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TRIAL OF UNLAWFUL ENEMY BELLIGERENTS

CHARLES F. BARBER

The Supreme Court introduced a new test of military jurisdiction when it decided in *Ex parte Quirin*¹ that because the Nazi saboteurs were "unlawful enemy belligerents" they were subject to trial by military commission. For a full understanding of the proper place of this newly discovered jurisdictional principle in our military and constitutional law, it will be necessary to examine the Articles of War to determine whether any or all of them are applicable to the trial by military commission of "unlawful enemy belligerents," and if so to decide whether such Articles effect a valid congressional limitation upon the power of the President as Commander in Chief of the Army and Navy. Since these problems involve "unlawful enemy belligerents," it will be appropriate first to examine the meaning of the term.²

I. THE RULES OF WAR

When civilized peoples exult at the news that their bombers have devastated a great city, one wonders what has become of the "laws of humanity and the dictates of the public conscience," which not so long ago sought to mitigate the severity of war by confining it, so far as possible, to the destruction of the armed forces of the enemy.³ One wonders if the so-called "rules of war" are more than philosophers' reveries. A review of the morning newspaper would indicate that in total war the humanitarian criterion, which guides the judgment of international conferences in peace time as to acceptable conduct in war, gives way to military "convenience" which looks primarily to prospective advantage and balances that advantage against the effect of certain retaliation.⁴ This same review, however, would indicate that

¹ 317 U. S. 1, 63 Sup. Ct. 1 (1942).

² This article is concerned only with the law governing the trial and punishment of offenders against the law of war. It discusses one class of cases in which persons not members of our armed forces are subject to "military law." It does not deal with the law of "military government" of occupied or conquered territory; neither does it discuss "martial law" in domestic territory. The "military commissions" discussed hereinafter are those appointed by military command to try offenses against the law of war, and should be distinguished from the courts associated with military government and those which administer martial law, both of which are also called "military commissions." See WEINER, *A PRACTICAL MANUAL OF MARTIAL LAW* (1940) 6-7, 134-135; Miller, *Relation of Military to Civil and Administrative Tribunals in Time of War* (1941) 7 OHIO ST. L. J. 188. Miller apparently overlooks the military commission with jurisdiction over offenses against the law of war.

³ See preamble to HAGUE CONVENTION NO. IV, *Convention Respecting the Laws and Customs of War on Land* (1907), 36 STAT. 2277 (1910) [hereinafter cited HAGUE IV (1907)].

⁴ *E.g.*, when reports suggesting that gas might be used by the Axis against the

certain standards of conduct, particularly as regards individuals, are in fact maintained by the belligerents. Such conduct is not incidental, but rather is a demonstration of adherence to certain still-honored "rules of war."

It was in comparatively recent times that it came to be recognized that the long range interests of all concerned were best served by limiting the scope of military operations, and that the object of war was to impose one's will on the enemy, rather than to destroy him.⁵ It was thus only recently that there was an area for the development of standards of decency in war not inconsistent with attaining the objective for which one went to war. Formal rules of war were first set down in Lieber's *Civil War Instructions for the Government of the Armies of the United States in the Field*.⁶ Subsequently, nations entered into reciprocal conventions having as their object the mitigation of the suffering and hardships endured by the wounded⁷ and prisoners of war,⁸ and the establishment of rules of warfare designed to outlaw practices which cause suffering out of proportion to the end gained.⁹ These international agreements, together with the rules of warfare published by the several nations for the guidance of their armies, the acts of the belligerents, and the analyses of these acts published by students of military

Chinese and the Russians were received, the President (June 6, 1942; June 8, 1943) and the Prime Minister (May 10, 1942) were quick to threaten deadly retaliation in kind. This may have helped tip the scale of "advantage" in the mind of the enemy. At any rate, gas warfare has not yet been generally employed, if at all.

⁵Cf. Cramer, *Military Commissions* (1942) 17 WASH. L. REV. 247, 249. Major General Cramer is currently the Judge Advocate General of the United States Army.

⁶Promulgated to the Union Forces as General Order No. 100 of 1863. "Not only the first but the best book of regulations on the subject ever issued by an individual nation on its own initiative." SPAIGHT, *WAR RIGHTS ON LAND* (1911) 18. This code served as a basis for future international discussions of the subject which culminated in the Hague Conventions of 1899 and 1907. See HALL, *INTERNATIONAL LAW* (8th ed. 1924) 469, n. 1; 2 WINTHROP, *MILITARY LAW AND PRECEDENTS* (1896) 1204, n. 3 (hereinafter cited WINTHROP. WINTHROP was reprinted in 1920 in a small type, one volume edition. The original pagination is shown in the reprint). ". . . The Rules of War are pervaded by one grand animating principle—to obtain justice as speedily as possible at the least possible cost of suffering and loss to the enemy, or to neutrals, as the result of belligerent operations." RISLEY, *THE LAW OF WAR* (1897) 73. As the methods and instrumentalities of war have changed, established rules have been adopted to fit the new situation. For a current discussion of the basis for rules of war, see Healy, *Rules of War. "What Acts of War Are Justifiable?"* (1941) 17 N. Z. L. J. 129.

⁷E.g., *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field* (1929), 47 STAT. 2074 (1932); HAGUE CONVENTION No. X, *Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention* (1907), 36 STAT. 2371 (1910).

⁸E.g., HAGUE CONVENTION No. II, *Convention with Respect to Laws and Customs of War on Land* (1899), 32 STAT. 1803 (1902) ANNEX; § I, c. 2; HAGUE IV (1907) ANNEX, § I, c. 2; *Geneva Convention Relative to the Treatment of Prisoners of War* (1929), 47 STAT. 2021 (1932).

⁹E.g., HAGUE IV (1907) ANNEX, § II, c. 1.

and international law comprise the present day "common law of war."¹⁰

A review of events of this war would indicate that, as regards employment of the means of warfare, the "common law of war" has little content. Adherence to the rules of warfare is more evident, however, as regards the conduct and status of soldiers and civilians as individuals. The soldier's conduct in the field is still guided by manuals drawn up in accordance with international conventions, and his treatment on capture has been, on the whole, in accordance with international usage. Thus the American soldier is instructed, *inter alia*, not to kill or wound an enemy who has laid down his arms and surrendered, or to declare that no quarter will be given, or to employ arms or material of a nature to cause superfluous injury, or to make improper use of a flag of truce, or to pillage a town or place even where taken by assault,¹¹ and if he is captured under conditions which entitle him to treatment as a prisoner of war, he may expect to be humanely treated, to be permitted to retain his personal belongings of a nonmilitary nature, to be confined only as an indispensable measure of safety, to be paid a wage for all labor done suitable to the nature of the work, which pay may be expended toward his maintenance and toward improving his position, and to be repatriated promptly after the conclusion of peace.¹² Although the years since the adoption of these rules have seen the development of submarine, air, and other new forms of warfare, the rules have been generally recognized as applicable to uniformed participants in the new forms of warfare. Otherwise the vicious circle of retaliation and counter-retaliation would take a pointless toll. The present state of the law of war concerning prisoners of war is indicative of the change which has taken place since the time when all war prisoners became the slaves of their captors, a practice recognized by Grotius as still conformable to the law of nations, but which by that time had been mitigated to the extent of permitting prisoners of war to ransom themselves from captivity.¹³

Another development in the law of war centers about the distinction, now

¹⁰See Munson, *The Arguments in the Saboteur Trial* (1942) 91 U. OF PA. L. REV. 239, 242. By reference to the law of war in Article of War 15, Congress has adopted "the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts" as part of the law of the land. See *Ex parte Quirin*, 317 U. S. 1, 30, 63 Sup. Ct. 1, 12 (1942); *The Lola*, 175 U. S. 677, 700, 20 Sup. Ct. 290, 299 (1900).

¹¹RULES OF LAND WARFARE (U. S. War Dep't, 1940) §§ 25, 33, 34, 42, 61; HAGUE IV (1907) ANNEX, Arts. 23, 28.

¹²HAGUE IV (1907) ANNEX, Arts. 4-20. This convention, or the similar one of 1899, *supra* note 8, has been ratified or affirmed by forty-seven nations, including all the principal belligerents in the present conflict.

¹³See TWISS, *THE LAW OF NATIONS* (2d ed. 1875) § 177.

universally recognized, between the armed forces and the peaceful populations of belligerent nations.¹⁴ The armed forces, by international agreement, must carry arms openly and must wear a fixed, distinctive emblem recognizable at a distance. Provided they meet these conditions, individuals are entitled, on capture, to be treated as prisoners of war. The peaceful population, provided it remains peaceful, is entitled to be spared the impact of war so far as is consistent with military operations. In accordance with these principles, the enemy soldier who fails to wear markings which indicate that he is a member of the armed forces, or the enemy civilian who is in fact belligerent—the two amount to the same thing—are not entitled to treatment as prisoners of war.¹⁵ Enemy spies and enemy marauders who come through the lines in civilian dress or a false uniform to destroy war materials, industrial facilities, or for any hostile purpose, are in this class. They have committed no crime against international law; they are heroes on the one side. But they are the most despised representative of the enemy on the other. Though some have questioned their honor, none could question their bravery. They are brave because, if captured, in accordance with universal custom they will be put to death.

Both the uniformed soldier whose individual conduct violates accepted rules of war, and the apparent civilian who is in fact belligerent, are "unlawful enemy belligerents." Though they are universally recognized as beyond the law, they are customarily given a trial before being put to death or otherwise punished.¹⁶ Such a trial is not in mitigation of punishment, for the guilty suffer death. It is accorded rather to assure that only the guilty are put to death and that those accused who are in fact entitled to treatment as prisoners of war or as civilians are restored to that status.

Trials of persons charged as spies or for other reasons as unlawful enemy belligerents, are an adjunct of every war. Occasionally such trials are accom-

¹⁴HAGUE IV (1907) ANNEX, Art. 1. See also authorities cited in *Ex parte Quirin*, 317 U. S. 1, 30, 63 Sup. Ct. 1, 12, n. 7 (1942). The general acceptance of this distinction has been heralded as "the principal advance made by international law in treating war primarily as an act of hostility between states rather than individuals." BATY AND MORGAN, *WAR, ITS CONDUCT AND LEGAL RESULTS* (1915) 172.

¹⁵RULES OF LAND WARFARE (U. S. War Dep't, 1940) § 351; MANUAL OF MILITARY LAW (Great Britain War Office, 1929) §§ 445-451; HALL, *INTERNATIONAL LAW* (8th ed. 1924) 498-499; BATY AND MORGAN, *loc. cit. supra* note 14; SPAIGHT, *AIR POWER AND WAR RIGHTS* (1924) 283. See also authorities cited in *Ex parte Quirin*, 317 U. S. 1, 31, 63 Sup. Ct. 1, 12, n. 8, 14, n. 12 (1942).

¹⁶No individual should be punished for an offense against the laws of war unless pursuant to a sentence imposed after trial and conviction. . . ." RULES OF LAND WARFARE (U. S. War Dep't, 1940) § 356. In the case of spies, HAGUE IV (1907) ANNEX, Art. 30, requires a trial. See also PHILLIPSON, *INTERNATIONAL LAW AND THE GREAT WAR* (1915) 210; BENET, *MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL* (1868) 203, 211.

panied or followed by great public excitement; probably more often they are passed over as a routine event of war. The wars in which the United States has been involved have not been exceptions.¹⁷

II. THE CASE OF THE SABOTEURS¹⁸

In the hours of darkness, on or about June 13, 1942, four men, trained in Germany in the art of sabotage and wearing the uniform of the German Marine Infantry, landed on a Long Island beach from a submarine which had escaped detection by our coast patrols. They brought with them certain explosives, fuses, incendiary and timing devices. Immediately after landing they buried their uniforms and instruments of sabotage, and proceeded in American-made civilian dress to New York City. On or about June 17, 1942, four other men landed on a Florida beach under similar circumstances. All had been residents of the United States at one time; all had returned to Germany within the decade prior to the outbreak of war; one claimed to be a citizen of the United States. All had received instructions in Germany from an officer of the German High Command to destroy war industries and transportation facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. All had received substantial sums of money, some of which was in their possession when they were apprehended. One saboteur testified that he had been told that each of the accused had been assigned to a German army

¹⁷The military trial and hanging of Major André of the British Army, who was apprehended within the American lines in civilian clothing bearing information concerning the defenses of the fort at West Point which he had just obtained from General Benedict Arnold, is a familiar event of the Revolutionary period, as is the trial and hanging of Nathan Hale by the British. Some eighteen other military trials of British spies apprehended during the Revolutionary period and the War of 1812 are listed by the Court in *Ex parte Quirin*, 317 U. S. 1, 42, 63 Sup. Ct. 1, 17, n. 14 (1942). During the Mexican and Civil Wars there were many similar trials, the majority being trials by military commissions. *Id.* at 32, 63 Sup. Ct. at 13, n. 10 (1942); *DIGEST OPS. J. A. G.* (1912) 1071; 2 *WINTEROP* 1296-1299. Two World War I court-martial trials of German spies are referred to on pp. — *infra*.

¹⁸The case was argued before the Supreme Court on July 29 and 30, 1942. The Court announced its decision, *per curiam*, the following day. *Ex parte Quirin*, 317 U. S. 1, 18, 63 Sup. Ct. 1 (July 31, 1942). Subsequently, an extended opinion was filed. 317 U. S. 1, 63 Sup. Ct. 1 (Oct. 29, 1942). The facts are stated as they appear in the extended opinion of the Court, supplemented in certain respects by facts declared to have been admitted by the accused and set forth in Respondent's Answer to Petitions, filed July 29, 1942. As the record of the proceedings before the military commission has been classified as secret, it was not available to the writer. The case has been much discussed. See, e.g., Cushman, *Ex parte Quirin*, et al.—*The Nazi Saboteur Case* (1942) 28 *CORNELL L. Q.* 54; Munson, *The Arguments in the Saboteur Trial* (1942) 91 *U. OF PA. L. REV.* 239; Cramer, *Military Commissions* (1942) 17 *WASH. L. REV.* 247. Among the case notes are: Note (1943) 56 *HARV. L. REV.* 631; Note (1942) 37 *ILL. L. REV.* 265; Note (1942) 41 *MICH. L. REV.* 481.

unit before departure. They were instructed to commit no acts of sabotage within ninety days after their arrival in America. At the time of their arrest by agents of the Federal Bureau of Investigation, less than two weeks after landing, they had committed no acts of sabotage.

It was clear that the prisoners did not belong to the class of lawful belligerents entitled to status as prisoners of war, for after landing they did not wear a fixed, distinctive emblem recognizable at a distance indicating that they were members of the armed forces of Germany; nor did they bear arms openly. If belligerents at all, they were unlawful belligerents and according to the usages of war faced death at the hands of their captors. The law of nations permitted trial and punishment of these eight men. The law of the United States determined the form of trial.

On July 2, 1942, a military commission consisting of four major generals and three brigadier generals was appointed by the President, as President and Commander in Chief of the Army and Navy.¹⁹ The commission was ordered to convene at Washington, D. C., on July 8, 1942, to try the prisoners "for offenses against the law of war and the Articles of War." The Attorney General and the Judge Advocate General of the Army were directed to conduct the prosecution. The order further provided that:

"The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, 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. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon."

At the same time, the President, by proclamation,²⁰ declared:

". . . that all persons who are subjects, citizens, or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy . . . in the courts of the United States. . ."

¹⁹7 FED. REG. 5103 (1942).

²⁰Proclamation No. 2561, 7 FED. REG. 5101 (1942).

Charges supported by specifications, alleging violation of the law of war and of Articles 81 and 82 of the Articles of War, and conspiracy to commit the same, were duly filed with the commission by the Judge Advocate General's Department of the Army, and on July 8, 1942, the commission met and proceeded with the trial. For sixteen days the commission heard the evidence. At the close of the evidence, but before the argument of counsel, seven of the prisoners petitioned the Supreme Court of the United States for leave to file petitions for habeas corpus. A special term of the Supreme Court was convened on July 29, 1942, at which time the petitions were presented in open court, and full oral argument was had thereon.²¹

The petitioners contended that under the Constitution of the United States they were entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any event, they contended that the President's order which established the commission, and the actual procedure of the commission under the order, were in conflict with the Articles of War as adopted by Congress, and that therefore any conviction which might be obtained against them would be illegal and void, and their detention for such trial likewise unlawful.²²

The government challenged these contentions, but argued in the first instance that regardless of the merits, the petitioners must be excluded from the courts both because they were unlawful enemy belligerents and because the President's proclamation undertook to exclude them from the courts. The Court summarily dismissed the argument, pointing out that nothing in the proclamation precluded access to the courts for determining its applicability to a particular case, nor did anything alleged preclude determination by the courts as to the jurisdiction of a military tribunal, under the Constitution and laws of the United States, to try the charges preferred against

²¹While the argument was proceeding in the Supreme Court, the prisoners petitioned the Supreme Court for certiorari before judgment to the United States Court of Appeals for the District of Columbia, in which court appeals from the order of the district court, 47 F. Supp. 431 (1942), denying their applications for leave to file petitions for habeas corpus, were pending. Certiorari was granted, and the cases were decided together.

²²"When [the sentence of a court-martial has been] confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless . . . having jurisdiction over the subject matter, [the court-martial] has failed to observe the rules prescribed by the statute for its exercise. . . . In such cases, everything which may be done is void . . . and civil courts have never failed, upon a proper suit, to give a party redress, who has been injured by a void process or a void judgment." *Dynes v. Hoover*, 20 How. 65, 81 (U. S. 1857). See also *United States v. Brown*, 206 U. S. 240, 244, 27 Sup. Ct. 620, 621 (1907); *Runkle v. United States*, 122 U. S. 543, 555-556, 7 Sup. Ct. 1141, 1146 (1887); cf. SCOTT, *ANALYTICAL DIGEST OF THE MILITARY LAWS OF THE UNITED STATES* (1873) 278, n. 1 (c).

the petitioners.²³ The Court then proceeded to a consideration of the merits.

The Court noted that the Constitution authorized the Commander in Chief to direct the performance of those functions which may be performed by the military in time of war, and that Congress had explicitly recognized the military commission appointed by military command as an appropriate tribunal for the trial of offenders against the law of war.²⁴ After a review of the history and content of the common law of war, the Court held that petitioners, charged with passing our military and naval lines and defenses and going behind those lines in civilian dress and with hostile purposes, in circumstances which made them enemy belligerents, were charged with a violation of the law of war. It followed that the trial by military commission was proper, unless prohibited by the Constitution. Specifically, it was argued that the trial was subject to Article III, Section 2, and the Fifth and Sixth Amendments of the Constitution of the United States, which require presentment by a grand jury in cases involving capital or otherwise infamous crimes, and trial by jury in a civil court. The Court noted, however, that military tribunals were not courts in the sense of the Judiciary Article,²⁵ that these procedures were unknown to military trials, and that it had consistently held that the Constitution, including the amendments, did not intend to enlarge the right to trial by jury existing under the common law.²⁶ The Court held, therefore, that the petitioners, including the one who

²³Nothing precluded the Court from considering these questions, but on the other hand, because the petitioners were enemy belligerents they were without the protection of the constitutional guarantees, and hence could have been lawfully excluded from the courts. See *Brown v. United States*, 8 Cranch 110, 122-123 (U. S. 1814); *De Lacey v. United States*, 249 Fed. 625, 626 (C. C. A. 9th, 1918); Atkisson, *The Constitutional Sources of the Laws of War*, SEN. DOC. NO. 86, 65th Cong., 1st Sess. (1917) 35; cf. *Ex parte Colonna*, 314 U. S. 510, 511, 62 Sup. Ct. 373 (1942). The law of England is the same. *Rex v. Knockaloe Camp Commandant*, 87 L. J. K. B. 43 (1917); *Sylvester's case*, 7 Mod. 150, 87 Eng. Rep. R. 1157 (K. B. 1703).

As the petitioners were "admitted enemy invaders," the basic fact of identity was not disputed. This can be a very troublesome issue. The fact that the Court heard the petition does not mean that unlawful enemy belligerents who succeed in getting into the country have a right to a hearing before a civil court under the Constitution. Rather it indicates that the civil courts may police the conduct of the military by examining the constitutionality of asserted jurisdiction in cases where it deems such inquiry appropriate.

²⁴317 U. S. at 28-29, 63 Sup. Ct. at 11-12 (1942); Article of War 15, 41 STAT. 790 (1920), 10 U. S. C. § 1486 (1940).

²⁵*Ex parte Vallandigham*, 1 Wall. 243 (U. S. 1863) (military commission); *In re Vidal*, 179 U. S. 126, 21 Sup. Ct. 48 (1900) (court-martial).

²⁶See *District of Columbia v. Colts*, 282 U. S. 63, 72-73, 51 Sup. Ct. 52, 53 (1930); *Callan v. Wilson*, 127 U. S. 540, 549, 8 Sup. Ct. 1301, 1303 (1888). Hamilton wrote in *The Federalist* (Dawson ed. 1863) 587: "I feel a deep and deliberate conviction that there are many cases in which trial by jury is an ineligible one. I think so particularly in cases which concern the public peace with foreign nations; that is, in most cases where the question turns wholly on the law of nations."

claimed to be a citizen,²⁷ were lawfully placed on trial by the commission without a jury.

The Court noted that the petitioners were *enemy* belligerents. The relationship necessary to establish the association with the armed forces of the enemy which gives one this status was not explained. In the *Quirin* case, the petitioners were trained in Germany by officers of the German Army and admitted by stipulation that they acted "for and on behalf of the German Reich, a belligerent enemy nation." That they were enemy belligerents, therefore, was clear. The Court contrasted these facts to those of the much debated *Ex parte Milligan*.²⁸ It noted that Milligan, a citizen twenty years resident in Indiana, had never been a resident of any of the states in rebellion, and that ". . . Milligan, not being a part of or associated with the armed forces of the enemy, was a nonbelligerent, not subject to the law of war."²⁹ The fact that the petitioners in the *Quirin* case were "enemy belligerents" was crucial, for however hostile might be their intent, unless they were a part of or associated with the armed forces of the *enemy*, they would not be subject to the international law of war which deals only with the relations between nations at war, and individuals acting for, and on behalf of, those nations. If not "enemy belligerents," they would be protected by the Constitution of the United States, which is applicable to citizens and aliens alike,³⁰ and could be tried by military tribunal only if they were members of our military forces, persons made subject to the law of war by the second Article of War, or persons "whose offenses occur in the theater of war, in the theater of operations, or in any place over which the military forces have actual control and jurisdiction."³¹

²⁷The Court was express on this point. 317 U. S. at 37-38, 63 Sup. Ct. at 15 (1942). This is probably the first judicial decision holding that a citizen who joins the enemy loses rights pertaining to his person, as distinguished from rights pertaining to his property. Compare *Ex parte Milligan*, 4 Wall. 2, 121 (U. S. 1866), where the Court declared that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed," with 1 HALL, PLEAS OF THE CROWN (1800) 346, where it is stated, "that regularly when the king's courts are open, it is time of peace in judgment of law."

²⁸4 Wall. 2 (U. S. 1866).

²⁹317 U. S. at 45, 63 Sup. Ct. at 19 (1942).

³⁰*Wong Wing v. United States*, 163 U. S. 228, 16 Sup. Ct. 977 (1896); see *Fong Yue Ting v. United States*, 149 U. S. 698, 724, 13 Sup. Ct. 1016, 1026 (1893).

³¹See Morgan, *Court-Martial Jurisdiction over Non-military Persons under the Articles of War* (1919) 4 MINN. L. REV. 78 (hereinafter cited Morgan). The quotation is from Morgan at 107. Professor Morgan suggested that these cases were "cases arising in the land . . . forces," and hence within the express exception from the operation of the amendments. *Ibid.* As indicated in note 2 *supra*, this article does not deal with the situation where martial law has been declared.

Any hostile act committed for or on behalf of the enemy is a belligerent act. It is not necessary that the act be committed in the theater of war, as is the case with spying. Agents who destroy war industries and supplies are no less belligerents than are agents who destroy fortified places.³² In the *Quirin* case, the petitioners crossed our military lines, or having crossed our lines, remained in our territory without a uniform and with hostile intent. On so entering, or on so remaining, without a uniform, the offense was complete. In the *Quirin* case the petitioners had in fact passed our military lines, and the decision was limited to the facts before the Court.³³ The rationale of the opinion, however, applicable to both citizens and aliens, goes beyond the case where an enemy belligerent enters our territory with hostile intent in time of war. Thus a person who owes allegiance to the United States and has never left the country and who is accused of aiding the enemy by hostile acts in a locality far from the fighting front would be subject to the jurisdiction of a military tribunal provided he were found to be an "enemy belligerent."³⁴ The person has also committed an offense against the United States traditionally punishable only in the civil courts thereof save in cases arising in the land or naval forces. Since with a finding that the person is an "enemy belligerent" the locality of the act is immaterial, in a case like the one postulated the Court has sanctioned an expanded jurisdiction of military tribunals by what would appear to be the "subterfuge of a changed phraseology."³⁵ If this has become the law, the meaning of "enemy belligerent" is all the more important. Probably the resident who hires himself out to an enemy agent-saboteur, or a sympathizer

³²317 U. S. at 37, 63 Sup. Ct. at 15 (1942).

³³Note also that the proclamation of the President closing the courts to certain persons was limited to those who, *inter alia*, ". . . enter or attempt to enter the United States . . . through coastal or boundary defenses. . . ." See p. — *supra*.

³⁴The question of what court should determine this basic fact was not raised by the *Quirin* case since facts were admitted which established that the petitioners were enemy belligerents. See second paragraph of note 23 *supra*.

³⁵*Cf.* Morgan at 105-107, 112-114. A World War I attempt to confer jurisdiction on courts-martial by declaring the United States "a part of the zone of operations conducted by the enemy" and defining spy to include "any person who should endanger good discipline, order, movements, health, safety, or successful operations of the land or naval forces" [see *Hearings before the Committee on Military Affairs on S. 4364*, 65th Cong., 2d Sess. (1918) 3-4], was opposed by President Wilson and died in committee. Said the President: "I am wholly and unalterably opposed to such legislation . . . I think it not only unconstitutional but that in character it would put us on the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America. . . ." Letter to Senator Overman, *N. Y. Times*, April 23, 1918, p. 6, col. 1. Mr. Charles Warren had argued that such a bill was constitutional as within the war power of Congress. See Warren, *Military Tribunals and Spies* (1919) 53 *A.M. L. Rev.* 195. See also Kroch, *When Martial Law Was Proposed for Everybody*, *N. Y. Times*, July 14, 1942, p. 18, col. 5.

who carries on a private war, is a civilian gone wrong, and is entitled to trial by jury before a civil court, unless the locus of his offense puts him within the jurisdiction of the military. But the agent-saboteur himself would present a closer case. Even though nominally a citizen of the United States, if he had taken an oath of allegiance to the enemy government, or accepted a billet in the enemy army, he would probably be an "enemy belligerent" and, following the implications of the *Quirin* case, would be subject to trial by military commission.

The rationale adopted by the Court is new. In accordance with the language of the *Milligan* case, both the Attorney General and the courts have in the past explained the jurisdiction of military tribunals over "civilians," where martial law has not been declared, as jurisdiction over offenses occurring in the "theater of war." Thus it was argued at length by the government in the *Quirin* case that the eastern seaboard of the United States was in a theater of operations, an argument not unreasonable when submarines were sinking ships within sight of the shore.³⁶ And in the original opinion in the World War I case of Pablo Waberski, the Attorney General was emphatic as to the court-martial's lack of jurisdiction to try the alleged agent-saboteur.³⁷

"However, if there were no *Milligan* case to furnish us with an authoritative precedent, the provisions of the Constitution would themselves plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts-martial or military commissions, cannot constitutionally be granted jurisdiction to try persons charged with acts or offences committed *outside of the field of military operations* or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers. Were this not the correct conclusion, then any person accused of espionage, for instance, wherever apprehended and wherever the act charged may have been committed, would immediately become subject to the jurisdiction of a military court, and all the above-cited provisions of the Constitution would be rendered nugatory in the cases of the most grave class of crimes, generally carrying the death penalty."

The Attorney General had assumed that Waberski was a Russian and

³⁶See Brief for Respondent, 10-11, 46-47, United States *ex rel.* Burger v. Cox, 317 U. S. 1, 63 Sup. Ct. 1 (1942); Munson, *supra* note 18, at 247. The fact that the Court did not explain military jurisdiction in the *Quirin* case as jurisdiction over offenses committed in the "theater of operations" may indicate that it considered the "theater of operations," for purposes of conferring jurisdiction on military courts, to be limited to the area of actual combat.

³⁷31 OPS. ATT'Y GEN. (1918) 356, 361 (italics added).

that he "had not come through the fighting lines or field of military operations," but his language was not restricted to that case. When it was later discovered that Waberski was a German and was arrested in the vicinity of military encampments, after having crossed the border several times, a subsequent Attorney General assured the Secretary of War that the court-martial had had jurisdiction to try Waberski.³⁸

In another case growing out of World War I which involved a test of the jurisdiction of a naval court-martial to try an officer of the Imperial German Navy apprehended about the port of New York in 1918, under a forged passport, while masquerading as a Swiss business man, a district court, in upholding the jurisdiction of the court-martial, said:³⁹

"Military authorities should have power to try spies wherever found; otherwise they may not be subject to trial for that offense. . . . The term 'theater of war,' as used in the Milligan Case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. . . ."

The cast of this decision may have been suggested by the fact that the accused was charged with being a spy. Spying was one of the earliest forms of unlawful belligerency to be universally recognized as such. Summary death for spies has been an axiom of military law throughout the history of this country. It long antedated the more refined concepts of belligerency, which in setting up conditions of lawful belligerency, have the further effect of outlawing that belligerency which does not meet those conditions. Spies have always been defined as operators found "lurking or acting as [spies] in or about any of the fortifications of any of the armies."⁴⁰ "Spies" were defined by the Hague Convention as persons, who, *inter alia*, were apprehended "in the zone of operations."⁴¹ Therefore, in order to convict the prisoner as a spy, the court-martial would have had to find that the accused

³⁸This opinion was not released for publication until July 29, 1942. 40 Ops. Att'y GEN. No. 54 (Dec. 24, 1919).

³⁹United States *ex rel.* Wessels v. McDonald, 265 Fed. 754, 763-764 (E. D. N. Y. 1920), *appeal dismissed per stipulation*, 256 U. S. 705, 41 Sup. Ct. 535 (1921). Compare: "the doctrine of the majority in *Ex parte* Milligan does not go far enough to meet the conditions of modern war." Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1254.

⁴⁰*E.g.*, Article of War 82, 41 STAT. 804 (1920), 10 U. S. C. § 1554 (1940). Although Article 81 adds "or elsewhere," this term has been construed as being constitutionally applicable only to those persons whose offenses are committed within the zone of operations, or who are for other reasons subject to military law. Morgan at 115-116. See also MANUAL FOR COURTS-MARTIAL (U. S. War Dep't, 1929) § 142.

⁴¹HAGUE IV (1907) ANNEX, Art. 29.

was apprehended in the "theater of war." It was not unnatural, therefore, for the district court to consider the court-martial's jurisdiction in those terms. An English court-martial, in a similar case,⁴² rather than expand the concept of "theater of war" in order to convict the prisoner as a spy, anticipated the theory of the Court in the *Quirin* case by convicting the prisoner as an unlawful enemy belligerent.⁴³

The second contention of the petitioners raised a question which apparently has escaped discussion by the writers on military law. Do the Articles of War restrict the power of the Commander in Chief to deal with enemy belligerents?⁴⁴ An examination of the history of the Articles of War will indicate their applicability to trials of unlawful enemy belligerents. An analysis of the content of the Articles of War will indicate their applicability to trials by military commissions, and the degree to which they purport to regulate such trials. In the event it is found that they purport to regulate such trials, a further question as to their constitutionality, arises, namely, whether they work an undue interference by Congress with the power of the President, acting as Commander in Chief of the Army. The Court split as to the applicability of the Articles of War to the trial of the saboteurs. The constitutional issue was not decided, however, because those justices who believed the Articles of War to be applicable found the procedure prescribed by the President and employed by the commission to be consonant with those Articles.⁴⁵

III. THE ARTICLES OF WAR, 1775-1912

The trial of the saboteurs was governed by military law. In its ordinary sense, military law is the law governing the Army as a separate community. In a wider sense, it includes that part of the law of nations which regulates the relations of enemies in time of war.⁴⁶ Its code of laws in the national

⁴²In 1914, one Lody, a German subject, was accused of attempting to give information to the German Government in letters from Dublin. He was tried by a general court-martial as a "war criminal," sentenced to death, and shot. See PHILLIPSON, INTERNATIONAL LAW AND THE GREAT WAR (1915) 215. Phillipson comments that the "punishment was inflicted conformably to the customary international martial law." *Id.* at 216.

⁴³In order to reach the result of the *Lody* case, the Court would have had to consider the naval court-martial as a court administering the international law of war rather than a naval court-martial proper, for the Articles for the Government of the Navy do not provide for the trial of offenders against the laws of war other than spies. See Articles for the Government of the Navy, REV. STAT. § 1624 (1875), 34 U. S. C. § 1200 (1940).

⁴⁴Professor Morgan noticed an analogous problem in connection with the trial of Major André by a "Board of General Officers" after the Continental Congress had directed that trial of spies be by court-martial. See Morgan at 107, n. 101. See p. 67 *infra*.

⁴⁵317 U. S. at 47-48, 63 Sup. Ct. at 20 (1942).

⁴⁶See 1 WINTHROP 1, 44.

sense is the Articles of War. Its code, in the international sense, is the common law of war.⁴⁷

The custom of governing armies by articles of war, or ordinances for the government of the army, as they were called, extends far back into history.⁴⁸ The earliest British ordinances were issued under the prerogative power of the Crown, either by the king himself or by the commanders in chief holding commissions from the king, and continued in force only so long as the war continued. Later codes were effective during peace as well as in time of war. On the commencement of hostilities in America, the assemblies of the several colonies enacted articles of war for the government of their contingents,⁴⁹ and on June 30, 1775, the Second Continental Congress enacted the first American Articles of War, which were patterned largely after the contemporary British code.⁵⁰ The Articles were revised and enlarged in the fall of 1775 and again in September, 1776.⁵¹ This amended code became the American Articles of War. These articles for 140 years, without substantial systematic change, governed the Army of the United States.

The Articles of War established the court-martial system for the trial and punishment of offenders against them. The jurisdiction of courts-martial as therein established was limited to members of the Army, and to certain limited classes of civilians who were intimately associated with the Army⁵² or who, because they owed allegiance to the United States and jeopardized the safety of the Army in the theater of operations in war time, were deemed amenable to trial by military courts-martial.⁵³ The Articles made no reference to, or provision for, the trial of enemy belligerents accused of violating the law of war. That was left to the common law of war.

Shortly after the enactment of the Articles, the Continental Congress specifically recognized one type of unlawful enemy belligerent, enemy spies. The Congress:⁵⁴

⁴⁷See pp. 53-57 *supra*.

⁴⁸See the Ordinance of Richard I — A. D. 1190, printed at 2 WINTHROP 1411, and the Articles of War of Richard II — A. D. 1385, *id.* at 1412.

⁴⁹*E.g.*, Mass. Bay, April 5, 1775, 1 AM. ARCH. (4th Ser. 1839) 1350; Conn., May 31, 1775, 2 *id.* at 565; N. H., June 29, 1775, 2 *id.* 1180. (N. H. adopted the Mass. Articles). The Mass. Articles are printed at 2 WINTHROP 1470.

⁵⁰1 JOUR. CONG. 90 (June 30, 1775), 2 WINTHROP 1478. The contemporary British articles are printed at 2 WINTHROP 1448.

⁵¹*Id.* at 12. The 1776 Articles are printed at 2 WINTHROP 1489.

⁵²Section XIII, Art. 23, of the 1776 Articles makes the articles applicable to "all sutlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field."

⁵³*E.g.*, Articles of War, 1776, § XIII, Art. 18, subjects "Whosoever shall relieve the enemy with money, victuals," *etc.*, to trial by court-martial; Art. 19 refers to "whosoever shall be convicted of holding correspondence with or giving intelligence to the enemy."

⁵⁴1 JOUR. CONG. 450 (Aug. 21, 1776); see Morgan at 108.

"RESOLVED, That all persons, not members of, nor owing allegiance to, any of the United States of America . . . who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States . . . shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct."

This resolution was ordered printed "at the end of the Articles of War." In so far as this statute defined spies and subjected them to trial and punishment, it was declaratory of the practice of all nations. It went further and specified that trial be by court-martial. At this time, the court-martial was the universal military court. Its procedure was designed to meet the requirements of expediency and severe discipline demanded by the military. It is not extraordinary that in providing for the trial of spies, the Continental Congress should select a ready-made military procedure—trial by general court-martial. In so doing, the Congress accepted a familiar and regular procedure in place of the uncertain content of a trial ordered by a military commander acting independently. The Congress determined that spies would be tried by a military court governed by the same rules as the courts which tried the members of our own military forces. International law could ask no more. It is significant that this statute was not included as one of the Articles of War, but rather was enacted as an independent statute which was printed in juxtaposition to the Articles of War only because the Congress resorted to the procedure established by the Articles.

One of the best known spy cases of the revolutionary period is that of Major John André, Adjutant General of the British Army in America, who had entered the American lines at the behest of Major General Arnold and was apprehended while attempting, in disguise, to return to the British lines, after receiving certain information relative to the surrender of West Point from the treasonous General Arnold.⁵⁵ The circumstances of Major André's arrest caused considerable public excitement and official debate as to André's guilt as a spy, the British contending that the circumstances of André's conduct saved him from that status. A board of fourteen general officers was convened by General Washington to try André. This "Board of General Officers" having "maturely considered the facts," reported that André

" . . . ought to be considered a spy from the enemy, and that agreeable to the law and usage of nations . . . ought to suffer death."

Accordingly, André was hanged on October 2, 1780.

⁵⁵The circumstances of André's arrest and trial are set forth in the well-documented article in 2 STOWELL AND MONROE, *INTERNATIONAL CASES* (1916) 78-87. See also Halleck, *Military Espionage* (1911) 5 AM. J. INT. L. 590, 598 *et seq.*

It is clear that the spy resolution quoted above was applicable to the trial of Major André, and it seems equally clear that General Washington was aware of the statute, for he had confirmed at least three sentences of death by courts-martial in cases involving enemy spies previous to the André affair.⁵⁶ It seems probable that General Washington, moved by official clamor and the public interest in the case, sought to create an extraordinary court of great prestige in order to subdue the certain criticism of those on both sides who thought André not subject to punishment as a spy, and to forestall unjustified retaliation by the British.

The Articles of War, as amended during the course of the Revolution, survived the adoption of the Constitution. One of the first acts of the First Congress continued in force the existing Articles of War.⁵⁷ In 1806, the Articles, with some minor modifications, were re-enacted so as to meet the requirements of the Constitution; for example, by substituting the President for Congress in cases in which Congress had previously been vested with final revisory authority.⁵⁸ It is significant that the code of 1806 did not include the spy resolution as an Article of War. It was revised, however, so as to make the death penalty mandatory, and re-enacted at the same time as the revised Articles of War.⁵⁹

In this form, the Articles of War stood for many years without further change. They were the articles which governed the army of General Scott, as it advanced on Mexico City and later occupied that area. In addition to problems of discipline of his own forces, General Scott, as commander in chief of America's first successful expeditionary army, was faced with the new problem of providing for the discipline of the population of invaded and occupied areas. Within this group there were two classes of offenders—those who violated the usual criminal laws and in time of peace would be tried by the civil courts, and those who transgressed the laws of war and "unlawfully" made war on the invading forces. These persons were without the protection of the United States Constitution, and their punishment was completely within the discretion of the military commander, who could be expected to conduct himself, in so far as expedient, according to the principles and usages of war. A court designated a "court-martial" and conducting its business in accordance with the Articles of War could have been con-

⁵⁶The general orders signed by General Washington confirming the sentences are printed in 15 WRITINGS OF WASHINGTON (Bicentennial Comm'n ed. 1936) 364; 13 *id.* 139-140; 19 *id.* 23.

⁵⁷1 STAT. 96 (Sept. 29, 1789).

⁵⁸2 STAT. 359 (Apr. 10, 1806); see 1 WINTHROP 51.

⁵⁹2 STAT. 371-372 (Apr. 10, 1806).

vened to try these cases.⁶⁰ International law could ask no more. But this was objectionable, since the jurisdiction of courts-martial, as set forth in the Articles of War and other statutes, did not include cognizance of these types of cases, and in general administrative convenience suggested that the several types of cases ought to be handled separately.⁶¹ Consequently, General Scott, by General Order No. 20 issued at Tampico on February 19, 1847, established a "military commission" to try those criminal cases which ordinarily would have been tried in the civil courts, and a "council of war" to try persons charged with violating the laws of war.

This convenient dichotomy of General Scott disappeared during the Civil War, when military courts for the trial of offenses against the laws of war were, in addition to the military government courts, designated as "military commissions."⁶²

"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. Military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war. . . . In the armies of the United States the first is exercised by courts-martial, while 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*."⁶³

Its jurisdiction so defined, the military commission gained a firm position as a competent American military tribunal. It was recognized by the executive,⁶⁴ by Congress,⁶⁵ and by the courts.⁶⁶ The spy statute, which in 1861 had been made applicable to "all persons,"⁶⁷ *i.e.*, both citizens and aliens, was further amended to permit trial by military commission.⁶⁸ Though its procedure was not regulated by statute, it was usual for commissions to

⁶⁰Though not a court-martial proper, it would still have been a legal body under the laws of war. See 2 WINTHROP 1296.

⁶¹See 2 WINTHROP 1296-1297.

⁶²See note 2 *supra*.

⁶³G. O. No. 100 (1863) Art. 13 (*italics added*), quoted in part by the Supreme Court in *Ex parte Vallandigham*, 1 Wall. 243, 249 (U. S. 1863). In England the court-martial is the universal military court. The jurisdictional distinction between courts-martial and military commissions which obtained in the United States during the Civil War period was viewed with favor by some English writers. 2 WINTHROP 1296.

⁶⁴11 OPS. ATT'Y GEN. (1865) 297.

⁶⁵See note 63 *infra*.

⁶⁶*Ex parte Vallandigham*, *supra* note 63.

⁶⁷12 STAT. 340 (1862).

⁶⁸12 STAT. 737 (1863).

adhere to the rules prescribed for courts-martial by the Articles of War.⁶⁹

In 1874, in the course of the preparation of the Revised Statutes, the Articles of War were rearranged, reworded, and combined, but under the limited authority of the revisers, no changes in substance were made.

The Articles in this form continued through the Spanish War, and into the twentieth century.

IV. ARTICLES OF WAR, 1912-42

By 1912, the necessity for a thoroughgoing revision of the Articles of War was appreciated on all sides. A twentieth-century army was functioning under an eighteenth-century code. Even President Wilson, in endorsing their revision, referred to the existing code as "archaic."⁷⁰ At the instance of the Judge Advocate General of the Army, a revised military code was introduced into Congress in 1912, and extensive hearings were conducted by the House Committee on Military Affairs. Ten articles dealing with the classification and jurisdiction of courts-martial—the most urgent of the revised Articles proposed in 1912—were passed in 1913.⁷¹ In subsequent sessions of Congress the question of the revision of the Articles of War was frequently raised and a revised code was twice passed by the Senate,⁷² but it was not until 1916 that a revised code was forced through the House by attaching it as an amendment to the Army Appropriation Bill.⁷³ The War Department describes the code of 1916 as "a complete revision which . . . introduced many modifications and changes looking toward a scientific and modern statement of military law."⁷⁴ The fundamental shortcomings of the 1916 code, however, were vigorously pointed out by Assistant Judge Advocate General Ansell and others who fought to establish reasonable procedural safeguards and the principle of judicial review of the often arbitrary court-martial proceedings.⁷⁵ Their efforts were partially successful,

⁶⁹DIGEST OPS. J. A. G. (1912) 1070. See also WINTHROP 841-842; BENET, *MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL* (1868) 204, 212; DAVIS, *MILITARY LAW OF THE UNITED STATES* (3d ed. 1913) 308, 313; DUDLEY, *MILITARY LAW* (1908) 314; SEN. REP. No. 130, 64th Cong., 1st Sess. (1916) app. 40 (statement of J. A. G. Crowder).

⁷⁰See H. R. Doc. No. 1334, 64th Cong., 1st Sess. (1916) 1.

⁷¹37 STAT. 721-723 (1913). This partial revision of the Articles was deemed a temporary expedient only. See SEN. REP. No. 229, 63d Cong., 2d Sess. (1914) 20.

⁷²For a comprehensive statement of attempts, 1912 to 1915, to revise the Articles of War, see 52 CONG. REC. 4301-4303 (1915).

⁷³39 STAT. 650-670 (Aug. 29, 1916). See 53 CONG. REC. 11509-11512 (1916).

⁷⁴MILITARY LAWS OF THE UNITED STATES (War Dep't, 8th ed. 1939) 163.

⁷⁵See *Hearings before sub-committee of Committee on Military Affairs on S. 64, 66th Cong., 1st Sess.* (1919) 51 *et seq.* (remarks of Gen. Ansell), 1371 *et seq.* (remarks of Lt. Col. Morgan). But see *id.* at 170 *et seq.* (remarks of J. A. G. Crowder); WIGMORE, *MILITARY JUSTICE DURING WAR* (1919).

and in 1920 the Articles of War were amended to require review of the more serious sentences by a board of officers of the Judge Advocate General's Department and a finding that the records upon which such sentences were based were legally sufficient to support the sentence, before the sentence could be carried into execution.⁷⁶ In addition, the revised Articles required that a thorough and impartial investigation of charges be made before referring them for trial,⁷⁷ and that a qualified law member be appointed to each general court-martial with functions similar to those of a civil judge in the conduct of a jury trial.⁷⁸

Of importance to the argument here, the revisions of 1916 and 1920 mentioned military commissions, or substituted "military tribunals" for "courts-martial," in eleven of the Articles. At the same time the original reason for the military commission had substantially ceased, for courts-martial were given jurisdiction over "any person who by the law of war is subject to trial by military tribunals."⁷⁹

General Crowder had explained the functions of the military commission to the House Committee on Military Affairs, and commented that it was "an institution of the greatest importance in a period of war."⁸⁰ A little later he pointed out that "the constitution, composition, and jurisdiction of these courts have never been regulated by statute,"⁸¹ and added that "it is highly desirable that this important war court should be continued to be governed as heretofore by the laws of war rather than by statute." The Articles of War, however, as finally enacted did more than recognize and preserve the common law of war jurisdiction of military commissions.⁸²

An examination of the legislative history and content of those articles which are applicable by their terms to military commissions will assist in

⁷⁶Article of War 50½, 41 STAT. 799 (1920), amended 50 STAT. 724 (1937), 10 U. S. C. § 1522 (1940).

⁷⁷Article of War 70, 41 STAT. 802 (1920), amended, 50 STAT. 724 (1937), 10 U. S. C. § 1542 (1940).

⁷⁸Article of War 8, 41 STAT. 788 (1920), 10 U. S. C. § 1479 (1940).

⁷⁹Article of War 12, 41 STAT. 789 (1920), 10 U. S. C. § 1483 (1940). This article originally appeared as paragraph 8 of the 1913 partial revision. 37 STAT. 722 (1913). An important limitation on the capacity of courts-martial to deal with unlawful enemy belligerents continued, however, for Congress authorized courts-martial to inflict the death penalty only "in cases expressly mentioned" in the Articles of War. See p. 84 *infra*.

⁸⁰Hearings before Committee on Military Affairs on H. R. 23628, 62d Cong., 2d Sess. (1912) 28.

⁸¹*Id.* at 35.

⁸²The implications of this fact as regards the procedure of military commissions has, so far as is known, escaped notice except in WEINER, A PRACTICAL MANUAL OF MARTIAL LAW (1940) 122-125. The current court-martial manual ignores them. In an article focused on the *Quirin* case, the Judge Advocate General indicated the problem but did not discuss it. See Cramer, *supra* note 18, at 255.

the determination of the extent, if any, to which Congress intended to regulate these courts. The articles in question will be considered in numerical order.⁸³

Article of War 15

"The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving *military commissions*, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such *military commissions*, provost courts, or other military tribunals."

Article 12 gives courts-martial jurisdiction to try "any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals." Thus the jurisdiction of courts-martial is not limited to the persons defined in Article of War 2 as subject to military law, but includes "any other person who by the law of war is subject to trial by military tribunals."⁸⁴ Thus Congress has made provision for trials of offenders against the laws of war; and *every* case involving a violation of the laws of war which might be tried by a military commission, including cases involving unlawful enemy belligerents, might, under Article 12, also be tried by a court-martial.⁸⁵ Lest this express award of jurisdiction over cases previously tried by military commissions be construed as depriving military commissions of concurrent jurisdiction, Article 15 was enacted.⁸⁶ This article in no way restricts or enlarges the common law of war jurisdiction of the military commission; it merely saves to the commission the jurisdiction it already had. Under it the military commander, in a proper case, is at liberty to employ either court, "whichever happens to be convenient."⁸⁷

⁸³Hereafter all references to the Articles of War, unless otherwise indicated, are to the 1920 code, 41 STAT. 787-812, as amended, 46 STAT. 1203 (1931), 50 STAT. 724 (1937), 56 STAT. 732 (1942), 10 U. S. C. §§ 1471-1593a (1940), (hereinafter cited by article number only). Except as hereafter indicated, all the provisions relative to military commissions appeared in the 1916 code. The Articles will be discussed only as to implications with regard to trials by military commissions. The word "commission" has been italicized in all instances where it appears in quoted portions of the Articles.

⁸⁴General Crowder considered this provision to be declaratory of the jurisdiction of general courts-martial. See *Hearings on H. R. 23628*, *supra* note 80, at 28.

⁸⁵See *Ex parte Quirin*, 317 U. S. 1, 27, 63 Sup. Ct. 1, 10 (1942).

⁸⁶See SEN. REP. No. 130, 64th Cong., 1st Sess. (1916) app. 40 (remarks of J. A. G. Crowder). Cf. ESPIONAGE ACT OF 1917, 40 STAT. 217, 50 U. S. C. § 38 (1940) (award of jurisdiction over certain war offenses to civil courts shall not "be deemed to limit the jurisdiction of the general courts-martial, military commissions . . .").

⁸⁷General Crowder did not explain the factors which might enter into this determination of "convenience." He assured the Senate committee, however, that "both classes of courts have the same procedure." See SEN. REP. No. 130, 64th Cong., 1st Sess. (1916) app. 40.

Article of War 23

Article 23 gives military commissions power to compel testimony from persons not subject to military law by providing that such persons,

“being duly subpoenaed to appear as a witness before any military court, *commission* . . . refuses to appear, or refuses to qualify as a witness, or to testify . . . shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the District Court of the United States. . . .”

This provision assures to the military commission the same power to compel testimony that is possessed by the civil courts. In extending the arm of the military commission, Congress has been careful not to place the punishing power in the commission, but rather to leave punishment in the civil courts which may judge the crime against the civilian in accordance with civil law standards.

A proviso to this article requires that any person,

“not subject to military law, who before any . . . military tribunal . . . is guilty of any of the acts made punishable as offenses against public justice by any provision of sections 231-241 of Title 18, shall be punished as therein provided.”

Sections 231-241 of Title 18⁸⁸ provide for the punishment in the courts of the United States of perjury, bribery, destroying public records, *etc.* This proviso, like the principal part of Article 23, increases the power of the commission over persons who, previous to its enactment, it could not reach. But here again, Congress stopped short of placing the punishment of the crime in the hands of the military tribunal.

It is interesting to note that this provision assumes that the services of the United States courts are available. This is small limitation on the power, for where United States courts are not available, it is probable that most of the witnesses who might be called before the commission would be persons subject to military law, and therefore within the complete control of the commission.

Article of War 24

“No witness before a military court, *commission* . . . shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.”

Article 24 codifies in the military law the general principle of the common

⁸⁸35 STAT. 1101 (1909), 18 U. S. C. §§ 231-251 (1940).

law, affirmed in the Constitution, that no person "shall be compelled in any criminal case to be a witness against himself."⁸⁹ This principle, indeed, has always been held applicable to trials before military tribunals.⁹⁰

In its terms, Article 24 gives *any* witness the right to stand mute before a military commission where the answer to a question would tend to incriminate him, or is immaterial to the issue and tends to degrade him. In its terms, it places a duty upon officers as regards the conduct of the examination of all witnesses. It is natural that Congress might seek to make express the applicability of this fundamental safeguard to the questioning of witnesses who, but for the circumstances of the trial, would have been within the protection of the constitutional guarantee. It is not so natural that Congress would extend this provision to persons who have no rights under the Constitution or laws of the United States.

Articles of War 25, 26

"A duly authenticated deposition . . . may be read in evidence before any military court or *commission* in any case not capital . . . if such deposition be taken when the witness resides . . . beyond the . . . distance of one hundred miles from the place of trial . . . or other reasonable cause, is unable to appear . . . *Provided*, That testimony by deposition may be adduced for the defense in capital cases."

"Depositions to be read in evidence before military courts, *commissions* . . . may be taken before . . . any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths."

Articles 25 and 26 preclude the admission of depositions not taken in accordance with their terms, and of depositions offered by the prosecution in capital cases. The rules are expressly made applicable to proceedings before any "military court or commission." In explaining the changes in existing law made in his proposed revision of the Articles of War, General Crowder pointed out that this article had been broadened to include military commissions and went on to explain that such commissions were our common law of war courts, and had jurisdiction over persons who had violated the laws of war.⁹¹

Article of War 27

Article of War 27 provides that the records of proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before

⁸⁹U. S. CONST. AMEND. V.

⁹⁰See 1 WINTHROP 523-526.

⁹¹Hearings on H. R. 23628, *supra* note 80, at 35.

a military commission in any case not capital nor extending to the dismissal of an officer. A court of inquiry is a summary investigatory board which may be convened upon the demand of one accused to investigate the accusation and report the facts.⁹² The earlier article on the admissibility of proceedings of a court of inquiry⁹³ was applicable to courts-martial only, and provided that such records were admissible in cases not capital provided that oral testimony was not obtainable. The revision of 1916 made the article applicable to military commissions, and provided further that such evidence could be adduced by the defense in capital cases. In 1920, the protection to the accused was further enlarged by conditioning the admissibility of such evidence upon his consent. It is at least questionable that Congress intended to place a commander in the field in the position of being required to request the consent of an enemy spy before the record of a court of inquiry could be placed before a court-martial or military commission trying the spy. In its terms, however, the article is applicable to proceedings of all military commissions.

Article of War 32

Article 32 gives a "military tribunal" power to punish as for contempt "any person" who uses menacing words, signs, or gestures in its presence and provides maximum punishments therefor. This article was made applicable to military commissions for the first time in the revision of 1920, which substituted the words "military tribunal" for "court-martial" in the article.⁹⁴ The punishment which might be imposed by a military commission for such contempts was thus limited to the maximum declared in the article.

Article of War 38

"The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, *military commissions*, and other military tribunals, which regulations shall insofar 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: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually."

In providing that the President may prescribe the procedure in cases be-

⁹²See Articles of War 115-121.

⁹³REV. STAT. § 1342, Art. 121 (1875).

⁹⁴Military commissions had previously punished contempts, not by virtue of any statutory authority, but under their general province as courts administering the law of war. See 2 WINTHROP 1313, n. 29.

fore military tribunals, the act makes express a power always exercised by the War Department through its *Manual for Courts-Martial*, which have been published from time to time for the guidance of officers in the field. "The revision will make certain a great deal that has been read into the existing code by construction."⁹⁵

The provision that these regulations shall apply the rules of evidence generally recognized in the trial of criminal cases provides a standard, but in no way limits the rules of evidence which may be prescribed. For this reason the Army General Staff, in its review of the 1916 bill, did not approve the section. They were "afraid that the President might exercise his power in a way that would jeopardize the accused." The Secretary of War, however, assured the Senate that he did not construe the article as giving the President the "power to alter the more essential rules of evidence," and he suggested that if the Senate did so construe the article, that they should amend the provision to exclude this construction.⁹⁶ The Senate did not amend the provision. A general control, however, was maintained by providing that all rules made in pursuance of this article must be laid before Congress annually.

The requirement that nothing contrary to or inconsistent with the Articles of War shall be prescribed, is mandatory. The article thus restricts the "procedure, including modes of proof," which the President may prescribe for trials before military commissions, but only insofar as certain of the articles are made expressly applicable to such trials.⁹⁷ The restrictions imposed by the relevant articles are summarized elsewhere.⁹⁸ The regulations prescribed by the President in the order convening the commission for the trial of the saboteurs, however, will be examined here. In that order,⁹⁹

⁹⁵Hearings on H. R. 23628, *supra* note 80, at 39 (remark by J. A. G. Crowder).

⁹⁶See SEN. REP. No. 130, *supra* note 87, app. at 97.

⁹⁷It was argued at the trial in the *Quirin* case that this proviso adopted for military commissions the procedure, including modes of proof, which is prescribed for courts-martial. See Munson, *supra* note 18, at 251. In view of the fact that the *Quirin* case upheld the President's order, which prescribed rules in four respects inconsistent with the Articles of War (see text), and the procedure of the commission, which departed from established court-martial rules in at least two additional respects (no peremptory challenges allowed, contrary to Article 18; confessions of each prisoner admitted against other prisoners, contrary to § 114 (c) of the *Manual for Courts-Martial*), this view is now untenable. See Munson, *id.* at 241. It is settled that the civil courts have no authority to review the methods of procedure followed by a military commission where no relevant statute has been violated. *Ex parte Vallandigham*, 1 Wall. 243 (U. S. 1863). As unlawful enemy belligerents are not entitled to the protection afforded by the constitutional guarantees, the procedural requirements of the due process clause are not relevant. See 11 OPS. ATT'Y GEN. (1865) 297, 313; Note (1943) 56 HARV. L. REV. 631, 642.

⁹⁸See p. 79 *infra*.

⁹⁹See p. 58 *supra*.

the President directed that "such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man"—a strange and unusual standard in a case where the accused is on trial for his life. Those members of the Supreme Court who considered the provisions of this article to be applicable to the trial, however, held the procedure prescribed for the trial to be in consonance therewith.¹⁰⁰ Of course, their judgment was determined in the light of the actual procedure of the commission as disclosed by the record. In the order convening the commission, the President further directed that the concurrence of two-thirds of the members of the commission present would be sufficient for a conviction or sentence. As Article 43, which requires a unanimous verdict to convict of an offense for which the death penalty is mandatory, or to return a sentence of death, is applicable only to convictions and sentences imposed by general courts-martial, the President was limited only by the uncertain content of international law in prescribing the vote necessary to convict or sentence. Nor was he guided by any relevant usages in this regard, for all the military commission precedents antedate 1920, before which date the requirement of a unanimous verdict in capital cases was not a part of our military law.¹⁰¹ The President did not detail a member of the commission as law member as required in the case of courts-martial by Article 8. This is not objectionable, as there is no indication in the Articles of War, or elsewhere, that this article is applicable to military commissions. The legality of the further direction that the record of the trial be transmitted directly to the President is examined below under Article 46.

Article of War 46

"Under such regulations as may be prescribed by the President every record of trial by general court-martial or 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. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

The first sentence of this article was added by the revision of 1920, and was intended to help assure that no sentence would be carried into execution

¹⁰⁰317 U. S. at 46-48, 63 Sup. Ct. at 20 (1942).

¹⁰¹Under the 1916 and previous codes, concurrence of two-thirds of the members of a general court-martial was sufficient to support a sentence or conviction requiring death. See Article of War 43, 39 STAT. 657 (1916). The present requirement of a unanimous verdict to convict in certain cases has recently been critically examined. See Sabel, *Court-Martial Decisions by Divided Courts* (1943) 28 CORNELL L. Q. 165.

where the record of the trial did not support the judgment of the court. This effect it will have, so long as the judge advocate to whom it is referred exercises an independent judgment. Nothing in this article requires that the record of a trial by military commission be reviewed. In situations where the record of a trial by military commission is received by a reviewing or confirming authority, however, the article is mandatory. In the *Quirin* case, the President directed that the record "shall be transmitted directly to me for my action thereon." This direct reference to the Commander in Chief was peculiarly appropriate due to the fact that the Judge Advocate General acted as a prosecutor in the case and for that reason neither he nor his military subordinates could qualify as disinterested reviewers. Possibly it was in recognition of this fact that those members of the court who deemed this article applicable to the trial, found the prescribed procedure not inconsistent therewith.¹⁰²

Article of War 80

"Any person subject to military law who buys, sells, trades . . . captured or abandoned property . . . advantage to himself . . . shall . . . be punished . . . as a court-martial, *military commission*, or other military tribunal may adjudge. . . ."

Article 80 gives military commissions jurisdiction concurrent with that of courts-martial over the statutory crime defined therein. As dealing in captured or abandoned property is not an offense against the common law of war, military commissions would not otherwise have jurisdiction to try persons accused of the violation of its provisions.

Article of War 81

"Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or *military commission* may direct."

General Crowder explained: "As the offenses denounced by the Article may and usually will be committed by persons outside the Army, I think the jurisdiction of a military commission for their trial should have been

¹⁰²317 U. S. at 46-48, 63 Sup. Ct. at 20 (1942). The fact that the President, as the supreme military authority, has the power to substitute his own judgment for that of his subordinates is not of itself a sufficient reason for construing the Article as inapplicable to this case. Subordinate military commanders have a similar power over their subordinates. The President, of course, as head of our system of military justice, could be relied on, in most cases, to exercise his confirming authority in a conservative way.

recognized in the old statute, because military commissions will in time of war try most of these offenses. The new article is drafted so as to recognize the jurisdiction of a military commission in such cases."¹⁰³ General Crowder's statement that military commissions should have been recognized in the old statute is correct, but his reason is out of date, or assumes that the expanded jurisdiction of courts-martial will be ignored.

Article 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 any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a *military commission*, and shall, on conviction thereof, suffer death."

Article 82 is a re-enactment of the Civil War statute previously noticed.¹⁰⁴ It defines the only offense for which the death penalty is mandatory. To this extent, it governs military commissions.

Article of War 115

Article of War 115 gives the president of a military commission power to appoint reporters, interpreters, *etc.* It serves to assure the fiscal officer in the field that expenditures for the stated purposes are proper. It is further recognition by Congress of military commissions; it in no way affects their jurisdiction or procedure.¹⁰⁵

Summary

To sum up, Congress has expressly recognized the power of military commissions over persons not subject to military law to compel testimony through process in the district courts, and punish contempts, but the amount of such punishment is limited. Certain safeguards, which the President is expressly enjoined from abridging, have been established for the protection of the accused, *viz.*, compulsory self-incrimination is prohibited; depositions in capital cases are inadmissible when offered by the prosecutions; records of courts of inquiry are inadmissible except with the consent of the accused; all records received for review or confirmation must be referred to the Judge Advocate General or a staff judge advocate before being acted upon by the

¹⁰³SEN. REP. No. 130, *supra* note 87, at 79. See note 104 *infra*.

¹⁰⁴See p. 69 *supra*. The legislative history and present scope of Articles 81 and 82, with particular reference to jurisdiction over civilians, is thoroughly examined in Morgan at 97 *et seq.*

¹⁰⁵*Cf.* 37 STAT. 575 (1912), 10 U. S. C. § 644 (1940) (enlisted men may be detailed to serve as stenographers and reporters for military commissions).

reviewing or confirming authority. In the case of spies, upon conviction, the death penalty is mandatory. Finally, the common law of war jurisdiction of military commissions is affirmed.

* * * * *

It might be argued that Congress intended these articles to be applicable to military commissions only in cases involving the trial of persons who as a class are within the sheltering arm of the Constitution of the United States or who would under normal conditions be tried by the civil courts, and that they are not applicable to cases involving the trial of unlawful enemy belligerents. It could be explained that the only article which necessarily applies to unlawful belligerents, Article 82, which provides for the trial of spies, was included for the sole purpose of making death mandatory in that class of cases, and therefore should not be considered in connection with the procedural articles applicable to commissions. It does seem strange that Congress would make inadmissible the deposition of a coastguardman who apprehended the accused, an enemy saboteur, after he had landed on our shores from an enemy submarine, and who could not be made available as a witness because of the requirements of his military duty. In the light of history, the law has never looked kindly on the enemy belligerent. Only since the latter part of the nineteenth century have belligerents been universally recognized as having status according to the law of nations. It would seem extraordinary, therefore, for Congress to better the status of the unlawful enemy belligerent, especially during the period just preceding our entry into World War I. It could be argued that although Congress intended the Articles of War to govern the procedure of routine military commissions, it did not intend the Articles to restrict the President acting in his official executive capacity.¹⁰⁶ Or it might be argued that the treatment of unlawful enemy belligerents is a matter for the President as Commander in Chief of the Army and Navy, and that any legislation purporting to regulate such treatment would be unconstitutional.¹⁰⁷ Such considerations as these probably led some members of the Supreme Court in the *Quirin* case to conclude that the Articles of War should not be construed to apply to the trial of the saboteurs.¹⁰⁸

¹⁰⁶The fact that Article 38, after authorizing "The President" to "prescribe the procedure," goes on to qualify this authority by providing that "nothing contrary to . . . these articles shall be so prescribed," would seem to leave little basis for this argument.

¹⁰⁷But see pp. 83-84 *infra*.

¹⁰⁸317 U. S. at 47, 63 Sup. Ct. at 20 (1942). It should be noted that no element of necessity or emergency was present in this case which would make the Articles inapplicable as interfering with the war powers of the executive.

An examination of the whole problem, however, has led the writer to the opposite conclusion.

It was indicated in Part I of this article that the status of enemy belligerents is determined by the rules of international law. The law of war gives status only to those enemy belligerents who wear distinguishing emblems and otherwise conduct themselves in accordance with the laws and customs of war. The rest are unlawful belligerents and are abandoned to the grace of their captors. In the absence of overwhelming military necessity, a trial should precede punishment of such belligerents, since there is great necessity to determine the facts. International law does not presume to prescribe the form of the trial, but Congress has from time to time entered the field. The Ninth Congress of the United States prescribed death for enemy spies, and at the same time prescribed the form of the trial—trial by court-martial. In the Mexican War the separate military tribunal for the trial of unlawful enemy belligerents was born, and in the Civil War period it was called a military commission and recognized by Congress and the courts as a competent military tribunal. Congress amended the spy statute during this period and authorized trial of enemy spies by "military commissions." There can be no doubt that Congress intended this statute to govern a military commission convened for the determination of questions relating to spies, one class of unlawful enemy belligerents. By its terms the statute contemplates trial of enemy spies, and it requires the commission, on conviction of the accused, to return a sentence of death. In the 1916 revision of the Articles of War this statute was included as Article 82. The letter of its command cannot, because it is so included, be construed as inapplicable to enemy spies. The history of the measure indicates conclusively that Congress intended the mandate to extend to such trials. Ten other articles of the revised Articles of War are applicable to military commissions. The functions of military commissions as embracing the trial of spies and others who offend the law of war were explained at one time or another to the Military Affairs Committees of both the Senate¹⁰⁹ and the House,¹¹⁰ and these explanations were printed in the report putting the bill before Congress.¹¹¹ In the light of this legislative history, the conclusion that Congress used the words "military commission" with reference, *inter alia*, to a military commission convened to try unlawful enemy belligerents seems inevitable.

¹⁰⁹Hearings before Subcommittee of Committee on Military Affairs on S. 3191, 64th Cong., 1st Sess. (1916), printed as appendix to SEN. REP. No. 130, *supra* note 87, app. 40.

¹¹⁰Hearings on H. R. 23628, *supra* note 80, at 28-29, 35.

¹¹¹SEN. REP. No. 130, *supra* note 87, app. 40.

If the Articles of War merely recognized military commissions, this conclusion would be without significant consequence. But as has been shown, the revised Articles did more than recognize military commissions; they established certain fundamental safeguards for the protection of the accused, and declared these safeguards to be applicable to trials before military commissions. Since Congress understood that unlawful enemy belligerents were customarily tried by military commissions, it follows that these safeguards are applicable to such trials. The argument that Congress could not have intended to expand the incidents of a military trial of unlawful enemy belligerents at a time when "Hun" atrocity stories were filling the newspapers, is untenable. The mandate of Congress is express, and the motive is reasonable even assuming that fair treatment of the enemy is not an object of their intent. The shield of a regularized procedure does not benefit the unlawful enemy belligerent. He will be punished provided only that the unlawful nature of his acts is proved to the satisfaction of the commission. Its principal intent is to save from the gibbet those who are accused but are not guilty, and thus to preserve the orderly process of democracy. It is believed, therefore, that Congress intended the Articles of War, in so far as expressly applicable to military commissions, to govern a military commission convened for the determination of questions relating to unlawful enemy belligerents, including persons in the position of the petitioners in the *Quirin* case—admitted enemy invaders.

It is not contended that Congress, by these articles, conferred any rights on such unlawful enemy belligerents.¹¹² Such an interpretation is quite unnecessary. Rather Congress, in prescribing rules for the regulation of the land forces of the United States, established rules to govern the conduct of officers convening or participating in a trial by a military commission. The articles impose on these officers certain enumerated statutory duties which if not observed will result in a failure to accord the accused the type of trial that Congress has declared should be given. The correlative right to this duty to follow certain procedures, is the right and duty of the military superiors of the officers conducting the trial, or in some cases of the civil courts, to discipline those officers who fail to conduct themselves in the manner in which Congress has commanded. Thus, though the Fiji Islander or the invading saboteur who may appear as a witness before a military

¹¹²The fact that a civil court may take cognizance of a case and declare the process of a military tribunal conducted without regard to the statutory rules to be null and void [see note 22 *supra*] does not confer a right on the unlawful belligerent, for the court may, in its discretion, refuse to consider the case. See note 23 *supra*.

commission has no privilege against self-incrimination under the Constitution or statutes of the United States, the officer interrogating them has a statutory duty to conduct the examination in consonance with the procedure established by Congress.

A further question remains as to the constitutionality of these provisions, since as construed above they purport to restrict to a degree the power of the Commander in Chief to deal with enemy belligerents. The Constitution gives to Congress the power "to provide for the common Defense," "to raise and support Armies," "to provide and maintain a Navy," "to make Rules for the Government and Regulation of the land and naval Forces," and "to declare War." Congress is further authorized "To define and punish . . . Offenses against the Law of Nations."¹¹³

The Constitution makes the President "the Commander-in-Chief of the Army and Navy of United States," and charges him with the duty "to take Care that the Laws be faithfully executed."¹¹⁴

As summed up in the *Quirin* case:¹¹⁵

"The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."

Among the laws "passed by Congress for the conduct of the war" are the Articles of War, herein discussed, which regulate to a degree the process of military commissions. They are clearly constitutional, therefore, unless they work an undue interference with the power of the President as Commander in Chief of the Army and Navy.¹¹⁶ An analysis of the requirements of the applicable articles has shown that they establish certain minimum safeguards, and with respect to one class of offenders, make a death sentence mandatory upon conviction. As to the latter, no possible interference is present, for the provision does not purport to impair the President's power of pardon. As to the safeguards, they in no way impede the prosecution of the war. That they are consistent with the demands of the military for expediency is evidenced by the fact that the same safeguards, and many more, are thrown about the court-martial procedure.

¹¹³U. S. CONST. Art. I, § 8, cls. 1, 12, 13, 14, 11, 10, respectively.

¹¹⁴U. S. CONST. Art. II, § 2, cl. 1, and Art. II, § 3, respectively.

¹¹⁵317 U. S. at 26, 63 Sup. Ct. at 10 (1942).

¹¹⁶See Atkisson, *The Constitutional Sources of the Laws of War*, SEN. DOC. No. 86, 65th Cong., 1st Sess. (1917) 17.

It is concluded that Congress may restrict to a degree the power of the Commander in Chief to deal with enemy helligerents, and that Congress has exercised that power by requiring the President to afford unlawful enemy belligerents a trial with certain requisites before subjecting them to punishment.

V. POSTSCRIPT

The *Quirin* case is illustrative of one class of cases which may be tried by military commissions under the Articles of War. Although courts-martial now have a concurrent jurisdiction over this class of cases, courts-martial may return a sentence of death only in cases "expressly made punishable by death" in the Articles of War.¹¹⁷ Spying is the only common law of war offense expressly mentioned in the code. The trial of other common law of war offenses, all of which by international usage are punishable by death, must be accomplished by military commissions if a sentence of death is to be returned.

The import of this observation is not great, however, since a person who has offended the common law of war could almost certainly be charged with spying or the statutory offense of relieving the enemy,¹¹⁸ both of which are expressly made punishable by death in the Articles of War. Yet, on its facts, the *Quirin* case strongly suggested trial by military commission. The facts suggested the military commission because they concerned persons other than members of our armed forces, and the specification which most aptly described the offense,¹¹⁹ although cognizable by a court-martial, was not one of those offenses for which the court-martial could return a sentence of death. As a problem in the system of military jurisprudence, the case revealed the uncertain position of the military commission in the law.

The commission originated as a court for the trial of persons which the court-martial could not reach. But now that Congress has expanded the jurisdiction of courts-martial to include cases involving violations of the law of war which formerly were tried by military commissions, the original necessity for the military commission, except in capital cases, has ceased. It is submitted that the next logical step is to authorize courts-martial to return a verdict of death in cases involving violation of the common law of war, and that then its jurisdiction as the tribunal for the trial of these cases should be declared exclusive. That the military commission as such is no

¹¹⁷Article of War 43.

¹¹⁸See, e.g., the specifications in the *Quirin* case covering Charges II and III, violation of Articles of War 81 and 82 respectively. Brief in Support of Writ of Habeas Corpus, 6-7, United States *ex rel.* Burger v. Cox, 317 U. S. 1, 63 Sup. Ct. 1 (1942).

¹¹⁹Specification 1 of Charge I. *Id.* at 5.

longer essential in time of war is evidenced by the fact that no commissions were convened for the trial of unlawful enemy belligerents during World War I.¹²⁰ If it can be demonstrated, however, that there is some political, psychological, or administrative advantage in retaining a military court other than the court-martial for the trial of these cases, Congress should further regularize the procedure of the common law of war military commission by expressly providing by statute that "proceedings of military commissions in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions shall be governed by the rules established for courts-martial in the Articles of War."

The flexibility and uncertainty of procedure which now characterizes the common law of war military commission is capable of serious abuse.¹²¹ If this flexibility is to facilitate the shot at sunrise at the insistence of a field commander or the Commander in Chief, it is to be condemned as un-American regardless of the fact that the person shot is thought to be an unlawful enemy belligerent. Military justice ought to have more certain content.

¹²⁰Brief for the Respondent, app. 76, United States *ex rel.* Burger v. Cox, 317 U. S. 1, 63 Sup. Ct. 1 (1942).

¹²¹In the *Quirin* case, the Commander in Chief took advantage of the flexibility as regards admission of evidence, the vote required to convict, and the mode of review. See p. 58 *supra*.