determine facts and in this respect they perform the functions of jurors. However the differences are apparent, as they determine sentence, have a vote on some interlocutory matters and, of course, are a more expert homogeneous body of men than is generally found in the jury box. The analogy is more closely to that of a multi-judge court sitting without a jury.<sup>51</sup> Actually they are like the various fact finding boards found in other phases of administrative law. This constitutes added reason applying throughout our whole discussion for not surrounding them with rules of procedure and evidence which are largely offshoots of the jury system.<sup>52</sup> Furthermore it would thus seem as noted later on that as experts greater finality could safely be given their decision than is given to that of a petit jury.<sup>53</sup> As military jurisprudence antedated other phases of administrative law, it is probably an historical accident that so far has prevented the growth of rules based on such considerations.<sup>54</sup>

We think greater use of administrative ability could be made by having certain officers fitted for this duty sit almost continuously as a court in the case of a field army or other large command. They would thus become more expert in the judicial process, thus enabling their actions to be made more summarily as necessity demanded.

## 6. HABEAS CORPUS

There is no provision in army procedure whereby the accused himself can summarily test before a military tribunal the legality of his detention. To this extent the writ of habeas corpus may be

---

<sup>50</sup>Balzac v. Porto Rico, (1922) 258 U. S. 298, 42 Sup. Ct. 343, 66 L. Ed. 627.

<sup>51</sup>Page, Military Law—A Study in Comparative Law, (1919) 32 Harv. L. Rev. 349, 372, sees an analogy between the court-martial and the *judex* of Roman law.

<sup>52</sup>See Stephan, The Extent to Which Fact-Finding Boards Should be Bound by Rules of Evidence, (1938) 24 A. B. A. J. 630.

<sup>53</sup>See McDermott, To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?, (1939) 25 A. B. A. J. 453.

<sup>54</sup>This is especially odd in view of the fact that the powers delegated to the secretary of war by the River and Harbor Act were among the first examples of administrative law in this country recognized as such by the courts, *Union Bridge Co. v. United States*, (1907) 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *Monongahela Bridge Co. v. United States*, (1909) 216 U. S. 177, 30 Sup. Ct. 367, 54 L. Ed. 408.

viewed as suspended as to persons subject to trial by courts-martial.

There are several provisions which take the place of the writ and effectively assure speedy trial and prevent unlawful detention. The Articles of War provide that where the accused is in arrest or confinement immediate steps should be taken to bring him to trial or to dismiss the charges.<sup>55</sup> It is a military offense punishable by court-martial to delay unnecessarily investigating or carrying a case to final conclusion.<sup>56</sup> The commanding officer is required to forward the charges to the authority which appointed the court within eight days if practicable, and if not practicable to report the reason for the delay.<sup>57</sup> In view of the necessity of soundness of discipline in any effective fighting force, there is no need to give the accused further rights, as these provisions are ample for his protection without interfering with effective handling of emergencies.

State courts are without jurisdiction to inquire into the legality of restraint where it appears that the custody is by virtue of the authority of the United States.<sup>58</sup> This rule arising from dual sovereignty received early recognition, and the mere announcement that the detention is because of the authority of the United States is sufficient answer to any attempt to exercise the authority of the writ.<sup>59</sup>

Where the writ is issued from any United States court a return will have to be made,<sup>60</sup> but the army detention in the usual case would be viewed as valid. To this extent the writ of habeas corpus still exists, but except in extremely rare cases<sup>61</sup> would test nothing other than whether or not the person detained was subject to military law. Even this limited interference should not be allowed in time of great emergency.

---

<sup>55</sup>A. W. 70 paragraph 4.

<sup>56</sup>A. W. 70 par. 4.

<sup>57</sup>A. W. 70 par. 4.

<sup>58</sup>*Ableman v. Booth*, (1858) 21 How. (U.S.) 506, 16 L. Ed. 169.

<sup>59</sup>*Tarble's Case*, (1871) 13 Wall. (U.S.) 397, 20 L. Ed. 587.

<sup>60</sup>The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course, and on the return made to it the court decides whether the party applying is denied the right of proceeding any further. *Ex parte Milligan*, (1866) 4 Wall. (U.S.) 2, 18 L. Ed. 281; 14 Stat. at L. 385 (1867), 28 U. S. C. A. sec. 455, 28 F. C. A. sec. 455.

<sup>61</sup>Such as *Kahn v. Anderson*, (1921) 255 U. S. 1, 41 Sup. Ct. 224, 65 L. Ed. 469. The court on habeas corpus considered the competency to sit of the members of the court-martial as having a bearing on a possible lack of jurisdiction.

## 7. DOUBLE JEOPARDY

The main protection in the privilege against double jeopardy need not be questioned for our purposes. This protection applies in trials before courts-martial much as in ordinary criminal trials,<sup>62</sup> and its abolition would seem to do little to make discipline more effective.

The army plea of former jeopardy is affected by our federal system of government. Thus the same act can constitute a crime against the state and against the United States. Court-martial trial gives immunity against conviction by United States courts and vice versa, but is not affected by and does not affect state trial.<sup>63</sup> This is rather silly, and the extent of the privilege should not depend upon such accidents of locality.<sup>64</sup> Any thorough-going revision of our military law should consider making this privilege more uniform. We think it would be best to apply it only as between army courts, and not let trial by court-martial be affected by or affect earlier or later trials even in United States courts.<sup>65</sup> This is so that minor civil irregularities may not affect a soldier's use in emergencies, and yet a minor military punishment which still leaves him available for service should not, as we view it, exempt him forever from the civil courts.

## 8. RIGHT TO COUNSEL

The right of the accused to counsel is preserved in trial by courts-martial in a form only slightly different from that prevailing in civil law generally.<sup>66</sup> As in any criminal trial the accused may have civil counsel of his own selection if he provides this himself.<sup>67</sup>

Military counsel (not necessarily a lawyer or member of the Judge Advocates General's Department) selected by the accused

---

<sup>62</sup>A. W. 40; M. C. M. par. 68.

<sup>63</sup>M. C. M. par. 68.

<sup>64</sup>See Lerner, *Double Jeopardy and the Concept of Identity of Offense*, (1937) 7 Brook. L. Rev. 79; Grant, *Penal Ordinances and the Guaranty Against Double Jeopardy*, (1937) 25 Geo. L. J. 293.

<sup>65</sup>The answer to the constitutional question is the same as with that for jury trial namely that constitutional guarantees only apply to persons who are entitled to indictment under the fifth amendment. See note 42, *supra*. The power is derived from the grant to Congress in article I, section 8 of power "to make rules for the government and regulation of the land and naval forces."

<sup>66</sup>A. W. 17; M. C. M. pars. 43, 44 and 45.

<sup>67</sup>"Civilian counsel will not be provided at the expense of the government." M. C. M. par. 45a.

will be provided only "if such counsel be reasonably available."<sup>68</sup> Determination of the availability of counsel is left to the officer who has authority to detail the person selected.<sup>69</sup> Decision as to availability is subject to revision by appeal to the superior of the officer making the decision.<sup>70</sup>

The defense counsel (and assistant defense counsel where trial is by general court-martial) is always appointed for the full term of the court.<sup>71</sup> Such counsel is in many respects analogous to the public defender appointed in many communities in that he is available in all cases.<sup>72</sup> However, the military protection goes further in that if the accused has individual counsel the defense counsel appointed for the court will if the accused so desires act as associate counsel.<sup>73</sup>

In serious criminal cases most states as well as the federal government have provisions for counsel assigned by the court where a criminal defendant is not otherwise represented. Other than the provision for defense and assistance defense counsel (who are not necessarily lawyers or officers in the Judge Advocate General's Department) and military counsel if available, there is in military law no provision for assigned counsel at government expense, no matter how grave the case. The partial relaxation of the right of counsel seems necessary to meet military exigencies.<sup>75</sup> The only respect in which the provisions as to counsel need re-examination is in connection with the right of an accused to appeal decisions as to the availability of military counsel requested. Although ordinarily this is not very important, in times of great emergency it would offer an accused an added chance for delay.<sup>76</sup> By proper selection of the counsel requested, an accused could secure the right of appeal, if his request were denied, to a distant

---

<sup>68</sup>A. W. 17.

<sup>69</sup>M. C. M. par. 45a.

<sup>70</sup>M. C. M. par. 45a.

<sup>71</sup>A. W. 11.

<sup>72</sup>Goldman, Public Defenders for the Poor in Criminal Cases, (1940) 26 Va. L. Rev. 275.

<sup>73</sup>M. C. M. par. 45a.

<sup>74</sup>United States v. Hiatt, (D. Pa. 1940) 33 F. Supp. 545.

<sup>75</sup>Relaxing the safeguard in the sixth amendment of the constitution is justified by the power of Congress over the armed forces. See Note 65, supra.

<sup>76</sup>"Application, through the usual channels, for the detail of a person selected by the accused as military counsel may be made by the accused or anyone on his behalf. When the application reaches an officer who is authorized to make the detail and order any necessary travel, he will act thereon. *His decision is subject to revision by his immediate superior on appeal by or on behalf of the accused.*" M. C. M. par. 45a. [Italics added.]

officer from whom the command for which the court was appointed might be isolated. We think such appeals should not be allowed in time of great emergency.

#### 9. COMPULSORY PROCESS TO OBTAIN DEFENSE WITNESSES

The provisions governing compulsory process for the attendance of defense witnesses closely parallel those found in criminal procedure generally.<sup>77</sup> The only important difference lies in the fact that the trial judge advocate through whom the defense secures the issuance of the necessary subpoenas may sometimes refuse to issue this process. Thus where the proposed testimony is immaterial or unnecessary, or a deposition would fully answer the purpose with less expense and inconvenience, the compulsory process may not be had.<sup>78</sup> The ultimate decision is for the appointing authority before the court convenes and thereafter for the court.<sup>79</sup> Inasmuch as the cases in which a deposition may be taken include that where a witness because of reasonable cause is unable to appear and testify in person,<sup>80</sup> this exception to the issuance of compulsory process takes care of any military necessity.

In one respect the accused before a court-martial is fortunate in that process for the attendance of witness runs to any part of the United States, its territories and possessions.<sup>81</sup> This safeguard is thus as broad as it could possibly be, subject to the necessary exception that takes care of military exigencies. We could leave it in its present form.

---

<sup>77</sup>A. W. 22; M. C. M. par. 97.

<sup>78</sup>M. C. M. par. 97a. The accused is given greater rights than before the typical federal administrative agency where the board is usually given greater discretion than this. See Note, Subpoenas and Due Process in Administrative Hearings, (1940) 53 Harv. L. Rev. 842, 847.

<sup>79</sup>Ibid.

<sup>80</sup>A. W. 25.

<sup>81</sup>A. W. 22. In the federal courts in spite of the sixth amendment of the United States constitution it is only a "person who is indicted of treason or other capital crime" who has the same absolute rights as the prosecution namely to have process for the attendance of witnesses run into any district. 1 Stat. at L. 118, 18 U. S. C. A. sec. 563, 18 F. C. A. sec. 563 which gives such accused the rights given the prosecution by 42 Stat. at L. 848, 28 U. S. C. A. sec. 654, 28 F. C. A. sec. 654. Other defendants are left to their rights under the constitution such as it may be. 9 Hughes, Federal Practice, Jurisdiction and Procedure (1931) sec. 7100. The states generally have gotten no further than the using of compulsion for the return of witness wished by the prosecution. See Snyder, Compelling the Attendance of Witnesses From Without the State in Criminal Trials, (1937) 85 U. of Pa. L. Rev. 717.

## 10. SEPARATION OF THE FUNCTIONS OF COURT AND PROSECUTOR

The modern innovation in administrative law of having the same individual or body act as both prosecutor and judge has been applied in only a few situations in connection with courts-martial. The impartial investigation (analogous to an information or indictment by a grand jury) which precedes the trial is conducted by a single officer who both calls and examines witnesses and determines whether or not to recommend trial.<sup>82</sup> Likewise, in the case of cases on review after conviction, the same body often acts as court and counsel.<sup>83</sup> These reviews, as we will see, follow automatically, and are generally without benefit of counsel either for the prosecutor or the accused. Finally, summary courts-martial consist of a single officer acting as prosecutor, judge and jury.<sup>84</sup> These courts deal only with extremely minor offenses. As they cannot order confinement in excess of one month and have jurisdiction over only certain enlisted men in the lower ranks, they are not important for our purposes.<sup>85</sup> They are an adjunct to discipline rather than tribunals for the consideration of major offenses, and as such we have disregarded them throughout this article. Our attention has been confined to special, and in the main to general courts-martial. These, of course, have separate trial judge advocates who act as prosecutors, and in the case of a general courts-martial one or more assistant trial judge advocates.<sup>86</sup> Further provisions are made to secure separation of the two functions by prohibiting members of the court, trial judge advocates and their assistants and also the defense counsel from acting, in the same case, as the staff judge advocate who advises the reviewing or confirming authority.<sup>87</sup>

Whatever justification there may be in other fields for combining the functions of prosecutor and judge where only a limited number of experts are available for a large task,<sup>88</sup> there seems to

<sup>82</sup>A. W. 70, M. C. M. par. 35.

<sup>83</sup>M. C. M. pars. 87 and 88.

<sup>84</sup>A. W. 10; M. C. M. par. 5. The court may also be the appointing authority and accuser. *Id.* a.

<sup>85</sup>A. W. 14. They may also order restriction to limits up to three months and forfeiture or detention of up to two-thirds of one month's pay. Persons above private first class in the army are exempt from summary courts-martial except noncommissioned officers below technical sergeant may be so tried if they do not object or if such trial be ordered by an officer competent to order trial by general court-martial. M. C. M. par. 16.

<sup>86</sup>A. W. 11.

<sup>87</sup>A. W. 11.

<sup>88</sup>Landis, *Crucial Issues in Administrative Law*, (1940) 53 Harv. L. Rev. 1077, 1080.

be no reason for extending this innovation further into military law. It would certainly prevent an accused from feeling he was getting a fair trial,<sup>89</sup> and seems to us much like the Gestapo at its worst.<sup>90</sup> At any rate, possibly because we do not think human nature makes one capable of acting efficiently as prosecutor and judge in the same case, we think it would be unfortunate if this joinder of functions should penetrate further in military legal procedure.

### 11. PRIVILEGE AGAINST SELF-INCRIMINATION

The historic Anglo-Saxon privilege against being forced to give evidence against one's self and its corollary exempting a criminal defendant from testifying applies in toto in trials by a courts-martial.<sup>91</sup>

As applied to witnesses we pass the question as within the realm of abstract jurisprudence. The privilege, in reducing the terror of the witness chair, may well be productive of more evidence than would be forthcoming by forcing answer to incriminating question.<sup>92</sup> Even with witnesses it might be noted that in a closely knit unit like an army command the mere claim of the privilege is apt to result in investigation, thus affecting somewhat the scope of the protection afforded by the privilege.<sup>93</sup>

---

<sup>89</sup>See Bell, *Let Me Find the Facts*, (1940) 26 A. B. A. J. 551: "Gilbert & Sullivan immortalized a device like that when the lord chancellor in *Iolanthe* passed on his own application to marry his ward. Those old-fashioned writers thought the idea funny. Today it is apparently a device of efficiency. But it may still be thought that the arrangement is not a sound one. . . ."

<sup>90</sup>After weighing the arguments against this phase of administrative law Dean Landis concludes "The necessity for coordinating enforcement with policy is still so urgent as not to lead lightly toward the divorcement of these functions." Landis, *The Administrative Process* (1938) 106. Yet no greater example of "coordinating enforcement with policy" can be found than the totalitarian government. The Gestapo combines prosecutor and judge for a full coordination of enforcement with policy. See Gunther, *Inside Europe* (War ed. 1940) 553.

<sup>91</sup>A. W. 24; M. C. M. pars. 120d and 122b.

<sup>92</sup>"The witness-stand is today sufficiently a place of annoyance and dread. The reluctance to enter it must not be increased. Every influence which tends to suppress the sources of truth must be removed. To remove all limits of inquiry into the secrets of the persons who have no stake in the cause but can furnish help in its investigation, would be to add to the motives which now sufficiently dispose them to evade their duty." 8 Wigmore, *Evidence* (3d ed. 1940) sec. 2251-1.(a).

<sup>93</sup>While it is not settled in military law, a court-martial would probably follow the rule generally prevailing in this country as to ordinary witnesses against drawing inferences from the claim of the privilege. Wigmore, *Evidence* (3d ed. 1940) sec. 2272 notes the difficulty of the triers of fact ignoring the operation of their own mind where they too pass on the claim

As applied to an accused in time of war the privilege against self-incrimination should be critically examined. We think it would not be requiring too much to require a person under suspicion of espionage, or who is otherwise charged with the commission of a wartime offense helpful to the enemy, to explain his action.<sup>94</sup> Mere lack of proof should not, through solicitude for the rights of the individual, endanger the safety of all those whom the armed forces are defending. Realistically speaking, the third degree practices of the guard house could be reduced by allowing questioning in the court room.

The manner of relaxing the privilege should be<sup>95</sup> carefully considered, namely whether it should be relaxed at the impartial investigation preceding trial,<sup>96</sup> at the trial or merely in respect to inferences drawn from the accused's failure to testify. We think that to make the relaxation effective it would have to relate to all three. Some limitations in inquiry into offenses other than those charged would probably have to be made in order to make the privilege afforded witnesses effective.<sup>97</sup>

Necessities of war should be sufficient answer to any constitutional objection.<sup>98</sup> The matter might be viewed as sufficiently important to consider an amendment if necessary. If a technical approach is desired, the term "criminal case" in the fifth amendment could be interpreted as not including trial by court-martial,

of the privilege. (The actual ruling on this as "an objection to the admissibility of evidence offered during the trial" is made by the law member. A. W. 31. The court, however, is present and fully conversant with what is going on.)

<sup>94</sup>"No law-abiding person can be erroneously convicted of a crime because he is compelled to disclose what evidence, if any, he controls with respect to the crime." Carman, *A Plea for Withdrawal of Constitutional Privilege From the Criminal*, (1938) 22 MINNESOTA LAW REVIEW 200.

<sup>95</sup>"... the remedy for the third degree and its derivatives is to satisfy the reasonable demands of the police and the prosecutors for an investigation of suspected persons and thus do away with the excuse for extra-legal questionings.

I submit that there should be express provision for a legal examination of suspects or accused persons before a magistrate; that those to be examined should be allowed to have counsel present to safeguard their rights; that provisions should be made for taking down the evidence so as to guarantee accuracy." Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, (1934) 24 Jour. Crim. L. and Proced. 1014.

<sup>96</sup>This is the continental method that Pound calls "an inquisitorial system of prosecution." See Keedy, *The Preliminary Investigation of Crime in France*, (1940) 88 U. of Pa. L. Rev. 385, 692.

<sup>97</sup>Under present court-martial procedure, where one accused of a number of offenses testifies as to but part of them, he cannot be asked about the others on cross-examination. M. C. M. par. 121b.

<sup>98</sup>If the privilege is only relaxed in war time.



at least for war offenses, and possibly for some other offenses so triable. Regardless of the legal approach,<sup>99</sup> the result should be achieved whereby in times of war or emergency persons subject to military law cannot avoid answering questions as to their actions.

## 12. DEGREE OF PROOF REQUIRED

As provided in the Manual for Courts-Martial, the court, to convict, must be satisfied beyond a reasonable doubt of the guilt of the accused.<sup>100</sup> This adoption without sanction of statute of the rule generally prevailing in criminal trial deserves careful attention.

The Manual defines this degree of proof so as to require the exclusion of every rational hypothesis except that of guilt.<sup>101</sup> In spite of this apparently unconscious adoption of the strictest definition,<sup>102</sup> the Manual description on the whole resembles the type of charge on the burden of proof which the prosecution might request in a criminal case.<sup>103</sup> Yet this straining to define away the

---

<sup>99</sup>The constitutional problem should be no greater than with jury trial or double jeopardy. As to these see notes 65 and 75 *supra*.

This privilege has never been considered as within the fourteenth amendment; See Cardozo, J., in *Palko v. Connecticut*, (1937) 302 U. S. 319, 325, 58 Sup. Ct. 149, 82 L. Ed. 288; "immunity from compulsory self-incrimination . . . might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to the duty to respond to orderly inquiry." *Fraenkel*, *One Hundred and Fifty Years of the Bill of Rights*, (1939) 23 MINNESOTA LAW REVIEW 719, 722.

<sup>100</sup>M. C. M. par. 78.

<sup>101</sup>"The meaning of the rule is that the proof must be such as to exclude not every hypothesis or possibility of innocence but any fair and rational hypothesis except that of guilt. . . ." M. C. M. par. 78.

<sup>102</sup>See *Commonwealth v. Costley*, (1875) 118 Mass. 1, 24. This "hypothesis" theory is adopted only in Alabama, Georgia, Illinois and Massachusetts. Wharton, *Evidence in Criminal Cases*, (11th ed. 1935) sec. 890. (Georgia is not listed but see Georgia, Code 1933, sec. 38-109 requiring that convictions based on circumstantial evidence "exclude every other reasonable hypothesis save that of guilt of the accused.")

<sup>103</sup>Beside the backhand way in which the rule is stated with the exclusion first (see note 101 *supra*) note the following part of the definition which preceded the part quoted in note 101: "By 'reasonable doubt' is intended not fanciful or ingenious doubt or conjecture but substantial, honest, conscientious doubt suggested by the material evidence, or lack of it, in the case. It is an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony; nor a doubt born of a merciful inclination to permit the defendant to escape conviction; nor a doubt prompted by sympathy for him or those connected with him." M. C. M. par. 78.

So, too, the Manual adopts the rule as to reasonable doubt to every

rule adopted is natural, for if the distinction between proof beyond a reasonable doubt and proof by preponderance of the evidence has any vitality it should have more before a trained board than a lay jury.<sup>104</sup>

We thus have a situation where, in spite of this feeble attempt to correct it by amplifying the definition,<sup>105</sup> a person in time of war and in the face of great emergency may be returned armed to a focal point of danger even though the preponderance of evidence indicates he was guilty of, say aiding the enemy or acting as a spy.

Two solutions suggest themselves; the adoption of one or the other seems imperative. The simpler, and one which we prefer would be in time of war or possibly only in time of great emergency to relax the burden of proof generally, or at least as to war offenses, to that of proof by a preponderance of the evidence. The second, which could be adopted if the reasonable doubt rule is viewed as furnishing a necessary safeguard, is to allow the court to prevent the return of certain accused persons to positions where they could do harm. Details of this latter, which would have to be worked out, would involve a verdict of "not proven," which would place military personnel in some sort of guarded labor battalion, and others in internment or other custody for the duration of the war.

Allied to the question of the burden of proof is the number of members of a court who must be persuaded. The present rule is that the death penalty requires concurrence of all members present when the vote is taken,<sup>106</sup> confinement in excess of ten years concurrence of three-fourths,<sup>107</sup> and other convictions two-thirds of the members so present.<sup>108</sup> Other questions are determined by a majority vote.<sup>109</sup>

Where the number required for a finding of guilty do not concur the finding must be not guilty.<sup>110</sup> This is utterly absurd.

element of the offense. *Ibid.* The general rule in criminal law is contra to this. 9 Wigmore, *Evidence* (3d ed. 1940) sec. 2497.

<sup>104</sup>See Wigmore, *Science of Judicial Proof, as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials* (3d ed. 1937) secs. 310, 341; 9 Wigmore, *Evidence* (3d ed. 1940) sec. 2497.

<sup>105</sup>See note 103 *supra*.

<sup>106</sup>A. W. 43.

<sup>107</sup>A. W. 43.

<sup>108</sup>A. W. 43.

<sup>109</sup>A. W. 43.

<sup>110</sup>"A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon." M. C. M. par. 78d. Furthermore

It is as if a "hung" jury were considered as finding for the defendant.<sup>111</sup> Taken in connection with the rule against double jeopardy it gives a safeguard, especially great in cases where the death penalty is mandatory,<sup>112</sup> far beyond that given in any criminal law. Carried to its logical conclusion it would restore to armed duty, or in the case of civilians allow freedom, to persons of whose guilt the majority of members of a court-martial were convinced even beyond a reasonable doubt. Some provision should, of course, be adopted either to allow decisions by a simple majority in war time<sup>113</sup> or to provide for retrials of those defendants for whom at least a majority of the court did not vote a finding of not guilty.<sup>114</sup> The first of these is best fitted for times of great emergency, while the second would give a greater safeguard where the situation admits of some delay. The defect is so apparent that we consider it inexcusable negligence not to correct it.

### 13. APPEAL OR OTHER REVIEW

Four appellate bodies review convictions by general court-martial. Every such conviction is subject to review by at least two and often three of these.

A. The officer holding general court-martial jurisdiction over the offender, together with his staff judge advocate, constitute the first reviewing authority.<sup>115</sup> This officer is generally the one who appointed the court,<sup>116</sup> and is usually at least a division com-

where a two-thirds or three-fourths requirement results in a fraction the required fraction will be counted as an additional one. *Ibid.*

<sup>111</sup>The rule in criminal cases is that a disagreement is not an acquittal and that the proper discharge of a jury which cannot agree "constitutes no bar to further proceedings." *United States v. Perez*, (1824) 9 Wheat. (U.S.) 579, 580, 6 L. Ed. 165; *Keerl v. Montana*, (1909) 213 U. S. 135, 29 Sup. Ct. 469, 53 L. Ed. 734.

<sup>112</sup>Acting as a spy in violation of Article of War 82 is such an offense; hence each member of the court has power to acquit. In all other war offenses punishable by "death or such other punishment as a court-martial may direct" one vote can defeat the death sentence while a vote of more than one-third but less than a majority of the members present can prevent any conviction or punishment.

<sup>113</sup>This would be the efficient way. That it prevents retrials is evident. Cf. the less than unanimous verdicts in civil cases. *New York Civil Practice Act* (1920) sec. 463-a, added Laws 1937, ch. 120 (allowing verdicts in civil cases by five-sixths of the jurors.)

<sup>114</sup>This slight recast of the criminal rule allowing retrials in *all* cases of disagreements, see note 111 *supra*, is suggested so as to avoid multitudinous retrials and out of general confidence in courts-martials as experts.

<sup>115</sup>A. W. 46.

<sup>116</sup>M. C. M. par. 87a. It might, however, be his successor in command. A. W. 46

mander.<sup>117</sup> No sentence of a general court-martial may be carried out without review by this officer, who must act only after reference to his staff judge advocate or, if none there be, to the Judge Advocate General.<sup>118</sup> The weight of the evidence may be considered on this review.<sup>119</sup> Sentence may be mitigated or remitted.<sup>120</sup> Errors involving evidence, pleading or procedure may be disregarded unless they "injuriously affected the substantial rights of an accused."<sup>121</sup> A sentence may be suspended in whole or in part.<sup>122</sup>

Though appeals do not lie from findings of not guilty, the appointing authority may by letter point out errors, for the future guidance of the court.<sup>123</sup>

B. The Board of Review in the Judge Advocate General's Office,<sup>124</sup> followed by action by the judge advocate general, constitute the second reviewing group in the more serious cases. They consider three types of cases. First, are cases which because of the grave nature of the offense will eventually require confirmation of the sentence by the president of the United States.<sup>125</sup> This includes cases affecting a general, involving the dismissal of any officer or cadet, or any death sentence.<sup>126</sup> In time of war they also consider sentences involving dismissal of an officer, and certain death sentences which may in lieu of confirmation by the president be confirmed by the commanding general of an army in the field, of a territorial department or of a division.<sup>127</sup>

Next, the Board of Review considers other convictions by general court-martial in which the sentence involves at least dismissal, dishonorable discharge not suspended, or confinement in a penitentiary.<sup>128</sup> These cases of intermediate gravity are then reviewed by the judge advocate general.<sup>129</sup> Only when the judge advocate general and the reviewing board differ as to whether or

---

<sup>117</sup>A. W. 8 (the commanding officer of a separate brigade can also appoint a general court-martial. A. W. 46).

<sup>118</sup>A. W. 46.

<sup>119</sup>M. C. M. par. 87b.

<sup>120</sup>M. C. M. par. 87b.

<sup>121</sup>M. C. M. par. 87b; A. W. 37.

<sup>122</sup>A. W. 52.

<sup>123</sup>M. C. M. par. 87b.

<sup>124</sup>A. W. 50½.

<sup>125</sup>A. W. 50½.

<sup>126</sup>A. W. 48.

<sup>127</sup>A. W. 48(b) and (d).

<sup>128</sup>A. W. 50½.

<sup>129</sup>A. W. 50½.

not the decision should be approved are these cases sent to the secretary of war for action by the president.<sup>130</sup> In the usual case wherein they agree, they exercise final appellate jurisdiction,<sup>131</sup> though their decision unlike that of the first reviewing authority is confined to errors of law.<sup>132</sup>

Lastly the Board of Review considers those cases in which the record of trial by general court-martial has been found legally insufficient in routine examination in the Judge Advocate General's office.<sup>133</sup> These cases are referred to the judge advocate general if the board, too, finds the record legally insufficient to support the findings and sentence.<sup>134</sup> He in turn forwards the record together with his recommendation to the secretary of war for action by the president.<sup>135</sup>

C. The section officers conducting routine review in the Judge Advocate General's Office constitute the third reviewing body. They consider all records of trial by general court-martial which do not go directly to the Board of Review.<sup>136</sup> Where no error is detected this ends the case.

D. Review by the president is the fourth type of review. In accordance with decided policy the secretary of war usually acts for the president.<sup>137</sup> Cases not governed by previously set policy may, however, come directly before the President.<sup>138</sup> Three types of cases already discussed have this type of review.<sup>139</sup>

Our first observation is the technical failure to achieve symmetrical uniformity. Possibly this is due to the fact that the provisions were enacted at different times.<sup>140</sup> Whatever the cause, the

<sup>130</sup>A. W. 50½.

<sup>131</sup>A. W. 50½.

<sup>132</sup>Note in M. C. M. to A. W. 50½ citing court-martial No. 152797: "... if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the board of review and the judge advocate general are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though there be uncontradicted evidence of such facts."

<sup>133</sup>A. W. 50½.

<sup>134</sup>A. W. 50½.

<sup>135</sup>A. W. 50½.

<sup>136</sup>A. W. 50½.

<sup>137</sup>(1877) 15 Op. Atty. Gen. 291; (1882) 17 Op. Atty. Gen. 397.

<sup>138</sup>*Runkle v. United States*, (1887) 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167.

<sup>139</sup>1. Those of exceptional gravity; 2. Those wherein the Board of Review and the judge advocate general differ. 3. Lesser cases wherein routine examination and the Board of Review have both found the record legally insufficient. See A. W. 50½.

<sup>140</sup>A. W. 50½ enacted in the codification of 1920, 41 Stat. at L. 797,

most glaring error of this type lies in the fact that the Board of Review, with the concurrence of the judge advocate general, can in important cases coming to it in the first instance vacate the finding and return the case for whatever rehearing is necessary, but cannot do so in less important cases which come to it because of error detected in the routine review.<sup>141</sup> These less important cases in which the sentence is less than confinement in a penitentiary must, though the routine reviewer, the Board of Review and the judge advocate general all detect error, nevertheless go to the secretary of war for action by the president.<sup>142</sup>

Next, the machinery is fully as cumbersome as appellate criminal procedure,<sup>143</sup> which has often been the subject of criticism.<sup>144</sup> Even though the lawyer's part in military review is less than in a criminal appeal, this does not necessarily reduce delay by making the reviewer's task easier.<sup>145</sup> Indeed the work is more, for the first reviewing body may consider the weight of the evidence to a greater extent than is generally allowed in criminal appeals.<sup>146</sup>

The gist of the problem as it would be affected by wartime conditions lies in the double and triple review now required. A single automatic review as of right in all cases wherein confinement in a penitentiary or death is ordered should be enough. This review, confined to errors of law, should be by a board of Judge Advocate General Department officers. We can dispense with review by the appointing authority. This officer in combat would be beset with many duties, and time for judicial action on his part,

---

10 U. S. C. A. sec. 1522 was again amended in 1937, 50 Stat. at L. 724, 10 U. S. C. Supp. V sec. 1522. The articles enacted in much their present form by Act Aug. 29, 1916 ch. 418, 39 Stat. at L. 658 did not contain the important A. W. 50½ which as noted grants important reviewing authority to the Judge Advocate General's Office.

The other articles dealing with review (e.g. A.W. 46-53) were enacted piecemeal beginning with the Act of April 10, 1806, 2 Stat. at L. 367. See 4 U. S. Comp. Stat. (1916) sec. 2308a notes to A. W. 46-53.

<sup>141</sup>A. W. 50½.

<sup>142</sup>A. W. 50½.

<sup>143</sup>Orfield, *The Right of Appeal in Criminal Cases*, (1936) 34 Mich. L. Rev. 937; Orfield, *History of Criminal Appeal in England*, (1936) 1 Mo. L. Rev. 326.

<sup>144</sup>Taft, *The Delays of the Law*, (1908) 18 Yale L. J. 28; Orfield, *Criminal Appeals in America* (1939) 122.

<sup>145</sup>"The oral argument when properly employed is an extremely effective aid in a correct decision." Report of Section of Judicial Administration of the American Bar Association (1938) 101 quoted in Orfield, *Criminal Appeals in America* (1939).

<sup>146</sup>M. C. M. par. 87b.

even with the aid of his staff judge advocate, would be hard to find. In view of the great speed of modern war, and in view of the fact that certainty of punishment is a great deterrent, it might be well to consider regulations under which the commander of an army or territorial department, in times of great stress and for purely wartime offenses, could suspend all review and order all sentences carried out summarily.

After parliamentary debate Great Britain in the provisions of the Emergency Power (Defense) (no. 2) Act, to go into effect upon invasion, decided against this abolition of appeal and in favor of the single speedy review.<sup>147</sup> We feel, however, that some limited use of the type just suggested of the no appeal<sup>148</sup> principle may be needed. A possible compromise in times of great emergency would be a speedy discretionary review similar to the Supreme Court's review by certiorari.<sup>149</sup> This could be worked out so as to amount to quasi-judicial as distinguished from an administrative suspension of review.

### CONCLUSION

The expansion of the military, with its consequent extension of military jurisdiction, which is necessary if this country is to re-

---

<sup>147</sup>Regulations made pursuant to the Emergency Powers Defense Acts 1939 and 1940, Comparative Law Series, July 1940, 394 divided Great Britain into thirteen regional areas each with commissioners who in the event of attack will take over. In the event any region is cut off from the government through enemy action their authority will become practically unlimited. Provisions in the bill as introduced in the House to make their rulings free from review were deleted. Sturges, London Letter, (1940) 26 A. B. A. J. 802, 803-4, New York Times Aug. 20, 1940. The decision in favor of review is in accord with the general British treatment of defense regulations. See Butterworths, Emergency Legislation Service (1940) Title 13, Regulation 2A creating the offense of acts done with intent to assist the enemy, which was amended by S. R. & O. 1940 No. 669, May 9, 1940, by adding a provision that "A person shall not be summarily convicted of an offense against this Regulation" to clear up doubts as to the method of procedure. Even after conviction on indictment the maximum penalty cannot exceed two years imprisonment and a fine of £500! *Id.* Regulation 92.

Cf. the belated adoption of the no appeal principle by France: The Vichy Government is applying this in the trials by "Cour Martiale" of those charged with aiding General de Gaulle. They are tried forty-eight hours after arrest and judgment executed twenty-four hours later without appeal. N. Y. Times September 25, 1940, p. 4.

<sup>148</sup>At one time Taft advocated a great reduction if not a total abolition of appeals in criminal cases. See Taft, *The Administration of Criminal Law*, (1905) 15 Yale L. J. 1.

<sup>149</sup>Orfield, *Criminal Appeals in America* (1939) 52, advocates this type of appeal in criminal cases generally "If the appellant was substantially prejudiced, the court is likely to discover the fact. Frivolous appeals are thus discouraged at the outset." The errors alleged would be considered on abbreviated statements without the necessity of reviewing the whole record.

main great, makes immediately important consideration of the law governing our military establishment.<sup>150</sup> The whole nation, and not just the administrative department governed thereby, may be affected by efficiency of our military law. The induction into the service of a large number of draftees<sup>151</sup> will without doubt necessitate some change in the Manual for Courts-Martial as regards the punishment of dishonorable discharge.<sup>152</sup> The discharge will in many cases have to be suspended until the termination of the draft period, and allowable limits of other punishments increased to take the place of this normally severe punishment. This seems necessary, as dishonorable discharge would not be the deterrent with many draftees that it is with career soldiers.

This is thus the logical time for a thoroughgoing revision of court-martial procedure. We recommend that the Articles of War and the Manual for Courts-Martial be revised so as to accomplish the following:

1. Allow the prosecution to use depositions when necessary in the trial of all cases in war time.
2. Eliminate repetition while the same court is sitting of the oath required of the court personnel.
3. Widen the scope of cross-examination so as to include any relevant issue.
4. Make admissible in evidence hearsay statements by witnesses since deceased.
5. Make civilian acts harmful to the military objective triable by courts-martial.
6. Provide in the case of large commands for judicially fitted officers acquiring administrative expertness by functioning as a continuing court.
7. Eliminate even the issuance of the writ of habeas corpus by United States Courts *in time of great emergency*.
8. Do not allow trial by court martial to prevent later civil punishment by federal courts.
9. Abolish *in time of great emergency* appeals by the accused from a refusal to assign the person requested as military counsel.
10. Abolish at least in war time the privilege against self-incrimination.
11. *In time of great emergency* relax the burden of proof to proof by a preponderance of the evidence.
12. Provide for retrials where there is neither a conviction nor

<sup>150</sup>"The underlying necessity of national self-preservation exists in time of peace as well as after war has been declared." Mickelwait, *Legal Basis for Conscription*, (1940) 26 A. B. A. J. 701.

<sup>151</sup>Selective Training Service Act of 1940, (54 Stat. at L.)

<sup>152</sup>See table of offenses so punishable M. C. M. par. 104c.



a majority vote of not guilty and *in time of great emergency* allow conviction by a simple majority.

13. In war time limit review to a single reviewing body considering only cases involving at least penitentiary confinement; *in time of great emergency* abolish all review by order of the commander or discretionary action by the reviewing body.

As the situation stands today court-martial procedure is for the most part a fairly good carbon copy of the practice in our criminal courts. Of the fifteen safeguards we discussed only three<sup>153</sup> are greatly relaxed by present procedure. Eleven,<sup>154</sup> as seen by our recommendations, could be profitably reexamined; in the case of five of the safeguards<sup>155</sup> revision, as suggested in our recommendations 4, 5, 10, 12 and 13, is vital. We do not claim our categories of safeguards exclusive and as others come to mind<sup>156</sup> other changes will doubtless suggest themselves. Speed of administration and certainty of punishment for the guilty are the two central thoughts we have in mind.

This need of speed is the reason for the third category of "great emergency" which we added in five<sup>157</sup> of our recommendations to that of war and peace. This concept of super war almost received legislative recognition.<sup>158</sup> Constituting more than war or emergency it involves a situation where other considerations than the rights of an individual would weigh their greatest.<sup>159</sup> For this

<sup>153</sup>5. Grand Jury and Jury Trial; 6. Habeas Corpus.

<sup>154</sup>Topics 2-8 and 11-13 supra.

<sup>155</sup>Topics 4, 5, 11, 12, 13.

<sup>156</sup>Some other safeguards which might be discussed: Public trial, trial in place where offense committed, use of illegally obtained evidence, physician-patient & attorney-client privileges.

<sup>157</sup>Recommendations 7, 9, 11, 12 and 13 discussed in Topics 6, 8, 12 and 13.

<sup>158</sup>Thus the first draft of the Conference report on Selective Training Service Act of 1940, 54 Stat. at L., provided in the "draft industry" provision so called for the government taking over on a leasing basis certain uncooperative plants after the President has found that "public danger is immediate, imminent and impending, and the emergency in the public service is extreme and imperative." This clearly meant more than emergency and probably more than a technical state of war. Its inclusion in a provision designed to operate if need be in peace time would have been unfortunate.

<sup>159</sup>"In this world of arms, constitutional civil rights will endure only if protected by arms. The constitutional authority of the United States government to wage war, being unrestricted, implies the full use of the war power. That power is the power of necessity, than which none is greater. What necessity requires, it justifies. Wherefore, not only upon the actual theater of war, but wherever an emergency of war arises, the violation of every civil constitutional right impeding the war power is justified, if necessary. At peace, civil law should be absolute; at war, martial rule, wherever necessary, must be absolute." Hatcher, *Martial Law and Habeas Corpus: Extent of War Power in Emergency*, (1939) 25 A. B. A. J. 375.

See *Gilbert v. State of Minnesota*, (1920) 254 U. S. 325, 41 Sup. Ct. 125, 65 L. Ed. 287.

reason we recommend that some of the more extensive changes be made only in such times of "great emergency." This expression was used to describe the situation prevailing during a great battle or an invasion with definite penetration of holding lines. As we used these terms we meant more than war being carried to our own territory, for this alone does not preclude stabilized warfare. What it is intended to portray is a situation such as confronted the former French Republic after the break through, namely speedy modern warfare requiring quick action. This added third category of situations governed by different rules should be of help in total warfare as meeting the challenge of totalitarianism with the least, but not avoiding the necessary, sacrifice of the rights of the individual.