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# Courts-Martial

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There is one fact for every budding critic to bear well in mind in approaching the system of military law or anything else connected with the military establishment. Here is a field of necessary activities, which for many years lay choked and barren by virtue of popular neglect. Until the advent of war, the Army and the Navy were not supported by our people; its officers and men were flouted and derided, and the opinions of the best experts they could produce were kicked from pillar to post. Therefore, it is well and just that the public stifle its bitter reproaches, its saeva indignatio, against the services and their officers, accept its own share of responsibility for their mistakes, and confine its opinion to a calm estimate of how to better the situation for the future.

One illustration of just how attentive civil life has been to conditions in the military service, may not be inappropriate. This horrible example is taken from the House Naval Affairs Committee, where one might properly expect to find concentrated civil wisdom on service affairs. The writer had the somewhat qualified pleasure of seeing a letter from a member of this Committee to a Captain of Marines, a Company Commander, requesting the immediate discharge of a certain marine and threatening to take up the matter with Secretary Baker. The Company Commander's reply painfully explained that the Marine Corps was subject to the control of the Secretary of the Navy and not the Secretary of War. Incidentally, in order that another straw may not be unjustly laid on the back of the overburdened administration, it may be stated that the author was a Republican, although it is not claimed that the Republicans have a monopoly on ignorance.

Approaching the subject of military courts-martial with impartiality between civil and military law, it is possible that the experience of a civilian lawyer, in the trial of numerous general and summary courts-martial for over two years, may warrant a few comments and suggestions. Although the Army courts have borne the brunt of criticism, the Navy system is essentially the same, and general comments upon the latter necessarily apply to both.

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The hue and cry that courts-martial are composed of grim martinets, bristling with importance, to whom the enlisted man is a shrinking creature to be hunted down and done to death, is an excellent specimen of the worst rot than can be uttered on the subject. Courts-martial, on the contrary, are composed in the majority of good fellows who are considerably bored with the proceedings, have an idea that they can pick up the proper judgment offhand, and whose strict attention is only focused upon any point by considerable effort on the part of counsel. This is not peculiar to military law. The same phenomenon is frequently exhibited by our judges, as any lawyer well knows who has seen the judicial eye roving to the clock at all stages of the proceedings. Then, the habit of prejudging, also not unknown to civil courts, is common with courts-martial. Almost, as a matter of course, the members pick up camp gossip on the cases they are about to try. As an example of snap-judgment, a member of a general court told counsel, after only one witness in a long case testified, that he thought this witness was a liar and he was going to vote for acquittal. Such abuses arise simply from the infirmities of human nature, which consistently renders slip-shod all science and system that touches it. To a certain extent, these eccentricities would be obviated by the provision of a trained legal corps for duty on courts-martial only. But the difficulties are insuperable. The proper judicial timber could not be obtained to devote itself to trying Pvt. John Jones for spitting at Sgt. Smith or Cpl. Brown for getting a huge jag out of a bottle of vanilla extract. The result of establishing a legal corps would be to get a personnel of half-baked lawyers who would be infinitely worse than the run of fairly practical men who now sit on the courts. Whatever improvement is possible must be made along the line of a more thorough legal education of officers, a course impracticable in war times.

The provision of competent counsel for the accused is without doubt important. The tendency of courts-martial is to consider counsel as more or less of an impertinence, particularly when he takes issue with a member of the court. The horror with which certain majors and colonels regard an objection by a lieutenant to their sometimes ridiculous questions, may be readily imagined. Counsel, who has a little rank or is a lawyer and knows his rights, will not allow himself to be intimidated in the least. And the consistent assignment of such counsel only will familiarize court members with the certainty that their dignity will be infringed whenever they interfere improperly with the defense or otherwise misconduct themselves. A

necessary amendment to existent courts-martial law is, therefore, a provision that, upon the request of accused for counsel in a general court-martial case, the commanding officer shall not detail an officer below the rank of captain, unless such officer is a graduated and licensed lawyer. The suggestion that a civilian lawyer be detailed for every general court is absolutely impractical. First, American civilian lawyers are not available in many places where troops serve and courts-martial convene; second, the payment of fees would create a job-seeking, wire-pulling class or at least the feeling that such a class existed; third, the civilian frequently rubs a military court the wrong way by his ignorance of military life, and cannot possibly work as effectively for the accused as can an officer who knows the members of the court and is on terms of often intimate friendship with them.

A finding of acquittal by the court should terminate the proceedings: the present right to change to a conviction is really intolerable. The writer defended the cases of two men, separately arraigned, who had participated in the same transaction. The specifications were badly drawn, and the men were not guilty of the offense charged, although possibly guilty of another minor offense. After considerable effort, the court acquitted the first man, the finding being, according to regulations, a profound secret, although, of course, everybody knew what it was. The second case came on. The accused did not create a favorable impression, and, although the facts were identical and the law had not changed in half an hour, the court convicted him. Then, to make it unanimous, the court went back to the first case, struck out the acquittal and entered conviction there. This case was stamped upon my memory by a subsequent letter from the mother of the once-acquitted man, then in the Naval prison, stating that she was dying and wanted to see her son. The thing to be emphasized is that the court acted within its rights: the court is not to be blamed, but a particular feature of the system, for which public indifference to military affairs is largely responsible.

An acquittal may be disapproved and the case sent back for revision by the convening authority. The court theoretically cannot be compelled to change its finding, but practically the feature of compulsion is there. The same thing applies to proceedings in revision looking to a heavier sentence. No one wants to have his actions disapproved by his military superior, particularly if such disapproval may be accompanied by nasty comment which will injure his military record. The writer is firmly convinced that the severity of many sentences is due to the natural, human feeling of courts, that they are only safe

from criticism if they lay it on thick, in which case the convening authority can mitigate without returning the case for revision. The opinion that this is the only practicable course to follow under the system, is so often expressed by experienced officers, and the cases are so often illustrative of such course, as to offer no escape from this conclusion. As one illustrative case, an officer, who had served many years without a spot on his record, participated in several expeditions with honor, distinguishing himself particularly at Vera Cruz, who was in addition one of the most valuable technical men in the service, was tried for a casual affair with a woman. The writer does not believe that a single member of the court thought this man should be dismissed from the service, or that, if their judgment had been free, they would have considered for a moment a penalty greater than fine and loss of numbers. But they voted unanimously for dismissal simply because they knew the extreme opinions of the Secretary of the Navy on such matters, and that they would only succeed in hanging themselves also if they refused to sacrifice the required victim. Again, neither are the members to be blamed for having the normal instincts of self-preservation, nor is the Secretary to be blamed for having private opinions; but the system, which masks personal views as final arbiter under the guise of a judicial proceeding, is in that respect a mockery and a farce. The appropriate remedy for this serious defect is a provision that a finding of acquittal shall be final, and that proceedings in revision shall not lie to revise a sentence upwards.

The secret finding and sentence is closely akin to the practice of convicting acquitted men and revising sentences upward. Indeed, that practice is the only excuse ever offered for secrecy; although the connection is difficult to understand unless the system is ashamed to let it be known that a man has been first acquitted and then convicted. In any event, this gum-shoe, hush-hush proceeding should stop. In the first place, it is a joke. Of course, everybody is solemnly sworn to secrecy, but everybody also knows that it is a lot of monkey-business and that strict secrecy is of no practical importance. In consequence, anybody who has sufficient curiosity, can nine times out of ten get a hint which discloses what the finding was. If the accused has a previous conviction, which often is the case, no hint is necessary, his record is read if he is convicted, but not read if he is acquitted. In such cases, we have therefore the solemn comedy of a court, sworn to secrecy on its verdict, disclosing by its next act exactly what that verdict is. To repeat, court-martial secrecy is a joke; but a very bad joke. It casts a twilight haze over the proceedings, which encourages members to find

verdicts and impose sentences that they would hesitate considerably about if they had them to proclaim face to face with accused, counsel and spectators. It is unmanly, unfair and archaic, and serves no useful purpose whatsoever. Both Gen. Crowder and Col. Ansell agree that convicting acquitted men, revising sentences upward, and secret findings and sentence should be abolished.

A limitation should be imposed upon trying a man at the same time for all sorts of different offenses. An accused was tried on three charges: (1) Theft, (2) Unlawful possession, (3) An insubordinate remark about a sergeant. He was acquitted of the first two charges, convicted on the third and sentenced to two years. Without the shadow of a doubt, the court was punishing him for the theft of which they had insufficient evidence, but believed him guilty. This system of heaping up entirely disconnected charges is vicious in the extreme, and offers an opportunity to convict anybody by raking up all of his past delinquencies and heaping them upon him. The limitations of joinder in the Federal Criminal Code permit sufficient latitude to the prosecution in allowing joinder of acts arising from "the same transaction," "or connected together," or comprising "the same class of crimes," in the latter case discretion to compel election resting with the trial court. These provisions ought to be incorporated in the military law and thus prevent the possibility of trying a man at the same time for murder in Alaska and chicken-thieving in Texas.

The rigidity of the proceedings and record, the insistence upon the most trivial matters, is a noticeable feature of the court-martial system. The reformers do not make much of this, apparently because it favors the accused, and no popular gnashing of teeth can be aroused over the escape of military offenders on technical grounds. The charges and specifications are often very badly drawn, indeed the draughtsmen in the department seem at times to have a positive genius for charging everything else except what the man is guilty of. This may be due to misconceptions arising from the papers submitted, the draughtsmen having no opportunity to interview the witnesses personally. I speak now only of general courts-martial originating in the department at Washington. In every case, the trial judge advocate should have more authority and responsibility. If he interviews the witnesses, he should prepare the charges and specifications and forward them with the statements of the witnesses. Before and at the trial, he should have the power, subject to the court's approval, to amend the charges and specifications not merely in trivialities but in substance, reserving to the accused, if taken by surprise, the

right of postponement. The idea, that the trial judge advocate and the court are not competent to do this, is simply typical of the old military style which is not satisfied unless it has a colonel doing a second lieutenant's job. No record should be sent back for revision except for errors in substance; any inartificial statement that conveys the appropriate meaning should suffice. The writer has seen a case returned because the sentence was to perform extra "police duty," instead of "police duties." This is typical also.

The practice of clearing the court to rule on all objections to evidence is impossible. This unduly protracts the trial. I have known instances where all participants cooled their heels for over half an hour outside while the court discussed simple objections, such as "leading." The result is that counsel has to pass up all sorts of improprieties in order to get through at all. The President of the Court should rule on all objections to evidence, unless other members indicate a desire to participate, and then the discussion should be informal, unless a majority of the court votes to clear the court room. There is nothing to prevent this practice being now followed, but it is not and will not be until some law or regulation makes it mandatory.

In spite of the several glaring defects pointed out in the court-martial system, the writer's experience is that substantial justice is done by courts-martial about as well as by civil courts. The army, by virtue of its stupendous increase and total re-organization, was up against a much stiffer proposition than the Navy, and its courts-martial problems were proportionately more difficult to solve. For this reason, temporary and abnormal conditions may have in some cases produced abnormal results. But the wholesale indictments, the frothing and raving, the appeals to popular prejudices about martinets and Prussian militarism and all such buncombe, with which the reform agitation has been accompanied, cannot be regarded properly as other than barren and disgraceful. This arouses the same ignorant prejudices that have killed any attempt to improve the military establishment in the past, and by catering to such influences makes a pretty poor start towards improving it in the future. The defects in the system are plain, and most of them easily identified. Bills to remedy them were before Congress in the early part of last session, and, if Congress had attended to its business, they would have been passed before the court-martial fanfare started. Thinking men do the country a great disservice when they encourage Congress in its preference for investigation and raving and its dislike of work.