NAVAL WAR COLLEGE, 1896. NAVAL LAW AND NAVAL COURTS

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(Address delivered by Chas. H. Lauchheimer, First Lieutenant, U. S. Marine Corps, at the War College, Newport, R. I., August 28 and 31, 1896.)

GENTLEMEN:

The subject assigned me by the President of this College—Naval Law and Naval Courts—is one of such magnitude that it has been quite a task to condense into two lectures such features as I trust will be not only interesting but at the same time instructive to the student of that branch of our profession which, I regret to state, has hitherto been neglected and not given that degree of attention which its importance merits. A knowledge of naval law is, in my humble opinion, necessary to the Naval officer who desires properly to perform the functions of his office, no matter what his rank or position may be. I have designed to preface my remarks with a brief history of naval law, and then to discuss the various tribunals which by statute are in force in the naval service, and which are known as Naval Courts.

NAVAL LAW.

Naval law is synonymous with military law, and in its restricted sense is the specific law governing the Navy as a separate community. Ordinarily and for all practical purposes military and naval law may be considered under the general head of military law, and hereafter in these lectures whenever the term military law is used, it is to be understood as including naval law, *i. e.*, I will speak of that branch of the law which governs the Army, Navy, and the Militia when called

into active service, but with special reference however to that branch thereof which pertains to the naval service.

At the very beginning may I ask your attention to the distinction between military and martial law, the latter being operative only in time of war or like emergency when the military government supersedes the civil, and has as its object the control of the respective armies and of those violating, in respect to said armies, the laws of war; whilst military law, as before stated, is the specific law governing the Army and Navy, in time of peace as well as war.

Historically considered, military law antedates the Constitution, but as, however, all law, both public and private, began to exist or operate anew from the time of this instrument, it is customary to designate the Constitution as the source of all military law. We have, therefore, only to look at that document to find the specific provisions which may be regarded as the source or sanction of our present military law and its jurisdiction, and they are as follows:

Congress is empowered "to define and punish offenses against the law of nations;" "to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water;" "to raise and support armies;" "to provide and maintain a navy;" "to make rules for the government and regulation of land and naval forces;" "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" "to provide for organizing, arming 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,"(*i. e.*, those set forth as well as others in the same section), "and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." The President, as Commander-in-Chief of the Army and Navy of the United States and of the militia of the

several states when called into the actual service of the United States, is empowered to appoint (in conjunction with the Senate) and to commission the officers of the Army and Navy, etc., and it is also made his duty "to take care that the laws be faithfully executed."

And perhaps the most important of all, the Fifth Amendment, which provides that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

Military law, which as I have before stated, is operative both in peace and in war, is both written and unwritten, just as is the civil law.

The written military law, so far as it applies to the navy, is founded upon the statutory code known as the Articles for the Government of the Navy; other statutory provisions relating to the Navy; the Navy Regulations, and general and special orders issued by the Department.

The unwritten military law, while it has derived from the common law certain of its precepts and doctrines, has nevertheless an unwritten law distinctively its own, which consists of certain established principles and usages peculiar or pertaining to the naval service, and which, from their immemorial usage, are as well known to the officers of the service as are the doctrines of the common law to the lawyer. The customs of the service are recognized as binding on courts-martial, and in fact, by the act entitled "An act for the government of the Navy of the United States," approved March 2, 1799, it is provided that "every commander-in-chief and captain, in making private rules and regulations, and designating the duties of his officers, shall keep in mind also the customs and usage of the sea service most common to our nation." This, in effect, provides a statutory enactment for the recognition of the unwritten military law.

In our service the unwritten military law is very meagre, for from time to time the customs of the service have been embodied in the Navy Regulations, and have thus become part of the written military law. Still there does exist an unwritten military law, and perhaps it will not be out of place to state here that in order that a particular usage or custom may have the force of unwritten law, it must fulfill certain conditions, the most important of which are that it must be uniform, well defined, and equitable; must be of long standing; must be certain and reasonable, and not in conflict with statute or constitutional provisions, and must be so long continued and notorious that all persons concerned may be presumed to have knowledge of it. It must also refer to a subject upon which the written law is silent, and must not be prejudicial to discipline. It is essential that all these conditions be present in order that the custom or usage may come within the category of the unwritten law.

Naval law, therefore, as we find it, is principally statutory law, or regulations made in conformity therewith, and the customs of the service.

With this short review of what naval law is, we will pass to the consideration of those tribunals by which it is administered, *i. e.*, courts-martial and courts of inquiry, and will first trace briefly the origin and history, the nature as a legal tribunal, the constitution, the composition and jurisdiction of courts-martial.

ORIGIN AND HISTORY.

Some form of tribunal for the trial of military offenses seems to have existed since the early history of armed forces. In Rome, justice was administered by the *Magistri militum*, and especially by legionary tribunes either as sole judges or with the assistance of councils. Among the early Germans, in times of peace the courts were held by the counts, assisted by the freemen, but in time of war by the duke or military chief, who generally delegated this authority to the priests who

accompanied the army; later, courts of regiments were formed, and the matter was left to the colonel of the regiment, who could, however, delegate his authority to an officer by investing him with the staff or mace called the *regiment* as the emblem of judicial authority. Courts-martial proper (Militär-gerichts), however, probably date from the Articles of War promulgated in the time of Frederick III, 1487; they (the courts) were specifically provided for in the penal code of Charles V, although more accurately defined in the articles of Maximilian II, of 1570. In France, courts-martial (conseils de guerre) were first established by the ordnance of 1655. Previous to this, military prisoners were subjected to the jurisdiction, successively of the Mayor of the Palace, the Grand Seneschal, the Constable, and the Provost-Marshal. In England, the original of the modern court-martial is seen in the "King's Court of Chivalry," or as it was also called the "Court of Arms" or the "Court of Honor," of which the judges were the Lord High Constable and the Earl Marshal. These officials also formed part of the "Aula Regis" of William the Conqueror, but it was not until the sub-division of that tribunal into separate courts by Edward I, in the latter part of the 13th century, that the Court of Chivalry had an independent existence; as thus constituted its jurisdiction was an extended one applying to matters both civil and criminal, and touching "all matters of honor and arms," "pleas of life and member arising in matters of arms and deeds of war," "the rights of prisoners taken in war," and also to "offenses and miscarriages of soldiers contrary to the rules of the army" and to "civil crimes and matters of contract." Owing to the extended jurisdiction accorded to this tribunal, it gradually encroached upon the common law courts and consequently it was, by various acts of parliament, gradually shorn of much of its power, and although never specifically abolished by statute, it had, nevertheless, before the English Revolution, practically ceased as a military tribunal. Subse-

quent to the decadence of the Court of Chivalry and preceding the first mutiny act, justice was administered by martial courts, or councils, convened in accordance with the articles of war then in force. During the reign of the Tudors and Stuarts and prior to the Petition of Right, military law, as administered, resembled martial law rather than military law of modern times, as civilians were tried by courts-martial and even the death penalty inflicted upon them in cases where the law of the land did not authorize such jurisdiction or punishment. Finally, by the mutiny act of 1689, the death penalty was prohibited except in certain cases and the Sovereign (for the first time by legislative authority) was expressly empowered to grant commissions to convene courts-martial, and this authority was gradually increased and enlarged by subsequent mutiny acts and Articles of War, and finally established and defined by the Army Act of 1881.

The English military tribunal having been transplanted to this country prior to our Revolutionary War, was recognized and adopted for the army by the Continental Congress in the Articles of War of 1775, in which the different kinds of courts were distinguished and their composition and jurisdiction defined. These articles were amended by those of 1776 and 1786. The first act of the Continental Congress tending to the establishment of rules and orders for the Navy of the United Colonies was passed November 24, 1775. This was subsequently modified from time to time, and finally enacted into the first act for the better government of the Navy of the United States, approved April 23, 1800. Since then articles have, from time to time, been enacted, those referring to the Army being known as the "Articles of War," and those referring the Navy as "Articles for the Government of the Navy." The articles under which naval courts now derive their power and jurisdiction are contained in the act approved July 17, 1862, and known as Section 1624 of the Revised Statutes.

NATURE OF THE COURT-MARTIAL AS A LEGAL TRIBUNAL.

By Article 1, Section 8, of the Constitution, Congress is empowered "to make rules for the government and regulation of the land and naval forces," and in pursuance of this authority it has enacted "Articles for the Government of the Navy," which contain provisions relating to the organization, jurisdiction, and other features of naval courts-martial. The Fifth Amendment, before referred to, is also frequently considered as the source of authority for courts-martial, for, as stated by Attorney-General Cushing (6th Opin., 425), this amendment "expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law," and, as was decided in the case of Trask vs. Payne, (43 Barb., 569) "this provision practically withdraws the entire category of military offenses from the cognizance of the civil magistrate, and turns over the whole subject to be dealt with by the military tribunals." This decision has only recently been confirmed by the Supreme Court in the naval case of Johnson *vs.* Sayre (158 U. S., 109).

Another authority for the creation of courts-martial is attached to the constitutional function of the President as commander-in-chief of the army and navy.

Courts-martial of the United States, have a legal sanction of equal importance with the federal courts, still, unlike the latter, they are not a portion of the judiciary of the United States, and are not, therefore, included among the "inferior courts" which Congress "may from time to time ordain and establish." In the leading case of Dynes vs. Hoover (20 Howard, 79), the Supreme Court held, referring to the provisions of the Constitution before referred to, that "these provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any con-