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Courts-Martial and the Constitution

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COURTS-MARTIAL AND THE CONSTITUTION

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GRAND JURY INDICTMENT

Prosecutions of persons subject to military or naval authority are expressly excepted from the Constitutional requirement of grand jury presentment or indictment.[1]

DOUBLE JEOPARDY

The prohibition on double jeopardy contained in the Fifth Amendment to the Constitution of the United States[2] is binding upon courts-martial. The phrase, "except in cases arising in the land or naval forces," qualifies only the preceding grand jury clause, and it is a justifiable inference that the benefits of the prohibition against double jeopardy were intended for members of the armed forces.[3]

Mr. Justice Harlan, speaking for the United States Supreme Court, has stated:

> "Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States, and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States."[4]

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[1] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . ." Fifth Amendment, United States Constitution. The last phrase qualifies only the word "militia." Johnson v. Sayre, 158 U.S. 109 (1895).

[2] ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

[3] "We have no doubt that the provision of the Fifth Amendment, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,' is applicable to courts-martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment, abundantly shows that such cases were in contemplation but not excepted from the other provisions." Judge Sibley, for the Fifth United States Court of Appeals, in Sanford v. Robbins, 115 F.(2d) 435, 438 (1940).

[4] Grafton v. United States, 206 U.S. 333, 352 (1907). This case denied the constitutionality of a second trial in a federal civil court for the same offense earlier tried by a military court-martial.

A federal court has recently held the Constitutional ban on double jeopardy binding on an Army court-martial. In *Wade v. Hunter*,[5] a soldier had been exposed to trial by a court-martial which adjourned without rendering judgment. He was subjected to another trial by a different court-martial and found guilty. Under the federal "urgent necessity" rule, there is no former jeopardy if the first trial was terminated because of urgent or imperious necessity. The Court considered this rule applicable to courts-martial, but held the facts showed no such need; "the absence of witnesses, rather than an emergency due to the military situation" seemingly being "the reason for the withdrawal of the case from the court-martial which first heard it."[6]

On the false assumption that an accused in the armed forces is denied all the guarantees of the Fifth Amendment, because of the phrase limitative only of grand jury indictment, a federal district court has held the Constitutional ban on double jeopardy not binding on a naval court-martial.[7] This is an unsound decision. In fact, the Navy has recognized the applicability of this Constitutional prohibition to its courts.[8]

The 40th Article of War decrees:

> "No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case."

Where an accused has been found guilty, and the reviewing authority has ordered a new trial, there is no double jeopardy.[9] This is sufficiently analogous to the rule that there is no double jeopardy by a second trial ordered upon an appeal perfected by the accused.[10] The 40th Article of War also provides that there shall be no re-trial of a finding of acquittal.[11] This Article of War is constitutionally deficient only in embodying an unsatisfactory definition of jeopardy. The traditional military plea of "autrefois acquit" is completely inadequate to safeguard the constitutional rights of a soldier or sailor who has been exposed to successive trials, none of which resulted in judgment. Under the accepted federal rule a person is assuredly in jeopardy before his trial has been reviewed, even before he has been acquitted, and, indeed, be-

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[5] 72 F.Supp. 755 (D.C., Kansas, 1947), in 48 Col.L.Rev. 299 (1948).
[6] *Id*, at 763-4.
[7] In re Wrublewski, 71 F.Supp. 143 (D.C., S.D., Calif., 1947).
[8] "Naval Courts and Boards," official publication of the Navy (1937), p. 217.
[9] Ex parte Steele, 79 F.Supp. 428 (D.C., M.D., Penna., 1948).
[10] Trono v. United States, 199 U.S. 521 (1905).
[11] "No authority shall return a record of trial to any court-martial for reconsideration of—(a) an acquittal; . . ."

fore the trial has come to an end.[12] There is less excuse for exposure to multiple trials in the armed forces than in civil courts. The greatly increased possibility of witnesses becoming unavailable, the probability of defense counsel being assigned elsewhere, the absence of anything comparable to bond, all militate against any indulgence in a court-martial concept of jeopardy satisfied only by rendition of judgment on review.[13]

Privilege Against Self-Incrimination

Evidence procured by unreasonable search and seizure should be inadmissible at trial by court-martial, following the long-established federal rule.[14] Present practice of both Army[15] and Navy[16] courts conforms to such a rule.

Hicks v. Hiatt[17] clearly holds that a soldier accused of crime is entitled to the Constitutional protection against self-incrimination. This case decided that "the comment of the trial judge advocate as to (defendant's) failure to make a sworn statement before trial was highly prejudicial to (the defendant) and constituted reversible error."[18] Both the Army[19] and the Navy[20] admit the applicability to an accused of this Constitutional protection against self-incrimination.

Due Process of Law

A soldier or sailor before a court-martial is entitled to due process of law, under the Fifth Amendment. To posit a contrary notion regarding the rights of American citizens called to defend their country upon

[12] "The weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him." Kepner v. United States, 195 U.S. 100, 128 (1904).

[13] Wade v. Hunter, note 5 above, properly found court-martial jeopardy before judgment. As in that case, when an accused has presented his defense, the prosecution has rested, and the court-martial closed, there is jeopardy within the proper meaning of the term. The undesirability and unfairness of the Army interpretation is well illustrated by the Judge Advocate General's decision that a soldier was not tried in an earlier case wherein the court was assembled, the prosecution had completely presented its case, and then a nolle prosequi was entered by the appointing authority. JAGQ-CM 302833 (1946).

[14] Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914).

[15] C.M. 161760 (1924); C.M. 196526 (1931).

[16] In re Meader, 60 F.Supp. 80, 81-2 (D.C., E.D., N.Y., 1945); U.S. Navy C-M Order No. 11 (1929), p. 11; USN C-M Order No. 3 (1943), p. 47.

[17] 64 F.Supp. 238 (D.C., M.D., Penna., 1946).

[18] *Ibid.*, at 245.

[19] The 24th Article of War provides: "No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate him or to answer any question not material to the issue or when such answer might tend to degrade him." See also C.M. 187610 (1929), and C.M. 199315 (1932).

[20] Naval Courts and Boards," official publication of U.S. Navy (1937), p. 160.

language in *Ex parte Quirin*,[21] which concerned the trial of enemy saboteurs, is most unwise.[22] Due process of law may not make identical demands upon military and naval courts-martial as upon criminal procedure in the federal civil courts, but certainly an American soldier is a "person" entitled to due process under the Fifth Amendment.[23]

DUE PROCESS OF LAW (a) LACK OF JURISDICTION

It is well established that a court-martial of one not subject to military or naval authority is lacking in jurisdiction and accordingly violative of due process of law.[24] A court-martial is entitled to no presumption of jurisdiction,[25] nor can the lack of jurisdiction be waived.[26]

A void enlistment confers no jurisdiction.[27] However, a minor enlisting fraudulently and without consent of parents is subject to military jurisdiction,[28] the enlistment being only voidable at the act of the parents.[29]

An officer on inactive duty is not subject to the jurisdiction of a military tribunal, and it has been further held that such officer is still beyond the jurisdiction when recalled to active duty only to permit prosecution.[30]

Jurisdiction is ordinarily terminated by discharge from the service. This is covered capably elsewhere,[31] and only a later case need be noted here. *Durant v. Hironimus*[32] recently held that a court-martial has no jurisdiction over an officer on terminal leave, even though the army pay continued during the leave period.

[21] 63 S. Ct. 2 (1942).

[22] See, for an example, the language of Judge Frank, for the Second United States Court of Appeals, in United States ex rel. Innes v. Crystal, 131 F.(2d) 576, 577 fn. 2 (1943).

[23] Reaves v. Ainsworth, 55 L.Ed. 225, 228 (1911); United States v. Hiatt, 141 F.(2d) 664, 666 (C.C.A. 3d, 1944); Hicks v. Hiatt, 64 F.Supp. 238, 244, 245, 246, 247, 249, 250 fn. 27 (D.C., M.D., Penna., 1946); Henry v. Hodges, 76 F.Supp. 968, 973-4 (D.C., S.D., N.Y., 1948); Anthony v. Hunter, 71 F.Supp. 823, 831 (D.C., Kansas, 1947).

[24] Dynes v. Hoover, 20 How. 65 (U.S. 1857); Ex parte Reed, 100 U.S. 13 (1879); Wales v. Whitney, 114 U.S. 564 (1885); McClaughry v. Deming, 186 U.S. 49 (1901); Carter v. McClaughry, 105 Fed. 614 (C.C.A., Kan., 1901) *affd.* 183 U.S. 365; Rose v. Roberts, 99 Fed. 948 (C.C.A. 2d, 1900); Ex parte Henderson, 11 Fed. Cas. 1067, No. 6347, (C.C.A., Ky., 1878); Cole v. Blankenship, 30 F.(2d) 211 (C.C.A., 4th, 1929); VerMehren v. Sirmyer, 36 F.(2d) 876 (C.C.A. 8th, 1929).

[25] Geo. L.J. 538 (1947), citing cases.

[26] VerMehren v. Sirmyer, 36 F.(2d) 876 (C.C.A. 8th, 1929).

[27] Hoskins v. Pell, 239 Fed. 279 (C.C.A. 5th, 1917).

[28] In re Morrisey, 137 U.S. 157 (1890).

[29] United States v. Reeves, 126 Fed. 127 (C.C.A. 5th, 1908); Ex parte Rush, 246 Fed. 172 (D.C., M.D., Ala., 1917).

[30] United States ex rel. Sanantonio v. Warden, 265 Fed. 787 (D.C., E.D., N.Y., 1919); United States ex rel. Viscardi v. MacDonald, 265 Fed. 695 (D.C., E.D., N.Y., 1919).

[31] Comment, "The Amenability of the Veteran to Military Law," 46 Col. L.R. 977 (1946); and Note, 36 Geo. L.J. 445 (1948).

[32] 73 F.Supp. 79 (D.C., S.D., W.Va., 1947); in 16 Geo. Wash. L.Rev. 142 (1948), 21 Temp. L.Q. 426 (1948), and 96 U. of Pa. L.Rev. 440 (1948).

DUE PROCESS OF LAW (b) IMPROPERLY CONSTITUTED COURT

The United States Supreme Court has ruled that an improperly constituted court-martial has no jurisdiction over the accused.[33]

The old 4th Article of War made only officers eligible for membership on courts-martial. That such a court-martial composed only of officers was unconstitutional for the trial of an enlisted man was charged, but found otherwise by the Court.[34] The revised 4th Article of War, effective February 1, 1949, provides that "no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court." Violation of this provision would deprive a court-martial of jurisdiction.

Under the old 4th Article of War[35] it was customarily held that a general court-martial was not improperly constituted although the law member was not an officer of the Judge Advocate General's Department.[36] Even where the record showed that at least two members of the JAGD were available, a federal court held that this was "unquestionably a matter, which lies for determination, in the sound discretion of the officer who appoints the court-martial."[37] A contra result was reached in another federal court, when an available JAGD officer served not as law member, but as assistant trial judge advocate.[38]

The revised 4th Article of War decrees more positively:

> "The authority appointing a general court-martial shall detail as one of the members thereof a law member who shall be an officer of the JAGD or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail."

Gone is the alternative which permitted the law member to be one completely untrained in the law. In the future, any failure to appoint a proper law member will result in an improperly constituted court devoid of jurisdiction.

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[33] McClaughry v Deming, 186 U.S. 49 (1902).
[34] Adams v. Hiatt, 79 F.Supp. 433 (D.C., M.D., Penna., 1948).
[35] "The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member."
[36] Martin v. Mott, 12 Wheat. 19, 25 U.S. 19 (1827).
[37] Henry v. Hodges, 76 F.Supp. 968, 976 (D.C., S.D., N.Y., 1948).
[38] Brown v. Hiatt, 17 Law Week 2247 (Nov. 17, 1948).

DUE PROCESS OF LAW (c) INADEQUATE PRE-TRIAL INVESTIGATION

A "thorough and impartial investigation" is required by the Articles of War[39] before any charge is referred to a general court-martial.

The Eighth Circuit Court of Appeals in 1946 intimated that a general court-martial would be divested of jurisdiction by failure to provide a thorough and impartial investigation of the charges.[40] The following year a federal district court held that failure to provide such an investigation stripped the court-martial of jurisdiction.[41] Another federal court, which the same year held that an investigation conducted by "the originator of the charges and the accuser in fact" was not enough to deprive the court-martial of jurisdiction,[42] was overruled on appeal by the Third Circuit Court of Appeals.[43] The Tenth Circuit Court of Appeals has likewise held that a court-martial was without jurisdiction when the accused was not afforded a thorough and impartial pre-trial investigation,[44] as has the Federal District Court for the Southern District of New York in a fine opinion by Judge Ryan, who granted habeas corpus to a military prisoner whose investigation was conducted by his accuser who refused to call witnesses for the accused, and who later testified against him at the trial.[45]

It is suggested that the above courts unwisely posit their insistence upon a fair and complete investigation upon the Articles of War. A strong argument can be made that neither the Congress nor the Judge Advocate General consider the demands of the Articles jurisdictional,[46]

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[39] *Old* 70th Article of War: "No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides." *New* AW 46b (effective February 1, 1949) inserts after the second sentence: "The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts-martial jurisdiction over the command."

[40] Reilly v. Pescor, 156 F.(2d) 632; certiorari denied, 329 U.S. 790. The sentence was here upheld because justified by charges which had been adequately investigated.

[41] Anthony v. Hunter, 71 F.Supp. 823 (D.C., Kans., 1947), in 57 Yale L.J. 483 (1948).

[42] Ex parte Smith, 72 F.Supp. 935 (D.C., M.D., Penna., 1947).

[43] Smith v. Hiatt, 170 F.(2d) 61 (C.C.A. 3d, 1948).

[44] Benjamin v. Hunter, 169 F.(2d) 512 (C.C.A. 10th, 1948).

[45] Henry v. Hodges, 76 F.Supp. 968 (D.C., S.D., N.Y., 1948).

[46] Waite v. Overlade, 164 F.(2d) 772 (C.C.A. 7th, 1948); Dissenting Opn. of Circuit Judge Goodrich, in Smith v. Hiatt, 170 F.(2d) 61, 66 fn. 1; 57 Yale L.J. 483 (1948).

so courts professing to base decision upon Congressional grounds are in a precarious position. Far better and sounder that the requirement of adequate investigation of the charges be based upon due process of law. Traditionally all accused of crime have been afforded certain safeguards in advance of trial. A criminal defendant customarily has an investigation by the police, a determination by a prosecuting official, a grand jury indictment[47] or information, and probably a hearing before a committing magistrate. Certainly an accused before a court-martial —almost always unable to have civilian counsel of his own choice, and, because of his incarceration, having inadequate opportunity to prepare his defense[48]—is, at the very least, entitled to a thorough and impartial investigation of the charges *as due process of law.*[49] Obviously there is no fair trial, in any sense of the term, when an accused is tried without the opportunity to assemble evidence to prove his innocence.

DUE PROCESS OF LAW (d) USE OF INVOLUNTARY CONFESSION

It can be stated unequivocally that a court-martial conviction based upon an involuntary confession, within the usual meaning of this concept,[50] will be unconstitutional.[51]

[47] "The functions of the investigating officer, as contemplated by Article of War 70 are those ordinarily performed both by the civil prosecuting officer and the grand jury. These functions are described in 'The Soldier and the Law' by McCoomsey and Edwards (at page 155) as being 'similar in many respects to a grand jury investigation in which the grand jury determines whether a man is to be tried.'" District Judge Ryan, in Henry v. Hodges, 76 F.Supp. 968, 974 (D.C., S.D., N.Y., 1948).

[48] "While one of the purposes of the prescribed pretrial procedures is to determine whether charges shall be brought against a member of the armies of the United States, a primary purpose is to enable the accused to prepare his defense. The soldier cannot avail himself of the means of procuring witnesses and pertinent testimony so readily available to a civilian defendant. Under such circumstances the employment of the investigative techniques prescribed by the Articles of War and the Courts-martial Manual is essential if the accused is to enjoy a fair trial." Biggs, J., in Hicks v. Hiatt, 64 F.Supp. 238, 249 (D.C., M.D., Penna., 1946).
The thorough and impartial pre-trial investigation "was intended not only to prevent unnecessary trials of charges founded upon insufficient evidence and to afford protection to an accused from such charges, but also to grant to him, restricted as he is by his military service, an opportunity of probing into the facts of the charge and to uncover evidence, if available, which might lead to his ultimate exculpation, both by direct evidence and testimony of witnesses who could give affirmative proof as to his innocence, as well as testimony which might affect the credibility of the witnesses upon whom the prosecution depended to establish proof of guilt." Ryan, J., in Henry v. Hodges, 76 F.Supp. 968, 973 (D.C., S.D., N.Y., 1948).

[49] "Whether failure to do the things required be construed as a defect precluding the acquiring of jurisdiction or whether the failure be held to deprive the accused of the due process contemplated by the organic law, the result is the same. Relief should be granted by a court of general jurisdiction, charged with the responsibility of inquiring into the legality of the detention of the accused." Anthony v. Hunter, 71 F.Supp. 823, 831 (D.C., Kans., 1947). See also cases cited in note 48.

[50] Antieau, "The Admissibility of Confessions," 9 Detroit L.Rev. 43, 87, (March, June 1948).

[51] Brown v. Sanford, 170 F.(2d) 344, 345 (C.C.A. 5th, 1948); Winthdrop on Military Law (2d ed., 1920) p. 328; and note Winthrop's sound recommen-

DUE PROCESS OF LAW (e) VAGUE AND INDEFINITE STATUTES

The Articles of War and the Articles for the Government of the Navy abound in vague and uncertain prescripts. What are the "reproachful or provoking speeches or gestures" forbidden by the 90th Article of War? Or the "contemptuous or disrespectful words" of the 62nd Article? Or the "threatening or insulting language" of the 65th Article? When is a sailor in danger of engaging in "any other scandalous conduct tending to the destruction of good morals," interdicted by the Eighth Article for the Government of the Navy? What is "conduct unbecoming an officer and a gentleman" prescribed by the 95th Article of War? And what beacons of behavior are furnished by the omnibus clause of the 96th Article which enjoins soldiers to avoid "all disorders and neglects to the prejudice of good order and military discipline"? It is no defense of these mystical mandates to assert that a specification will inform the accused of the particular misdeed; the Constitutional abhorrence of these vague and indefinite rules is posited primarily upon their inadequacy as guides to one who would be lawful.[52] If anything, the requirements of clarity and guidance should be applied more vigorously to military and naval rules than to the civil statute, for the vague becomes meaningless to one suddenly projected into an alien societal context. Convictions under any of these "prescripts for psychoanalysts", as Cardozo would have described them,[53] have no claim to constitutionality.

DUE PROCESS OF LAW (f) A COMBINATION OF FACTORS RESULTING IN THE MILITARY PROCEDURE BEING ADMINISTERED IN A FUNDAMENTALLY UNFAIR WAY

Due process of law demands that courts-martial be administered with the same "fundamental fairness essential to the very concept of justice,"[54] required of our civil courts. Judge Maris has said well "that

dation: "In military cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent, unless very clearly shown not to have been unduly influenced," at p. 329. The new 24th Article of War amends the former by the addition of this paragraph: "The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any accused person or witness, shall be deemed to be conduct to the prejudice of good order and military discipline, and no such statement, admission, or confession shall be received in evidence by any court-martial. It shall be the duty of any person in obtaining any statement from an accused to advise him that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, and that any statement by the accused may be used as evidence against him in a trial by court-martial."

[52] United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[53] Shepard v. United States, 290 U.S. 96 (1933).

[54] "As applied to a criminal trial, a denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." Roberts, J., in Lisenba v. California, 314 U.S. 219, 236 (1941). "Fundamental fairness" test applied in Boone v. Nelson, 72 F.Supp. 807 (D.C., S.D., Me., 1947).

this basic guarantee of fairness, afforded by the due process clause of the Fifth Amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court."[55] There is no conceivable reason why "the basic standard of fairness which is involved in the constitutional concept of due process of law"[56] should not be respected by military tribunals trying American citizens called to the defense of their country.

Denial of "fundamental fairness" will be found most frequently in a combination of improprieties. The Eighth Circuit Court of Appeals in 1943 found a want of due process in this combination of factors alleged by the soldier: (1) denial of right to be represented by military counsel of his choosing; (2) incompetent counsel; (3) refusal to call witnesses in his behalf; (4) denial of his right of confrontation; (5) intimidation of defense witnesses; and (6) conviction of one crime when charged with another. The case was remanded for a new trial to determine the truth of these allegations.[57]

Another federal court discharged from custody a soldier when it found that the military procedures "were not applied in a fundamentally fair way."[58] Here, (1) the investigator failed to warn the accused that his statements would be used against him; (2) the investigator failed to examine all the witnesses requested by the accused; (3) the accused was not permitted to examine adverse witnesses during the investigation; (4) the investigator suppressed a considerable body of evidence valuable to the accused; (5) the accused was cross-examined at the trial on prejudicial matters not relevant; (6) witnesses for the prosecution were permitted to testify to hearsay and irrelevant matters prejudicial to the accused; (7) the trial judge advocate was permitted to make prejudicial statements concerning the failure of the accused to make a sworn statement during the investigation; (8) inadmissible evidence was received; and (9) the conviction was received though the Court indicated it had a reasonable doubt of the guilt of the accused.

Clearly justice is not done by retreating into the apologetics of an absolete concept of limited habeas corpus review.[59] Where congeries of unfairness such as the above characterize courts-martial proceedings, due process of law demands that sentences thereunder be reversed.

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[55] United States v. Hiatt, 141 F.(2d) 664, 666 (C.C.A. 3d, 1944).
[56] Hicks v. Hiatt, 64 F.Supp. 238, 250 (D.C., N.D., Penna., 1946).
[57] Schita v. King, 133 F.(2d) 283 (C.C.A. 8th, 1944), *cert. denied* Schita v. Pescor, 322 U.S. 761.
[58] Hicks v. Hiatt, 64 F.Supp. 238 (D.C., M.D., Penna., 1946).
[59] "The Scope of Review over Courts-Martial on Habeas Corpus," 41 Ill. L.R. 260 (1946).

Due Process of Law (g) Sentence Beyond the Power of the Court-Martial

It is firmly established that a sentence beyond the power of court-martial to impose for the particular offenses of which the accused was found guilty is invalid.[60]

An unanimous vote of guilty is required only where the death sentence is mandatory; other findings of guilty may be sustained with less than an unanimous vote. But where the sentence of death is optional, the vote on the *sentence*—though not on the finding of guilt—must be unanimous.[61]

Although it is customarily said that the sufficiency of the evidence before a court-martial will not be reviewed on habeas corpus, it has been assumed that a *total* absence of evidence would deprive the court-martial of jurisdiction and avoid a sentence so imposed.[65]

Right of Confrontation

The Constitutional right of an accused in a criminal prosecution to be confronted with the witnesses against him,[63] is, on principle, applicable to an accused before a court-martial. This safeguard would be denied to a member of the armed forces by some on the theory that court-martial trial is not really a "criminal prosecution",[64] but what the notion possesses in ingenuity it lacks in both logic and policy. Furthermore, this fundamental right of an accused can reasonably be held to be essential to the fair trial required by the due process clause of the Fifth Amendment.[65] It is assumed by the federal courts that this Constitutional right of an accused is not to be denied by courts-martial.[66] In the light of the above, the use of depositions by the prosecution, as permitted by the 25th Article of War,[67] is assuredly unconstitutional. The overwhelming weight of authority has held unconstitutional the attempted use of deposition evidence by the prosecution in

[60] Carter v. McClaughry, 183 U.S. 365 (1902).

[61] Article of War 43; Stout v. Hancock, 146 F.(2d) 741 (C.C.A. 4th, 1944), certiorari denied, 325 U.S. 850; Hurse v. Caffey, 59 F.Supp. 363, (D.C., N.D., Texas, 1945).

[62] Boone v. Nelson, 72 F.Supp. 807 (D.C., S.D., Me., 1947). See also: Charlton v. Kelly, 229 U.S. 447 (1913); In re Watts, 190 U.S. 1 (1903); Ex parte Cuddy, 131 U.S. 280 (1889); Clewans v. Rives, 104 F.(2d) 240 (C.A., D.C., 1939); In re Schmidt, 68 F.Supp. 765 (D.C., N.D., Calif., 1946).

[63] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Sixth Amendment to the Constitution of the United States.

[64] Winthrop, Military Law (2d ed., 1920), p. 287 note. But observe the same author's admission elsewhere: "Military courts, however, though not bound by the letter (of the Sixth Amendment), are within the *spirit* of the provision." Op. ctd., p. 165 (italics in original).

[65] Rottschaefer, Constitutional Law, 1939, p. 797.

[66] Schita v. King, 133 F.(2d) 283 (C.C.A. 8th, 1944); Hicks v. Hiatt, 64 F.Supp. 238 (D.C., N.D., Penna., 1946).

[67] "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a

criminal proceedings,[68] and the mere residence of a witness "beyond the distance of one hundred miles from the place of trial" is no justification for depriving an American citizen of a right so fundamental, so precious, and so necessary in a situation sufficiently conducive to inquistorial trial.

Denial of Counsel

The Sixth Amendment to the Constitution of the United States requires that "In all criminal prosecutions, the accused shall enjoy the right. . .to have the assistance of counsel for his defence." Trial by court-martial is a "criminal proceeding" if the nature of the trial and resultant incarceration are meaningful characteristics. The denial of counsel to a member of the armed forces charged with a serious crime finds justification neither in the necessity nor the practice of the military, and assuredly not in concepts of "fair trial" fundamental to our way of life.

The United States Court of Claims has held that the Sixth Amendment's requirement of counsel applies to courts-martial.[69] The Court further ruled that the right to counsel embraces, as elsewhere, time for counsel to adequately prepare the defence.[70]

The new 11th Article of War requires that defence counsel be either a "member of the Judge Advocate General's Department or an officer of the bar of a Federal court or of the highest court of a State" whenever the trial judge advocate is either of the aforementioned.

In 1943 the Ninth Circuit Court of Appeals held that there was no violation of the Sixth Amendment when counsel chosen by the accused was not a lawyer, nor was there transgression in the exclusion of accused's civilian associate counsel from a part of the trial involving military secrets.[71]

In *Ex parte Benton*,[72] a federal prisoner alleged that "the counsel assigned to defend him before the court-martial that tried him was so unqualified, incompetent, inefficient, negligent and unfaithful in the

military board, if such depositions be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to, or, in foreign places, because of non-amenability of process, refuses to, appear and testify in person at the place of hearing . . ." (effective February 1, 1949).

[68] Dowdell v. United States, 221 U.S. 325 (1911); Diaz v. United States, 223 U.S. 442 (1912); Wigmore on Evidence (2d ed.) sec. 1398.

[69] Shapiro v. United States, 69 F.Supp. 205 (1947), in 35 Geo. L.J. 538 (1947), and 5 Nat. B.J. 348 (1947).

[70] *Ibid*, at 206-7. No such time to prepare the defense was found in the facts of the case wherein counsel was appointed at 12:40 p.m. and went to trial at 2 p.m. the same day at a place 35 to 40 miles distant.

[71] Romero v. Squier, 133 F.(2d) 528 (1943), certiorari denied 318 U.S. 785.

[72] 63 F.Supp. 808 (D.C., N.D., Calif., 1945).

performance of their duties" that he did not have effective assistance of counsel. The prisoner specified that (1) associate counsel did not consult with him prior to trial; (2) counsel consulted with him only once prior to the trial (for murder), and then for a period of only twenty to twenty-five minutes; (3) counsel failed to subpoena witnesses requested by the accused; (4) counsel failed to produce character witnesses on behalf of the accused; and (5) counsel failed to effectively cross-examine witnesses. The federal district court saw "no basis in the averments of the petition or in the trial record for holding that the basic doctrine of fairness under the due process clause" was violated.[73] The Fifth Circuit Court of Appeals has also denied habeas corpus to a military prisoner who alleged—but did not prove—incompetence of counsel. Here, however it was "assumed that a writ of habeas corpus may be obtained on the ground that defense counsel was incompetent."[74]

Beets v. Hunter[75] is the rare case in which a federal court finds incompetence of counsel and discharges the prisoner for want of due process of law. In that case court-martial counsel admitted in the federal court "that he was wholly incompetent to represent" the accused, and testified "too plain for mistake, that he did so only on orders." The case is sound in holding incompetence of counsel within habeas corpus review of courts-martial, and eminently desirable in deciding that proved incompetence of counsel defending an accused before a court-martial is a denial of counsel under the Sixth Amendment.[76]

Cruel and Unusual Punishment

Since there is no specific exception as in the grand jury clause of the Fifth Amendment, and no words susceptible of misconstruction as in the Sixth, the inclusive ban on cruel and unusual punishment embodied in the Eighth Amendment[77] will certainly, if occasion arises, be held applicable to sentences imposed by military or naval courts-martial. Our cultural antipathy to this particular kind of socio-legal barbarism is recognized in the 41st Article of War.[78]

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[73] *Ibid.*, at p. 810.

[74] Exkano v. Hiatt, 170 F.(2d) 93 (1948).

[75] 75 F.Supp. 825 (D.C., Kan., 1st Div., 1948).

[76] Right to counsel is recognized by the 11th Article of War, as well as by Naval custom. Re the latter, see "Naval Courts and Boards," official publication of the Navy, p. 356. A healthy awareness that this right to counsel means the right to *effective* counsel is being manifested of late by the military authorities. See, for instance: CM ETO 4756 (1945) where sentence was set aside because counsel failed to exercise reasonable diligence in safeguarding the interest of the accused; CM 281684 (1945) where sentence was vacated because a seasonable motion for continuance for counsel to prepare the defense was denied; CM 284066 (1944) where sentence was reversed because the defense counsel was the accuser; CM 316898 (1946) and JAGQ-CM 315877 in both of which sentences were vacated because the investigating officer served as defense counsel.

[77] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[78] "Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body are prohibited."