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# THE NOTRE DAME LAWYER

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"Law is the perfection of human reason"

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## MILITARY LAW AND MILITARY JUSTICE

By MAJOR CHARLES H. McDONALD, *U. S. Army*

Military Law in its ordinary and more restricted sense is the specific law governing the army as a separate organization or community.

In a wider sense it includes also that law which, operative only in time of war or like emergency, regulates the relations of enemies and authorizes military government and martial law.

Historically, much of our military law is older than the Constitution. With the Constitution, however, all public law began either to exist or to operate anew, and the Constitution is, in general, referred to as the source of military law as well as the other laws of the United States. Thus it is said by Chief Justice Chase in *Ex parte Milligan*, (4 Wallace 137), "The Constitution itself provides for military government as well as civil government \* \* \* \* there is no law for the government of its citizens, the armies or the navy of the United States, within American jurisdiction which is not contained in or derived from the Constitution."

The provisions of the Constitution which may be regarded as the source or sanction of or authority for our existing military law are the following:

A. Those by which Congress as the legislative branch of the Federal Government is empowered:

- (1) To define and punish offenses against the law of nations.
- (2) To declare war, grant letters of Marque and Reprisal and make rules concerning captures on land and water.
- (3) To raise and support armies.
- (4) To provide for calling forth the Militia to execute the

laws of the Union, suppress insurrections and repel invasions.

- (5) To provide for organizing armies and disciplining the Militia and for governing such part of them as may be employed in the service of the United States.

And generally, to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. \* \* \* \* and all other powers invested by the Constitution in the government of the United States or in any department or office thereof.

B. Those laws by which the president, as executive power, is constituted the "Commander in Chief of the Army and Navy of the United States and of the Militia of the several states when called into the service of the United States."

In the exercise of its constitutional power to make rules for the government and regulation of the land forces, Congress has from time to time enacted statutes known as Articles of War. The Articles of War are statutory provisions for the enforcement of discipline and for the administration of military justice in the army. The Articles of War as contained in the Army Reorganization Act of June 4, 1920 (41 Stat. 787) are the ones now in force. These provisions, now governing the Army of The United States, consist of 21 Articles.

The present Articles of War are the outgrowth of long experience and careful study. The unusual experience of the World War, when upwards of 200,000 officers were commissioned in the service largely with brief training and some with none, and nearly 4,000,000 men suddenly called into the Army, developed what some thought defects in the system of military justice. To cure these defects the present Articles of War were enacted. While some difficulties developed, the system as a whole worked well. A mighty army was quickly disciplined. An army mobilized within a few months and raised within that brief period to such a high pitch of discipline, did its duty so magnificently that it challenged the admiration of the world. And the relative number of court-martial trials were markedly less than in ordinary peace time.

It may be interesting to know that during the entire period of the world war, it was not found necessary to carry into effect a death sentence in a single case for a purely military offense.

Military justice as now administered is not essentially different than civil justice. Every safeguard that is thrown around a civilian when charged with crime is afforded one subject to military law, when charged with an offense. He is presumed to be innocent and is protected by this cloak of innocence at every stage until he has been proven guilty beyond a reasonable doubt and his sentence finally approved.

Military justice is presided over by the Judge Advocate General of the Army, whose office is in Washington, D. C. The Judge Advocate General's Department consists of upwards of one hundred Judge Advocates and the necessary stenographers and clerks. It is I believe the largest law organization on this continent except that of the Attorney General.

There are three kinds of courts-martial, known as General, Special and Summary.

General Court-Martial is a court of general jurisdiction for the trial of offenses of military law. It tries the cases involving the more serious offenses regardless of whether they be purely military offenses or those of a civil nature, such as murder, rape, larceny, robbery, sodomy, etc.

Special and summary courts, being of special and limited jurisdiction are utilized for the trial of less serious offenses.

The extent of the punishment upon conviction may be said to be discretionary with a General Court, under many of the Articles of War.

Neither a special court nor a summary court martial has power to discharge an enlisted man dishonorably nor to dismiss an officer. A special court cannot adjudge confinement for more than six months nor a forfeiture of more than two-thirds of a soldier's pay for a like period.

A summary court cannot adjudge confinement for more than one month nor forfeiture of more than two-thirds of the soldier's pay for more than one month.

In order that the comparative importance of these three courts may be understood, I may say that the General Court in the army is used for such class of offenses as would ordinarily be brought before a circuit or district court were the offender not subject to military law. The special court is used for such cases that ordinarily in civil life would be tried by a municipal court and the summary court dis-

poses of those cases which might be brought before a police court magistrate.

Any commissioned officer in the military service is competent to serve on any court-martial unless he has been disqualified by reason of his interest in the case. Of this I shall discuss later.

General courts shall be comprised of any number of officers not less than five. Special courts likewise have no maximum limit to the number of its members but cannot try a case with less than three members.

A summary court consists of but one member.

In practice an odd number is usually designated for both general and special court-martials. For general courts we usually detail seven or nine members including the law member so as to allow for absences and challenges without breaking the legally required quorum of five.

With these observations, I will not further discuss the law with reference to inferior courts.

A general court may be appointed by the President of the United States, and by the Commanding General of a Corps Area, Division or Department.

The United States is divided into nine Military districts. Each is known as a Corps Area and is commanded by a Major General. Indiana is in the Fifth Corps Area which consists of Ohio, Indiana, West Virginia and Kentucky. The official headquarters of this corps area is located at Fort Hayes, Columbus, Ohio. There are at present but three General courts trying cases in this corps area—one at Fort Hayes, O., one at Fort Thomas, Ky., and one at Fort Benjamin Harrison, Ind.

The order appointing the court does not designate the president but the senior officer present is the presiding officer of the court.

In the order appointing the court the appointing authority designates a law member, a trial judge advocate and a defense counsel and may designate one or more assistants to the trial judge advocate or defense counsel.

The selection of the law member of the court is an important matter. The law requires the appointing authority to detail on each court as one of its members a law member who shall be a member of the Judge Advocate General's Department, except when no officer is available for the purpose. If no officer of the Judge Advocate

General's Department is available, an officer, who is trained in the law and one specially qualified to perform the duties of law member, must be selected from some other branch of the service.

The functions of the law member on the court are similar to those of a trial judge in a jury trial in a court of record. He is required to rule on all questions arising on any objection as to the admissibility of the evidence offered during his trial; his ruling in this regard is final, so far as the Court is concerned. In the event the person being tried pleads guilty, the law member is required by law to explain to the accused the various elements which constitute the offense charged and inform the accused the maximum punishment which may be adjudged for the offense to which he has plead guilty. The accused is then asked whether he fully understands that, by pleading guilty to the charge, he admits having committed all the elements of the crime or offense charged and that he may be punished as stated. If he replies in the affirmative the plea of guilty will stand, otherwise a plea of not guilty will be entered. The explanation of the law member and the reply of the accused must be given in the record of trial.

The law member also is required by law and each record must show that the rights of the accused to testify, to make a statement, or remain silent have been explained. He must explain to the accused that he has a right as to each charge to remain silent, in which case no inference adverse to him can be drawn from such silence, that he has a right to testify under oath as a witness, in which case he will be subject to cross examination upon the subject matter of his direct examination or upon any matter bearing thereon, or to make a statement, oral or written, not under oath, in denial or in defense, or in excuse or mitigation, and that the court will give his statement such weight and value as the court believes it is entitled to. After such explanation is made the law member is required to ask the accused what he desires to do upon the premises. This explanation and reply of the accused are required to be incorporated into the record of trial.

The trial judge advocate is the prosecutor. He and his assistant prepare the case for trial on behalf of the Government and present the evidence to the court. In doing this he must be just as fair and impartial as the court.

The defense counsel advises the accused and defends him before the court. He cross examines the witnesses of the prosecution and presents the evidence on behalf of the accused. His special duty is to protect the constitutional and other legal rights of the accused. It should be observed that, while every person brought to trial before a military court is provided with military counsel, he may, if he so desire, have special counsel of his own selection—either from the Army or from civil life.

I assume you are interested in knowing how charges are preferred and what preliminary steps are taken to bring a person in the military service before a court martial for trial.

Any person in the military service who has reason to believe that a person subject to military law has violated any of the punitive Articles of War may prefer the charge. The alleged offender may or may not be placed in arrest or confinement. Much depends on the seriousness of the charge. If the crime charged is of a serious nature it would be, of course, advisable to place the accused in confinement. In less serious cases he is merely placed in arrest which ordinarily means that he is restricted to his quarters or to some designated place at his military station. In exceptional circumstances, although the charge is only of a minor offense, the commanding officer may, in the exercise of his discretion, place the accused in arrest or confinement for the purpose of holding him to the post or preventing his escape. But no soldier can be confined without the order of his commanding officer who must personally enquire into his offense. While the law provides that the charges must be signed and sworn to by a person subject to military law, a civilian who becomes cognizant of a serious offense committed by an officer or soldier is but performing a public duty to bring it to the attention of the proper military commander.

When one is placed in arrest or confinement his commanding officer is required to take immediate steps for the trial of the person accused or to dismiss the charge and release him from arrest or confinement as the case may be.

When a person is held for trial before a general court his commanding officer is required by law to furnish him with a copy of the charges and within eight days after the arrest or confinement forward the charges to the officer exercising general court-martial jurisdiction.

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The charge corresponds to a civil indictment. It must state facts sufficient to constitute some particular offense recognized and made punishable either under some Article of War or some other federal statute or the code of the District of Columbia or the common law as recognized by the District of Columbia. No person can prefer a charge unless he is able to and does make the required oath on his own responsibility that he has personal knowledge of or has investigated the matters set forth in the indictment and that the same are true to the best of his knowledge and belief.

After the charges have been preferred they are forwarded to the commanding officer of the accused who examines them for the purpose of determining whether, on their face, they have been preferred legally, by a person authorized to do so, whether the person is subject to military law and whether the charge is properly drawn and states an offense cognizable by a court martial. If the charges appear proper in every way, are not trivial or inconsequential, he will within twenty-four hours make or cause to be made by an impartial officer, an informal investigation of the charges. This investigation is not unlike the preliminary examination held before an examining magistrate in a civil court.

The accused is advised of the proposed investigation, a copy of the charge has been furnished him, and for the purpose of assisting him in the investigation, he is furnished with counsel. The investigating officer is required to have such rank, experience and qualifications as fit him for the performance of this important judicial duty. At such investigation full opportunity is given the accused to meet the witnesses face to face and to examine those whose testimony is unfavorable to him and to present any thing he may desire in his own behalf either in defense or in mitigation. Further, all available witnesses requested by the accused are called and examined in the presence of the accused. The investigating officer is also required carefully to warn the accused that it is not necessary for him to make any statement with reference to the charge but that if he makes one



it may be used against him. This investigation should ordinarily be completed within twenty-four hours.

After the examination has been completed the investigating officer will submit his report in writing to the authority appointing him and attach to such report a summary of the testimony of the witnesses and all papers and documents examined by him in this preliminary hearing on the case which, in his judgment, may become important and necessary in the case.

The investigating officer must also include a statement in his report of all explanatory or extenuating circumstances which come to his attention during the investigation.

From this report the next immediate commanding officer must decide whether:

- (a) He will dismiss the charge.
- (b) Impose company punishment.
- (c) Refer them to an inferior court for trial or
- (d) Forward the report of the investigating officer together with the charges and accompanying papers with his recommendation for action of the headquarters exercising General Court-Martial jurisdiction.

Up to this point in a case it is unlikely that the Staff Judge Advocate has been called upon, but after the report of the investigating officer has been received by the Commanding General, and before directing trial, the Commanding General refers the charges and all the papers, which include, as you will remember, summaries of testimony taken before the investigation officer, to his Staff Judge Advocate for his opinion. The case is then considered by the Staff Judge Advocate who is required to write his opinion to advise the Commanding General if the charges are:

1. Correct and complete in form.
2. Appropriate to the indicated competent evidence in the case.
3. Whether or not a prima facie case, justifying trial or other proceedings, exists.
4. Whether each count states an offense cognizable by court-martial.
5. Whether the indicated competent evidence justifies trial on each charge, and if not on all, on which ones.
6. Whether the evidence as contained in the summary of the statements of witnesses or documents or other evidence

submitted is incompetent to be introduced in the trial for any reason.

7. Whether in view of the report of a medical officer or on any other grounds there is reason to believe that the accused may be mentally deranged either temporarily or permanently.
8. The age of the accused, and with an expression of the further view as to what disposition he believes should be made of the case.

The Staff Judge Advocate further expresses the view with respect to these preliminary papers:

1. Whether the case should be dismissed without trial or further proceedings.
2. Disposed of by company punishment.
3. Referred to trial by inferior court.
4. Referred to trial by General Court.
5. Disposed of by taking steps looking to the discharge of the accused.
6. Whether a medical board should be convened on account of mental defect or derangement.
7. And whether the accused should be surrendered to trial by civil authorities or the case disposed of in any other manner than in one of the cases just mentioned.

Assuming that it is a serious offense and that the Staff Judge Advocate concludes that the charges are properly drawn and state an offense or offenses under the appropriate Articles of War, that the preliminary and jurisdictional steps have been properly taken and that the indicated evidence offered at the trial will be sufficient to sustain a conviction, the charges and all the accompanying papers, together with the opinion of the Staff Judge Advocate, are forwarded to the Trial Judge Advocate of a General Court with the direction to bring the case to trial before the court of which he is the prosecutor. The Trial Judge Advocate promptly serves a true copy of the charges together with the accompanying papers on the accused and proceeds to bring the offender to trial. However, the trial does not take place until at least five days after the serving of the papers just mentioned.

Fundamentally the trial is conducted very much like a criminal case in civil practice. I have recited how the court is appointed.

You have heard of the duties of the law member, of the trial judge advocate, and of defense counsel. A court reporter who has been previously designated is sworn. The trial judge advocate inquires of the defense counsel and the accused whether he desires to introduce individual counsel and asks the accused if he desires a copy of the record of his trial. If he desires a copy of this record the court reporter is directed to prepare a carbon copy of the record. The order appointing the court is read to the accused. The members of the court are asked if any member present is known to be the accuser, or has formed an opinion concerning the case, or for any reason thinks himself disqualified, or is aware of any facts which he believes might cause him to be challenged, in order that he may be excused or challenged. Such officers who are disqualified are excused and retire from the court. The accused is then asked if he objects to being tried by any member of the court present or desires to exercise his right as to a peremptory challenge against any member of the court except the law member.

After all members who have any interest, opinion or prejudice in the case or who have been objected to by the accused have been excused, the court and the trial judge advocate are sworn. It should be observed in connection with the swearing of the court and the trial judge advocate that failure of the record to show that fact is fatal error requiring the disapproval of the sentence.

The accused is then arraigned. He may interpose at this time any of the known pleas such as plea to the jurisdiction, plea in abatement or in bar of trial. These pleas are taken up and disposed of by the same method and with the same effect prevailing in other courts of justice. Assuming that any special plea interposed has been over-ruled, the accused is then required to plead to the general issue, "guilty" or "not guilty". If he declines to plead the court may proceed to try him the same as though he had pleaded "not guilty"

If a plea of guilty is entered its meaning and effect and the maximum punishment that may be imposed for the offense must be carefully explained to the accused by the law member of the court and the accused be given the opportunity to change his plea to "not guilty"

The order of proof is not unlike that followed in a civil court of justice. The common law of evidence governs in military courts except where the common law has been modified by Federal statute

or regulation made pursuant to statute. The purpose of evidence in a military court is the same as that obtaining in the civil courts. It is to elucidate and settle the issues raised in the case. The proof is required to be confined to such issues under the well known rules of evidence which experience has shown best conserves the interests of all concerned. Evidence of course must be competent, relevant and material.

If the court finds the accused "not guilty" the case is ended. The defendant stands acquitted. He is at once released from confinement and restored to duty.

If he is found "guilty" he is sentenced in open court. The court reporter transcribes the proceedings and the record is made up and forwarded to Corps Area Judge Advocate for review and opinion as to its legal sufficiency. This reference to the Judge Advocate is in the nature of an automatic appeal. The sentence is not effective until the record of trial has been reviewed and found by the Judge Advocate legally sufficient to support the findings and sentence. No steps by the accused are necessary to get the benefit of this review.

When the evidence in support of a charge is weak or conflicting or where the evidence for the defense tends to weaken the evidence for the prosecution or disprove the allegations in the charge, the Judge Advocate reviews and weighs all the material evidence relating to the charge and gives his opinion both as to the weight of the evidence and of any errors or irregularities that may be involved and as to whether or not the findings of "guilty" should be approved together with his reasons for such opinion. All errors as may have been committed prejudicial to the accused in the course of the trial or in the preparation of the record and all irregularities as may have affected the validity of the proceedings or the sentence are covered and each error or irregularity is carefully weighed in the review for the purpose of informing the Commanding General whether or not he should hold the sentence invalid or direct a rehearing.

After discussing the facts in the case and the law involved the Judge Advocate considers the sentence as to whether it should be approved, modified or reduced, and prepares a draft of action to be taken by the Commanding General. This action is a statement of the Commanding General's decision and order in the case. It not only declares what punishment shall be imposed, but in the event

confinement is approved, designates the place of confinement.

The court may, in addition to confinement and forfeitures, adjudge that the person convicted be dishonorably discharged from the service. It will be observed that a soldier cannot be dishonorably discharged from the service except by a sentence of a General Court-Martial.

A dishonorable discharge is, in itself, a severe punishment and is usually suspended until the period of confinement has expired, unless the conviction has been for an offense involving that degree of moral turpitude which disqualifies him for further military service. The sentence of a court adjudging dishonorable discharge is usually suspended in a case involving a purely military offense, especially when the accused is relatively young and his record, except for the offense for which he stands convicted, is good.

When the dishonorable discharge is suspended the prisoner may, if he desires, by good conduct and strict attention to his duties redeem his record and earn an honorable restoration to duty with the colors.

If the confinement imposed be less than six months, the guard-house at the local military post is designated as the place of confinement, but if the period of confinement be more than six months the prisoner is committed to the disciplinary barracks. Usually the disciplinary barracks selected for military prisoners from this territory is the one at Fort Leavenworth, Kansas.

If the conviction is for a felony and the prisoner has been sentenced to be confined for a term exceeding one year he may be confined in a United States Penitentiary, but by no means is every offense that is legally punishable by confinement in a penitentiary so punished. The dividing line between offenses legally punishable by confinement in a penitentiary and those not so punishable is necessarily in many cases arbitrary. For instance, the difference of a single cent in the value of two articles stolen may make the offense in one case grand larceny legally punishable by penitentiary confinement, and in the other case petty larceny not legally punishable by confinement in such an institution.

Accordingly, in considering the place of confinement to be designated, careful consideration is given to all the circumstances, the nature of the offense, the offender's age, his mental condition and development, and his prior service and military record, with a view

of determining whether, the interests of justice and discipline demand confinement in a penitentiary where such confinement may be legally directed or whether confinement in a disciplinary barracks would serve to vindicate the law. In the case of youthful offenders who have not exhibited fixed criminal tendencies and whose offenses are not of such a character as to endanger the future of the disciplinary barracks as a reformatory institution the disciplinary barracks may, with propriety, be designated instead of a penitentiary as the place of confinement.

As a further step looking to the protection of the legal rights of the prisoner, after the case has been acted upon by the Staff Judge Advocate and the Commanding General, the record of trial, all accompanying papers, the action of the Commanding General and the opinion of the Staff of Judge Advocate are transmitted to the Judge Advocate General at Washington, D. C., where it is further examined. In cases involving dishonorable discharge, not suspended, dismissal and those in which a penitentiary has been designated as the place of confinement, the record of trial is passed upon by a board of review and the Judge Advocate General, in whose office the record of trial, the opinion of the Staff Judge Advocate reviewing the case, and the action of the Commanding General, together with the other papers in the case are filed.

These remarks have taken you through an ordinary case tried by a General Court-Martial step by step from the moment of the arrest to the approval of the sentence and the confinement. Of course, many details have been necessarily omitted. A study of this procedure will I am sure convince students of law, familiar with practice in civil courts, that, at each stage of the proceedings, the legal rights of the accused before a military court are carefully guarded. Indeed it is difficult to conceive a system of justice where greater precautions could be taken in behalf of one charged with an offense when his life or liberty is at stake.