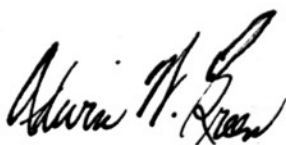


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MILITARY COMMISSIONS
AND
PROVOST COURTS
WITH PARTICULAR REGARD TO PROCEDURE
INCLUDING RULES OF EVIDENCE
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PART I
THE MILITARY COMMISSION

1. Origin and History:

During the early history of military law the name "military commission" was unknown. In 1776 Captain Nathan Hale was charged with spying and was tried by a military court; in 1780 Major Andre was tried on a similar charge by a military court of inquiry; and in the same year by Congressional resolution Joshua Hett Smith was tried by a special court martial for complicity with General Arnold in treasonable action. During the Mexican War a military commission as such was appointed by General Scott in G. O. 20 of 19 February 1847 for the trial of murder, robbery, and other criminal offenses usually tried in civil courts. General Scott, however, appointed separate tribunals, called councils of war, for the trial of violations of the laws of war; thus the council of war performed the functions of the modern military commission in its stricter sense. In 1861, during the Civil War, the functions of the commission and council initiated by General Scott were united and in 1863 the name received statutory recognition. In the following year a Bureau of Military Justice was established to revise and record the proceedings of military commissions.¹ The name was continued through World War I.² On the day after the attack on Pearl Harbor, G.O. No. 4 of 8 December 1941 was issued establishing the jurisdiction of the military commission under martial law in Hawaii, and on July 2, 1942 (7 Fed. Reg. 5103) The President appointed a military commission to try eight saboteurs (Ex parte Quirin, 85 L. Ed. 1; 63 Sup. Ct. 2). Under Article II of Proclamation No. 4 of the plan inaugurated for the Allied Military Government of Occupied Territory (AMGOT), and more especially for the military government of Italy, three types of military court are established, as follows: the general military court, similar to the military commission; the superior military court, similar to the superior provost court; and the summary military court, similar to the inferior provost court.

2. Authority for the Military Commission:

The military commission, like the civil law, exists by common law and statutory authority.³ Common law authority is derived from the law of war. The military commission exercising jurisdiction under common law authority is appointed by a superior military commander and is limited in its procedure only by the will of that commander.⁴ Like any other common law court, in the absence of directive to the contrary the military commission is free to formulate its own rules of procedure. Statutory authority is usually derived from special legislation conferring specific powers upon the military commission. Of this legislation, the most important statutes are the Articles of War. The military commission must observe the procedure set forth in the Articles of War and in A Manual for Courts-Martial 1928 only when it is appointed under the authority of the Articles of War.

The military commission appointed by The President on July 2, 1942 in Ex parte Quirin combined both common law authority (the law of war) and statutory authority (the Articles of War). The eight saboteurs were tried not only on Charge I, "Violation of the Law of War" but also on Charges II and III, violation of AW 81 and 82 respectively, and on Charge IV, "Conspiracy to Commit All of the Above Acts". The order appointing the commission reads in part, "The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it". The commission disregarded the procedure established in the Articles of War for the conduct of military commissions and invoked the power contained in the next sentence of the appointing order for the purpose of establishing its own procedure: "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man".

1 See pp. 832-833, Military Law and Precedents, 2nd ed., William Winthrop, Colonel, U. S. Army.

2 See pp. 80-81, Vol. I, American Military Government of Occupied Germany, I. L. Hunt, Colonel, U. S. Army, et al.

3 See pp. 1-14 and 414 of British Manual of Military Law 1929 for general background.

4 See pars. 10-11, Part I, of British Notes on the Military Government of Occupied Enemy Territory.

a The Constitution of the United States:

(1) Powers of Congress under the Constitution:

Art. I, Sec. 8:

- "To...provide for the common Defense and general Welfare"
- "To constitute Tribunals inferior to the supreme Court"
- "To define and punish...Offenses against the Law of Nations"
- "To declare War...and make Rules concerning Captures on Land..."
- "To raise and support Armies..."
- "To make Rules for the Government and Regulation of the land and naval Forces"
- "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"
- "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States..."
- "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers..."¹

(2) Powers of The President under the Constitution:

Art. II, Section 1: The President is vested with the "executive power" and takes an oath faithfully to "execute the Office of President" and to "preserve, protect, and defend the Constitution..."

Art. II, Section 2: "The President shall be Commander in Chief of the Army and Navy of the United States..."

Art. II, Section 3: The President "shall take Care that the Laws be faithfully executed..."²

1 The Constitution, as noted above, gives Congress abundant authority to appoint military commissions; this authority was exercised in the case of Joshua Hett Smith, noted in par. 1 above; it is described in Military Commissions (1865) (11 Op. Atty. Gen., 298) thus: "A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure."

2 The minority opinion in Ex parte Milligan (4 Wall. 139) expressed through Chief Justice Chase, provides: "Congress has, therefore, the power to provide by law for carrying on the war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief." See also Ex parte Quirin, "The Constitution thus invests the President...with the power...to carry into effect...all laws defining and punishing offenses against the law of nations..."; "The power of the executive to establish rules and regulations for the government of the army is undoubted" (U. S. v. Eliason, 16 Pet. 302, quoted in Note 2 on Art. 2, Sec. 2, cl. 1, USCA, Pt. 2, 232); "Under this clause the President has the power to employ the army and the navy in a manner which he may deem most effectual, including the power to establish rules and regulations for the government of the army and navy" (Nordmann v. Woodring, 28 F. Supp. 573, quoted in Note 2 on Art. 2, Sec. 2, cl. 1, USCA, Supp. to Pt. 2, 72); "Congress cannot by rules and regulations impair the authority of the President as commander-in-chief" (Swain v. U. S., 28 Ct. Cl. 173, 165 U. S. 553, quoted in Note 3 on Art. 2, Sec. 2, cl. 1, USCA Pt. 2); and "The right of the President temporarily to govern localities through his military officers he derives solely from the fact that he is the commander-in-chief of the army, and is to see that the laws are executed..." (Griffin v. Wilcox, 21 Ind. 382, quoted in Note 5 on Art. 2, Sec. 2, cl. 1, USCA Pt. 2).

b The Articles of War (41 Stat. 787; 10 USCA 1472):¹

The following Articles of War mention the "military commission" in terms: AW 15, 23, 24, 25, 26, 27, 32 ("military tribunal" used here), 38, 46, 80, 81, 82, and 115.

Of these, however, only the following are particularly important in this connection:

AW 15 provides that jurisdiction of courts martial shall not deprive military commissions of concurrent jurisdiction (AW 80, 81, and 82).

AW 38 provides that The President may prescribe "the procedure, including modes of proof, in cases before...military commissions..." and that The President shall "in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States..."

AW 80 provides for trial by military commission or other military tribunal of any person subject to military law who deals in captured or abandoned property whereby he receives or expects benefit to himself or any one connected with him, or who fails to give notice of possession of such property and to turn it over to the proper authority when it comes into his possession or custody.

AW 81 provides for trial by military commission of those "relieving, corresponding with, or aiding the enemy." Violation of this Article was charged in Ex parte Quirin.

AW 82 provides for trial by military commission of any person "found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere."

Violation of this Article was charged in Ex parte Quirin.

c Statutes other than the Articles of War:

Many statutes apply directly or indirectly to offenses normally tried by the military commission. The most significant of the more recent statutes may be found in the supplement to Volume 50 U. S. C. A.

1 The authority of the military commission transcends the authority contained in the Articles of War. Certainly the Articles which do not mention military commissions (as, for instance, AW 33 and 70) cannot be considered to apply even in trials by military commission appointed under the Articles of War. Indeed The President, although invoking the power granted by AW 38 in his appointment of a military commission on July 2, 1942, was not confined to the provisions of A Manual for Courts-Martial U. S. Army 1928. The Articles of War were enacted primarily for personnel of the United States Army and followers thereof. The exigencies of a particular situation may well require disregard of these Articles. The following quotations are pertinent in this connection: The Supreme Court said in Ex parte Quirin, "Some members of the Court are of the opinion that Congress did not intend the Articles of War to govern a Presidential military commission...and that the context of the Articles makes clear that they should not be construed to apply in that class of cases" (p. 23); and in the same case (p. 9) "Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals"; at p. 81 of vol. I, American Military Government of Occupied Germany it is said, "the Commanding General of the Army claimed the right of control over the judgments of Military Commissions"; in U. S. v. Diekelman (92 U. S. 520) it is said that martial law (i. e. military law) "is administered by the general of the Army, and is under his supreme control;" and Sec. 13 of Instructions of Francis Lieber, published in 1863 for the armies in the field says, "...cases which do not come within the 'Rules and Articles of War' or the jurisdiction conferred by statute on courts-martial are tried by military commissions."

d Legal Precedent: Decisions of the Supreme Court and Opinions of the Attorney General:

The number of precedents is too great to enumerate even those of major importance. The following are representative only:

Ex parte Milligan, 4 Wall. 2

Mechanics and Traders' Bank vs. Union Bank, 22 Wall. 276

U. S. ex rel. Wessels vs. McDonald, 256 Fed. 754; 256 U. S. 705

U. S. vs. Diekelman, 92 U. S. 520

Ex parte Quirin (1942), 87 L. Ed. 1, 63 Sup. Ct. 2)

Military Commissions, 11 Op. Atty. Gen. 297

The Modoc Indian Prisoners, 14 Op. Atty. Gen. 249

e Treaties, Armistices, Conditional Surrenders, and Capitulations:

The military commission will, of course, be governed by the terms of any treaty between the United States and the territory in which that commission has jurisdiction and by the terms of any armistice, conditional surrender, or capitulation entered into by the United States. Among the treaties of a general nature are the following:

Geneva Convention July 27, 1929 - prisoners of war

Geneva (Red Cross) Convention July 27, 1929 - wounded and sick

Hague Convention No. III October 18, 1907 - opening of hostilities

Hague Convention No. IV and Annex thereto, October 18, 1907 - laws and customs of war on land

Hague Convention No. V October 18, 1907 - neutral powers

Hague Convention No. VIII October 18, 1907 - submarine contact mines

Hague Convention No. IX October 18, 1907 - bombardment by naval forces

Hague Declaration No. XIV October 18, 1907 - discharge of explosives from balloons

f War Department Publications:

Basic Field Manual 27-5, Military Government, July 30, 1940

(see pars. 1 and 2)

Basic Field Manual 27-10, Rules of Land Warfare, October 1, 1940

Technical Manual 27-250, Cases on Military Government, May 20, 1943

g Proclamations:

President Lincoln, September 24, 1862

Governor Poindexter of Hawaii, December 7, 1941

President Roosevelt, July 2, 1942

h Laws of War: Laws of Nations:

The military commission has great authority under the laws of war.¹

1 Francis Lieber in Section 13 of his Instructions, says "Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war," (see also par. 7 FM 27-10); "The law of nations, although not specifically adopted by the Constitution, is essentially a part of the law of the land," (statement of Attorney General Randolph as quoted in Military Commissions, 11 Op. Atty. Gen., 299); "...but military offenses which do not come within the statute, must be tried and punished under the common law of war...Cases which do not come within the 'rules and regulations of war,' or the jurisdiction conferred by statute or court martial, are tried by military commissions" (Ex parte Vallandigham, 1 Wall. 249). War crimes in international law are enumerated in chapters 6 and 11 of War Department Field Manual 27-10, "Rules of Land Warfare" and in paragraphs 441-451 of chapter 14 of the British Manual of Military Law 1929. They are also enumerated in Proclamation No. 2 of the AMGOT plan.

Congress¹ is empowered "To define and punish...Offenses against the Law of Nations" (Art. I, Sec. 8, Cl. 10, Const.) and The President as commander in chief (Art. II, Sec. 2, Cl. 1, Const.) and by authority of other constitutional powers, and the Secretary of War on behalf of The President, have the power to appoint and direct the procedure of military commissions. Yet in the absence of direction from any of these, the commander in the field has absolute power over military commissions.²

- i Law of Place in which Offense Was Committed and in which It is Tried:
The law of the place in which an offense was committed and the law of the place in which the offense is tried, if the places are not the same, are important as guides for the military commission, but such law in no sense governs the military commission.³

1 "Congress has not undertaken to define the code of war nor to punish offenses against it." (Military Commissions, 11 Op. Atty. Gen., 313); "Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course" (Ex parte Quirin, p. 10).

2 Although in Congress and The President lie the "power to wage war successfully" (Home Building and Loan Assn. v. Blaisdell, 290 U. S. 398, 426) yet (as stated by Fairman in Memorandum on Military Commissions and Provost Courts, February 27, 1943) military commissions "conduct their proceedings unfettered, in the main, by rules of either legislative or executive origin," for (as stated in Military Commissions, 11 Op. Atty. Gen., 305, "The commander of an army in time of war has the same power to organize military tribunals...that he has to...fight battles. His authority in each case is from the law and usage of war," and (*ibid.* 298) "Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare," and "All the proceedings in this case derive their authority and validity from the common law of war." As stated by Hyde (II Int. Law Sec. 702) "...martial law (i. e., military law) is a body of rules which the occupant may affirmatively establish." G.O. 225 provided for convening military commissions for trial for offenses against the laws of war (I A. M. G. of O. G., 80). The law of war is described in Military Commissions, 11 Op. Atty. Gen. 300, with great eloquence: "The law of war...declares what shall not be done...The legitimate use of the great power of war, or rather the prohibitions upon the use of that power, increase or diminish as the necessity of the case demands." In Mechanics and Traders' Bank vs. Union Bank (22 Wall. 276) it is said, "A court established by...the commanding general...will...be presumed to have been authorized by The President." The law of war is recognized in G.O. No. 4, December 8, 1941, Hawaii, in Proclamation 2561, 1942, and in appointment of military commission in Ex parte Quirin, July 2, 1942.

3 This statement is not inconsistent with that of Lieutenant Colonel Fairman, who says, "The law previously existing in the territory, unless suspended or changed by the commanding general of the occupying power, or inconsistent with the policy of the occupant, will be deemed to have been retained by him" (Memorandum on Military Commissions and Provost Courts). The freedom of the commander is today nearly as absolute as it was when Francis Lieber prepared Section 41 of his Instructions for armies of the United States in the field: "All municipal law of the ground on which the armies stand or of the countries to which they belong, is silent and of no effect between armies in the field." The power of military law was described by the Duke of Wellington in the House of Lords as being "neither more nor less than the will of the general who commands the army" (quoted in U. S. v. Diekelman, 92 U. S. 520). These opinions are substantially corroborated by Oppenheim (II International Law, 6th ed., 342): "In carrying it (military administration) out the occupant is totally independent of the constitution and the laws of the territory." It will often be found advantageous to an occupying force to retain existing laws and courts: see par. 10d FM 27-5; par. 39 (b) and (c) of British Military Manual of Civil Affairs; and par. 22 of Part I and pp. 30 and 33 of Part II of British Notes on the Military Government of Occupied Enemy Territory.

G. O. No. 4 of December 8, 1941 announcing the policy of military commissions in Hawaii, establishes sound criteria in providing that "military commissions will be guided by, but not limited to, the penalties authorized by the courts-martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases."

j General Orders, Ordinances, etc., of Commanding General.

3. Appointment of Military Commission:

The following have the power to appoint military commissions:

Congress, under the powers noted in 2a(1) above.

The President, under the powers noted in 2a(2) above.¹

The Secretary of War when empowered by or acting on behalf of Congress or The President.

The commanding general of a theater of operations or one so delegated by him,² including a military governor,^{3, 4}

Usually, a commanding officer exercising general court-martial jurisdiction.⁴

4. Composition of Military Commission:

The personnel comprising a military commission are normally Army officers.⁵ They should, if possible, be superior to any officer tried,⁶ but they are not legally required to be. It is not essential, however, that the military commission be comprised of Army officers. Officers of the Navy,⁷ Marine Corps,⁸ or Coast Guard⁹ may sit on such commissions, as may civilians, if the military commander wishes to avail himself of their services.¹⁰ Indeed, it may be highly desirable to appoint Army and Navy officers (or officers serving with the Navy) to the same military commission in remote places in which both Army and Navy are serving or in which the number of suitable Army officers is limited.

1 Winthrop (p. 835) says, "The President, as Commander-in-chief may of course assemble military commissions as he may assemble courts-martial."

2 Par. 24a of FM 27-5 provides: "Military commissions may be appointed by the commanding general of the theater of operations only, and, if that power shall be delegated by him to them, by the commanding generals of armies, corps, divisions, or military districts, or by the officers in charge of civil affairs for states, provinces, or military districts." It will be noted that these officers are not identical with those noted in AW 8 as empowered to appoint general courts-martial.

3 On December 8, 1941 the Military Governor of Hawaii announced the policy for military commissions.

4 No specific authority by The President or the Secretary of War is a prerequisite to the appointment of such commission, although as a matter of policy, it is desirable for such commander to obtain specific authority.

5 "If the question be one concerning the laws of war, he should be tried by those engaged in the war - they and they only are his peers, "Military Commissions, 11 Op. Atty. Gen. 315.

6 See AW 16 and note quoting Swain v. U. S., 165 U. S. 553.

7 A Naval officer was appointed to a provost court in Hawaii (G. O. 70, I).

8 The Marine Corps usually serves with the Navy in time of war.

9 In time of war a part of the Navy, if so directed by The President.

10 Civilians were appointed to provost courts in Hawaii (G. O. 53, I and II; 69; 103, V). On September 24, 1940, a French court was established in North Africa for the trial of "les crimes et manoeuvres contre l'unite et la sauvegarde de la Patrie." The court consisted of five members, of whom two were civilians ("La Cour Martiale de Gannat," "La Justice," Les Documents Francais, December 1941).

No number has been legally prescribed to form a military commission. In practice the number has usually been a minimum of three.¹

Although not legally required, it is desirable to appoint, in addition to the members of the commission, officers or civilians to act as defense counsel and prosecution.²

5. Jurisdiction of Military Commission:

a Concurrent and Exclusive:

(1) Courts Martial and Military Commissions:

A. W. 15 provides as follows: "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions...of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions..."

A. W. 80 provides that a court martial or a military commission may try any "person subject to military law" who deals in captured or abandoned property.

A. W. 81 provides that a court martial or a military commission may try any person who relieves or attempts to relieve the enemy or who harbors or holds correspondence with the enemy or gives intelligence to him.

A. W. 82 provides that a court martial or a military commission may try any person who in time of war is accused of being a spy.

Violations of A. W. 80, 81 and 82 by military personnel and camp followers³ have been tried by military commission,⁴ and there may be good reason for trying such persons by military commission for offenses not included in these three articles or not efficiently justiciable under the other Articles of War (like A. W. 96) if such offense is violative of the laws of war and not strictly of a military nature or if, indeed, officers of high rank have offended against the law of nations. Otherwise, military personnel and followers of the Army should be tried by courts martial under the Articles of War.⁵

1 Scott's council of war was composed of "not less than three nor more than thirteen officers". Halleck's commission had a minimum of three, the minimum noted in Lieutenant Colonel Fairman's Memorandum. In G.O. 4 of December 8, 1941, the Military Governor of Hawaii directed that the procedure of the military commission follow that of the special court martial, in which there is a minimum of three. During the Civil War the number was usually five (Winthrop, 835-836). The commission appointed by President Roosevelt in Ex parte Quirin, July 2, 1942, was composed of seven. Par. 23a FM 27-5 suggests a minimum of five in addition to the trial judge advocate and defense counsel. Under Section 1 of Article III of Proclamation No. 4 of the AMGOT plan the general military court consists of not less than three officers, one of whom must be a judicial officer of the Allied military government.

2 In Ex parte Quirin two of each were appointed.

3 See A. W. 2.

4 Winthrop 838.

5 Par 25a, FM 27-5, provides: "Persons subject to the military law of the United States charged with offenses will be tried by court martial." Par 7c, FM 27-10, provides: "...it has generally been held that military commissions have no jurisdiction of such purely military offenses specified in the Articles of War as those articles expressly make punishable by sentence of court martial (except where the military commission is also given express statutory jurisdiction over the offense (A. W. 80, 81, 82))." G. O. No. 4 of December 8, 1941 announcing the policy to be followed by military commissions under martial law in Hawaii provides: "The jurisdiction thus given does not include the right to try commissioned and enlisted personnel of the United States Army and Navy. Such persons shall be turned over to their respective services for disposition." Constitutional Powers and Limitations, U.S.M.A., provides at p. 87: "on the other hand courts-martial take jurisdiction primarily for the purpose of military justice and maintaining discipline in the army itself. Over such purely military offenses this jurisdiction of courts-martial is exclusive." Section 2 of Article II of Proclamation No. 4 of the AMGOT plan provides that members of the Allied forces and prisoners of war are excepted from the jurisdiction of military courts.

(2) Civil Courts and Military Commissions:

If the civil courts are open and functioning properly, military commissions do not ordinarily exercise civil jurisdiction.¹ If the offense has been committed against the laws of war by one not in the military service, it may be tried by a military commission even though the civil courts are open and functioning,² and even though the offense is cognizable by the civil courts.³ In this connection, the Espionage Act of 1917 (40 Stat. 219; 50 USCA 38) provides that "Nothing contained in this chapter or chapter 12 of this title (Vessels in Territorial Waters of United States) shall be deemed to limit the jurisdiction of...military commissions." Moreover, Proclamation No. 2561 of July 2, 1942 (7 Fed. Reg., No. 132, p. 5101) provides that any person acting under the direction of an enemy nation and committing, or attempting to commit, sabotage, espionage, or war-like acts or violations of the laws of war shall be subject to the laws of war and to the jurisdiction of military tribunals and shall not be entitled to remedy in the courts of the United States or its states except under regulations of the Attorney General approved by the Secretary of War. It is not necessary, however, that all offenses against the laws of war be tried by military commission.⁴ The nature and the degree of the offense, as well as judicial comity and common sense, will determine which tribunal should have jurisdiction.⁵

1 See pp. 107-108, Constitutional Powers and Limitations, Department of Law, U. S. M. A.; par. 25b, FM 27-5; pars. 282 and 285-289, FM 27-10; and Garner, International Law and the World War, II, 81-87, and footnotes thereto.

2 In Ex parte Milligan (4 Wall. 2) the Supreme Court granted a writ of habeas corpus and discharged Milligan, a civilian, largely on the ground that the civil courts were open and functioning and that Milligan, a citizen of a state which had not seceded from the Union, might not be tried by a military commission. The Federal Court for the Southern District of New York in 1920, however, declined to follow the Milligan case (U. S. ex rel. Wessels v. McDonald, 265 Fed. 754). In Ex parte Quirin, the Supreme Court held that although the civil courts were open, a military commission had jurisdiction to try saboteurs. In Military Commissions (11 Op. Atty. Gen., 312) it is stated: "As has been shown, when war comes, the laws of war come with it. Infractions of the laws of nations are not denominated crimes, but offenses. Hence, the expression in the Constitution that 'Congress shall have power to define and punish...offenses against the law of nations.' Many of the offenses against the law of nations for which a man may, by the laws of war, lose his life, his liberty, or his property, are not crimes;" and (*ibid.* 298) the conspirators who effected the assassination of President Lincoln "not only can but ought to be tried before a military tribunal;" and (*ibid.* 314-315) "The judge of a civil court is not more strongly bound under the Constitution and the law to try a criminal than is the military to try an offender against the laws of war;" and (*ibid.* 317), "If the persons charged have offended against the laws of war, it would be...palpably wrong for the military to hand them over to the civil courts..."

3 "Spies and other war offenders...have also...committed offenses cognizable by the civil courts..." (Brief for the respondent, Ex parte Quirin.)

4 "The necessity for martial rule arises rather from the proximity of danger than from the fact that the courts are closed." The 'proximity of danger' may obviously be such as to require military jurisdiction of some war offenders without necessarily requiring it for all citizens." (Brief for the respondent, Ex parte Quirin, pp. 47-48, quoting Fairman Martial Rule 147.) "Provision of this section (A. W. 15)...did not impliedly deprive civil courts of concurrent jurisdiction." (People v. Denman, 177 p. 461, 179 Cal. 497; Note 1 to Sec. 1486, 10 USCA).

5 See par. 25b, FM 27-5.

b Over Persons:

(1) Military Personnel and Camp Followers:

For violation of A.W. 80, 81, and 82, military personnel and camp followers may be tried by either court martial (by general court martial only for violation of A.W. 82) or military commission. For violation of the Articles of War it has been the practice for courts martial to exercise exclusive jurisdiction.¹

(2) Civilians of the United States Not in Army and Not Following It:

Such persons are subject to the jurisdiction of the military commission for offenses against the law of war.²

(3) Friendly Aliens:

In general, such persons when not subject to military jurisdiction have the status of civilian citizens not in the Army and not following it. They are amenable to trial by military commission for violation of the laws of war. If, however, they are not resident in, or have committed no offense in, the United States or in areas occupied by United States troops and if their violation of the laws of war does not affect the safety of our troops or interfere with our military mission, they are not subject to trial by United States military commission. If, however, such friendly aliens are in the Army of the United States or are following or accompanying it, their status is that of citizens of the United States.³

1 Ch. 31 of the United States of America (Visiting Forces) Act, 1942 (5 and 6 Geo. 6) recognizes the doctrine of international law that the military forces of one country who are visiting in another country are subject to their own military law, and renders exclusive such jurisdiction of the United States over its forces in the United Kingdom. Par 25a FM 27-5 excludes from the jurisdiction of the military commission and the provost court all persons subject to military or naval law. On page 34 of Part II of British Notes on the Military Government of Occupied Enemy Territory it is said that "a civilian employee may be tried by court martial" and also by "military court if the Military Administrator so proclaims".

2 The conspirators against the life of President Lincoln were tried by military commission (Military Commissions, 11 Op. Atty. Gen., 297). Under martial law in Hawaii civilian citizens became subject to trial by military commission for major offenses -- not necessarily violations of the laws of war (G.O. No. 4, December 8, 1941). Proclamation No. 2561 of July 2, 1942, declares that any persons who "act under the direction" of any nation at war with the United States shall be "subject to the law of war and to the jurisdiction of military tribunals"; this would appear to include not only aliens but also citizens of the United States. In *Ex parte Quirin* it was argued that two of the petitioners for a writ of habeas corpus, one of whom had been actually naturalized and the other impliedly naturalized, repudiated their American citizenship under the Nationality Act of 1940 (54 Stat. 1168; 8 USCA 801) (see pp. 84-91, Brief for the Respondent).

3 Subjects of an allied nation who enter the armed forces of a belligerent "are in no better and no worse position, as regards the enemy, than the subjects of the States whose forces they have joined," (Oppenheim, *International Law*, Vol. II, 6th ed., p. 207). See par. 25a FM 27-5.

(4) Neutrals:

In general, subjects of neutral states do not bear enemy character. According to American practice, however, they may assume enemy character by continuing to be domiciled in enemy territory after the outbreak of hostilities. Conversely, enemies who are domiciled in neutral country after the outbreak of hostilities lose their enemy character. Either is subject to trial by military commission for violation of the laws of war.¹

(5) Enemy Aliens:

Proclamation No. 2561 above noted says that enemy aliens who enter or attempt to enter the United States in time of war and are charged with committing or attempting to commit sabotage, espionage, or hostile or warlike acts are subject to the jurisdiction of military tribunals and are denied access to tribunals of the United States and the States thereof except under regulations of the Attorney General approved by the Secretary of War.² The mere continuance of an American citizen in enemy territory may cause him to be classified as an enemy.³ United States military tribunals may also try alien enemies in territory under American martial law or military occupation, including military government, if the safety of United States forces or the accomplishment of the military mission so requires. During the occupation of Germany, 1918-1920, military commissions tried inhabitants of the occupied area for offenses against the laws of war or the military government.⁴ There is apparently no legal objection to the trial and punishment by military commission of major offenders against The Pact of Paris (Kellogg-Briand Pact) of 1928, signed by the United States, Germany, Italy, and Japan and intended to renounce resort to war.⁵

1 Ch. 2, Title 18 USCA 21-39 defines offenses against neutrality. See also Art. 17 Hague Convention No. IV (par. 400, FM 27-10) and Oppenheim, International Law, 6th ed., Vol. II, pp. 218-219.

2 As early as the beginning of the eighteenth century the practice noted was a well established legal principle: "If an alien enemy come into England without the queen's protection, he shall be seized and imprisoned by the law of England, and he shall have no advantage of the law of England..." (Sylvester's Case, 7 Mod. 150). Because of the proclamation noted above, citizens of the Reich were denied access to United States courts although the actionable event occurred before declaration of war (Bernheimer v. Vurpillot, D. C. Pa. 1942, 42 F. Supp. 830). In this case it was said, "Generally, in time of war no nation will permit a citizen of an enemy country to use its courts in any way which might be hurtful to it, or helpful to the enemy, in prosecution of the war." See also par. 351, FM 27-10.

3 Miller v. U. S., 11 Wall. 268; The Venus, 8 Cranch 253.

4 "G. O. 225 provided that Army, Corps and Division Commanders should convene Military Commissions for the trial of inhabitants for offenses against the law of war or the military government." (A. M. G. of O. G., p. 80, Vol. I). The military laws of a belligerent govern alien enemies in its forces, (Oppenheim, ibid., 207).

5 Art. 227 of the Versailles Treaty provided for the punishment of Kaiser Wilhelm.

c Offenses:

The military commission in general has jurisdiction over offenses:

- (1) Against the law of nations and the law of war
- (2) Affecting adversely the security of the military forces
- (3) Hindering the purposes of the military mission or of the military government, as in Occupied Germany 1918-1920
- (4) Ordinarily only if the civil courts are not functioning or are believed to be inefficacious in the dispensation of justice
- (5) Violative of military orders or regulations.¹

Paragraph 25b of War Department Basic Field Manual 27-5, Military Government, provides that a military commission in occupied territory may exercise jurisdiction over offenses against the law of that territory, against the laws of war, and against the order promulgated by the commanding general, theater of operations, or any of his assistants acting within their authority. Under Section 3 of Article II of Proclamation No. 4 of the AMGOT plan, Allied military courts have jurisdiction over offenses against the laws and usages of war; offenses under proclamations, orders, and regulations of the Allied Military Government; and offenses under the Italian Penal Code provided that the Military Governor or one authorized by him has ordered the trial of the case or class of cases by a military court.

d Place:

The military commission ordinarily exercises jurisdiction only in the area actually under military control or occupation.² This is usually territory of the enemy, which, as defined by paragraph 6, FM 27-10, includes "domestic territory recovered by military occupation from rebels treated as belligerents." The military commission may, however, function under martial law within the United States or within its territories, as in Hawaii, in which the inhabitants are not treated as belligerents. In Occupied Germany, 1918-1920, "for an offense committed within a particular area, the Commanding General of that area" appointed a military commission.³ It, however, would have been possible so to interpret G. O. 225 as to permit the Commanding General of the Army of Occupation or the Officer in Charge of Civil Affairs to appoint a commission to try in one area offenses committed in other areas. A commission was appointed in Ex parte Quirin to try in Washington, D.C., offenses committed in New York and in Florida.⁴

1 Winthrop, pp. 839-840. G. O. No. 48, Hawaii, 2 January 1942, gives to provost courts jurisdiction concurrent with courts martial to try personnel of the Army and Navy for violations of traffic ordinances.

2 "The laws of the United States limit the exercise of authority by military commissions to areas under military occupation..." (Wilson On International Law, pp. 313-314. Par. 25a, FM 27-5, provides that such jurisdiction shall be "within the occupied territories." Under Section 1 of Article II of Proclamation No. 4 of the AMGOT plan, jurisdiction extends to all territory occupied by the Allied forces.

3 A. M. G. of O. G., vol. I, p. 80.

4 This now appears to be the law despite Ex parte Milligan (4 Wall. 2) and Winthrop, p. 836. If the doctrine laid down in Ex parte Milligan were strictly adhered to, there could be no punishment in Germany, for example, of offenses committed against the laws of war in Czechoslovakia. The Judge Advocate General of the Army in an address on September 25, 1942, before the Washington State Bar Association said, "Military commissions...sit in conquered territory over which we have established military government...; or in domestic territory over which...we have taken military control...They may also sit and try cases for violations of the law of war in domestic territory over which martial rule has not been established and where the courts and other civil functions of the government are being carried on normally." Those Germans who seized French private property and transported it to Germany in contravention of Article 46 of the Annex to Hague Convention No. IV of October 18, 1907 (pars. 323-326, FM 27-10) were held to be punishable by the French criminal courts (see pp. 478-480 of vol. II, Garner, International Law and the World War).

e Time:

It has frequently been stated incorrectly that the offense must have been committed within the period of the war or the exercise of military government or martial law.¹ If this were true, those who made the attack upon Pearl Harbor on December 7, 1941, could not be tried for an offense against the law of war or the law of nations because the official declaration of war was not made until December 8, 1941, even though The President has declared that the war began on December 7, 1941; nor could the Japanese who attacked China or the Germans who conquered various countries without formal declaration of war (which is required by Article 1 of Hague Convention No. III; paragraph 14, FM 27-10) be punished. Offenses against the law of war and the law of nations committed without a formal declaration of war or which led to a formal declaration of war are, therefore, punishable by military commission.² On February 21, 1942, Bernard Julius Otto Kuehn was tried by military commission in Honolulu for conspiring with Japanese officials to betray the United States fleet to the Imperial Japanese Government four days before the attack on December 7, 1941. He was sentenced to be executed but the sentence was reduced to imprisonment. Offenses against the laws of war and of nations committed during an armistice may likewise be punished. Offenses committed after the ratification of a treaty of peace by the hostile parties or after declaration by competent authority of the termination of the war are not cognizable by military commissions.³

6. Procedure of Military Commission:

The procedure of the military commission may be regulated by Congressional action,⁴ by direction of The President, by order of the Secretary of War acting on behalf of The President, and by order of the commander having power to appoint such commissions.

In general, Congress has refrained from regulating such procedure.⁵ It has given to The President in A. W. 38 (41 Stat. 794, 10 USCA 1509) the power to issue "regulations, which he may modify from time to time" prescribing "the procedure, including modes of proof, in cases before...military commissions..."

The President has not availed himself of the authority given to him by A. W. 38 to issue general regulations governing the procedure of military commissions. He has in specific cases, however, issued directions governing procedure, the most notable, perhaps, and the most recent, being in Ex parte Quirin.

The Secretary of War has from time to time issued directions governing the procedure of military commissions. The most recent of a general nature are those contained in FM 27-5, which is designed solely for military government. A brief account of the normal functions of the military commission is also set forth in paragraph 7, FM 27-10.

Commanders have from time to time issued procedural instructions, the most recent of importance being those contained in G. O. No. 4, Hawaii, December 8, 1941. Under Section 2, Article IV, Proclamation No. 4, of the AMGOT plan, the Chief Civil Affairs Officer makes rules of procedure. Briefly stated, under this plan the defendant is entitled to a public trial; to have in advance a copy of the charges; to have defense counsel of his choice; to apply for further time to prepare his defense; to call such witnesses as he desires; to give evidence in his own behalf if he desires; and to have the proceedings translated into his own language.

1 Winthrop, p. 837, and Wilson On International Law, pp. 313-314

2 By G. O. 48, January 2, 1942, provost courts were given jurisdiction over traffic offenses in Hawaii "whether heretofore or hereafter committed." The Judge Advocate General has held that a military commission may take cognizance of offenses committed before the initiation of military government or martial law (Dig. Op. JAG 1912, p. 1067).

3 Dig. Op. JAG 1912, p. 1068.

4 It is a well recognized judicial doctrine that "the power to ordain and establish carries with it the power to prescribe and regulate the modes of procedure in such courts." (Livingston v. Story, 9 Pet. 655, 9 L. Ed. 255).

5 In c. 75 of the Act of March 3, 1863, Congress formally recognized the military commission; it enacted legislation in 1867, called the Reconstruction Acts, under which the military commission operated. (See Winthrop 833 and 846, et seq.)

In the absence of specific direction from higher authority, therefore, the military commission may formulate such procedural regulations as it may determine to be suitable.¹ As previously stated, military commissions, when appointed to try violations of the Articles of War, should be guided by those Articles of War which include military commissions in terms. Military commissions appointed under the authority of the common law of war or the law of nations need not be governed by the Articles of War applicable to such commissions. They may apply the principles contained therein when it appears expedient or desirable to do so. Except, then, for the observance of the fundamental American and international judicial principle that the accused should be given a fair and an impartial trial, the military commission is virtually without restriction as to procedure.

Turning from general to specific matters of procedure and emphasizing again the fact that the Articles of War which mention military commissions govern such commissions only when the offenses tried are tried under the authority of the Articles of War:

a The Accused:

(1) Preliminary Investigation:

A. W. 70 does not apply to military commissions. The investigation provided by this Article does, however, expedite the trial and often precludes an unnecessary trial.

(2) Trial by Jury in State and District Where Crime Committed:

The provisions of Article III, Section 2, Clause 3, and Amendments V and VI of the Constitution do not require the military commission to indict and try by jury.² Manifestly those who seek to destroy a nation are not entitled to the constitutional rights of that nation -- rights not granted even to the armed forces thereof. The Fifth Amendment, moreover, specifically excepts "cases³ arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger..."

(3) Habeas Corpus:

There is no right to release, on petition for writ of habeas corpus, from the lawful jurisdiction of a military commission.⁴

(4) Challenge:

The provisions of A. W. 18 and A. W. 99, granting the privilege of challenge for cause and peremptory challenge, do not apply in terms to military commissions. Peremptory challenge was denied in Ex parte Quirin. The right to challenge for cause would appear to be an essential of a fair and an impartial trial.

(5) Questions Tending to Degrade:

A. W. 24 prohibiting compulsory self-incrimination applies in terms to persons tried by military commissions appointed under authority of the Articles of War. Proper safeguards against self-incrimination are requisite to a fair and an impartial trial by a commission appointed under the common laws of war and of nations.

(6) Contempt:

Under the provisions of A. W. 32 any "military tribunal" may punish for contempt. This is, moreover, a prerogative of any judicial body, pursuant to which contempts may be punished by commissions appointed under the common law of war and the law of nations. Under the AMGOT plan, a military court may punish for contempt of court.

1 This principle is recognized in Ex parte Dickey (D. C. 204 F. 322) and in Ex parte Quirin (87 L. Ed. 1). A. M. G. of O. G., p. 81, says, "no particular form of procedure was required, by order, for trial before Military Commissions." Under Article VI of Proclamation No. 4 of the AMGOT plan any allied military court may do anything requisite to the administration of justice, including granting bail and accepting and forfeiting security therefor, making orders for the attendance of witnesses with or without documents, administering oaths, making orders for the disposition of exhibits, and punishing for contempt of court. Par. 27a of FM 27-5 provides, "The procedure of military commissions shall be the same as that of general courts-martial, except insofar as obviously inapplicable."

2 See Kurz v. Moffitt, 115 U. S. 500; Kahn v. Anderson, 255 U. S. 1; U. S. v. McDonald, 256 U. S. 705; In re Waldman, 42 F.(2d) 239; Terry v. U. S., 2 Fed. Supp. 932. See also par. 7, M. C. M., 1928 and p. 260, Bull. JAG, Vol. 1, No. 5.

3 The reading here is not members; civilians are therefore included.

4 Ex parte Quirin, in which petition for writ was denied.

(7) Counsel:

The accused may not legally demand the right of counsel. It has, however, usually been the practice to afford the accused the benefit of counsel.¹

(8) Bail:

It is not legally requisite that bail be granted the accused. If bail is granted, the commander may issue such directions as he deems suitable.²

(9) Witnesses:

To insure a fair and an impartial trial the accused, in capital cases, should be confronted with the witnesses against him. A. W. 25 provides that "testimony by deposition may be adduced for the defense in capital cases." This article applies in terms to military boards and commissions appointed under authority of the Articles of War.

(10) Pleas:

Although not legally requisite, general and special pleas of the accused should be heard and passed upon by the court in order to insure a fair and an impartial trial, and particularly pleas to the jurisdiction and in bar of trial. The plea of superior order or command will give military commissions some difficulty: if, during and after the present war, such plea is accepted as a good defense, it is probable that only Hitler in Germany will be punishable; if it is not accepted, a large percentage of the German army will be punishable for violation of the laws of war. This plea, if accepted at all, should be accepted with great caution, consideration being given to the nature of the offense, the intelligence of the accused, and other factors indicating the legal malice involved. War crimes should, therefore, be limited to only the most heinous offenses.³ Paragraph 347 of the United States War Department Basic Field Manual 27-10, Rules of Land Warfare, after denominating certain offenses as war crimes, adds, "Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall." Section 443 of Chapter XIV, "Laws and Usages of War on Land" contained in the British Manual of Military Law is almost identical therewith. In Mitchell v. Harmony (13 How. 115) the Supreme Court held that if a superior in giving an order acted within the limits of a discretion confided to him by law, an inferior is justified in executing the order even though the superior abused his power.⁴ The principle of immunity on the basis of plea of superior command is rejected as legally unsound by the better authorities on international law.⁵ The rules for naval warfare adopted at Washington in 1922 reject the defense of superior order.⁶

b Members of the Commission:

(1) Law Member, Trial Judge Advocate, and Defense Counsel:

It is not legally necessary, but it is highly desirable, that each of these be appointed.⁷

(2) Oath of Members:

It is not legally necessary that an oath be administered to the members of the commission,⁸ but it is desirable. The oath contained in A. W. 19 may be used, making such changes as are necessary. This statement applies also to the prosecution and to others connected with the trial.

1 Par. 23a, FM 27-5, provides for both trial judge advocate and defense counsel and one or more assistants. If procedure is to follow that of the general court martial, as recommended by par. 27a, FM 27-5, or that of special court martial, as required by G. O. No. 4, Hawaii, the provisions of A. W. 11 and A. W. 17 relating to defense counsel should be adhered to. Counsel is permitted under the AMGOT plan.

2 Par. 26, FM 27-5. Bail may be granted under the AMGOT plan.

3 London International Assembly Commission I, Sec. II, pp. 4 and 7.

4 Page 24, W. D. Technical Manual 27-250, Cases on Military Government.

5 Oppenheim's International Law (6th ed.), Vol. II, pp. 453-454; Garner, International Law and the World War, Vol. II, pp. 483-497; Bellot, Grotius Society Publications, 46.

6 Hall's International Law (8th ed.), p. 499.

7 Par. 23a, FM 27-5.

8 "...proceedings...will not be rendered illegal by the omission of...a specific oath to the members," Winthrop, p. 841.

c Charge and Specification:

Formal charge is not legally requisite: A. W. 70 does not apply to military commissions. The mere designation of an offense is sufficient.¹ Efficient procedure, however, makes it desirable that the charge be designated by its legal name or be described in terms of international law. The specification should set forth the circumstances conferring jurisdiction, as that martial law existed, and should indicate the status of the accused, as that he was an enemy alien in the military service of the enemy.² It is not legally essential that there be a formal accuser as defined by paragraphs 5a and 60, M. C. M., 1928, and the charges need not be signed and sworn to. Good procedure, however, makes such practice desirable. The military commission, like other military tribunals, has jurisdiction over "such charges only as may be referred to it for trial by the officer appointing it or his successor."³

d Interpreter:

If the accused or witnesses do not speak the language of all the members of the court, an interpreter may be appointed. The provisions of A. W. 115 and of paragraph 47, M. C. M., 1928,⁴ apply in terms to military commissions appointed under the authority of the Articles of War.

e Witnesses:

Military witnesses may be obtained by a military commission as they are by courts martial. Civilian witnesses may be obtained in the same manner, with the assistance of civilian authorities if necessary.⁵ If the military commission has been appointed under authority of the Articles of War, fees and mileage of civilian witnesses must be tendered in accordance with A. W. 23, which applies in terms to military commissions appointed under authority of the Articles of War. Under the same circumstances, witnesses must not be compelled to incriminate themselves: A. W. 24 also applies in terms to military commissions appointed under authority of the Articles of War. A. W. 32 provides that a "military tribunal" may punish for contempt.

f Depositions:

The provisions of A. W. 25, regarding the admissibility of depositions; of A. W. 26, regarding the method of taking depositions; and of A. W. 27, regarding the admissibility of the records of courts of inquiry, apply in terms to military commissions when they are appointed under authority of the Articles of War. Similarly, commissions not appointed under authority of the Articles of War may admit depositions and records of courts of inquiry if they so desire.

g Evidence:

A. W. 38 provides that The President may make regulations which shall "in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States..." The President has not issued such regulations governing military commissions appointed under authority of the Articles of War or under the common law of war or the law of nations. It is well, however, when military commissions evaluate evidence for them to consider both civil and criminal rules recognized in the district courts,⁶ as well as rules commonly accepted in the United States.⁷

¹ Ibid., 842.

² Although A. W. 70 is not legally applicable to military commissions, it is valuable as a guide in this connection.

³ Par. 25b, FM 27-5. In Occupied Germany no particular form of procedure was required. In practice, however, the procedure of the general court martial was followed where applicable (A. M. G. of O. G., I, p. 81). Par. 29a, FM 27-5, provides that the charge will be placed on a printed Charge Sheet, no oath to the charges being necessary.

⁴ See also par. 27e, FM 27-5.

⁵ See par. 27d, FM 27-5, and par. 97, M. C. M., 1928.

⁶ Federal rules of civil procedure appear in Title 28 U.S.C.A. foll. Sec. 723c: Rule 1 provides that rules of procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action," and Rule 43a that "testimony of witnesses shall be taken orally in open court...All evidence shall be admitted which is admissible under statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held." Federal rules of criminal procedure are found in Part 2, 18 U.S.C.A. 541-681.

⁷ In Hanley v. Donoghue (116 U. S. 1) it is said that "general rules of pleading and evidence" must obtain in the absence of Congressional prescription.

It is now axiomatic that in criminal cases the prosecution must establish the guilt of the defendant beyond a reasonable doubt.¹ Although not legally essential, it is desirable that the testimony of witnesses be heard orally before the commission and that it be reduced to written form or that an intelligible abridgment thereof be made, that all objections to the competency of testimony be recorded, and that the ruling thereon be noted.² The directive to the military commission in Ex parte Quirin to admit such evidence as would "in the opinion of the President of the Commission, have probative value to a reasonable man" is an excellent generalization of the evidence that should be admitted.³

h Record:

Under the provisions of A. W. 115, which in terms includes military commissions, a reporter may be appointed for military commissions appointed under authority of the Articles of War.⁴ Commissions appointed under the common law of war or the law of nations appoint reporters as may be prescribed by appropriate authority. The oath for the reporter in court martial procedure given in A. W. 19 may be modified and used.

There is no legal requirement for the keeping of records of trial by military commission. The record will not be held insufficient if the testimony is abridged or only the substance thereof is given.⁵ In practice, however, it is desirable that a record be kept substantially equivalent to that required for special or general courts martial. G. O. No. 4, Hawaii, December 8, 1941, requires the record to be "substantially similar to that required in a special court-martial." Paragraph 29c, FM 27-5, advises that it be "as nearly as practicable like that of a general court-martial." Winthrop, Military Law and Precedents, page 841, says that the proceedings of military commissions "will not be rendered illegal by the omission of details required upon trials by courts-martial..." Under Section 2, Article VII, Proclamation No. 4, of the AMGOT plan, every record of trial by an Allied military court must be transmitted to the chief legal officer for examination and file.

i Conviction:

A. W. 43, which notes the number of votes required for conviction by court martial, does not apply to military commissions even when appointed under authority of the Articles of War. The number may be fixed by higher authority or by the commission itself. In Ex parte Quirin the "concurrence of at least two-thirds of the members of the Commission present" was required for conviction or sentence, as prescribed by The President in the order appointing the commission.

j Previous Conviction and Double Jeopardy:

A military commission may consider previous convictions and previous sentences,⁶ but it is not required legally to do so. There should be no more than one military commission trial of the same person for the same offense.

1 Holt v. U. S., 218 U. S. 245. See John Bene and Sons v. Fed. Tr. Com., 299 Fed. 468; Miss. Valley Barge Line Co. v. U. S., 292 U. S. 282; Natl. Lab. Rel. Bd. v. Col. E. and S. Co., 306 U. S. 292; Fairman, Memorandum. The statement of Spaight, War Rights on Land, p. 349, "...throwing the onus of proving his innocence on the accused...is a necessary principle of martial law justice" is questionable. See par. 41c, M.C.M., 1928; Winthrop, M. L. and P., p. 315; the British Manual of Military Law, p. 72, and McComsey and Edwards, The Soldier and the Law, p. 63, to the contrary.

2 Cf. R. S. 4097 (12 Stat. 75, 22 USCA 154).

3 Pars. 111-126, M.C.M., 1928, provide a good general account of rules of evidence.

4 Enlisted men may be used as reporters (37 Stat. 575; 10 USCA 644; Sec. 203 M. L. 1939). See par. 2h, AR 35-4120, WD, 1942 (50 Stat. 805; 10 USCA 699) for rates.

5 Winthrop, 841.

6 Par. 27f, FM 27-5; par. 79, M.C.M., 1928. Under Sec. 1, Art. V, Proclamation No. 4, of the AMGOT plan, evidence of character may be received, including prior criminal record before military tribunals and civil courts.

k Sentence:

There is no legal restriction upon the sentence that may be imposed by a military commission. The sentences are usually death, imprisonment, or fine.¹ In Occupied Germany 1918-1920, "No limitation was placed upon the Military Commission as to the penalty which might be imposed."² In G. O. No. 4, Hawaii, December 8, 1941, it was provided, "Military commissions may adjudge punishment commensurate with the offense committed and may adjudge the death penalty in appropriate cases." Under Section 1, Article III, Proclamation No. 4, of the AMGOT plan, the general military court may impose any lawful punishment. Military commissions have also assessed costs of trial against the accused; have forfeited various rights or confiscated property or required bond to be furnished; have banished or expelled beyond the military lines; and have ordered the taking of an oath of allegiance to the United States.³ In order to preclude disparity of punishment, a table of maximum punishments may be published.⁴ Although it is not necessary to observe the law of the place in which the offense was committed or tried, the application of the penalties under such local law may tend to convince natives that the sentence is just: G. O. No. 4, Hawaii, December 8, 1941, recommends that the sentence be not in excess of that prescribed for similar offenses against the laws of the United States or the Territory of Hawaii, and directs that military commissions be guided, but not limited, by the penalties authorized by A Manual for Courts-Martial, 1928, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases. Under Section 6, Article V, Proclamation No. 4, of the AMGOT plan, a military court may suspend a sentence of imprisonment and may, upon subsequent conviction by a military court, put into operation a suspended sentence.

1 Confirmation and Review:

Approval by the officer appointing the commission, or by the officer commanding for the time being,⁵ or by one delegated by either, is usually obtained before the sentence becomes effective, for such officer is responsible for the proceedings of the commission. In Occupied Germany 1918-1920, no death sentence was executed without approval of the Commander-in-Chief.⁶ Under Article VIII, Proclamation No. 4, of the AMGOT plan, the Military Governor or an officer not below the rank of brigadier or brigadier general, delegated in writing by the Military Governor, must confirm the death sentence. G. O. No. 4, Hawaii, December 8, 1941, provides that no military commission sentence shall become effective until approved by the Military Governor. In Ex parte Quirin provision was made for transmittal of the record direct to The President for his action. A. W. 46 provides, "Under such regulations as may be prescribed by the President every record of trial by...military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General." This requirement, however, applies only to those commissions appointed under statutory authority. The Judge Advocate General has held that there is no legal requirement that "the proceedings of military commissions be reviewed or approved by the Board of Review, The Judge Advocate General, or the President prior to execution of their sentences."⁷

1 See Winthrop, pp. 842-843, and par. 28a (1), FM 27-5. Fines collected in occupied territory may be expended by the military commander for the benefit of such territory (MS. Comp. Gen. B-23647, Feb. 16, 1942; Sec. 1765, Vol. I, Bull. JAG, Jan.-June 1942). Under Sec. 2, Art. V, Proc. No. 4, of the AMGOT plan, imprisonment may be imposed in default of payment of fine.

2 A. M. G. of O. G., I, p. 80.

3 See Winthrop, pp. 844-845; par. 28b, FM 27-5. Confiscation, padlocking, and residence within a specified area may be required under Art. V, Proc. No. 4, of the AMGOT plan.

4 Par. 28c, FM 27-5; par. 104c, M.C.M., 1928.

5 Par. 31a (1), FM 27-5.

6 A. M. G. of O. G., I, p. 80.

7 Bull. JAG, Jan.-June 1942, p. 5.

In Occupied Germany 1918-1920, under the provisions of G. O. 48, W. D. 1918, records of trial "were sent to the Acting Judge Advocate General for the American Expeditionary Forces" for review; none the less, the Commanding General of the Army claimed "the right of control over the judgments of Military Commissions and, through his Officer in Charge of Civil Affairs, investigated all charges of miscarriage of justice."¹ Under the AMGOT plan a sentence exceeding two years' imprisonment or a fine of 50,000 lire must be reviewed by the Chief Civil Affairs Officer or by his delegate, of the rank of colonel or higher, appointed for that purpose. Under Section 3, Article VII, Proclamation No. 4, of this plan, the reviewing authority may set aside any conviction, and may suspend, reduce, or commute the sentence, or order a new trial.

m Appeal:

There is no legal provision for appeal from the decision of a military commission. The Supreme Court of the United States has frequently held that it is not empowered to review the proceedings of military tribunals by certiorari.² Under Section 1, Article VII, Proclamation No. 4, of the AMGOT plan, however, a person convicted by a military court may within thirty days petition to have the conviction set aside or the sentence modified.

n Revision and Rehearing:

There is no legal provision for revising the record or granting a new hearing. Such action may be taken provided it is not inconsonant with the granting of a fair and an impartial trial. The Judge Advocate General has held, "The provision of R.S. 1199 (10 USCA 62) that The Judge Advocate General shall 'revise' the proceedings of all...military commissions does not empower him to alter, amend, suspend, or reverse their judgments but he may properly review the records of their proceedings with a view to recommending action to the President."³

7. Conclusion:

The requisites of the military commission are that it be:

Appointed by an official having the power to appoint it,
Invested with the power to try the person and the offense.

1 A. M. G. of O. G., I, p. 81.

2 Ex parte Vallandigham, 1 Wall. 243; In re Vidal, 179 U. S. 121; Winthrop, M. L. and P., p. 846; Grafton v. U. S., 206 U. S. 333; Ex parte Quirin, 87 L. Ed. 1.

3 Bull. JAG, Jan.-June 1942, p. 5.

PART II
THE PROVOST COURT

1. Origin and History:

The provost court, first established at New Orleans in 1862 by G. O. No. 6, promulgated by the Commander of the Department of the Gulf, was quite effective in the administration of local justice during the Civil War and the Reconstruction Period. It was revived by G. O. No. 225 during the occupation of Germany 1918-1920. When martial law was established in Hawaii in December 1941, G. O. No. 4 of December 8, 1941 was published announcing the policy governing the trial of civilians by provost courts.

A distinction is sometimes made, as in Occupied Germany 1918-1920, between the superior provost court and the inferior provost court, usually on the basis of seriousness of offense and penalty imposed.¹

Under Sections 2 and 3, Article III, Proclamation No. 4, of the Allied Military Government of Occupied Territory (AMGOT) plan, the superior military court, similar to the superior provost court, and the summary military court, similar to the inferior provost court, were established.

2. The Provost Court and the Military Commission:

The provost court is quite similar to the military commission; it might be considered to be virtually identical with it although inferior to it despite the fact that there is no appeal from the provost court to the military commission. The following are the fundamental distinctions in practice between the two:

- a The provost court, like the police court or the justice-of-the-peace court, is more summary than the military commission.
- b The procedure of the provost court is, therefore, less formal than that of the military commission.
- c The provost court has jurisdiction over minor offenses against the law of nations (although jurisdiction over all such offenses is sometimes exercised by the military commission) and over violations of orders, regulations, and ordinances of commanding officers.
- d The penalties imposed by the provost court are, therefore, less severe than those imposed by the military commission.

3. Legal Authority for the Provost Court:

The legal authority for the provost court is the same, in general, as that for the military commission, i. e., the Constitution and the powers of Congress, The President, and the Secretary of War acting on behalf of The President under the Constitution; statutes other than the Articles of War; legal precedent, including decisions of the Supreme Court² and opinions of the Attorney General; treaties, armistices, conditional surrenders, and capitulations; War Department publications (including Basic Field Manual 27-5, Military Government; Basic Field Manual 27-10, Rules of Land Warfare; and Technical Manual 27-250, Cases on Military Government); proclamations; the laws of war and the laws of nations; the law of the place in which the offense was committed and is tried; and orders, regulations, and ordinances of commanders and officers in charge of civil affairs.

4. Appointment of the Provost Court:

The persons who may appoint military commissions (Section 3, Military Commissions, *supra*) may also appoint provost courts. In Occupied Germany 1918-1920, superior provost courts were appointed by the commanding generals of the various divisions and such courts sat only at the headquarters of the commanding generals of such divisions; inferior provost courts were

1 Par. 24, FM 27-5.

2 Mechanics & Traders' Bank v. Union Bank, 22 Wall. 276.

appointed by the commanding officer of each garrisoned city, town, or other occupied place.¹ No distinction, however, was made under martial law in Hawaii in 1941-1942 between superior and inferior provost courts; all courts were appointed by the Military Governor.

5. Composition of the Provost Court:

The provost court, like the military commission, may be comprised of officers or civilians.²

No definite number has been prescribed. One officer, however, ordinarily constitutes a provost court. Paragraph 23 of FM 27-5 provides that both the superior and the inferior provost court shall consist of one officer, but that the officer constituting the superior provost court shall be of field grade. Under Sections 2 and 3, Article III, Proclamation No. 4, of the AMGOT plan, the superior military court consists of one or more officers, one of whom must be a judicial officer of the Allied Military Government if available; and the summary military court consists of one officer.

6. Jurisdiction of the Provost Court:

a Concurrent and Exclusive:

(1) Courts Martial and the Provost Court:

A. W. 15 provides as follows: "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving...provost courts...of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such...provost courts..." Usually, however, the provost court, like the military commission, does not exercise jurisdiction over military personnel or over "persons accompanying or serving with the armies of the United States" (A. W. 2(d)); such jurisdiction is ordinarily left to courts martial. The general principle is stated in paragraph 7c of Field Manual 27-10, "In practice, offenders who are not subject to the Articles of War...but are subject to trial by military tribunals, are tried by military commissions or provost courts."³ G. O. No. 48 of January 2, 1942, Hawaii, however, gave to the provost court concurrent jurisdiction with the Army for the trial of violations of vehicular and pedestrian traffic.

(2) Civil Courts and Provost Courts:

If the civil courts are open and functioning properly, provost courts do not ordinarily exercise civil jurisdiction.⁴

b Over Persons:

Persons other than those noted immediately above are subject to trial by provost court in accordance with the conditions set forth in Section 5b (2)-(5), Military Commissions, supra.⁵

c Over Offenses:

The jurisdiction of the provost court over offenses is the same as that of the military commission,⁶ although the former is usually limited to the trial of less serious offenses. The provost court may exercise jurisdiction over offenses of a specialized nature, like vagrancy or juvenile delinquency.

1 A. M. G. of O. G., I, p. 79.

2 Civilians were appointed in Hawaii (G. O. 53, I & II; 69; and 103 V).

3 Par. 17b of App. V, FM 27-5, excepts from jurisdiction of the provost court those persons who are "subject to military or naval law." See also par. 25a of the same manual.

4 See pp. 107-108, Constitutional Powers and Limitations, Department of Law, U.S.M.A., and par. 25b, FM 27-5.

5 See also par. 25a, FM 27-5.

6 See Sec. 5c, Military Commissions, supra. Under Secs. 2 and 3, Art. III, Proc. No. 4, of the AMGOT plan, the superior military court may try all offenses within the jurisdiction of Allied military courts; the summary military court may try similar offenses other than those for which the maximum punishment is death.

- d Place:
See Section 5d, Military Commissions, supra.
- e Time:
See Section 5e, Military Commissions, supra.

7. Procedure of the Provost Court:

A provost court appointed under authority of the common law of war or the law of nations is free to adopt any mode of procedure that will result in a fair and an impartial trial. In occupied territory it will, of course, be governed by any directives issued by the commander or the Officer in Charge of Civil Affairs exercising jurisdiction over the provost court. In Occupied Germany 1918-1920, the Officer in Charge of Civil Affairs for the Third Army determined the court procedure for the entire territory.¹ As previously stated, this is true also under the AMGOT plan.

The procedure of the provost court is usually more informal than that of the military commission.

G. O. No. 4 of December 8, 1941, Hawaii, provides that the procedure of the provost court shall follow that of the summary court.² Paragraph 27b of Field Manual 27-5 provides that the procedure "shall be the same as that of summary courts martial, except insofar as obviously inapplicable."

a The Accused:

Except for the general caveat that trial by provost court be fair and impartial, the accused has no inviolable legal rights. The accused may be given the benefit of a preliminary investigation; he is not entitled to trial by jury in the state and district where the offense was committed; he may not be released, on petition for writ of habeas corpus, from its law of jurisdiction; he should not be asked questions which tend to incriminate him; he may be punished for contempt under general principles governing judicial bodies; he may demand the right of being heard by counsel though not of being furnished counsel;³ bail may be denied;⁴ he should, unless there is strong reason to the contrary, be confronted with the witnesses against him;⁵ and depositions may or may not be admitted.⁶ While a provost court is not subject to challenge, for cause or otherwise, it will not try an accused upon charges preferred by it.

b Charge and Specification:

No formal charge is necessary. In Occupied Germany 1918-1920, written charges were filed but they stated "only the substance of the offense, the name of the offender, and the place where and time when the offense was said to have occurred."⁷ The accused was also informed of the charge against him.

c Interpreter and Witnesses:

An interpreter may be appointed. Manifestly a trial would not be fair and impartial if an accused were not understood by the court, and vice versa. Provision is made for one in paragraph 27a of FM 27-5.

Witnesses may be obtained as for military commissions.⁸

1 A. M. G. of O. G., Vol. I, p. 80.

2 See par. 82, M. C. M., 1928.

3 In Occupied Germany 1918-1920, accused might be heard in person or by counsel (A. M. G. of O. G., I, p. 81). Par. 27c of FM 27-5 provides that accused may employ counsel at his own expense.

4 It was denied in Occupied Germany (A. M. G. of O. G., Vol. I, p. 81). Par. 26, FM 27-5, provides that admission to bail is discretionary.

5 The method of obtaining witnesses is set forth in par. 27d(2), FM 27-5.

6 See par. 17d, App. V, FM 27-5.

7 A. M. G. of O. G., Vol. I, p. 81; see par. 29b, FM 27-5.

8 See Sec. 6e, Military Commissions, supra, and par. 27d, FM 27-5.

d Evidence:

Evidence is admissible as for military commissions. In Occupied Germany 1918-1920, all evidence was required to be under oath.¹ It should be taken under such circumstances and according to such procedure as will constitute a fair trial.

e Record:

No record is legally necessary, although it is desirable to keep a brief one. Certainly the decision of the court and the amount of any fine imposed and collected and the length of any sentence should be recorded. A record was kept in Occupied Germany 1918-1920.² By G. O. No. 4, December 8, 1941, Hawaii, the record is required to be similar to that of a summary court. Paragraph 29b of FM 27-5 provides that the record will be kept on the back of the charge sheet. Under the AMGOT plan, every record of trial by an Allied military court must be transmitted to the Chief Legal Officer for examination and file.

f Previous Conviction:

Consideration may be given to previous conviction.³

g Sentence:

A limitation is usually placed on the sentence. In Occupied Germany 1918-1920, the superior provost court was limited to the imposition of imprisonment for six months or a fine of 5,000 marks or both; the inferior provost court to imprisonment for three months or a fine of 1,000 marks or both. By G. O. No. 4 of December 8, 1941, Hawaii, the provost court was limited to imposition of confinement for a period of five years and a fine of \$5,000. The limitations in paragraph 28a of FM 27-5 are perhaps too low;⁴ superior provost courts are limited to the imposition of confinement at hard labor for six months and a fine of \$1,000 or both; inferior provost courts to confinement at hard labor for one month and a fine of \$100 or both.⁵ Under Sections 2 and 3 of Article III, Proclamation No. 4, of the AMGOT plan, the superior military court may impose any lawful punishment except death or imprisonment for more than ten years; the summary military court any lawful punishment except death or imprisonment for more than one year, or a fine of more than 50,000 lire, or both such imprisonment and fine.

h Confirmation and Review:

No confirmation or review is necessary. In Occupied Germany if a complaint was registered, an investigation was held and, in many instances, sentences were set aside or modified.⁶ By G. O. No. 4 of December 8, 1941, Hawaii, records in all cases were required to be forwarded to the Department Judge Advocate but sentence became effective immediately. Paragraph 31a (2) of FM 27-5 provides that, although sentence of the provost court is to become effective immediately, the record must be examined by the officer who appointed the court, or at his headquarters, or by his successor; that the sentence may be mitigated or vacated; and that the commanding general of the theater of operations or his delegate has power also to modify or vacate.

i Appeal:

There is no appeal from the decision of the provost court.⁷

1 See A. M. G. of O. G., Vol. I, p. 81.

2 See ibid., Vol. I, p. 80.

3 See par. 27f, FM 27-5; also Military Commissions, Sec. 6i, supra.

4 These limitations are, however, virtually identical with those recommended in App. No. 16, Vol. V, pp. 7-8, A. M. G. of O. G.

5 Confiscation, expulsion, padlocking, etc., may be included in the penalty; see also par. 28b, FM 27-5. For use of fines, see Military Commissions, Footnote 1, Sec. 6k, supra.

6 A. M. G. of O. G., Vol. I, p. 81; see also Military Commissions, Sec. 6i, supra.

7 Ex parte Vallandigham, 1 Wall. 243. See Military Commissions, Sec. 6m, supra, and footnote thereto.

ARMY OF THE UNITED STATES

S.O.No.

Headquarters,

Date

President

Trial Judge Advocate
Defense Counsel

By command of _____:

Signature

Grade and Organization

Official Position

OFFICIAL:

Signature

Grade and Organization

Official Position

ORDER APPOINTING PROVOST COURT

ARMY OF THE UNITED STATES

S.O.No.

Headquarters,

Date _____

_____, _____, _____, is hereby appointed
Grade Name Organization
Provost Court, to meet at the time and place designated by him, for the
trial of such persons as may properly be brought before the court.

By command of _____ :

Signature

Grade and Organization

Official Position

OFFICIAL:

Signature

Grade and Organization

Official Position

j Revision and Rehearing:

There is no legal provision as to rehearing and revising decisions of provost courts.

8. Conclusion:

The requisites of the provost court are that it be:

Appointed by an official having the power to appoint it,
Invested with the power to try the person and the offense.

SUBPOENA FOR CIVILIAN WITNESS

NO. _____

ARMY OF THE UNITED STATES

Military Commission*
Superior Provost Court*
Inferior Provost Court*

Place

Date

Name

Address

You are hereby directed to appear before this Commission* at Court*

Place

on

Date

at

Hour

to testify as a witness in the case of

Name

and to bring with you any articles or documents in your possession pertain-
ing to this case.

You will be tried for contempt if you fail to comply.

For Military Commission*
For Provost Court*

Grade and Organization*
Official Position*

SUBPOENA SERVED: _____

Date

Signature

Grade and Organization*
Official Position*

*Strike out inapplicable word(s)

No. _____

SUMMONS

ARMY OF THE UNITED STATES

Military Commission*
Superior Provost Court*
Inferior Provost Court*

Place _____

Date _____

Name _____

Address _____

You are hereby summoned to appear before this Commission* at Court*

on _____

at _____

Place _____

Date _____

Hour _____

for trial* investigation* of the following alleged offense:

CHARGE: (Violation of Standing Regulations, U. S. Army.

SPECIFICATION: Sale of firearms without permit.)

For Military Commission*
For Provost Court*

Grade and Organization _____

NOTE: 1. Failure to comply will result in compulsion.
2. Counsel may be provided at your expense.
3. Witnesses may be brought with you or subpoenaed at your request.

SUMMONS SERVED: _____

Date _____

Signature _____

Grade and Organization*
Official Position*

*Strike out inapplicable word(s)

RECORD OF TRIAL
ARMY OF THE UNITED STATES

Superior Provost Court*
Inferior Provost Court*

No. _____

Place _____

Date _____

DEFENDANT:

Last Name First Name Middle Name

Address

Occupation

Age

Wife

Other Dependents

Date and Place of Arrest

Date and Place of Confinement

Nature of Offense

Previous Convictions

Date Referred for Trial By Date of Trial

Plea

Finding

Fine

Paid (Yes or No)

Period and Nature of Confinement Date and Place of Confinement

Other Penalty Imposed

Remarks

WITNESSES:

For Accused:

Name

Address

Name

Address

Name

Address

Against Accused:

Name

Address

Name

Address

Name

Address

For Military Commission*
For Provost Court*

Grade and Organization*
Official Position*

ACTION BY REVIEWING AUTHORITY:

Name

Grade and Organization*
Official Position*

*Strike out inapplicable word(s)

COMMITMENT ORDER

ARMY OF THE UNITED STATES

No. _____

Military Commission*
Superior Provost Court*
Inferior Provost Court*

Place

Date

Name

_____ was tried by this Military Commission*
Provost Court*.

on _____ at _____ and was found
Date Place

guilty of _____ and sentenced to _____
Offense(s) hours'*
days'*
months'*
years'*

confinement with* hard labor.
without*

_____ has been designated as the place of
Place

confinement.

You are directed to detain said _____ under the
Name
conditions stated herein for the period named or until directed to release
him by proper authority.

This commitment order is your authority for the detention noted
herein.

Signature

Grade and Organization*

Official Position*

*Strike out inapplicable word(s)