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COURT-MARTIAL DECISIONS BY DIVIDED COURTS

STANLEY LAW SABEL

If a soldier and a sailor, while together on leave, become involved in a civilian fracas, they would be subject to trial by courts-martial of their respective—military¹ and naval²—branches of the service. This jurisdiction, although concurrent with that of the ordinary civil courts,³ if it were the first to be asserted, would take precedence. Such assertion of the service jurisdiction is the normal procedure where the offense is not heinous in nature.

The evidence against the soldier and the sailor may be identical and of such character as to persuade less than all of the members of each of the courts. Suppose that the evidence persuaded five of the nine members of the military tribunal⁴ of the soldier's guilt and that the evidence in the case of the sailor similarly persuaded five of the nine members of the naval court.⁵ The verdict in the case of the soldier would be "not guilty"; in the case of the sailor, "guilty as charged."

Even in the case of grave military offenses, if the members of the courts voted as above, the result would be the same: "not guilty" in the Army, "guilty as charged" in the Navy. The result in the case of a marine, who is sometimes subject to the jurisdiction of the Army and other times to that of the Navy,⁶ would be even more equivocal.

The apparent anomaly is the consequence of different methods of determining guilt and of imposing sentence.

The Army Rule

The *Articles of War*, which govern the Army, provide for determination of guilt and imposition of sentence:

"Article 43. No person shall, by general court-martial, be convicted of an offense for which the death sentence is made mandatory by law, nor sentenced to suffer death, except by the concurrence by *all* the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten

¹41 STAT. 787 (1920), 10 U. S. C. 1473 (1940).

²REV. STAT. 1624 art. 8, 34 U. S. C. 1200 art. 8 (1940).

³41 STAT. 806 (1920), 10 U. S. C. (1940); *In re Stubbs*, 133 Fed. 1012 (C. C. Wash. 1905).

⁴Article of War 4 provides: "General courts-martial may consist of any number of officers not less than five." 41 STAT. 788 (1920), 10 U. S. C. 1476 (1940).

⁵Article 5 of the *Articles for the Government of the Navy* provides: "A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members. . . ." REV. STAT. 1624 art. 39, 34 U. S. C. art. 39 (1940).

⁶41 STAT. 787 (1920), 10 U. S. C. 1473 (1940).

years, except by the concurrence of *three-fourths* of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a *two-thirds* vote of those members present at the time the vote is taken. All other questions shall be determined by a *majority* vote."⁷ (Italics added.)

Superimposed upon this and rounding out the picture, is the rule stated in the *Manual for Courts-Martial* that where there is not a sufficient concurrence for a finding of guilty, a verdict of not guilty is required. The *Manual* in the form prescribed by President Coolidge, November 29, 1927, contains an explicit provision that "a finding of not guilty results as to any specification or charge if no other valid finding is reached thereon."⁸ This is applied in the strictest possible way by treating any fraction, no matter how small, resulting from an application of the two-thirds or three-fourths requirement of Article of War 43 as necessitating an additional vote.⁹ For example, three-fourths of a court of seven members would be five and one-fourth. In order to impose a sentence of confinement in a penitentiary for over ten years, the small fraction is not disregarded; instead, an additional vote, a sixth, is required. In a similar manner, where a court consists of five members, the two-thirds required by statute, under the rule of the *Manual*, necessitates a vote of four since the remaining one-third is treated as necessitating the additional vote. This results not only in a technical unfairness of requiring a different percentage vote for conviction according to the varying size of the court, but also in a situation where the application of the rule will in more cases than not require a percentage for conviction higher than that stated in the statute.

Analyzing the Army rule: On the merit side is the *Manual* provision permitting verdicts of only guilty or not guilty. Anything analogous to retrials following jury disagreements would not fit in with the tempo of modern warfare nor would it be productive of the best use of manpower. Where the majority of the court feels that the charge has not been proven, the verdict of not guilty seems a good solution. That it gives an accused a somewhat greater chance of acquittal than is generally given by our criminal law is but an apparent anomaly, for the court of officers can be regarded as sufficiently expert to make its majority opinion of greater significance. Then, too, the apparent advantage to an accused should be weighed against the fact that, except in the rare case where death is the only possible penalty

⁷41 STAT. 795 (1920), 10 U. S. C. 1514 (1940).

⁸Par. 78d of *Manual for Courts-Martial* prescribed by the President pursuant to Chapter II, art 38, of 41 STAT. 794 (1920), 10 U. S. C. 1509 (1940).

⁹*Ibid.*

(*e.g.* spying),¹⁰ the accused may be convicted by less than a unanimous vote. Where, as in the above exception, unanimity is required, and as in the other situations where the two-thirds rule makes necessary a vote of more than a majority, the possibilities noted by the suppositious cases with which we began this study become possible. *That is, the verdict in such cases may be "not guilty" even though a majority of the members of a court-martial are persuaded beyond a reasonable doubt¹¹ of the guilt of the accused.*

This limited type of minority rule does not seem to be in accordance with true ideals of democratic justice. Our Anglo-Saxon concept that it is better for a thousand guilty to go free than for one innocent man to be convicted is, at best, a balancing of the interest of the innocent defendant against the interests of possible future victims of the acquitted criminal. Nevertheless, as a general rule, such a concept has a certain salutary effect. With a nation at war, however, it seems highly dangerous to balance against national interests the interests of an accused whom the majority of a court feels to be "guilty as charged."

The Navy Rule

The United States Navy indulges in no such folderol. In the Navy, the present rule, which has been in effect throughout the major portion of its history,¹² is that majority rule governs with the one exception that a two-thirds vote is required for a sentence of death. The applicable article for the government of the Navy provides:

"Article 50. No person shall be sentenced by a court-martial to suffer death, except by the concurrence of two-thirds of the members present, and in the cases where such punishment is expressly provided in these articles. All other sentences may be determined by a majority of votes."¹³

The exception to the above provision is somewhat collateral to the theme of this study since the Navy requires a two-thirds vote for *punishment* by death rather than for *conviction*. In no case under Naval jurisdiction is the death sentence mandatory.¹⁴ The removal from the death sentence of the individual-veto, a by-product of the unanimity rule, is probably helpful in producing discipline. Whether this reduction in the responsibility of the individual member

¹⁰Article of War 82 governing spying provides that such persons "shall, on conviction thereof, suffer death." It omits the phrase "or such other punishment as a court-martial may direct" found as an alternative to all other capital offenses. 41 STAT. 804 (1920), 10 U. S. C. 1554 (1940).

¹¹The *Manual for Courts-Martial* adopts the criminal law requirement of proof beyond a reasonable doubt. *Manual for Courts-Martial*, par. 78.

¹²See 12 STAT. 605 art. 19 (1862) and REV. STAT. 1624 art. 50.

¹³REV. STAT. 1624 art. 50, 34 U. S. C. 1200 art. 50 (1940).

¹⁴REV. STAT. 1624 arts. 4-7, 34 U. S. C. 1200 arts. 4-7 (1940).

of the court is productive of a greater percentage of votes for conviction the writer is, of course, in no position to say. Such would seem to be its psychological effect.

The important difference between the Army and the Navy rules lies in the fact that the Navy makes the question of guilt or innocence turn on a simple majority vote. This Navy rule at once commends itself as easily applied and productive of no uncertainty or anomalies. It is a rule which seems better fitted for wartime discipline, where speed of punishment is naturally essential, than any rule based upon the familiar pattern of the jury system with its possibility of retrials. In this respect, the court-martial rules of both the Army and the Navy are to be commended for requiring a decision one way or another by the first court to hear a case. The final question remaining is whether allowing conviction by a simple majority is too harsh a rule. It is submitted that a proper balancing of the interests involved indicates that it is not.

Possible Rules Analyzed

The possible rules that might govern votes necessary for a decision involving conviction or acquittal can be listed varying from the most lenient to the strictest:

- (1) Require unanimity; acquit if not achieved.
- (2) Require unanimity; retry until achieved.
- (3) Require unanimity; retry until unanimous conviction or a majority acquittal results.
- (4) Require a vote of a fraction greater than a majority; acquit where this is not had.
- (5) Require a vote of a fraction greater than a majority; retry until this is obtained.
- (6) Require a vote of a fraction greater than a majority; retry until this is had or at least a majority acquit.
- (7) Decide the case by a majority vote.

Other than the first possibility above, which is manifestly the most lenient, it is difficult to determine which of the other possible rules is more severe or lenient in all its applications. For example, should a bare majority vote for acquittal, the application of the seventh rule would favor the accused more than either the second (unanimity and retrials), or the fifth (high fractional requirement and retrials). A classification based on severity alone rests to a great extent on a guess as to the overall results of applying particular rules. From this it follows that a decision as to which rule to apply is not simply a choice between strictness and liberality. It does remain true, however, that the seventh (the Navy rule of deciding by majority vote)

will in all its applications be stricter than the first and fourth rules, which together represent the Army rule.

Considering briefly each possibility: Requiring unanimity and acquitting where it is not had (the Army rule in the situation where the death sentence is mandatory) furnishes an accused with a great protection. This rule which, conversely stated, allows acquittal by a single vote defeats a good part of the object of the death sentence. Realistically considered, the only purpose of capital punishment for wartime offenses is deterrence of potential offenders. The individual offender is certainly not reformed for restoration to society by this type of punishment. Protection against his future acts could be secured as well by incarceration. The danger of future remission of sentence, normally present with lengthy sentences, seems reduced to a minimum during continuation of hostilities. If the death sentence is imposed solely as a deterrent, its application should be made sure and not subject to individual veto which reduces certainty. Similarly, the offense to which this rule alone applies, *viz.*, acting as a spy,¹⁵ is not less serious from the viewpoint of public protection than crimes generally made punishable by death. While sometimes a spy may be subject to less moral censure than a murderer or a traitor, the need for deterring others is just as great. Yet with murder, treason, and the like, punished by our civil courts, disagreements are not productive of acquittal. Why should a person accused as a spy have such protection before an Army court-martial? The rule seems to be a result of the fact that, before such a court, death is the only possible punishment for such an offense.¹⁶ This, too, should be re-examined, for in recent times we have seen that where numerous persons are jointly involved in military offenses, apprehension of all the offenders and their conviction can sometimes best be obtained by remitting the death sentence of some of them.¹⁷ The Navy solves the problem by its rule that the death penalty requires a two-thirds vote of the members present, but that other punishment can follow a majority vote.¹⁸

The second possible rule, requiring unanimity for any decision and providing for retrials until this is had, is that generally applied to jury trials.¹⁹ So

¹⁵See *supra* note 10.

¹⁶*Ibid.*

¹⁷In the case of *Ex parte Quirin et al.* the President, acting on the recommendation of the Military Commission before whom the several defendants were tried, commuted the death sentences of Burger and Dasch. The official White House Release stated that this was done "because of their assistance to the government of the United States in the apprehension and conviction of the others." *New York Times*, August 9, 1942, p. 1.

¹⁸See *supra* note 13.

¹⁹The rule applied generally in this country and always applied in criminal cases here is that of requiring unanimity. Discharge of a jury which cannot agree "consti-

far as known, it has never been applied to multi-judge courts. The same is true in various fields of administrative law²⁰ in spite of the fact that often the administrative officer is largely a fact-finder. The ready answer is that retrials in these situations before the same body would be useless. This reason does not apply with the same force to either Army or Navy courts-martial since any commissioned officer may be appointed to such courts and seldom does the same court sit for any protracted period of time. In spite of this distinction, the jury trial rule has not been applied and nothing is seen to recommend its adoption in situations where delay should be avoided.

The third possibility, as a variation of the second rule, allows acquittal by a majority vote. Apparently, this is applied nowhere. It provides a method of avoiding some unnecessary retrials without allowing acquittal by a minority. At best, it is a compromise between the first and second possibilities.

The fourth is the rule applied by the Army to all but the exceptional case where capital punishment is mandatory.²¹ The principle governing this requirement of convictions only by a fraction greater than a majority is the same whether the required vote is two-thirds, or three-fourths, or any other fraction greater than a majority. The objection to it lies in its corollary that the minority fraction can, in effect, vote acquittal.

This last objectionable feature could be avoided by the device of retrials contained in the fifth rule. The same number of votes would be required for acquittal as for conviction. This is the rule applied in civil cases in states which allow jury verdicts by less than a unanimous vote. A familiar example is the New York civil verdict by a five-sixths majority.²² What we have previously said about the inadvisability of retrials, where the situation admits of no delay or unnecessary effort, applies equally here.

The sixth rule, like the similar modification of the unanimity rule, would eliminate retrials where a majority votes for acquittal. The retrials would occur only in the limited situation where guilt is voted by a majority but

tutes no bar to further proceedings." *United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165 (U. S. 1824); *Keerl v. Montana*, 213 U. S. 135, 29 Sup. Ct. 469 (1909).

²⁰See for example the well reasoned dissent of Commissioner Gaskill in *In re United States Steel Corporation*, 8 F. T. C. 1 (1924) wherein he differed from the majority on the question of Pittsburgh plus method of selling in the steel industry saying, "I am unable to find in law a warrant for holding that a delivered price policy is made unlawful because of the method used to calculate the selling price." Were unanimity required, we would be deprived of forceful dissents which with administrative bodies as with courts (*e.g.*, Holmes and Brandeis, JJ.) mould the law and are often destined to become the rules eventually adopted.

²¹Article of War 43, *supra* note 7.

²²N. Y. CIVIL PRACTICE ACT 463-a added by L. 1937, c. 120. For a less rigid provision, *cf.* Rule 48 of the FEDERAL RULES OF CIVIL PROCEDURE under which "The Parties may stipulate . . . that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

less than the number required for conviction. This avoidance of a minority determination of rights seems to be a minimum improvement of the Army rule. If the protection of requiring the higher fraction for conviction is thought to be worth anything, this modification of its inequitable by-product—acquittal by a minority—seems desirable.

Last is the Navy rule of determining the decision one way or another by a majority vote. This is a simple rule and the only one that does not produce some undesirable results. As stated before, this rule, in the situation where a majority of a divided court votes for acquittal, gives an accused greater advantages than are given by the rule generally applied to jury cases. Admittedly, however, the rule is harsher than that of the Army. Nevertheless, it is difficult to find any reason why this alone should condemn an otherwise workable provision. Functionalists will look in vain for any essential difference between Army and Navy service to justify this difference in rules. That one is now more largely composed of selectees than the other is no answer. The difference antedated the Selective Service Act. Furthermore, it is doubtful if a man ever chooses between the services with these rules in mind. Similarly, there seems to be no justification for the difference on the basis of the type of work performed. Effective discipline is needed as much in one service as in the other. Temptations to commit acts detrimental to such discipline are no greater on land than aboard ship.

Historical Development of the Army and Navy Rules

Historical analysis reveals the reasons behind this difference in the Army and Navy rules and supports the conclusions tentatively reached. The Army rule is the by-product of the provision making the death sentence mandatory in certain situations, *viz.*, spying.²³ On the other hand, the Navy, for all offenses punishable by death, allows "such other punishment as a court-martial may adjudge."²⁴ To resolve any doubts, the *Articles for the government of the Navy* specifically authorize imprisonment in lieu of death in any case.²⁵

The Army rule of mandatory death for spies²⁶ existed along with a rule requiring a two-thirds majority for sentences of death²⁷ without causing any

²³See *supra* note 10.

²⁴REV. STAT. 1624 arts. 4 and 5, 34 U. S. C. 1200 arts. 4 and 5 (1940). This rule has always been applied in the Navy. See 12 STAT. 602 art. 4 (1862).

²⁵REV. STAT. 1624 art. 7, 34 U. S. C. 1200 art. 7 (1940).

²⁶Death sentence for spies has been mandatory since the early history of our Army. See such a provision in 2 STAT. 371 (1806) and in REV. STAT. 1343.

²⁷This rule likewise has applied since early times with the two-thirds requirement applicable to death alone. See such a provision in 2 STAT. 369 art. 87 (1806) and in REV. STAT. 1342 art. 96. The Revised Statutes contain practically the same provision

difficulty until 1916. Until then the acquittal of persons, as to whom a court did not reach a two-thirds majority, was left to statutory construction. The hasty revision of the then existing *Articles of War* prior to our entry into World War I, which was tacked as a rider by the Senate to the Army Appropriation Bill of that year,²⁸ made one curious change in Article of War 43. The provision in the Revised Statutes which it amended was a simple rule similar to the one of the Navy providing that "no person shall be sentenced to suffer death except by the concurrence of two-thirds of the members of a general court-martial."²⁹ The 1916 amendment gave the first statutory recognition to the conflict between this rule and the mandatory requirement of death for spies. It added a proviso that no person should be *convicted* of an offense for which death is mandatory except by the concurrence of two-thirds of the members of a court-martial.³⁰ This 1916 amendment is but a codification, since, in the case of mandatory death sentences, the specific mandatory provision would in any event prevail over general rules relating to punishment for all offenses. The amendment left other decisions to a simple majority.³¹ The change made by this Article of War, in effect during World War I, would be unimportant if the story ended there. If such were the case, the point would be too narrow to warrant lengthy treatment. It would remain but another instance of too much legislative detail. Its importance, however, lies in the fact that it opened the door to a new technique which was used in our postwar return to "normalcy." The general surge away from strict wartime regulation resulted in the introduction of a bill in the Sixty-sixth Congress to amend the *Articles of War*.

Congressional statements accompanying this bill suggest that it was not introduced with any desire to make Army discipline more effective. The House Military Affairs Committee spoke of "many instances of apparent injustice which have been brought to the attention of the American people"³² and of the popular conviction of the need for "some radical changes in the matter of administering military justice."³³ The Committee added: "An investigation of many of the cases cited as showing unfairness in the administration of

as the earlier act except that the revision omits a clause sanctioning corporal punishment by providing that not "more than fifty lashes be inflicted on any offender." *Ibid.*

²⁸The Senate Bill contained most of the old provisions. At the time it was passed the sub-committee on Military Affairs of the House was considering a complete revision of the *Articles of War* with the intention of recommending to the House certain changes. See historical data in H. R. REP. No. 940, 66th Cong., 2d Sess. (1920), accompanying H. R. 13942.

²⁹REV. STAT. 1342 art. 96.

³⁰39 STAT. 657 (1916).

³¹*Ibid.*

³²H. R. REP. No. 940, 66th Cong., 2d Sess. (1920), accompanying H. R. 13942.

³³*Ibid.*

military justice in the past will disclose the fact that the personal element entered too largely into these cases."³⁴ The provisions changing the *Articles of War* were originally in a bill confined to a revision of these *Articles*.³⁵ The substance of this bill was added as a Senate amendment to the 1920 Army Reorganization Bill.³⁶ Apparently, Senator Chamberlain, who offered the amendment, had some misgivings. After stating that the revised *Articles* contained "many provisions . . . which tend to mitigate the condition of a man tried by a military court,"³⁷ he said: "*We have formulated Articles of War which may hereafter need amendment.*"³⁸ The final justification for the revised *Articles*, as stated by Senator Chamberlain,³⁹ was, "I think, they will go a long way to protect officers and enlisted men of our Army in the future."⁴⁰ Nowhere in the committee reports or the debates is the need for discipline, as affected by the anomalies produced by the revised *Articles*, considered. Officers and men of the Navy, which, it will be remembered, was being largely scrapped by treaty at about that time, were apparently regarded as without need of further protection.

As introduced in the Senate, the changed *Articles of War* would have continued the 1916 scheme for Article 43 by having one provision governing convictions where death is mandatory and another governing sentences of death. The number needed for conviction, however, was changed from two-thirds to *all* the members of a court where the sentence of death is either mandatory or permissive "Provided, however, that any penalty other than death may be imposed by three-fourths of the members of said court-martial."⁴¹ This latter provision is, of course, inconsistent with the mandatory death sentence and might have produced curious results, even where death is not mandatory, by requiring a greater vote for conviction of serious offenses than for the few remaining military offenses for which death is not, at least, a possible punishment. Finally, it was provided that other convictions should require a two-thirds vote.

The conferees on The 1920 Army Reorganization Bill, to which the revised *Articles of War* were eventually tacked in the Senate, reported Article 43 in its present form.⁴² The proviso permitting "any penalty other

³⁴*Ibid.*

³⁵S. 64, 66th Cong., 2d Sess. (1920), similar to H. R. 13942, 66th Cong., 2d Sess. (1920).

³⁶59 CONG. REC. (66th Cong., 2d Sess.) 5836 (1920).

³⁷*Id.* at 5845.

³⁸*Ibid.*

³⁹*Ibid.*

⁴⁰*Ibid.*

⁴¹See quoted provision at 59 CONG. REC. (66th Cong., 2d Sess.) 5839 (1920).

⁴²59 CONG. REC. (66th Cong., 2d Sess.) 7834 (1920).

than death" by a three-fourths vote was recast to avoid the glaring repugnance between this and the mandatory death provision. Presumably from a desire to make the change look as formal as possible, the same fraction, three-fourths, was kept but applied to *sentences* of life imprisonment and confinement in excess of ten years.⁴³ Neither the conference report nor the debates throw any light on the problems involved. There is some intimation of a change occurring first in the House. The report of the House conferees said of the *Articles of War* that "the form finally agreed upon is that of the House Bill."⁴⁴ The changes in Article of War 43 were apparently but slightly considered for the clear conflict between the proviso and the mandatory death provision, which is referred to in the same Article, remained in the bill until an advanced stage in its passage through Congress. These amendments, designed to afford easy treatment of the soldier, followed the mechanics of the 1916 pattern by requiring by statute more than a majority to convict. Found in the 1916 provision applying to mandatory death sentences, the principle was extended in application to all offenses. It is as a result of this hasty revision of the law in the period of postwar reaction that we begin World War II with an important phase of our court-martial procedure badly jumbled.

Suggested Remedies

The Army mandatory death sentence seems to be the keynote to the trouble. Humane considerations dictate, and probably rightly so, that a vote higher than a simple majority be had before this supreme penalty be exacted. Coupling this with a mandatory death requirement results in the possibility of minority acquittal which, it is submitted, is unsound. The result is the same whether the rule is spelled out by statute, as from 1916 on, or left to interpretation as before that time. When the possibility of minority acquittal is given even this limited recognition, the way is open for its extension. The principle, unsound in all of its applications, should be eradicated from the start.

One possible method of doing away with minority acquittal is by having retrials in cases where that principle would come into operation. This, in substance, was the idea behind the second, third, fifth, and sixth of the possible rules analyzed above.⁴⁵ This can be accomplished by amending the provisions in the *Manual for Courts-Martial* that failure to convict is equiva-

⁴³*Id.* at 7827.

⁴⁴*Id.* at 7834.

⁴⁵See *supra* pp. 169-171.

lent to acquittal.⁴⁶ An executive order is all that is needed for such a change, as the *Manual*, initially promulgated by the President, can be changed without legislation⁴⁷ provided nothing contrary to or inconsistent with the *Articles of War* be prescribed.⁴⁸ Recent use of this power in connection with the trial of the German saboteurs was approved by the Supreme Court in *Ex parte Quirin et al.*⁴⁹ The Court specifically considered the provision in the Presidential order appointing the military commission.⁵⁰ The order, authorizing a conviction by a two-thirds vote,⁵¹ was held valid as not in conflict with Article of War 43.⁵² Some of the justices based their holding on the ground that "Congress did not intend the Articles of War to govern a Presidential military commission"; others construed the Articles in question as not applying to the type of case before the Commission.⁵³ It follows that Presidential authority to regulate procedure encompasses determination of manner of proof so long as such regulations are not in conflict with specific Articles of War.

The questions raised above should not, however, be settled by such use of executive authority. The retrials, which such a change in regulation would entail,⁵⁴ would appear to be in time of war too great a price to pay even for the abolition of minority acquittal. This is the chief basis for the objection to the possible rules which would involve some retrials.⁵⁵ If statutory change in the *Articles of War* is the method best calculated to remedy an evil and, at the same time, to place the two armed services on a par in the manner through which guilt or innocence of offenders is determined, Congress should be willing to make such change. The attention which the last session of Congress gave to bills which would have changed the *Articles of War* in minor respects⁵⁶ indicates that Congress is not unwilling to amend the *Articles of War* in the national interest.

⁴⁶*Manual for Courts-Martial*, par. 78.

⁴⁷See *supra* note 10. Article of War 38, 41 STAT. 794 (1920), 10 U. S. C. 1509 (1940), gives the President power to make regulations "which he may modify from time to time" to prescribe the procedure in cases before courts-martial. Rules so made must be laid before Congress annually. *Ibid.*

⁴⁸*Ibid.*

⁴⁹317 U. S. —, 63 Sup. Ct. 1, 87 L. ed. 1 (1942) (heard at July Special Term, 1942; opinion rendered October 29, 1942). The court said that Article 38 authorizes "the President, with certain limitations, to prescribe the procedure for Military Commissions."

⁵⁰Order July 2, 1942, 7 FED. REG. 5103 (1942).

⁵¹*Ex parte Quirin et al.*, *supra* note 49.

⁵²*Ibid.*

⁵³*Ibid.* See the very able presentation of the holding of this case in Cushman, *Ex parte Quirin et al.—The Nazi Saboteur Case* (1942) 28 CORNELL L. Q. 54, 62-63.

⁵⁴See discussion *supra* pp. 169-171.

⁵⁵*Ibid.*, especially the discussion of possible rules, numbers two, three, five, and six.

⁵⁶See, for example, S. 2798, 77th Cong., 2d Sess., which would have enlarged slightly

The cure, it is submitted, is to remove the mandatory death clause from Article of War 82 by statute. That it may be in the national interest not to exact the death penalty from one guilty even of the offense of spying can be seen from the proceedings surrounding the recent trial of Nazi saboteurs.⁵⁷ Such relaxation by executive clemency may not always be possible in our far-flung global war.⁵⁸ Yet the advantages of possible mitigation, both as a deterrent to those embarked on a course of spying and as a means of aiding the government in the apprehension of other offenders and in the presentation of cases against them, are apparent. With the rule altered to allow penalties other than death, the way is open to amend Article of War 43 so as to provide for *all decisions of guilt or innocence by a majority vote*. This rule, which has prevailed throughout the history of the Navy and under which the Army has, in substance,⁵⁹ fought all its prior wars, should be readopted. The Navy rule seems preferable to the older Army rule, as it removes even the limited possibility of minority acquittal inherent in the mandatory death provision of that rule. The Navy rule is clear, sensible, and logical, treating all offenses alike as to the means of establishing their violation. Its adoption would give the Army a system of court-martial better fitted to assure effective discipline.

the class of commanders having authority under Article of War 52 to suspend the execution of other than death sentences imposed by courts-martial. This passed the Senate [88 CONG. REC. (77th Cong., 2d Sess.) 7925] and was reported to the House by its Committee on Military Affairs [88 CONG. REC. (77th Cong., 2d Sess.) 7996]. So, too, bills were introduced to amend Article of War 50½ to give the commanding general of distant commands greater authority than now possessed over decisions rendered by branch offices of the Judge Advocate General's Department established within such distant commands. H. R. 7389, 77th Cong., 2d Sess., and S. 2645, 77th Cong., 2d Sess.

⁵⁷See *supra* note 17.

⁵⁸Review by the President of certain death sentences, including that for spying is suspended in time of war. Article of War 48 (d), 41 STAT. 796 (1920), 10 U. S. C. 1519 (1940). Executions of spies can thus take place after review is had by the board of review in the Judge Advocate General's Office. *Ibid.* This may be a branch office established in the field. Article of War 50½, 41 STAT. 799 (1920), 10 U. S. C. 1524 (1940).

⁵⁹Prior to the 1920 amendments the possibility of minority acquittal was of technical interest only, since it existed solely in the case of those charged with spying.