

St. John's Law Review

Volume 17
Number 1 *Volume 17, November 1942, Number*
1

Article 3

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Rose Kraus

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SABOTEURS AND MILITARY JUSTICE

The legal profession in wartime America must focus its attention on matters that occupy the immediate interest of the country in times of such peril, as do all other members of society. The recent execution of the eight spies brought into action a military commission that had been in disuse in this country since the Civil War.

Under the laws of war, death is the penalty for espionage committed behind Army lines by an enemy not in uniform. The life and death of one thus captured pivots on rules of military law and procedure as administered by a military tribunal. In time of war a spy, whether he is in the military service or not and whether his offense is committed within or without a fort or camp or a five-mile zone, is triable before a general courts-martial. By international and military law, spies are within the jurisdiction of military tribunals.¹ The war power vested in Congress by the Constitution incidentally authorizes Congress to create military tribunals with customary jurisdiction. While courts-martial are recognized by the Federal Constitution, having been in existence prior to the ratification of that instrument by virtue of the adoption of the first American Articles of War in 1775, they are not a part of the federal judicial system. They are more properly a part of the executive branch of government, for they are essential to the government of the army and navy. Until the sentence of a court-martial has been approved by the proper commanding officer, it is not effective. This is because these tribunals are adjuncts to the executive power, rather than part of the judicial function. Nevertheless, courts-martial must carry out their duties in a judicial manner fundamental principles of justice and rules of law and evidence must be adhered to. Irregularities must be avoided before or during the trial of a case by a court-martial; these proceedings may be attacked in a civil court by having a general prisoner seek his liberty on a writ of *habeas corpus* which will challenge the jurisdiction of the court. Lack of due process violative of the prisoner's constitutional rights may be alleged. The record, therefore, should leave no room for doubt as to the regularity of proceedings, or as to the jurisdiction of the court and its members' legal eligibility.²

¹ ARTICLES OF WAR 82, "Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of the United States or elsewhere shall be tried by general courts-martial or military commission and shall on conviction suffer death."

² The jurisdiction of courts-martial and validity of any judgment rendered depend upon the following indispensable prerequisites:

- (a) It must be convened by an official empowered to appoint it (*e.g.*, President).
- (b) The membership must be qualified both as to number and competency to sit as a court.
- (c) The court so constituted must be invested by act of Congress with power to try the person and offense charged.

Purely military offenses, such as desertion or conduct unbecoming an officer and a gentleman, are under the exclusive jurisdiction of courts-martial; other crimes may be punishable by a civil court or a court-martial. It is often necessary to determine which shall have jurisdiction.

In time of war it would seem that the military authorities are not required to deliver offenders to the state authorities.³ However, it has been held that the Articles of War enacted in 1916 do not deprive the civil courts, either in time of peace or war, of the concurrent jurisdiction previously vested in them over crimes against either federal or state law committed within the United States by persons subject to military law.⁴ It is claimed that the basis of the jurisdiction of the military authorities over the enemy spy is that he is found lurking or acting as a spy in or about any of the fortifications, quarters or encampments of the United States. That only if a spy is caught anywhere in the zone of military operations may he be court-martialed and executed. That this is the basis, the court claimed, is indicated by the fact that if he escaped and returned to his own lines and is later captured, he may not be tried or punished as a spy, but must be treated as a prisoner of warfare.⁵

The principal characteristic of this offense is a clandestine dissimulation of the true object sought—an endeavor to obtain information with the intention of communicating it to the hostile party. Thus soldiers not wearing disguise, dispatch riders, whether soldiers or civilians, and persons in aircraft who carry out their mission openly and who penetrated hostile lines are not to be considered spies, for the reason that, while they may have resorted to concealment, they have practiced no dissimulation.⁶ It is necessary to prove an intent to communicate information to the hostile party. The proof must include evidence not only that the accused was found at a certain place within our zone of operations, acting clandestinely, or under false pretenses, but also that he was obtaining, or endeavoring to obtain,

(d) Also certain procedural requirements are matters of vital consequence.—MILITARY LAW AND COURT MARTIAL PROCEDURE, p. 15.

³ ARTICLES OF WAR 82, cited *supra* note 1.

⁴ United States v. Hirsch, 254 Fed. 109 (1918).

⁵ In the last World War a Russian national was sent to the United States by Von Eckhardt, the German ambassador to Mexico, carrying a cipher message in German consular code which constituted his credentials as a German spy. He confided to two men who accompanied him (who without his knowledge, were American and British service men) that he was coming to the United States to "blow the works up" and that he had in the past engaged in exploding and wrecking munition barges and powder magazines, etc. Immediately upon touching the border, he was apprehended by military authorities. The court held that as the offense had been committed outside of the field of military operations and by a person not a member of the military or naval forces in a district where regular civilian courts were functioning, the trial by a military tribunal was illegal. Opinion of Attorney General Gregory, Nov. 25, 1918, 31 Op. Atty. Gen. 356.

⁶ SCHILLER, MILITARY LAW AND DEFENSE LEGISLATION (1941) 463.

information with intent to communicate the same to the enemy. The intent to communicate information will very readily be inferred on proof of a deceptive insinuation of the accused among our forces. However, this inference may be overcome by very clear evidence that the person had come for a comparatively innocent purpose, as a visit to family or disguised so as to reach his own lines.⁷

There are three kinds of court-martial: general, special and summary. General court-martial consists of not less than five officers in military service of the United States. In practice, usually nine or eleven officers are appointed in order to permit the court to function even when some of its members are disqualified, sick, or absent from the post. The Articles of War impose certain restrictions as to those who may sit in judgment upon members of the military establishment. Thus an officer is legally incompetent if he is the accuser or witness for the prosecution.⁸ To be an eligible witness to sit on a court-martial one must be a "commissioned" officer. Officers suspended from rank may not sit on courts-martial during such suspension. Chaplains are not customarily assigned to this detail, but their presence will not invalidate the proceedings. The special court-martial is composed of any number of officers not less than three.⁹ While a summary court has but one officer.¹⁰

It is of extreme importance to an accused whether or not he will be tried by a military or a civil tribunal, because the procedure of the two differ greatly.

In military tribunals, before trial, any person subject to military law and charged with crime or with a serious offense under the Articles of War may be placed in confinement, or arrest, as circumstances may require.¹¹ The formal written accusation in court-martial practice consists of two parts, and is equivalent to a complaint or technical charge and the specification. The charge, where the offense alleged is a violation of the articles merely, indicates the articles the accused is alleged to have violated, while the specification sets forth the specific facts and circumstances relied upon as consti-

⁷ Where a soldier of the enemy's army separated from it on its retreat from Maryland in 1864, was arrested, after wandering about in disguise within our lines, for a month, seeking an opportunity to make his way back to the enemy's forces and join his regiment, it was held, he was not properly chargeable with being a spy. Dig. J. A. Gen. 709, par. 4.

⁸ ARTICLES OF WAR 8, 9. A conviction by a court-martial convened by a department commander, who is also accuser, should be set aside. *In re Bird*, Fed. Cas. No. 1428.

⁹ ARTICLES OF WAR 6.

¹⁰ *Id.* 7.

¹¹ Where the offense charged is minor, the accused (whether officer or enlisted man) is placed in arrest. If crime is serious, the person charged is held in confinement. Arrest and confinement differ in the type of restraint involved. The order fixing the physical limits of the arrest imposes a moral restraint, while confinement is, in one form or another, a physical restraint. MUNSON AND JAEGER, MILITARY LAW AND COURT MARTIAL PROCEDURE (1941) 31.

tuting the violation. Numerous charges may be made against one person in a single document and it is entirely immaterial whether they are related or not; however, it is not usual to join charges alleging serious offenses to others of a minor character, unless the latter serve to clarify the nature of the former. The charge is drawn very simply, but must state an offense in such a way that if the facts are proved, accused must be guilty of some offense.¹² There should be no evidentiary matter in the specification nor should there be conclusions of law.¹³ Each specification together with the charge under which it is placed constitutes a separate accusation. New and separate charges preferred after others have been preferred are known as "additional charges". Such charges may relate to transactions not known at the time the original charges were preferred or they may relate to offenses committed after the original charges were preferred.¹⁴ Charges of this character do not require a separate trial, but subject to the usual procedure may be tried with the original charges.

While civilians may initiate charges against a member of the military establishment, the law requires that they be signed and sworn to by a person subject to military law.

No charge will be referred for trial until after a thorough and impartial investigation thereof is made. This investigation will include inquiries as to the truth of the matter set forth in said charges. At such investigation full opportunity is given the accused to cross-examine witnesses against him and to present anything he may desire in his own behalf either as a defense or mitigation. An affidavit is added that the affiant has personal knowledge of the facts, or that he has investigated them and has satisfied himself as to their accuracy; which of these is the case must appear clearly from the affidavit.¹⁵

Care must be taken that the acts forming the basis of the charges did not occur at a time too remote to sustain them. The statute of limitations may be set up by the accused as a bar to his trial or punishment either by a special plea, or by evidence of the statute, and its

¹² Thus merely stating that "Private Doe shot Private Roe intentionally" is not sufficient, for Doe may have been so ordered (as a member of a firing squad). If the specification fails to state an offense, the proceeding is a nullity, even if accused pleads guilty. MUNSON AND JAEGER, *MILITARY LAW AND COURT MARTIAL PROCEDURE* (1941) 34.

¹³ Note the similarity here to the civil practice requirement under N. Y. C. P. A. § 241, "every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party pleading relies, but not the evidence by which they are to be proved." Also the subsidiary principles of pleading—that a pleading must contain the ultimate facts as distinguished from primary facts or evidentiary matter and a pleading should not contain conclusions of law. PRASHKER, *CASES AND MATERIALS ON N. Y. PLEADING AND PRACTICE* (2d ed. 1937) 339, 340.

¹⁴ Under N. Y. Civil Practice there could not be such joinder of causes of action. It would be necessary to serve a supplemental complaint under N. Y. C. P. A. § 245a. *Id.* 660.

¹⁵ MUNSON AND JAEGER, *MANUAL OF MILITARY LAW AND COURT MARTIAL PROCEDURE* (1941) 33.

applicability, introduced under a plea to the general issue, but without such evidence a plea of not guilty does not assert the bar of the statute. The time elapsed is computed, for this purpose, from the date of the commission of the offense to the date of arraignment. Absences from the United States and any period during which some manifest impediment prevented the government from prosecuting the accused must be deducted from the statutory period of limitation. (Such as accused's absence because a prisoner of war, etc.) However, mere inability to find him, because of his concealment or fraud, will not operate as a manifest impediment.¹⁶

At the military trial the members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court determines the relevancy and validity thereof. Each side is entitled to one peremptory challenge, but the law member of the court may not be challenged except for cause.¹⁷

Pleas in court-martial procedure include plea to the jurisdiction, plea in abatement, plea in bar of trial and pleas to the general issue. An objection to which a plea to the jurisdiction is applicable cannot be waived and may be asserted at any time. A plea in abatement operates merely to delay trial and is based upon some objection to a charge or specification as indefinite or redundant. Exemption from liability to be tried or punished may be claimed under a plea in bar of trial.

The rules of evidence applicable in court-martial procedure are those generally recognized in the trial of criminal cases in district courts of the United States. In order to convict of an offense the court must be satisfied beyond a reasonable doubt. Permissible findings include guilty; not guilty; guilty with exception with or without substitution and guilty of any substitution.¹⁸ Thus if the evidence fails to prove the offense charged, but does prove the commission of a lesser offense necessarily inclusive in the charge, the court may by its findings except certain words of the specification and substitute others.

When the court is ready to vote on the guilt or innocence of the accused, it does so by secret ballot.¹⁹ With the exception of the mandatory death sentence (which requires unanimity) two-thirds of the members must vote affirmatively to convict a person, except that

¹⁶ N. Y. C. P. A. § 19 suspends tolling of the statute of limitations in like manner.

¹⁷ Under N. Y. Practice, in a civil in a court of record each party may exercise not more than six peremptory challenges. In a court not of record each party may exercise not more than three challenges. "Each party" normally signifies each side to the controversy. The number of challenges for cause is not subject to any numerical limitation. PRASHKER, *CASES AND MATERIALS ON N. Y. PLEADING AND PRACTICE* (2d ed. 1937, Supp. II, 1942) 436-438.

¹⁸ *MANUAL FOR COURTS MARTIAL* 78.

¹⁹ *ARTICLES OF WAR* 31.

three-fourths is required if the sentence is for life or in excess of ten years.²⁰

To the extent that the punishment is discretionary the sentence should provide for a legal, appropriate and adequate punishment. In the exercise of any discretion the court may have in fixing punishment, it should consider, among other factors, the character of the accused as given on former discharges, the number and character of the previous convictions, the circumstances extenuating or aggravating the offense itself; or any collateral feature made material by limitations on punishments. Where acquittal is the result it must be announced in open court.²¹ In other cases it may be done under such regulations as the President of the United States shall prescribe. Sentences once approved can only be suspended by action of the Secretary of War or the officer having general court-martial jurisdiction over the offender. This does not extend to sentences of death,²² but includes dishonorable discharge.

Military courts seem uniquely fit to dispense military justice and civil jurisdiction over the matter seems quite superfluous.

ROSE KRAUS.

²⁰ *Id.* 43.

²¹ *Id.* 29.

²² *Id.* 52.