

# MILITARY TRIBUNALS

## *In A Democracy*

By Major Claro Gloria, JAGS



OR decades after the passage of Commonwealth Act 408 known as the Articles of War and even after the recent enactment of the Uniform Code of Military Justice in the United States, critics have been outspoken as to the accusation that the military law has never been the product of a serious thought and retrospection. Hence the defects heretofore noted in the law still subsist. This criticism might have arisen from the seeming indifference of the Filipinos as well as the American people to things military, trained as they are in the best democratic ideals under a government to which in all cases the military is under strict subordination to, and governed by, the civil authorities. Or, it might be a revindication of the great ideals of Washington when at the time of the Whiskey Rebellion he stated:

...the essential principles of a free government confine the provinces of the Military to these two objects: firstly, to combat and subdue all who may be found in arms in opposition to the National will and authority; secondly, to aid and support the civil Magistrate in bringing offenders to justice. The dis-

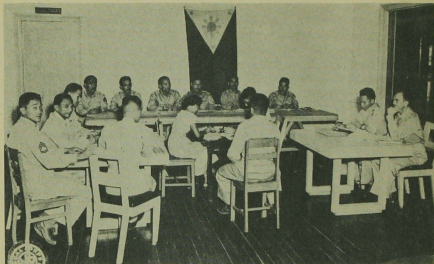
penation of this justice belongs to the civil Magistrate and let it ever be our pride and our glory to leave the sacred deposit there unviolated...1

### U.S. Military Courts

In spite of the criticisms against the military law, still the practical demonstration of the principles of American democracy has found ample expression in the United States Military Courts created not only within but also beyond the continental boundaries, in pursuance of the law. Not only have these courts enhanced military discipline to the highest level; they have as well preserved the rights of the individual in a democracy; and have developed themselves into an effective agency in the administration of justice, both at the home front and abroad in occupied territories.

During the past 130 years, the United States Government has engaged in thirteen major occupations: Florida; the Confederate States; Mexico (twice); Cuba; Puerto Rico; the Philippines; the Rhineland; Japan; Korea; Austria; Italy; and

1 Laswell, National Security and Individual Freedom (1950), p. 61.



A Court-Martial proceeding is typified in the picture above. The counsels table and the sight of stenographers taking down notes of the proceeding are not different from those in the civilian court. But unlike the ordinary court trial, the Court-Martial is presided over by military officers well versed in military law.

Germany.<sup>2</sup> In the exercise of military government in these occupied territories, the usual functions of government being suspended, the military commander of the victorious forces was empowered to organize military tribunals through which they protected their security and maintained law and order.<sup>3</sup>

#### Military Courts in Occupied Territories

On the surface, the establishment of military government is considered to be for the advantage of the army. But when the circumstances underlying its establishment are

more deeply analyzed, it becomes apparent that such government redounds more to the benefit of the people of the occupied territory over which it is organized. Without it they would be left at the mercy of a dominant military, which, due to confusion or through mere want of system, might rule them with oppression or undue harshness. But where a military government is established in an occupied territory, so long as the people conform to the will of the military authorities of the occupying forces who are now their new rulers, they are left unmolested in ordinary domestic and business relations, and largely in municipal affairs.<sup>4</sup> The great deterrent to the commission of offenses in this form of government is the military law

<sup>2</sup> Nobleman, *American Military Government Courts in Germany*, *The Annals*, Vol. 267 (January, 1950), p. 87.

<sup>3</sup> *Ibid.*

<sup>4</sup> Birkheimer, *Military Government and Military Law* (1892), p. 21.

acting through its agency, the military courts.

The importance of these military courts is co-extensive with the demands of civilized societies; they have become the safeguard of the people of the occupied territory; they are a necessary concomitance for efficient military control, and they have immeasurably become the true dispenser of justice over all lands under the military government.

#### Application of Military Government

Limiting the subject to the existence of war, a situation is created in which due to the conduct of war, there may be occasion for the military commander to occupy and govern conquered territory, and to administer a form of government supplanting that of the enemy. Such occupation and administration is called the *government of military occupation*, or "military government" which derives its authority from the laws of war.<sup>5</sup>

The true test of military occupation is exclusive possession. And to entitle military government to recognition it is necessary that the authority of the State to which the occupied territory belongs should have ceased there to be exercised.<sup>6</sup>

Since September 1944 up to the recognition of Western Germany as a sovereign state on May 5, 1955, American Military Government Courts functioned in the United States zone of Germany for the protection of the Allied Forces and the

punishment of offenders against military government and German law.

The role which the Military Government Courts played in the occupation of Germany constituted a somewhat complete departure from that traditional purpose and function.<sup>7</sup>

In September 1944, a new system of tribunals was established by the American forces as soon as they occupied the land. The establishment of military tribunals was predicated upon the theory that eleven years of National Socialism and five years of war had reduced the German judiciary to such a feeble and corrupt state that it could not be trusted. But the main purpose, as it was apparent, was to reconstruct a denazified German judicial system based on American democratic principles.<sup>8</sup>

#### Courts and Jurisdictions

In occupied Germany the United States military authorities established military government courts of three types, namely:

(1) general courts, empowered to impose any lawful sentence, including death penalty;

(2) intermediate courts, with authority to impose any lawful sentence up to and including imprisonment for years and/or fines not exceeding \$10,000; and

(3) summary courts, authorized to impose any lawful sentence up to and including imprisonment for one year and/or fines not exceeding

5 Dudley, *Military Law and the Procedure of Courts-Martial* (1907), p. 300.

6 Birkheimer, *Military Government and Martial Law* (1892), p. 21.

7 Nobleman, *American Military Government Courts in Germany*, *The Annals*, Vol. 267 (January, 1950), p. 87.

8 *Ibid.*, at p. 88.

\$1,000.<sup>9</sup>

Under Military Government Ordinance No. 2 military government courts were given jurisdiction over all offenses committed by persons in the occupied area with the exception of members of the armed forces of the Allied Nations and the enemy. In view of the indefinite suspension of the German Courts upon the occupation of Germany by the Allied forces, the jurisdiction of the United States Military Government Courts extended not only to all violations of military government laws, but to all offenses against German law as well.<sup>10</sup>

#### Right of Subjects

Ordinance No. 2 provided also that

*The Constitution, in its Bill of Rights, provides that 'No person shall be deprived of life, liberty or property without due process of law.' Courts-martial exist to determine the guilt or innocence of soldiers charged*

certain fundamental rights were to be afforded to all persons appearing before military government courts. Some of the rights guaranteed were: (1) the right of the accused to have, in advance of trial, a copy of the charges upon which he was to be tried; (2) to be present at his trial, to give evidence, and to examine or cross-examine any witness; (3) to consult a lawyer before trial and to conduct his own defense or to be represented by a lawyer of his own choice; (4) in any case in which a sentence of death might be imposed, to be represented by an officer of the

Allied forces, if he were not otherwise represented; (5) to bring with him to trial such material witnesses in his defense as he might wish, or to have them summoned by the court at his request, if practicable; (6) to apply to the court for adjournment where necessary to enable him to prepare in his defense; (7) to have the proceedings translated when he was otherwise unable to understand the language in which they were conducted; (8) and in the event of conviction, to file a petition setting forth the grounds why the findings and sentence should be modified or set aside.<sup>11</sup>

#### Fairness and Independence Stressed

In upholding the basic safeguards

of American democracy, the importance of fair treatment of all German defendants appearing before military government courts was stressed. Thus, on July 16, 1947, the Office of Military Government for Germany issued the following directive setting forth the fundamental principles to be adhered to in the trial of cases by military government courts:

It is...desired that Military Government Court proceedings in all essential points conform to the traditional procedures of American law which apply whenever the life, liberty, or property of an individual are subjected to penal procedure. Likewise every effort must be made, within the objectives of the Occupation, to respect the guaranties of personal rights provided by German Constitutions.

...The sole function of every Military Government Court is to give justice in every case before it according to the law and the evidence...<sup>12</sup>

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid., pp. 88-89.

<sup>12</sup> Ibid., at p. 91.

Among the fundamental principles laid down were the necessity for the independence of the courts, the requirement of due process of law and a speedy and public trial, and a prohibition against double jeopardy.<sup>13</sup>

In line with this basic concept of American democracy the directive concluded:

American Military Government must, to the maximum degree, exercise its government powers according to democratic principles and procedures. Military Government Courts are in constant and close contact with the German people. Their actions are considered by the German people as the standard of American justice. Therefore the proceedings and judgments of Military Government Courts must conform to the principles of due process, protect and enforce the rights as well as the responsibilities of the individual, and prove to the German people the essential fairness and soundness of the democratic judicial process.<sup>14</sup>

#### Military Courts Disseminate Democracy

From the foregoing, it is not difficult to state that the American Military Government Courts have played a more important role in the dissemination of democratic ideals and principles to the German people than any other military government operation. Three factors are considered in the advancement of democracy in Germany: first, military government courtrooms have been the only places in Germany where large numbers of German people have been able to watch Americans at work; second, military government courts are the only agencies of military government with which the Germans of all classes and strata of society have come

into direct contact; and third, they have constituted, until recently, the only graphic means whereby the people of Germany have been able to test the manner in which their newly acquired democratic rights and safeguards afford them actual protection in the course of their daily lives.<sup>15</sup>

The Occupation Forces of the United States have found the preparation of the German people for a democratic way of life extremely difficult. However, no one can deny the fact that the Military Government Courts have done much to win the confidence of the German people and have provided the practical demonstration of American democratic principles. These courts have ultimately developed into the foremost example of "democracy in action."<sup>16</sup>

#### Undue Fear of Military in a Democracy

And yet people living in a democracy have the constant fear that the military may rise someday to subdue the rights guaranteed by the Constitution. The fear is without foundation.

In a part of his decision in the case of *United States v. Lee*, Justice Miller stated that no man is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in the system of a democratic government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to

13 Ibid.

14 Ibid.

15 Ibid., p. 95.

16 Ibid., p. 97.

the supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.<sup>17</sup>

The foregoing view clearly indicates that the protection of fundamental rights against any form of encroachment on, or extinction by, any governmental agency, is one of the purposes of the American constitutional system to which the Government of the Philippines fully subscribes. At times, however, there seems to be a growing apprehension by the militant civil power that the military is transgressing the supremacy of the law and extinguishing the liberties of the people. That has been the reason why those who advocate the supremacy of the civil authorities fully agree in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that "he is no friend of the Republic who advocates the contrary." They believe that the established principle of every free people is, that the law alone shall govern and to it the military must always yield.<sup>18</sup>

#### Military Courts Subject to Supreme Court

The truth of this doctrine is never doubted. But analyzing the role of the military in relation to other governmental agencies, the much feared of "dominant establishments as is the case with all branches of government in any democratic state as the United States are under the law. All members of the armed forces, from the lowest enlisted personnel up through

the highest levels of command, are under the rule of law — be it municipal law or international law. That is the main foundation of the power of the Supreme Court relative to the military establishment — that the Supreme Court has the highest national jurisdiction, that is, the right to say what the rule of law is as it applies to the armed forces.<sup>19</sup>

In support of this principle, notwithstanding the independence of military tribunals, the right of the Supreme Court to determine questions of jurisdiction is an adequate safeguard against undue extension of the authority of military courts over military personnel and certain classes of civilians. The fact that the Supreme Court renders the final decisions relative to the competence of military courts in certain cases indicates its great power for restraining military authority from improper expansion of its jurisdiction — even in times of national emergency.

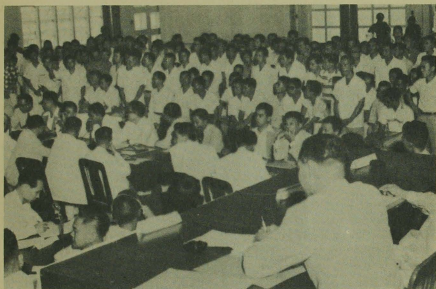
#### Civil Rights Not Abrogated

The role of the military commission in the administration of justice — and the court-martial or other form of military tribunal for that matter — shows that in no case did the military assert power without sanction of the law. It has been more than amply demonstrated that the proper civil court restrains military agents from injurious actions against civil rights. It also restrains the civil authorities from whom the military agents receive orders, from directing them to execute those orders, if they are beyond the pale of the law. "The

17 U.S. v. Lee, 106 (1882).

18 Dow v. Johnson, 100 U.S. 169 (1897).

19 Smith, American Democracy and Military Power (1951), p. 268.



Deportation of undesirable aliens is one of the inherent powers of a state. Thus, when an alien poses danger to internal security of a state, no power on earth can prevent his deportation. This is necessary for self-preservation. But notwithstanding this, like the citizen in an ordinary court action, an alien is given the opportunity to be heard and represented by counsel in the proceeding to deport him. Above photo shows a well-guarded session of the Deportation Board.

prohibitions of *Ex parte Milligan*, *Sterling v. Constantin*, and *Duncan v. Kahanomoku* were aimed at the military, but they were also meant to restrain the civil authority from using the military arm to commit excesses against the great and historic rights of Americans."<sup>20</sup>

The foregoing study on the role of the military government courts in the system of American democracy is merely a reiteration of the great assertion that wherever these courts are established they adhere to all constitutional precepts and exercise their authorities in accordance with what

Congress has given them through various legislations. Where peace exists the courts function in accordance with the laws of peace. But in times of war they function under the laws of war. No better attribute can justify the role of these courts than what Chief Justice Chase states in *Ex parte Milligan*:

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to

<sup>20</sup> *Ibid.*, at p. 286.

the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces. 21

### Conclusion

Under the great democratic system of government, therefore, there should be no apprehension that the military would likely abuse its authorities. The power and, therefore, beyond the pale of the judicial and legislative branches of the government, would always respect the sanctity of the law under which they derive their power, and uphold the great mandates of the Constitution. Fortified and strengthened by years of experience, these courts will continue to play an important role in preserving our ideals and principles and in strengthening the faith and dignity of all free men living in a democracy.

### About the Author



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