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NAVAL COURTS MARTIAL†

MAX C. PETERSON*

The surprise of the lawyer on being first introduced to court martial procedure is not at its dissimilarity to the concepts with which he became familiar in civilian life, but with its striking resemblance thereto. The time-honored rights and immunities of the defendant under trial for life or liberty rear again their venerable heads. It is with the thought of demonstrating this and other facts concerning military trials, frequently misapprehended in the legal profession, to say nothing of the laity, that these remarks are projected. Only a brief, general and descriptive picture of Naval courts martial procedure is attempted, eschewing detail and documentation, and not purporting to be technically complete.

Jurisdiction. Naval courts martial are courts of limited jurisdiction, confined to the trial of offenses within the purview of the Articles for the Government of the Navy¹ and other enactments of congress. Their jurisdiction is criminal only, and is exercised for the purpose of maintaining Naval discipline.² Territorial jurisdiction extends to any part of the globe necessary to try offenses committed by Naval personnel.³ Speaking broadly and without attempting strict accuracy or completeness, jurisdiction of Naval courts martial may be said to include persons in the Naval service, persons in the service of the Marine Corps when not detached for duty with the Army, and persons in the service of the Coast Guard while serving as a part of the Navy in time of war or national emergency.

Kinds of Courts. Courts martial are convened by officials or commanding officers invested with that power in

† Opinions or assertions contained herein are the private ones of the author and are not to be construed as official or reflecting the views of the Navy Department or the Naval service at large.

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1. USCA, Sec. 1200. In these Articles is found most of the statutory law governing Naval courts martial.

2. With one exception. See Summary Courts, etc., *infra*.

3. The crime of murder is an exception. Naval courts martial have no jurisdiction over murder committed within the territorial jurisdiction of the United States. See 6th A.G.N.

NOTE: The question of conflict between civil and military jurisdictions is scrupulously avoided in this paper.

the Articles for the Government of the Navy, for the hearing of a specified case or cases, and are dissolved by the same authority when the function which necessitated their convening has been performed. The Articles provide for three types of court martial: General Courts Martial, Summary Courts Martial, and Deck Courts.

A General Court Martial may be convened by the President, the Secretary of the Navy, the Commander in Chief of a fleet or squadron, the commanding officer of a Naval station beyond the continental limits of the United States, and such other commanding officers and commandants as are so empowered by the Secretary of the Navy. A Summary Court Martial may be ordered by commanding officers and commandants as enumerated in the Articles for the Government of the Navy. A Deck Court may be ordered by any officer who is empowered to order either General or Summary Courts. The Convening Authority⁴ in his discretion and with regard to the gravity of the offense determines which type of court is to be ordered.

General Courts Martial, Composition and Powers. A General Court Martial is composed of not less than five nor more than thirteen commissioned officers as members. Within these limits the largest number consistent with the exigencies of the service is summoned in each case. No officers are appointed below the rank of lieutenant in the Navy or captain in the Marine Corps, unless such ranks are not available. General Courts may try both enlisted men and officers, and have exclusive jurisdiction to try the latter. In such cases at least half the members must be senior in rank to the accused officer, and as a matter of policy all are required to be senior, unless the contrary cannot be avoided without injury to the service.

A General Court has jurisdiction over all offenses triable by court martials. It may inflict any punishment which is authorized for a Summary Court Martial, and in addition has the sole power to adjudge the death penalty, imprisonment or confinement exceeding two months, dishonorable discharge, and dismissal or reduction of an officer.

Summary Courts Martial, Composition and Powers.

4. "Convening Authority" is the term used for convenience to designate the officer empowered to create the court.

Three officers not below the rank of ensign sit on a Summary Court Martial. This court may try any enlisted man and impose sentences of bad conduct discharge, confinement up to two months, solitary confinement up to thirty days, reduction to next inferior rating, or deprivation of shore liberty on foreign station, and in addition, extra police duties and loss of pay up to two months. This court further has the power to deprive, on the grounds of incompetency, any enlisted man of his rating. Although the procedure is the same in such cases as all others, the action would seem to be civil in character, or at the most only quasi-criminal; and this power of Summary Courts is probably the sole exception to the purely criminal nature of all court martial jurisdiction.

No offenses are excluded from Summary Court jurisdiction by statute, but as a matter of policy and practice, serious charges for which Summary Court punishments would be inadequate are laid before General Court Martials.

Deck Courts, Composition and Powers. A Deck Court consists of one commissioned officer, and its jurisdiction is limited to minor offenses. Like the Summary Court it may try any enlisted man, but it has the peculiar feature of being an optional form of trial. When the accused objects to trial by a Deck Court, his trial is ordered before a Summary or General Court, as may be appropriate.

A Deck Court may impose a part or the whole of any punishment authorized for Summary Courts except discharge, or confinement or forfeiture of pay exceeding twenty days.

Parties. Actions before court martials are not styled or titled in the adversary manner (i.e., "State of Indiana v. John Doe") of criminal jurisdiction. However in legal theory the prosecution would seem to be conducted on behalf of the Navy Department, or in last analysis, its principal, the United States of America.

Before General Courts the official conducting the prosecution is the "Judge Advocate," and must be a competent commissioned officer. The corresponding official in Summary and Deck Court proceedings is called the "Recorder"; in Summary Court proceedings he must be a commissioned or warrant officer, and in the case of a Deck Court, a competent enlisted man. In each case he is appointed by the

Convening Authority, for the specific case or cases at hand as the courts themselves are; and the person appointed should be, if possible, not liable to summons as a material witness in the matter which is to be tried.

The defendant in all courts martial is designated as "the accused."

Duties of Judge Advocate. The Judge Advocate or Recorder⁵ performs, in addition to most of the functions of the prosecuting or State's Attorney, certain other duties not generally associated with that office. He examines the charges and specifications and advises the Convening Authority of any technical improprieties therein. He summons all witnesses, both for the prosecution and the accused, and, of course, interviews the witnesses and collects and arrays the evidence for the prosecution.

His duties in respect to the accused are specific and mandatory, and go far beyond the duties of a Prosecuting Attorney in similar circumstances. He must ascertain that the accused has received a true copy of the charges and specifications, and summon all witnesses requested by him. He must inform the accused of his right to counsel and explain the function of such; and of his right to have witnesses summoned in his behalf, and to a reasonable time for the preparation of his defense. He must indicate to the accused the witnesses who will probably testify for the prosecution, although he need not divulge the nature of the anticipated testimony. In all intercourse with the accused, he must scrupulously avoid any suggestion of a plea of guilty; and if it appears to him either before or during the trial that the accused has, or believes he has, a meritorious defense, he should discuss the case no further with the accused, but advise him to plead not guilty and obtain counsel. All negotiations with the accused should be through his counsel, once he has obtained one.

If the accused has no counsel, it becomes the duty of the Judge Advocate to protect his interests during the trial, to advise him against presenting matter to his own crimination or prejudice, to assist him in the submission of whatever matter in defense or mitigation he may have, and to bring no illegal evidence against him.

5. In this paper "Judge Advocate" will also denote "Recorder" wherever appropriate.

The Judge Advocate sees that a suitable place is provided for the sessions of the court. During the trial, he conducts the case on behalf of the government, and administers the oath to the members of the court, the reporter, and interpreter, if any. He has also—in wide variance with procedure in civil jurisdictions—the full duty and responsibility of keeping the complete record of the proceedings.

He advises the court, during its sessions, in matters of law, and cautions it when necessary against improper acts or rulings, or deviations from essential form. If his advice or opinion is rejected in any ruling of the court, he may enter his opinion to the contrary on the record.

The Convening Authority may in his discretion detail counsel to assist the Judge Advocate.

Counsel for the Accused. The accused has the fundamental right to be represented by counsel, and it is imperative that counsel be assigned him unless he expressly and in open court refuses such assistance. If he indicates a choice, the person requested must be assigned whenever practicable, and if such person is not assigned, the reasons must appear in the record.

If the accused makes no selection for himself, the Convening Authority or senior officer present details a suitable officer to act as his counsel; and this officer is charged with the duties usually devolving upon defense counsel in criminal cases tried before civil courts. He must exert all proper efforts to protect the interests of the accused, present all legal defenses the accused may have, and show any matter in extenuation or mitigation. He must explain to the accused his right to take the stand in his own defense or to refuse to do so, and the consequences of his choice.

Precept. General and Summary courts are created by means of a Precept, which is a written order of the Convening Authority establishing the court for the trial of such persons as may be legally brought before it. Time and place of meeting are specified therein, as well as the officers named to the court.

Charges and Specifications. The charge is a statement of the offense in general terms, ordinarily a mere denomination of the offense, such as "Murder," "Burglary," or "Break-

ing Arrest"; and it is followed on the same instrument by one or more specifications. The specification bears a very strong facial resemblance to the indictment or criminal affidavit with which Indiana lawyers are familiar. Although it need not be framed with the technical precision of a common law indictment, it has practically all the family features of criminal charges as commonly known in the practice. Each specification must state facts sufficient to constitute a violation of some law, regulation, or custom of the service, and must not consist of mere conclusions of law. The alleged offense must be sufficiently described to apprise the accused of the time, place, and circumstances thereof. In addition, the specification must affirmatively show that there is jurisdiction in the court over the accused and the offense charged.

Accused persons may be joined in the same charges and specifications if they have engaged in concert of action in the same offense. One or more charges may be brought in the same action, and one or more specifications laid under each charge, there being practically no limitation to joinder of offenses.

The charge is necessary only in General Court Martial Procedure. Before Summary and Deck Courts, specifications only are used.

The charges and specifications are prepared under the direction of the Convening Authority, and authenticated by his signature.

Pleas. Pleas of the accused are made orally, and may be of the following kinds:

- (a) Pleas to the jurisdiction, which may attack the authority of the Convening Officer, the composition of the court, jurisdiction over the person of the accused, or jurisdiction over the offense.
- (b) Pleas in bar of trial, which may invoke the defenses of statute of limitations, former jeopardy, or pardon.
- (c) Plea to the general issue: guilty or not guilty.

Functioning of the Court. Court Martial sessions are public, and the seating arrangements as to parties, court, and witnesses are substantially the same as in civil jurisdictions. The member senior in rank is always the president of the court. In the case of Summary Courts he is called

merely the "senior member." In either case he acts as the organ of the court, announces all rulings and decisions, and is responsible for the orderly and dignified conduct of the proceedings.

The members are seated at a table corresponding in location to the judge's bench, with the president in the center and the other members arranged on either side alternately in order of rank. The court as a body and by majority vote decides all questions presented, including the admissibility of evidence. Deliberations upon such questions are generally in closed court except where it is apparent that the ruling will be unanimous.

Issues, Arraignment, and Trial. After the precept has been read by the Judge Advocate at the commencement of the trial, any member of the court may be challenged for cause by the Judge Advocate or the accused; and the court passes upon the challenge, after hearing any evidence that may be pertinent to the question. The Judge Advocate is then sworn by the president of the court, and each member of the court is sworn by the Judge Advocate.

The accused is asked by the Judge Advocate if he has received a copy of the charges and specifications, and his reply in the affirmative must be shown in the record. If he should deny such receipt, proof must be produced showing that he has received such copy or refused it when offered.

At this point the Judge Advocate asks the accused if he has any objections to make to the charges and specifications, and the accused orally states such objections as he may have, if any. This statement, roughly speaking, serves the office of a motion to quash as known in Indiana courts. If error is found in the charges and specifications, they must be referred back to the Convening Authority for correction, and no amendment may be made without his express authorization. However, the Judge Advocate may, with the approval of the court, correct manifest clerical errors by interlineation. If the objection of the accused is found to be without merit, or if no objection is interposed, the court finds and enters of record that the charges and specifications are in due form and technically correct. Any special pleas, as enumerated above, which may be interjected by the accused, are then heard by the court, and determined after receiving

the pertinent evidence. When these matters are disposed of, the Judge Advocate arraigns the accused, reading to him the charges and specifications, and the plea of the accused is taken separately as to each specification of each charge. When the accused pleads guilty to any specification, he must be warned that by so doing he deprives himself of a regular defense, and can offer evidence only in mitigation, extenuation, or in proof of good character, and must be asked if he understands this and persists in his plea. If by any statement or act of the accused, or by evidence subsequently introduced, doubt is aroused as to his guilt, the plea of guilty will be rejected, and the trial will proceed as upon a plea of guilty.

Evidence—Witnesses. The civilian lawyer finds himself upon familiar ground when he deals with this subject, for the rules of evidence which obtain in courts martial are taken bodily from the common law, and although they may not always be applied with the technical strictness of civil courts, the law followed is fundamentally the same.

On the matter of proof, likewise, the hoary old phrases which are part of our juristic inheritance and a delight to the souls of defense counsel in criminal trials, and which have besieged the ears of innumerable juries and reverberated to the rafters of uncounted court rooms, are found to have equal respectability in military courts. The accused enters the trial clothed with a presumption of innocence of which the protective folds lie upon his shoulders throughout the proceedings; and the burden rests upon the prosecution to prove his guilt beyond a reasonable doubt. Every element of the crime must be so proved, and the burden of proof never shifts to the accused, regardless of the type of defense advanced. (This, of course, does not refer to special pleas, which must be proved by the accused by a preponderance of the evidence.)

The accused may not be compelled to testify nor to criminate himself in any way. Indeed, he must not be placed upon the stand unless he requests permission to testify; and there is fatal error unless the record shows such request. Any comment upon his failure to testify is improper.

A General Court Martial has statutory authority to subpoena civilian witnesses and to punish for contempt. Wit-

nesses are sworn by the president of the court, and testify in the order customary in civil courts. The witnesses are always separated, and no witness, except of course the accused, is present during the examination of other witnesses. The examination follows the usual pattern of direct, cross-, redirect, and recross-examination. The witness may be interrogated by any member of the court at any time he is on the stand. Documentary and real evidence are introduced in substantially the same manner as in civil courts.

The evidence is ordinarily taken in shorthand by a Yeoman,⁶ but whenever practicable and deemed necessary, the Convening Authority provides for the employing of a civilian reporter for the purpose.

Arguments and Statements. No opening statements are made by Judge Advocate or counsel. Arguments are heard at the conclusion of the evidence, the Judge Advocate opening and closing.

The accused himself may in any case, upon a plea either of guilty or not guilty, make an unsworn statement to the court. This statement has no effect as evidence, but may operate as a request for leniency or to modify an inconsistent plea of guilty.

Finding and Sentence. Except when the finding is rendered obvious by a plea of guilty, the court is closed for deliberations on the findings, which are arrived at by a majority vote. The accused may be found guilty of lesser included offenses, as, for example verdicts of manslaughter are often permitted by state statutes under a charge of murder, or verdicts of assault and battery under a charge of assault and battery with intent to commit a felony. Naval courts martial have, moreover, the power, not generally enjoyed by civil courts or juries, to find the accused guilty of a part of a specification, or to amend the specification to conform to the finding, provided, of course, that the specification in such part or after amendment still states the same or a lesser included offense.

Should there be an acquittal, the court is immediately reopened and the findings announced. A copy of the findings is transmitted to the commanding officer, who forthwith releases the accused and restores him to duty. Again

6. Petty officer of the Navy qualified in clerical ability.

in variance with civil rules, the court may in rare cases, "fully acquit," "honorably acquit," or "fully and honorably acquit," where the circumstances are appropriate.

After a finding of guilty but prior to determining the sentence, the Judge Advocate introduces and reads to the court the record of previous convictions of the accused by court martial, if any. Such record must be in due form, and the accused may examine it and object to its introduction. The accused is then permitted to introduce evidence of good character, or in mitigation or extenuation, of matter from his service record.

If the finding is upon a plea of guilty, and the evidence of the accused in extenuation or mitigation is found to controvert any element of guilt, the court will set aside its finding, reject the plea, and proceed as upon a plea of not guilty. The Judge Advocate may, where there is a plea and finding of guilty, introduce matter in aggravation, if the gravity of the offense requires it.

After these matters have been heard, the court is closed for determining the sentence. A majority vote is decisive, except for infliction on the death sentence, which requires concurrence of two-thirds of the members.

Review. The sentence of the court is not then announced or made effective, but the record is forwarded to the Convening Authority for review.⁷ This authority may: (1) return the record to the same court for revision of its findings or sentence, or correction of clerical errors, (2) remit or mitigate, but not commute, the sentence, (3) order a new trial, (4) disapprove the sentence (this completely releases the accused), or (5) approve the sentence. Upon approval of the Convening Authority or the Commander of the Fleet, sentences of a General Court Martial are carried into execution, except for sentence of death or sentence dismissing an officer, which must be confirmed by the President of the United States.

The sentences of Summary Courts, after being approved by the Convening Authority, are reviewed by his immediate superior in command, unless the Convening Authority is the senior officer present. Deck Court sentences are executed upon approval of the Convening Authority.

7. The accused is entitled to a copy of the record, which is furnished by the Judge Advocate at the conclusion of the trial.

After approval by the Convening Authority, or immediate superior in command in case of a Summary Court, the record is in all cases forwarded to the Judge Advocate General of the Navy. If the court was convened by the Secretary of the Navy, it is forwarded directly by the president of the court. The Secretary of the Navy has the power to set aside the proceedings, or remit wholly or partially the sentence of any Naval court martial.

Findings of not guilty are not reviewable, nor can any reviewing authority commute or increase the severity of a sentence.

In conclusion the writer ventures to hope that the foregoing paragraphs have demonstrated that Naval Courts Martial are not creatures alien to the tribunals of state or federal jurisdictions, but rather children—half-brothers, as it were—of the same family, and that the body of law which they follow and the fabric of justice they wear, are, to continue the metaphor, cut from the same cloth as those worn by their civil brethern, with only such variations in pattern and design as are necessary to fit the military figure.

