Denver Law Review

Volume 7 | Issue 10 Article 3

January 1930

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MOST laymen, and even some of the members of the Bar, do not know that our present system of army courts-martial has as distinguished an ancestry and almost as ancient a pedigree as our system of Common Law. During the Middle Ages, in keeping with the ideas of that time, a commander of any army, or any of the commanders of units under him, had absolute and complete control over his soldiers, even to the extent of pronouncing the death penalty summarily. However, even during this period, in times of peace, all soldiers were entitled to some form of a trial for any offense committed by them. At this trial the commander sat as the sole and only judge, but he was required to proceed thru the formalities of the trial at that period, whatever they might have been.

In our own country, the old "common law military" was recognized as an actuality even before the Constitution was adopted. All during the Revolutionary War, and under the Articles of Confederation, the Commander-in-Chief of the army was authorized to convene courts-martial in accordance with the "common law military". Washington acted as one of the judges during the winter at Valley Forge, and other regular courts-martial were convened from time to time upon order of General Washington.

Upon adoption of the Constitution the authorization for a system of courts-martial was found in that provision in the Fifth Amendment to the Constitution which excepts "cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger," from the Bill of Rights, and from the procedure of the ordinary civil courts. The Supreme Court has also interpreted that part of the Second Article of the Constitution which makes the President the "Commander-in-Chief" of the army and navy, as carrying with it the power to convene courts-martial in accordance with the ancient "common law military".

So much for the authorization of a system of courts-martial. The present system of courts-martial is the result of the

passage of numerous acts by Congress, and the installation of many ramifications of the acts by Presidents under their authority as Commander-in-Chief. Congress, under its constitutional power to make rules and regulations for the government of the land and naval forces, passed the Articles of War (Chapter Two, National Defense Act of June 4, 1920) which introduced many new features hitherto not used, and under which the present system of courts-martial is conducted and governed. The Articles of War really constitute the army penal code, and are the basis for its code of criminal procedure. They are supplemented by the Manual for Courts-Martial prescribed by executive order of President Coolidge. The Manual is, really, the army code of criminal procedure.

The jurisdiction vested by the Articles of War and the Manual of Courts-Martial is by no means a mere emergency investiture. It is the same in time of peace as in time of war, and the courts-martial is a regular military tribunal, administering the military law, which is that law which governs the military forces, alike in peace and in war, at all times and in all places, wherever they may be. Of course, the jurisdiction of the courts-martial extends only to criminal or tortious cases, dealing with offenses charged against members of the military establishment, but within its scope, it is not an inferior court. As to cases within its jurisdiction its decision is final, as far as review or further examination by any civil court or tribunal is concerned.

The court is composed of commissioned officers appointed by an authority holding a military command. Three kinds of courts-martial exist in the army: the Summary Court-Martial, one officer, usually the commanding officer of a troop or company, for the disposition of minor cases; the Special Court-Martial, three or more officers for the trial of more serious cases, which may adjudge confinement at hard labor in the guard house or army disciplinary barracks with forfeiture or detention of not exceeding two-thirds pay for not longer than six months, but has no power to separate any person from the military services; and, third, the General Court-Martial consisting of five or more officers for the trial of serious cases. The General Court-Martial may adjudge any punishment warranted by law, including death, confinement either in the

army disciplinary barracks or in a Federal penitentiary, dismissal of an officer, or dishonorable discharge of an enlisted man.

Besides the officers constituting the court-martial, there is an official prosecutor, called the Trial Judge Advocate, and also an official defense counsel provided as part of the regular personnel of the court. The defense counsel and the Trial Judge Advocate are both legal advisers of the Court, and are also, usually, both officers of equal rank, thus intending to show and convey an idea of equality in the representation to the accused. The accused has the privilege of retaining civilian counsel, if he so wishes, however, by actual experience the soldiers have come to know and recognize the worth and sincerity of defense counsel appointed for them, and usually accept the appointed counsel.

Under the revision of the Articles of War in 1920, there must be appointed, for all General Court-Martials, a Law member. That is, one of the members of the Court-Martial must be an officer of the Judge-Advocate General's Department, or if one is not available for the purpose, the appointing authority details another officer—selected—as specially qualified to perform the duties of the law member. This law member rules in open court on all interlocutory questions, other than challenges, arising during the proceedings. Upon questions other than of the admissibility of evidence, the court does have the power, by majority vote, to override his rulings; but, in practice, rarely, if ever, does so. He is a member of the court, and like the other members, has a single vote on the findings and the sentence. A reporter and interpreter may be appointed, and the necessary clerks and orderlies are detailed for the trial.

After the arrest and confinement of the accused, a formal written accusation is made consisting of "the technical charge" and "specification". The charge merely indicates what Article of War the accused has violated, while the specification sets forth the specific facts and circumstances relied upon as constituting the violation. Each specification, together with the charge under which it is placed, constitutes a separate accusation, or indictment. Any person subject to military law

may prefer charges, even tho at the time of preferment he is himself a prisoner.

Upon the preferment of charges, immediate steps are taken to draft the charge and specification. This is always couched in simple language, a specimen of which, is:

Charge I: Violation of the 93rd Article of War.

Specification: In that Richard Roe, did, at Fort Logan, Colorado, on or about May 13, 1930, feloniously take, steal, and carry away a diamond ring, value about $100.00, the property of John Doe.

No charge is preferred for trial until after a thorough and impartial investigation is made. Witnesses are examined, and evidence is taken by the commanding officer present, and a report is made of the charges accompanied by a statement of the substance of the testimony taken on both sides. A recommendation of the examining officer as to what disposition of the case he suggests, and also a statement of any reasonable ground for the belief that the accused is, or was at the time of the offense, mentally defective, deranged, or abnormal, is also sent in with the report. These charges are then forwarded to the commanding officer who has the authority to appoint a court-martial, along with any related papers and any available evidence of previous convictions. The appointing authority may, in his discretion, suspend action on the charges, pending a report of a medical examining board, appointed for the purpose of examining an accused where the forwarding officer reports that in his opinion the accused is, or was at the time of the commission of the act, mentally unsound.

Before the trial begins, both the Judge Advocate (the prosecution) and the defense are each allowed one peremptory challenge of the judges who are appointed to sit in the trial, except, of course, in a summary court-martial, since in that case there is only the one officer acting as judge. If any of the officers appointed as judges know of any reason why they should not serve as judges, it is their duty to express these reasons and ask that they be excused from sitting as judges. Any of the judges might also be challenged for cause on the grounds that the challenged member is not competent or is not eligible to serve on courts-martial; that he is not a member of the court; that he is the accuser as to any offense charged;

or that he has already come in contact with the case in some manner, or will receive it as a reviewing authority, or for other reasons. After the challenge is given and argument heard, the court votes upon the challenge by secret written ballot, and the majority vote governs as to whether the challenged member shall remain as a court member or not.

After the proceedings as to challenges are concluded, the members of the court and trial judge advocate are sworn, each taking an oath that he will endeavor to mete out Justice impartially, and judge the accused upon the evidence admitted. After the oath is taken, the accused is arraigned and asked how he intends to plead upon each specification. After this, pleas may now be made to the jurisdiction, in abatement, in bar of trial by reason of the Statute of Limitations, or by reason of a former trial. The plea to the jurisdiction may be made at the beginning of the trial or any time during the trial, while the other pleas should be made at the beginning of the trial. A motion to sever may be made by one of two or more joint accused who wishes to be tried separately from the other or others; or a motion to strike out on the grounds that the specification does not state any crime or offense may be made. These two motions should be made upon arraignment. A motion for findings of not guilty may be made at the close of the trial. A Nolle Prosequi may be entered by the prosecution upon order of the appointing authority upon the conclusion of the trial, but this can only be made by his order.

The trial is then continued in much the same order as a civil trial. Both sides make their opening statement, the prosecution puts on their witnesses, and the defense puts on their witnesses. At the close of the trial, each side sums up their case, and the court-martial then retires to render its decision. After the judges have retired, they re-argue the case among themselves as to the salient points or features of the trial, and they then vote. Voting is by secret written ballot, the members first voting as to the guilt or innocence of the accused. A two-thirds vote of the members present is sufficient for conviction and for the determination of the sentence; except, in case of a general court-martial, to adjudge penitentiary confinement for more than ten years, or for life, a three-fourths vote is necessary; and that the death penalty can be

imposed only by unanimous votes, both on the findings of guilty, and for the imposition of the sentence. If the accused is voted guilty, a second vote is then had as to his punishment. Each judge can vote the penalty he believes should be imposed, and the majority voting a certain penalty imposes that penalty upon the accused, except in case of a death penalty, in which case the vote must be unanimous. All the members must vote as to the penalty regardless of his vote upon the findings.

An automatic appellate review is supplied for every general court-martial trial. A transcript of record, including the testimony, is given the accused, as a matter of right, and without expense to him. The sentence imposed has no force until formally approved by the commanding general or other authority appointing the court; and this authority in turn refers the record to the reviewing authority of his Staff Judge Advocate or to the Judge Advocate General. The Board of Review, in the office of the Judge Advocate General, is a true appellate court. However, execution of the sentence in the meantime is not held up in the less important cases. In other words, as to the serious sentences, there is an automatic appeal, before execution; as to all the other cases an automatic writ of error is given, which does not delay the execution of the sentence. The sentence may be either affirmed, reversed, or sent back for a new trial.

All the ordinary rules of admissibility of evidence applies with equal stringency to a court-martial as well as a civil trial. The Articles of War, besides providing for the usual crimes and misdemeanors contained in any Code of Criminal Procedure, also lists a series of purely military crimes, such as, desertion, disobedience to orders, disrespect to superiors, and acts dealing with military property, or with the relations between a soldier and the civilian population.

In general, reviewing authorities for the army courts, including the Board of Review and the Judge Advocate General, are guided by substantially the same principles which guide civilian appellate courts. There is one difference, however, which at first glance must seem quite startling to a member of the Bar. In 1916 an Article of War was adopted providing that:

"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the grounds of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused."

This reverses the presumption of fatality of error, but as a matter of experience this eliminates many miscarriages of justice, and avoids the necessity of many new trials, without, in turn, imposing too much of an injustice upon the accused.

This detailed explanation of procedure applies mainly to a general court-martial, but with only slight differences, this is the procedure in a special court-martial, also. The summary court-martial being composed of only the one commanding officer deals only with smaller, less important cases, and is more in the nature of a disciplinary court. The three things in which the army in recent years has departed rather notably from the practice of the civil courts are: First, the reversal of the presumption of the fatality of procedural errors in the trial; Second, the automatic appellate review of every general court-martial case, without any request by the accused and without expense to him; and, Third, the institution of the official defense counsel at the trial for every case, and as a part of the regular personnel of the court.

In this bare skeleton of the general procedure of an army courts-martial I have tried to show you how closely it resembles and developed along the same lines as has the mother-tree of law, our own common law. It is interesting not only because of its age and ancestry, but because it has kept pace and developed as fast as our civil procedure. In fact, not only has it developed as fast as our civil procedure, but in some instances mentioned above has far outstripped our civil code of procedure, and can be pointed to with as much pride as any of our civil agencies for the dispensation of Justice.