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A Companion of Civil and Court Martial Procedure

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A COMPARISON OF CIVIL AND COURT-MARTIAL PROCEDURE

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A lawyer who was in the military service two years or so during the World War once remarked to the writer, "For a legal system that is administered entirely by laymen, Army courts-martial function remarkably well." While it is not strictly accurate to say that our courts-martial are administered entirely by laymen, it is sufficiently near the truth, perhaps, to mark the chief differentiation between criminal procedure in our civil courts and that of military tribunals. The purpose of this article is to compare, from a practical standpoint, civil and military procedure in criminal cases and to explain how it is possible for substantial justice to be evolved by a system of judicature in which judges, prosecuting attorneys and defense counsels alike are laymen—at least in the sense of being without legal training except in extremely rare cases.

Such a comparative study will develop some very close parallels and several wide divergences. For a starting point, it is necessary to recognize the necessity for a separate system of courts exclusively within the military establishment; first, because of the peculiar requirements of military discipline and the fact that it would be impossible to proceed against offenders in a civil court where strictly military offenses are concerned;[1] second, because of the fact that military jurisdiction must be exclusively *personal,* not territorial.[2] To these basic considera-

* See p. 608 for biographical note.

[1] Examples of "strictly military offenses," together with the Article of War by which each is condemned, are: A. W. 54, fraudulent enlistment; A. W. 55, procuring unlawful enlistment; A. W. 56, false muster; A. W. 57, rendering false returns; A. W. 58-60, desertion, aiding or advising desertion; A. W. 61, absence without leave; A. W. 62, disrespect toward the President and other high officials; A. W. 63, disrespect toward superior (military) officer; A. W. 64, 65, disobedience or insubordination; A. W. 66, mutiny; A. W. 67, failure to suppress mutiny.

[2] The question as to the residence or proper station of the accused has no jurisdictional significance in court-martial procedure. It is quite possible for a soldier to enlist in the United States, desert in China and be tried therefor in Panama. See also note (4).

tions let us add the fact that military jurisdiction is criminal (punitive) only, courts-martial taking no cognizance of private litigation.

While civil courts having criminal jurisdiction are variously classified, according to the practices of various states, as justice courts, city courts, circuit courts, criminal courts and what not, military tribunals are three in number—the summary court, composed of one member only; the special court, of not less than three members;[3] and the general court, of not less than five. Here it is impossible to draw on exact analogy with civil practice, since jurisdictional limitations are imposed by law both as to persons and as to offenses.[4] The summary court (except for its jurisdictional limitation as to persons) may be roughly compared to a justice of the peace; the special court, to a city court, or similar tribunal taking cognizance generally of misdemeanors; and the general court, to a circuit court or similar tribunal taking cognizance of felonies and high crimes.[5] Of still more importance are the limitations as to punishment. The summary court may not adjudge confinement at hard labor in excess of one month, nor "restriction to limits" in excess of three months, nor forfeiture in excess of two-thirds of one month's pay. The special court may adjudge confinement not in excess of six months, and forfeiture not in excess of two-thirds pay per month for six months. The general court is limited only by the executive

[3] Maximum limits for special and general courts-martial personnel were prescribed for many years, but removed with the adoption of the Manual for Courts-Martial, 1921. In practice, five members are usually detailed for a special court, and generally nine or eleven for a general court. When either court is reduced in membership to the minimum number by reason of challenges, death, or other cause, it is the custom to appoint new members. Of course, a court reduced below the minimum number of members has no jurisdiction to proceed with the trial of any case. Par. 58-f, M. C. M., 1928.

[4] Pars. 12, 14 and 16, M. C. M., 1928. These provisions are too complicated to be reproduced here. In general, the summary court has jurisdiction over enlisted men up to the grade of technical sergeant; the special court, all persons in the military service except officers and warrant officers for any crime, or offense not capital; the general court, all persons in the military service, for any crime or offense. A. W. 12 to 14, incl.

[5] In this connection it will be noted that military courts-martial have no jurisdiction to try murder or rape cases in time of peace. Par. 7, M. C. M., 1928; A. W. 92. "In time of peace" means a complete peace, officially proclaimed: *Kahn v. Anderson*, 225 U. S. 1.

orders, changed from time to time, announcing the limits of punishment for all crimes and offenses.[6]

No discussion of the military penal system would be complete without mention of one feature for which it would be very difficult to find a prototype in civil procedure—the disciplinary power of the commanding officer under the 104th Article of War, known in soldier parlance as "company punishment." This is a highly convenient and effective device for the maintenance of discipline in cases of trivial offenses.[7] In operation it is highly informal and takes on few of the features of a judicial proceeding. No written charges are preferred, witnesses are not sworn, and the only record kept is a brief notation in the soldier's service record as to the date, nature of the offense and the punishment imposed. "Company punishment" may only be used when the soldier himself consents to it. Neither confinement nor forfeiture of pay may be adjudged against a soldier[8] under the 104th Article of War. Punishment consists of restriction to barracks or camp not to exceed one week, extra fatigue duty, withdrawal of privileges, and the like. Even after the soldier has consented to punishment under the 104th Article of War, he may appeal to the next higher commander if he deems his sentence unjust or disproportionate to the offense.[9]

The "legal Bible" for the guidance and government of all courts-martial procedure and matters related thereto, is the Manual for Courts-Martial, prepared by the Judge Advocate General's Department, and published by direction of the President. The current edition was published in 1928. Earlier editions appeared in 1917 and 1921. A little book of 341 pages, including an exhaustive index and numerous appendices, the present Manual is a marvel of comprehensive information. It is a form-book, manual of practice, compendium of statute law and treatise on evidence[10] all rolled into one. Since all officers

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[6] Par. 104c, M. C. M., 1928. These punishments range all the way from death to forfeiture of one day's pay.

[7] Ch. XXIV, M. C. M., 1928; pars. 27, 69c, *id.*

[8] For a modification of this rule in the case of officers, see A. W. 104 and pars. 106, 107, M. C. M., 1928. The 104th Article of War is very seldom invoked against officers, except in time of war.

[9] When passing on such an appeal the superior hears no witnesses. He may modify the sentence but not increase it; nor may he, in any case, impose a different kind of punishment. Par. 108, M. C. M., 1928.

[10] This portion of the Book—Ch. XXV—is particularly interesting. Considering its size—some thirty pages—it is a remarkably comprehensive

in the service are required to perform various duties in connection with courts-martial, a working knowledge of the contents of the Manual is required of every commissioned officer. This is accomplished, with typical Army thoroughness, by means of garrison schools conducted by older and experienced officers. The Manual is designed to answer fully every question that may arise in the conduct of a trial by court-martial, from the time of the commission of an offense until the sentence has been approved and directed to be carried into effect. Since it is the only reference work or text to which court-martial officials ordinarly have access, it must be admitted that the Manual performs its function very well indeed.[11] Notwithstanding its extreme condensation, the Manual finds space for several informative and authoritative discussions of legal matters not particularly a part of, but closely related to, military law. As a few examples, may be cited the question of habeas corpus with relation to courts-martial,[12] and enlistment of minors.[13]

Whereas in civil jurisdictions the criminal statutes are very voluminous, comprising in the annotated forms several large books, the military tribunal finds its statute law in the Punitive Articles of War—numbers 54 to 96, inclusive, and contained in seven and one-half pages of fine print in the Manual. These articles, however, are clearly explained as to the gist of the offense and necessary proof in Chapter XXVI.[14] Crimes which are not in themselves purely military offenses—such as murder, rape, arson, burglary, assault and battery, forgery, and the like —are denounced, in the Articles of War, in the language of appropriate sections of the Federal Penal Code of 1910. Numerous crimes involving moral turpitude are grouped together in

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and accurate summary of the rules of evidence. The material is skeletonized, however, there being no annotations, references to authority, nor discussions of the rules.

[11] An officer who is detailed as Summary Court or as trial judge advocate, president, law-member or defense counsel of a general or special court very soon becomes intimately acquainted with the Manual—through necessity. Officers of limited service are detailed in these capacities only in emergencies.

[12] Par. 153ff, M. C. M., 1928.

[13] Par. 157ff, M. C. M., 1928.

[14] Pertinent passages from this chapter are required to be read, in full, to the court, by the trial judge advocate, during his opening statement, very much the same as the statutes are read to a jury by the prosecuting attorney in a criminal case in civil court. Par. 75b, M. C. M., 1928.

the 93rd Article of War,[15] while murder and rape are denounced by the 92nd Article. Articles 54 to 95 set forth specific crimes, while the 96th, known in the service as the "shotgun article," denounces "all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, though not mentioned in these (foregoing) Articles," and punishment imposed upon a finding of guilty under this Article is discretionary with the court.[16]

In civil procedure, each state, by statute, prescribes the forms by which criminal prosecutions are instituted—information, affidavit, or indictment. In most states both affidavit and indictment are used, depending upon the type of crime involved and the court before which trial is to be had. Requirements as to the preparation of these documents are generally very strict and technical, and the average criminal lawyer seizes upon some pinhole flaw in warrant, affidavit or indictment with great glee, as affording the opportunity to push his client through the net of the law to freedom. Only one form is used to institute proceedings, before courts-martial, and its preparation is so simple and so free from technicalities that even an inexperienced officer or company clerk finds it but a minor task.[17] The front page of the charge-sheet contains all the information relative to the accused which the trial judge advocate, the defense counsel and the court proper, may need. This includes the name, organization, rank, station, enlistment period and rate of pay of the accused;[18] place of confinement, if any; names of witnesses for

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[15] There are manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit a felony, assault with a deadly weapon and assault with intent to do bodily harm.

[16] While there is a special Article of War dealing with the offense of drunkenness on duty (A. W. 85), all other offenses under the Federal prohibition law are lodged under the 96th A. W. On the other hand, A. W. 95 reads "Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," and it has been held that offenses under A. W. 95 and A. W. 96 are not the same, and that conviction of an *officer* under both articles on the same facts is not illegal as placing him twice in jeopardy for the same offense: *McRae v. Henkes*, 273 Fed. 178; Opinions, Judge Advocate General, 1922, p. 118.

[17] Chs. VI, VII, M. C. M., 1928.

[18] Data as to previous convictions and/or punishment under A. W. 104 is not furnished on the charge sheet itself, but on separate paper accom-

the United States and for the defense, and where they may be found. The matter which sets forth the offense proper is of two parts: the *charge,* which is merely the number of the Article of War concerned; and the *specification,* which describes concisely but fully the nature of the offense under that Article. Forms for the preparation of charges under every Article of War are furnished in the Manual, and very rarely indeed are departures therefrom necessary.[19] The signature of the officer preferring the charges and his oath either (a) that he has personal knowledge of the matters set forth, or (b) that he has investigated the same and that they are true in fact, to the best of his belief, complete the charge sheet.

In civil practice, arrest of evildoers is hedged about by many restrictions; without a warrant, a peace officer may make an arrest only when a misdemeanor is committed in his presence, or when he has reasonable grounds to believe that a felony has been, or is about to be, committed. Military law makes a distinction between *arrest* and *confinement,* the former denoting moral restraint only, the latter actual physical restraint.[20] Any officer may order any enlisted man into arrest or confinement when he has knowledge of, or has inquired into, the alleged offense. For ordinary offenses confinement is not usually employed, unless circumstances clearly require physical restraint.[21] In court-martial procedure there is no provision for bail or any form of bond or surety upon which an accused is released from arrest or confinement pending trial. Officers are confined only under most unusual circumstances; and only the commanding officer may order commissioned personnel into arrest or confinement.[22] Nor is it necessary that charges be drawn up or preferred before an offender may be placed in arrest or confinement; but the official who orders an offender into arrest or confinement is required to prefer charges, or in some way initiate proceedings

panying the charges, and the court is only apprised of such information *after* a finding of guilty has been reached. Par. 79, M. C. M., 1928.

[19] Appendix 4, M. C. M., 1928. A typical charge and specification alleging larceny is as follows: "Charge I—Violation of the 93rd Article of War. Specification: In that Private John Smith, Co. A, 1st Infantry, did, at Fort Sam Houston, Texas, on or about January 1, 1929, feloniously take, steal and carry away one gold watch, value about $100 the property of Sergeant William Jones, Co. A, 1st Infantry."

[20] A. W. 60; Par. 139a, M. C. M., 1928.

[21] Army Regulations 600-355, 600-375; par. 19, M. C. M., 1928.

[22] Par. 20, M. C. M., 1928.

against the accused, at once—in any case, within twenty-four hours.[23]

After the submission of charges, the next step is a procedure which is faintly analogous to the function of a grand jury, except that ordinarily grand juries are empowered to investigate "felonies and certain misdemeanors," while every set of charges that reaches the commanding officer's desk is investigated, without delay, by that official or by someone appointed by him. It is the investigating officer's duty to inquire into all the facts, examine witnesses, and make a recommendation as to the disposition of the case. If the offense be not too serious, the commanding officer may refer it for trial to a summary court or a special court which he himself appoints. If the offense be of a serious nature, the charges, together with the report of the investigating officer, are sent to the military commander having general court-martial jurisdiction;[24] and by the latter, with the advice of his staff judge advocate, or legal adviser, disposition of the case is made. If this officer decides that the charges and specifications can be sustained, and that the offense is of sufficient gravity to merit trial by general court, the case is referred directly to the proper general court for trial. The analogy here, of course, is the finding of the "true bill" by the grand jury. He may also at his pleasure direct that charges be dropped, action taken under the 104th Article of War, or that trial be had by an inferior court.[25]

As to the organization and functioning of a military court for the trial proper, the system can best be described as a combined judge-and-jury system, except for the fact that many of the very objectionable features of our jury scheme in civil life are entirely lacking. In the first place, court-martial duty is by regulation—and by what is even more compelling, the ancient traditions of the military service—a highly important, almost

[23] If circumstances are such that charges cannot immediately be preferred, the commanding officer must be notified at once. As will later become apparent herein, no unnecessary delay of any sort in the prosecution of a case is tolerated. A. W. 70.

[24] A. W. 8 prescribes the military commanders who have authority to appoint general courts-martial, and hence have power to refer cases to such courts for trial. In general, corps area and higher commanders are so empowered.

[25] Chapter VII, M. C. M., 1928. Procedure at this point may become somewhat complicated by the raising of the issue of insanity, minority, etc. Proper action in each case is prescribed in the Manual.

sacred obligation. Every detail is carried out with extreme punctiliousness. From the time the newly-appointed officer first pins on his insignia of rank, he is constantly impressed with the necessity of serious, earnest attention to this duty and the cultivation of an impartial and judicial power of judgment. Bearing in mind the general educational and professional qualifications of commissioned personnel, it is not difficult to see in what respects the deliberations of courts-martial are superior to those of our hit-or-miss civil juries.

The officers of a military court are (1) the president, who is always the senior member present, whether so designated by name or not; (2) the law member, who is legal adviser to the court, and who has certain specific duties imposed by regulations;[26] the trial judge advocate, who is to all intents and purposes the prosecuting attorney; and the defense counsel.[27] The president and the law member have equal voice and vote with the other members upon any question. The trial judge advocate and the defense counsel, of course, have nothing whatever to do with the deliberations of the court.

The steps in the trial are very closely comparable to those in a criminal case in any civil court. After the court is in order, the right to challenge is accorded both prosecution and defense, in turn, exactly as a jury is ordinarily chosen.[28] The court, the trial judge advocate and the reporter are sworn. Each side may make, or may waive, an opening statement; evidence is heard, and cross-examination is conducted,[29] exactly as in civil courts.

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[26] Pars. 4c, 38, 51, 58a and 84, M. C. M., 1928. The law member rules on all interlocutory questions other than challenges, subject to the objection of any member; makes the statutory warnings and explanations to the accused upon his plea of guilty, etc. The law member is subject to challenge for cause only.

[27] A defense counsel is regularly appointed for each special and general court. The accused may ask for a particular officer to be detailed as his counsel, who will in every case be so detailed if the exigencies of the service permit. In addition, the accused may be represented by civilian counsel at his own expense, if he desires. While every courtesy is extended to civilian counsel appearing before military tribunals, generally the civilian lawyer is handicapped by his lack of familiarity with court-martial procedure. Employment of civilian counsel is infrequent. A. W. 17; par. 43, M. C. M., 1928.

[28] Each side, however, has but one peremptory challenge, regardless of the nature of the offense. Civil courts ordinarily allow more—sometimes as many as 20 in capital cases. Par. 51, M. C. M., 1928.

[29] Written depositions may be used in evidence in military courts

There are no instructions, as in civil courts, because each member of the court is both a judge and a juryman. The trial judge advocate makes the first closing argument for the United States; the defense counsel may reply, and if he does, the prosecution has a final argument.[30]

Whereas in civil courts the jury leaves the courtroom to deliberate on its verdict, in military procedure the situation is reversed; all persons in the courtroom except the members of the court withdraw, and the court, by secret ballot, arrives at a finding. Unanimous vote is not required except in cases where the death penalty is mandatory by law.[31] Three-fourths of the members present must concur in cases where life imprisonment, or imprisonment for more than ten years, are concerned. In all other cases a two-thirds vote is sufficient to support a finding of guilty. On all questions other than findings and sentence, a majority vote is determinative.

Voting on the sentence is done the same way, and governed by the same principles, the court in the meantime having reopened to receive data from the trial judge advocate as to the previous convictions, length of service and rate of pay of the accused. If an acquittal is arrived at upon voting on the findings, it is immediately announced in open court, and the accused is at once released from custody. In the event of findings of guilty, both findings and sentence are announced in open court, at the conclusion of which the court immediately adjourns.[32]

In its finding, the military court has one privilege that the judge or jury in the civil court does not always have: if the evidence fails to prove the particular offense charged, but does prove a lesser and included offense, the court may so find, amending the charges and specifications by exceptions and substitutions. Thus, absence without leave is a lesser and included

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(except in capital cases) by the prosecution, and by the defense in all cases. A. W. 25; par. 119, M. C. M., 1928.

[30] By custom in courts-martial, no time limit is placed on closing arguments, although the regulations are silent on this point . Par. 77 M. C. M., 1928.

[31] A. W. 43.

[32] The announcement takes this form (spoken by the president of the court): "Private Smith, the court finds you of the specification guilty, and of the charge guilty, and sentences you to be dishonorably discharged from the service of the United States, to forfeit all pay and allowances due and to become due, and to be confined at such place as the reviewing authority may direct for a period of two years." Appendix 9, M. C. M., 1928.

offense of desertion; and assault is a lesser and included offense of assault with intent to kill.[33]

It is with respect to the matter of appeal that the widest divergence between civil and military practice is noted. The writer has frequently heard the statement made by non-military persons that there is no appeal from the sentence of a court-martial. This is even more inaccurate than the popular belief, mentioned at the beginning of this article, that the whole system of military courts is administered by laymen. A short answer is, that every case tried by court-martial is appealed. True it is that we do not have, in military law, a formal appeal such as is afforded from decisions of trial courts in civil practice. Instead, is a system of supervision and scrutiny of the record of trial, by the appointing authority, or by higher authority. The nature and extent of this review is determined (*a*) by the rank of the accused, and (*b*) by the sentence imposed. Confirmation by the President of the United States is required in the following cases: (*a*) any sentence respecting an officer of the grade of brigadier-general or above; (*b*) any sentence extending to the dismissal of an officer;[34] (*c*) any sentence extending to the suspension or dismissal of a cadet of the Military Academy; (*d*) any sentence of death.[34] Confirmation by the President in all these cases is preceded by a thorough survey of the record by the Board of Review, composed of not less than three officers of the Judge Advocate General's Department. The purpose of this review is exactly that of an appellate court in civil procedure —i. e., to ascertain whether the evidence is sufficient in law to support the finding and sentence, and to assure that every substantial right of the accused was safeguarded during the whole procedure.[35] The power of the President to confirm, of course,

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[33] Pars. 78, 148, 149 and 152, M. C. M., 1928. A typical example of such a finding is as follows: "of the specification, guilty, except the words 'desert' and 'in desertion'; substituting therefor, respectively, the words 'absent himself without leave from' and 'without leave'; of the excepted words not guilty, of the substituted words, guilty. Of the charge, not guilty, but guilty of violation of the 61st Article of War." So foreign is this principle to the practice in civil procedure that civilian lawyers, upon coming into contact with it for the first time, frequently have trouble with its application.

[34] Subject to certain exceptions, not material here, in time of war. A. W. 48; Digest, Opinions of the Judge Advocate General, 1919, p. 46.

[35] On this matter the regulations are very explicit. A. W. 46, 50, 53, incl.

is inclusive of his power to confirm so much only of a finding of guilty as involves a finding of guilty of a lesser and included offense; the power to confirm or disapprove the whole or any part of the sentence; and the power to remand for rehearing, under the provisions of Article of War 50½.[36]

Sentences of general courts-martial in cases not required to be confirmed by the President are acted upon by appointing authorities, by and with the advice of their respective staff judge advocates, who are officers of the Judge Advocate General's Department. The review by staff judge advocates is similar in scope to that of the Board of Review, and is conducted for the same purpose. Confirmation of the proceedings of special and summary courts-martial rests with the respective appointing authorities, and inasmuch as post and regimental commanders do not have staff judge advocates, the matter is left largely to the conscience, judgment and legal knowledge of these commanding officers. These tribunals are courts of record only to the extent that a summary of the evidence appears in the record.[37] The writer is of the opinion that the non-existence of a review by legally trained personnel in cases tried by special and summary courts-martial is a weak link in our chain of military law administration. However, in a varied experience of more than ten years, but one case is recalled in which the rights of the accused were placed in jeopardy, and in that case the circumstances were such that no substantial miscarriage of justice resulted.[38]

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[36] Similarly, the power to order the execution of a sentence includes the power to mitigate or remit the whole or any part thereof. A. W. 50.

[37] The Act of Congress of August 24, 1912 (37 Stat. 575) authorizes the employment of stenographic reporters for special courts, but in practice considerations of economy usually limit the employment of reporters to general court trials. A. W. 115.

[38] The writer was defense counsel for a soldier being tried on three specifications under one charge. The evidence fully supported a finding of guilty as to two specifications, but failed utterly as to the third. The court found accused guilty of all three specifications, but the sentence imposed was one which would have been legal had it been adjudged upon a finding of guilty on one specification only.