Courts-Martial of the U. S. Army

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"Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there; and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience."—LOUIS DE GAYA, "The Art of War".

In order better to understand the court-martial as it functions today, it is well to examine briefly the historical background and source from which this military tribunal grew. In the early German armies, the chief commander summarily prescribed the punishment to be administered to those who transgressed against military discipline. Some of the punishment meted out to those unfortunates included death, whipping, forfeiture of cattle and horses, and a civil and military disqualification or dishonoring. The Greeks and Romans went even farther, and imposed upon their military offenders such harsh punishments as decimation, denial of sepulture, maiming, and exposure to the elements.

History tells us a good deal more about how the English army has dispensed military justice down through the ages. The earliest English Articles of War were nothing more than direct orders issued to the army, ordained by the King by virtue of his royal prerogative. These orders were issued with the assistance and advice of the King's peers, particularly the High Constable and Earl Marshall. Winthrop states that these officials were referred to as composing the court of chivalry,¹ which many military historians regard as the forerunner of the present day court-martial. Later, in 1879, the English lawmakers passed a new statute known as the "Army Discipline and Regulation Act", by which authority was given the sovereign to prescribe Articles of War, and in addition to provide for the drawing up of "Rules of Procedure" to govern the actions of courts-martial and

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¹Military Law and Precedents (1886).
the review thereof. This act was revised in 1881, and with a few minor changes, has remained the legal guide for the English army up to the present day.

Turning to look at the background of our own courts-martial in this country, it was only natural that, when in 1775 hostilities broke out in Massachusetts between British troops and the colonial militia, the second Continental Congress should provide rules and regulations to govern the conduct of the Continental Army (later referred to by Congress as the "Army of the United States"). The Congress on June 30, 1775, promulgated the first Articles of War for the Continental Army, replacing such regulations as had been established by the several colonies for their colonial militia. It is interesting to note here that inasmuch as the Congress was in fact exercising the powers of the Crown, and since the Crown had the sovereign power of establishing Articles of War, that the Congress felt it natural for it to do likewise.

These Articles of 1775 provided for general and inferior courts-martial, the inferior courts to be appointed by regimental and garrison commanders, but made no provision as to who should appoint the general courts-martial. Historians today regard this as indicating that power to appoint a general court was then felt to be inherent in the commander in chief. This Code of Articles further prescribed that there must be approval of the sentences of the inferior courts before execution, described various offenses, and limited capital punishment to certain specifically enumerated offenses.

In 1776, Congress enacted a new Code of Articles of War, which enlarged and modified the Articles of 1775, while in 1786 a Supplemental Code was passed by Congress. This Code contained a new section on the administration of military justice, and prescribed the composition of the courts-martial. It is of interest to observe that one of the provisions of this Code, fixing the minimum number of the general court at five, is still a part of our present Articles of War.

When the Constitution was adopted in 1789, it expressly empowered Congress to make rules for the government and regulation of the Army, which of course included authorization for courts-martial. Later, by the provisions of the Fifth Amendment, cases arising in the land or naval forces were exempted from requirement of indictment by grand jury. However, as is pointed out by Winthrop, "in legislating in view of these provisions, Congress did not originally
create the court-martial but . . . continued it in existence as previously established. Thus this court is perceived to be in fact older than the Constitution, and therefore older than any court of the United States instituted or authorized by that instrument.²

There would be little gained by the attorney from a too exhaustive study of the growth and development of courts-martial. An effort has been made to trace the roots from which the present day court-martial has evolved, so that the present form can be better understood in the light of what has gone before. To bring this source background to a close, it is sufficient to point out that since the adoption of the Constitution, Congress has enacted complete new codes in 1806, 1874, 1916, and 1920. The current Manual now in use was revised and published in 1928. Today we have 121 Articles of War which provide for the enforcement of discipline and the administration of justice in the Army. Military crimes and offenses are defined, and the punishment therefor is established. The Manual for Courts-Martial³ is concerned with court-martial procedure and military discipline. It contains the Articles of War as enacted by Congress, a detailed discussion and explanation of them, forms of charges and specifications, and is generally regarded as the military lawyers' "bible".

COURTS-MARTIAL TODAY

Offenders against military law (which may be defined as the legal system governing the entire military establishment) may be tried by one of three types of court-martial: general, special, or summary. A general court-martial consists of any number of officers not less than five, the special court-martial of not less than three officers, while a summary court-martial is composed of one officer.

All commissioned officers in the military service of the United States (including officers of the Marine Corps detached for service with the Army by order of the President) are eligible to serve on courts-martial. However, no officer is competent to sit as a member of a general or special court-martial if he is the accuser, a witness for the prosecution, or in case of a rehearing, if he sat as a member of the court which first heard the case. Whenever it can be avoided, an officer should not be tried by officers inferior to him in rank or by those below him on the promotion list. The Manual for Courts-Mar-

² AN ABRIDGMENT OF MILITARY LAW (4th ed. 1899) 16.
³ (1927).
tial prescribes that in appointing courts-martial the appointing au-
authority should detail as members those officers of the command
best qualified for the duty by reason of age, training, experience, and
judicial temperament. As a rule, officers having less than two years
service are not appointed to sit on courts-martial, but if appointed
through necessity, their number should be in the minority.

HOW COURTS-MARTIAL ARE APPOINTED

General Courts-Martial. Article of War 8 provides the method by
which general courts are appointed. “The President of the United
States, the commanding officer of a territorial division or department,
the Superintendent of the Military Academy, the commanding officer
of an army, an army corps, a division, or a separate brigade, and, when
empowered by the President, the commanding officer of any district
or of any force or body of troops may appoint general courts-mart-
tial; but when any such commander is the accuser or the prosecutor
of the person or persons to be tried, the court shall be appointed by
superior competent authority . . . .”

Special Courts-Martial. Article of War 9 states, “The command-
ing officer of a district, garrison, fort, camp, or other place where
troops are on duty, and the commanding officer of a brigade, regi-
ment, detached battalion, or other detached command may appoint
special courts-martial . . . .”

Summary Courts-Martial. Article of War 10 is as follows, “The
commanding officer of a garrison, fort, camp, or other place where
troops are on duty, and the commanding officer of a regiment, de-
tached battalion, detached company, or other detachment may ap-
point summary courts-martial; but such summary courts-martial
may in any case be appointed by superior authority when by the
latter deemed desirable: Provided, That when but one officer is pre-
sent with a command he shall be the summary court-martial of that
command and shall hear and determine cases brought before him.”

The appointing authority for general courts-martial is required
to detail one of the members thereof as law member, and if possible,
he should be a member of the Judge Advocate General’s Department.
It is his duty to rule on all interlocutory questions such as admissi-
bility of evidence, order of witnesses, and other similar matters.

5 Ibid., 10 U.S.C. (1934) § 1480.
6 Ibid. at 789, 10 U.S.C. (1934) § 1481.
The appointing authority must also designate, for each general and special court-martial, a trial judge advocate and a defense counsel; and for each general court-martial, one or more assistant trial judge advocates and one or more assistant defense counsels, when necessary.

The trial judge advocate is the prosecuting officer for the government, and in addition he has numerous other duties both prior to and after the trial. But while the trial judge advocate represents the government's interests, he must never forget that he is an officer of the court. As is stated in a 1939 memorandum from the Judge Advocate General, "The trial judge advocate should conduct himself not as plaintiff's attorney intent upon winning for the side he advocates, but as a sworn and impartial member of the court, and should charge himself with the fair and impartial trial of the accused whom he is bound to protect as well as to prosecute."

Likewise the duties of the defense counsel are very important—no less so than those of the trial judge advocate. The accused need not accept the services of the defense counsel provided by the government, and is at liberty to secure a civilian attorney to defend him. However, this does not always accrue to the benefit of the accused, for the average civilian attorney is unfamiliar with court-martial practice and procedure.

JURISDICTION OF COURTS-MARTIAL

The following persons are, by the 2nd Article of War, made subject to military law: "(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

"(b) Cadets;

"(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President . . . .

"(d) All retainers to the camp and all persons accompanying

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7 Extension Course, subcourse 40-2, lesson 6, p. 2.
or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

"(e) All persons under sentence adjudged by courts-martial;

“(f) All persons admitted into the Regular Army Soldiers’ Home at Washington, District of Columbia.”

The nature of the courts-martial jurisdiction is solely penal or disciplinary, and there is no power in the court-martial to assess damages or to enforce the collection of private debts. Unlike the civil courts, the jurisdiction of courts-martial does not depend upon where the offense was committed, but is personal in scope. This makes it possible to try a soldier wherever it is most convenient to do so, and the question of venue does not arise. For example, a soldier deserting from a post in Illinois, and apprehended in San Francisco, may properly be tried before a court-martial in San Francisco.

In the Manual for Courts-Martial, we find that “The jurisdiction of a court-martial, i.e., its power to try and determine a case, and hence the validity of each of its judgments, is conditioned upon these indispensable requisites: That the court was appointed by an official empowered to appoint it; that the membership of the court was in accordance with law with respect to number and competency to sit on the court; and that the court thus constituted was invested by act of Congress with power to try the person and the offense charged”.

Termination of court-martial jurisdiction is generally held to cease on discharge or other separation from the service; and “jurisdiction as to an offense committed during a period of service thus terminated is not revived by a re-entry into the military service”. However, there are some very important exceptions to this general rule of termination of jurisdiction. Jurisdiction is not terminated by discharge or dismissal in cases of certain fraudulent offenses against the government such as stealing or embezzling government property, making false claim for payment, or crimes of a similar nature. Nor does a discharge obtained by fraud operate to terminate the jurisdiction of a court-martial, for the discharge may be cancelled and the

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9 (1927) c.IV, 7.
10 Ibid. at 8, ¶ 10.
soldier court-martialed for his fraud. Also, an honorable discharge does not release a soldier from liability to trial by court-martial for a military offense committed during a prior enlistment, but a dishonorable discharge terminates all previous enlistments and releases the soldier from all consequences of the former enlistment, with the exceptions mentioned above in certain cases of fraud and embezzlement.

Offenses of a purely military nature come within the exclusive jurisdiction of courts-martial. But where the offense violates both military and civil law, the offender may be trial by either a court-martial or the proper civil tribunal. Generally it resolves itself in actual practice down to the rule that the jurisdiction which first attaches in any case is allowed to proceed. However, if the offender is being held for trial by the military authorities, or in time of war, the military officials may rightly refuse to turn an offender over to the civil authorities for trial. But it is well to know that in time of peace, within the limits of the United States, the commanding officer is required to aid the civil authorities in every way in the apprehension and securing of persons subject to military law who have been charged with a crime or offense committed within the above mentioned geographical limits. Further, it is provided by the 92nd Article of War that, in time of peace, no person shall be tried by court-martial for murder or rape committed within the geographical limits of the Union or the District of Columbia.

JURISDICTION OVER PERSONS AND LIMITS OF PUNISHMENT

A general court-martial has power to try any person subject to military law for any crime or offense made punishable by the Articles of War, and any other person who by the law of war is subject to trial by military tribunal. A general court-martial may pronounce any punishment that it sees fit, within certain prescribed limitations, such as the restriction found in Article of War 43 prohibiting the death penalty except when specifically authorized, the prohibition of certain kinds of inhuman punishment (Article of War 41), and certain offenses that carry mandatory punishments (Article of War 95).

13 Ibid. at 795, 10 U.S.C. (1934) § 1514.
14 Ibid. at 795, 10 U.S.C. (1934) § 1512.
15 Ibid. at 806, 10 U.S.C. (1934) § 1567.
This discretion of the general court-martial in levying punishment, in addition to being limited by the above restrictions, is also subject to the limits set forth in the Manual for Courts-Martial, wherein is prescribed the maximum limit of punishment for each offense cognizable by courts-martial.

Special courts-martial have power to try any person subject to military law for any crime or offense not capital made punishable by the Articles of War. A special court-martial cannot adjudge the death penalty, dishonorable discharge of an enlisted man, dismissal of an officer, confinement in excess of six months or forfeiture of more than two-thirds pay per month for a period not exceeding six months.

Summary courts-martial may try any person subject to military law for a crime or offense not capital which is made punishable by the Articles of War. The following classes of persons are exempted from the jurisdiction of the summary court: Officers, members of the Army Nurse Corps, warrant officers, field clerks, and cadets. Article of War 14 further provides that "noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial ...." In addition to being unable to pronounce the death penalty, dismissal of an officer, or discharge of an enlisted man, the summary court may not adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay.

OPERATION AND FUNCTIONING OF COURTS-MARTIAL

Having seen the machinery through which the military law functions, let us now examine its actual operation. After the accuser has alleged an offense, and the actual charges have been prepared and sworn to, the accused, if not already so, is placed under arrest or confinement, and the preliminary investigation of the charges commences. The investigating officer determines to the best of his ability whether the matter set forth in the charges is true, if the charges are correct in form, and makes his recommendation as to what disposition should be made of the case.

If the charges are recommended to trial by general court-martial, they are reviewed by the Staff Judge Advocate before trial is ordered,

\[16\] (1927) 95, ¶ 104.
so that an additional check may be had to determine not only that the charges are correct and complete, that an offense is stated, and that there is ample evidence to support the charges, but also that it is proper for the accused to be tried by general court-martial. Frequently charges recommended for trial by a general court are returned by the Staff Judge Advocate for disposition by an inferior court. There may be many reasons for this action, among which are youth of the accused, relatively short period of military service, lack of criminal intent, and previous good character.

All through the military law procedure, the accused is given every opportunity and consideration consonant with the dispensation of justice. The trial itself is as direct and speedy as possible, with many of the delays that are found in civil practice eliminated. Probably one of the greatest misconceptions lodged in the public mind concerns the court-martial. It was formerly generally regarded by those outside the military service as a cut and dried, pre-determined formality, at which the accused had no or little chance to defend himself. This picture of a court-martial, is, of course, wholly removed from the truth, as in actual practice, the court-martial resolves itself into a fair and open hearing at which the accused is given every opportunity to present matter in his defense.

Though there is no appeal in the ordinary sense, the military judicial system provides a safeguard for the accused in the provision for automatic review of every court-martial record. All records of summary, special, and general courts-martial are automatically forwarded after trial to the Staff Judge Advocate for review. And in addition thereto, all records of general court-martial are then sent to the Judge Advocate General’s Office for further review.

**EXTENT OF APPLICATION OF COURTS-MARTIAL**

In a recent bulletin the Judge Advocate General said, “In view of the rapid extension of the Army, I am most solicitous that no case be recommended for trial by General Court-Martial until it has had the most careful consideration of all facts involved including the nature of the offense, moral and psychological factors, and the salvage value of the offender. I am confident that the exercise by staff judge advocates of imagination, humanity and sound judgment, with attention to technical details only in cases in which law and justice demand it, will greatly assist in obtaining results which attest the wisdom of Congress in adopting selective service as a peace-time
method of personnel procurement." And in a recent lecture given to officer candidates at the Infantry School, Fort Benning, Georgia, we find the following: "A company properly administered will seldom have occasion to resort to court-martial and company punishments will be greatly decreased in number."

This matter of company punishment is deserving of attention, particularly with respect to diminishing the number of courts-martial. Article of War 104 provides that the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishment upon persons of his command, without the intervention of a court-martial.

In line with the policy of the War Department to use the general court-martial only when all else has failed, Lieutenant General De Witt, commanding the Fourth Army, recently issued a communique in which he stated, "The Army Commander has observed instances of very young soldiers in confinement. It is his opinion that many of these soldiers, who have been convicted of purely military offenses not involving moral turpitude and whose sentences to dishonorable discharge have been suspended, can be advantageously restored to duty . . . . The Army Commander does not believe that trial by general court-martial is necessary or desirable in every case where the administrative charge of desertion has been made against a very young soldier who has been in the military service but a short period of time . . . . If the soldier has voluntarily surrendered to military control, due consideration should be given to the possibility of trial by inferior court-martial . . . . If it appears that the soldier has future potential value to the service, trial by general court-martial should not be recommended."

And even though an accused may have been found guilty and sentenced by a court-martial, his case is not then forgotten by the military authorities. If in prison, his behavior is carefully watched, and if there is a chance of rehabilitation, the prisoner is given every opportunity to show that he is worthy of being restored to duty. In a War Department bulletin of July 2, 1941, regarding the restoration to duty of certain general prisoners, it was said: "In view of the extraordinary international situation which has necessitated the adoption, as a national policy, of compulsory military service and training, it is

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18 Executive Memo, Att'y Gen. (Oct. 16, 1940).
20 Circular 2 (Jan. 20, 1941).
important that each individual in the military service be retained to the full extent of his obligation. The dishonorable discharge of an enlisted man, and his consequential release from his military obligation, is to be avoided except in the instance that an individual is not a suitable person to associate with enlisted men.... In view of the foregoing, it is desired that cases of general prisoners now in confinement under your jurisdiction be again inquired into, and where it is determined unnecessary to release the prisoner from his military obligations, steps will be taken to restore him to duty after a suitable period of confinement. In future consideration of charges against an enlisted man where the prospective evidence does not indicate that he should be separated from the service under the policy set forth above, trial by an inferior court-martial should be had, when trial by court-martial is deemed necessary, rather than trial by general court-martial. It is believed by the writers that this bulletin very accurately reflects the attitude of the War Department toward restoration to duty of prisoners whenever possible, and, in actual practice, this is faithfully carried out wherever the prisoner has shown traits of character and behavior that will warrant his return to duty.

COURTS-MARTIAL COMPARED WITH CIVIL COURTS

Courts-martial are temporary summary tribunals, as contrasted with a civil court of record. There is no fixed place of meeting, no seal, no regular clerk or bailiff. Courts-martial are not subject to judicial revision, and the judgment of a court-martial is conclusive, and cannot be attacked except on the ground of jurisdiction. However, the court-martial is in every respect a court of law and justice, is bound by the same fundamental principles of law as guide the civil courts, and observes the standard rules of evidence.

No more appropriate matter can be found to close this brief discussion of courts-martial than a quotation from William Winthrop, whose classic Military Law and Precedents, while first published in 1886, is still a widely used authority on the subject of military law. Mr. Winthrop says, and we are in hearty accord with him,

"That Military Law, from its early origin and historical associations, its experience of many wars, its moderation in time of peace, its scrupulous regard of honour, its inflexible discipline, its simplicity, and its strength, is fairly entitled to consideration and study."21