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Admiral Colclough holds the Legion of Merit; Letter of Commendation from the Commander in Chief of the U. S. Fleet with authorization to wear the Commendation Ribbon; Gold Star (in lieu of a second Legion of Merit); Victory Medal and other distinctions. While in the service the Admiral completed a post-graduate law course in the George Washington University Law School where he received the Larner Medal for Highest Standing in the School and served at various times in the Office of the Judge Advocate General.

The following article was delivered as an address by Admiral Colclough before the New York State Bar Association meeting at Saranac, New York, June 21, 1947.—EDITOR.

Before undertaking to discuss Naval Justice, I must refer briefly to the backdrop against which this problem must be considered—that is, the place it occupies in national security.

A little less than two years ago this nation, in combination with its allies, brought to a successful conclusion another war—a war into which we were drawn by the expansionist policies of countries ruled by authoritarian concepts—a war for which we were again woefully unprepared. In winning this latest war we again demonstrated the might of a free people.

Now it is the future which is of primary concern to all of us. While preserving the freedoms which we hold dear, we must not have another war, if it can possibly be avoided. This nation is committed to the maintenance of peace by means of that instrumentality for the peaceful settlement of international differences, the United Nations. But, as we all know only too well, civilization has not progressed to the point that the desire for peace alone, not even as strongly developed as in the United States, can guarantee the prevention of war. Until the tremendous difficulties of a recently war-torn world have been completely resolved, we must remain strong and a great element of that strength must be your Navy—a Navy adequately equipped with ships and planes and above all adequately manned by personnel whose efficiency assures their being equal to any emergency.

I think it is fair to say that efficiency of personnel stems from

three basic elements—discipline, morale, and training and education. Personal courage, leadership, perseverance, self-control —all these rest upon a foundation of those basic elements. They won the beachheads at Salerno and Normandy, overcame the seemingly impregnable defenses of Iwo Jima, annihilated Japanese air power in the first battle of the Philippine Sea, and deciminated Japanese merchant shipping through submarine warfare.

An important, yes vital, factor in the maintenance of discipline and morale, and hence efficiency, in which all Naval officers whether educated in the law or not must have a lively interest, is naval justice. It is not uncommon for me to be asked to discuss this subject before groups of Naval Reserve officers representative of the line, its specialties and the Staff Corps. Such requests constitute striking evidence of a fact which is so fundamental that it often fails of recognition—namely, that the administration of justice in the Navy is not the sole responsibility of officer-attorneys. Rather, it is the responsibility of all officers. It is a basic element of the naval profession.

Naval justice is composed of two broad subdivisions—that is, the application of military law to the maintenance of a high standard of discipline, and the application to the same objective and sound principles of administrative discipline—in other words, corrective measures short of trial, and corrective clemency procedures applied to those convicted. The two, when properly combined, serve as the hallmark of an efficient, successful, victorious Navy. History testifies to the dire results that have come to military and naval forces that were unable, for one reason or another, to maintain a sufficiently high standard.

In talking about the first of these two broad subdivisions, I am aware that many of you have had experience with it or its counterpart in the Army. I am also aware, however, that there is considerable confusion as to just where and how military law fits into the traditional concepts of American justice. I have received many inquiries which indicate a misconception that the court-martial system is based solely upon executive regulation, rather than being rooted in the Constitution, the Federal statutes, and legal precedents.

Then again, there is a natural tendency, particularly among lawyers, to attempt to draw direct and complete analogies between military law, its practice and procedures, and the American system of criminal law. Many such analogies can be drawn. Others cannot. While not attempting a comparison of these two branches of the law, I do want to point out something of the basis

and problems of military law. Only with an understanding of them can comparisons be intelligently made.

The two basic statutes in the field of military law, the Articles of War and the Articles for the Government of the Navy, were enacted years ago by the Congress under the power given to it by the 14th clause of Section 8, Article 1 of the Constitution, to make rules for the government and regulation of the land and naval forces. These have been amended or revised from time to time, but they remain the cornerstone of the system.

It is important, first of all, to note certain fundamental features of military law. As many of you are aware, the tribunals before which those who violate military laws are tried, namely, courts-martial, are not part of the judicial organization of the United States. The Supreme Court of the United States has held over the years that the decisions of these tribunals, acting within their jurisdiction, both as to parties and the subject matter, are not subject to review by the Federal Courts. Then again, there are basic differences in procedure. For example, the 5th Amendment to the Constitution specifically excepts cases arising in the land or naval forces from the requirement of presentment or indictment of a grand jury. Again, it has never been seriously contended that the 6th Amendment requires a trial jury in a court-martial.

It is important to note these constitutional aspects of military law, and its instrument of enforcement, courts-martial, for there are also differences in procedural rules which, like the constitutional differences, flow solely from a recognition of military considerations. It should always be kept in mind that this branch of the law is and must be an adaptation of our American principles of justice to the exacting formula of military discipline.

In adverting to differences between military and criminal law tribunals and procedures, I do not want to be understood as suggesting a theorem or even philosophy of the law to the effect that Naval personnel are or can be deprived of constitutional guarantees. True, as a result of dicta in the celebrated case of *Ex Parte* Milligan (1866), writers on military law, including Judge Advocates General of the Navy, at one period maintained that courts-martial were bound not by the letter, but only by the spirit of constitutional safeguards and guarantees, in the absence of specific legislative enactment. The enlightened view, which has prevailed for the past quarter century at least, is clearly stated in a Judge Advocate General's opinion (1920) to the effect that all the amendments are applicable to persons in

the land and naval forces in letter as well as in spirit, except so much of the 5th and 6th Amendments as relate to presentment or indictment of a grand jury and to trial by jury.

Thus it is that the accused is entitled under the 6th Amendment to have the assistance of counsel for the defense, and the denial of the right constitutes fatal error; that the accused is entitled to compulsory process for obtaining the presence of witnesses for his defense under the same Amendment; that he cannot be compelled to give evidence against himself; that an accused cannot be placed twice in jeopardy for the same offense. These and other safeguards are applicable to members of the Naval service in like measure as they are applicable to a defendant in the criminal courts.

In considering the problem of naval justice, particularly on a comparative basis, it is necessary to take cognizance of fluctuations in the demands made upon the system. For example, prior to the last war the Navy's strength, including the Marine Corps, was about 330,000 men and officers. In this discussion they might be termed professionals. The average monthly figure for courts-martial of all types was then about 625. The Naval population rose during the war to a figure in excess of four million, including the Coast Guard, as well as the Marines. The monthly average figure for courts-martial of all types for the war was nearly 14,000 with a peak of 20,000.

From a geographical standpoint, prior to the war, the administration of naval justice was roughly limited to the United States and its territories, Cuba, Iceland, and the Philippines. During the war it embraced not only Europe, the Atlantic, and the Pacific, but practically the entire world. The Navy was confronted, in addition to the tremendous problem of logistics for ships, aircraft, and amphibious forces, with a real problem of the logistics of Naval justice under the stress and strain of war.

I do not mean to imply that there were not cases of injustice. Such a claim would be absurd on its face. I need not tell you as lawyers that the human equation is part and parcel of this problem. A claim of infallibility for Navy courts would be ridiculous, just as it would for any other judicial system. Having in mind, however, the strain put on the court-martial system by a global war, one can see the merit of the observation of a prominent lawyer that the wonder was not that mistakes were made, but that the system worked as well as it did. As a matter of fact, it has been my view that, in seeking reforms, we should be alert mainly for evidences of flaws brought to light by war conditions.

Nevertheless, there is direct evidence of the success of our disciplinary processes, in their broadest aspects. Not only did our Naval forces attain a victory which bespeaks their discipline and morale, but a very practical yardstick is the fact that the percentage of Naval prisoners rose only from the figure 0.173 in the prewar period to 0.183 during the war. This is slight increase indeed, in light of the fact that during the most recent war the population of the Navy consisted in great measure of men who had not dedicated their lives to the Naval service, who were not even volunteers, and hence might be expected to be less amenable to those limitations upon their personal freedoms which a military service must impose.

The problems in naval justice brought to light by a global war have been subjected to careful scrutiny by the Navy Department. Early in the war it was recognized that a court-martial system, adequate for a relatively small, compact organization, might show weaknesses under unprecedented wartime expansion. Because of the impracticability of making extensive changes while we were at war, the first studies taken to cope with the problem of expansion looked chiefly to expedition and simplification, and to attainment of a greater uniformity in punishments. The more basic questions were of necessity left for consideration after the cessation of hostilities.

These earlier studies were made jointly by the Honorable Arthur A. Ballantine of New York and Professor Noel T. Dowling of Columbia University Law School. They resulted in the Ballantine Report of 1943. Pursuant to its recommendations the Secretary of the Navy took action which reduced by 60 per cent the time required to complete action on general court-martial trials and which obtained a greater uniformity of punishment. In this latter connection, a Justice of the United States Supreme Court has spoken to me with approval of the Navy's review procedures which result, as he stated, in a greater degree of uniformity of sentences than can be found in any jurisdictions not having a highly developed parole system.

Since the conclusion of the war, four separate and distinct studies have been made: one by a committee headed by Justice Matthew F. McGuire of the District Court for the District of Columbia; one by Commodore Robert J. White of the Naval Reserve Chaplain Corps, Dean of Catholic University Law School; another Ballantine Report submitted by a board of which Professor Dowling and Judge McGuire were members; and finally a comprehensive study of the Navy system, in comparison with that of the Army and foreign armies and navies, submitted

by the Keeffe Board, headed by Professor Arthur Keeffe of Cornell University Law School. The Navy is deeply indebted to these eminent members of the legal profession who have given so freely of their time and energies.

It has taken some time to digest all the material resulting from the foregoing studies. Under the direction of the Secretary, a special section was created in my office devoted exclusively to this work, which includes drafting amendments to the Articles for the Government of the Navy and completely revising the Naval law manual, heretofore known as Naval Courts and Boards.

The first phase of the work was completed recently with the introduction in the Congress of companion bills to amend the Articles for the Government of the Navy. These bills are S. 1338 and H. R. 3687. It is expected that hearings on these bills will commence shortly.

The bills are of such scope that time would not permit describing them in detail. I would like, however, to enumerate some of the more significant changes proposed in the bill or to be implemented in the manual.

1. A more specific delineation of offenses, including the embodiment by reference of violation of Federal criminal laws and the grouping of punitive articles on the basis of punishment authorized. This is part of a general revision of the Articles pertaining to jurisdiction and would include removal of limitations as to place. The referral of offenses under proper circumstances for trial in civilian courts when authorized by the Secretary of the Navy would be provided for in the new Manual.

2. More comprehensive pre-trial procedure with assignment of counsel as soon as the person is in trouble.

3. Provision for safeguards against unreasoned action in violation of probation cases.

4. Separation of the functions of prosecutor and judge advocate, now combined in one. The judge advocate, an officer-attorney certified as to qualifications, would be established in a position free of any influences tending towards partiality. He would rule on interlocutory questions and on admissibility of evidence, subject to being overruled by the Court—in which case reasons for the Court's action, together with the views of the judge advocate, would be spread upon the record for the benefit of the reviewing authorities.

5. The prosecutor and defense counsel would be certified as to qualifications in the field of military law. In speaking of defense counsel I refer to the one made available to the accused.

His right to counsel of his choice will, of course, be preserved

6. The Court would be authorized to grant continuances, a power now reposing in the convening authority, and to entertain a motion to dismiss, or its equivalent, a procedural feature nonexistent heretofore.

7. As is the case now, the sentence of death would not be mandatory for any offense. It could be adjudged when specifically provided in the Articles, except for offenses upon the punishment of which the President places a limitation under the power which he has under the present Articles and which would be continued.

8. The sentence would be announced, along with the findings, in open court. Sentences of confinement would start to run from their pronouncement, and provision would be made for crediting confinement awaiting trial by mitigation or otherwise. The latter principle is now followed generally as a matter of policy, but pronouncement of the findings, except in case of acquittal, and the sentence in present practice must await review by the convening authority.

9. The convening authority, that is the authority ordering the trial, would no longer be required to review the record for legality—thus expediting its transmission to the Navy Department for review and eliminating any official conflict of views between the court and the convening authority as to the guilt or innocence of the accused.

10. The use of depositions would be changed to follow so far as practicable Rule 15 of the Federal Rules of Criminal procedure.

11. A mandate would be included requiring the Secretary to provide such rules as necessary to safeguard courts from being influenced by convening authorities.

12. A formal appeal would be provided for, in addition to present review procedures.

13. Enunciation and explanation of constitutional guarantees would be expanded in the new manual.

These and other reforms are, it is believed, in keeping with the modern, healthy trend in various branches of the law. Another, and no less important, step towards improvement of the Navy's court-martial system is that for a higher quality of legal services to the accused and to the court. The first move in this direction got underway at the end of June last year, with the dedication in California of the School of Naval Justice. I am particularly pleased that decision has been made to send general service Reserve officers to this school as part of their training

duty. Furthermore, the Navy is for the first time offering a law career in the line of the Navy to trained lawyers. At the present time some one hundred fifty officers, formerly in the Naval Reserve, have chosen a law career in the regular Navy. These steps are being taken in recognition of the fact that no system, no matter how well conceived, will be any better than the capabilities of those charged with administering it.

You may have noted that I referred a moment ago to the trend in various branches of the law as modern. If judged by tangible results it is, for I point to the fact that only recently, after years of study and consideration have we come, in the Federal courts, to such reforms as the Federal Rules of Criminal Procedure—the substitution of an information for the cumbersome procedure of indictment by grand jury, the adoption of amplified pre-trial procedure, and so forth.

It may not be immediately apparent to some why the Navy does not follow without modification the reforms in the Federal criminal practice. As I mentioned earlier, our problem is not quite the same. A ship is a community of itself, set apart. It must be self-sufficient, not only as to food, fuel, and ammunition, but also as to the administration of justice. The system must fit into the scheme of life at sea.

Furthermore, the purposes to be served by the criminal courts and by the Navy's disciplinary system may be said to differ more or less basically. This difference has been expressed succinctly as follows—the objective of criminal law is the protection of society; the objective of military law is the maintenance of that standard of discipline which is the *sine qua non* of an efficient fighting organization.

Nevertheless, law in the military services, as elsewhere, is a vital aspect of the problem of human relations. And, although it is but one aspect of that complex problem, human conduct is the sole concern of military law, as it is of criminal law with respect to civilians.

We are striving to perfect our system of justice in the Navy. To strike a proper balance so as to assure protection for the rights of the individual, while safeguarding the morale and discipline of a military organization, requires intensive study and a high degree of understanding, not solely by the legal profession, not solely by the Naval profession, but by an intelligent combination of the two.