

## Book Reviews

MILITARY EVIDENCE. By Joe H. Munster<sup>1</sup> and Murl A. Larkin.<sup>2</sup> Indianapolis: Bobbs-Merrill Co., Inc., 1959. Pp. xix, 562.

Military justice is an important phase of military law. Codes under which it has been administered are as old as the profession of arms. The purpose of such codes has been to provide a uniform rule for the administration of military justice. Military evidence has always been of vital importance in that endeavor. In the United States the first code is to be found in the Articles of War enacted by Congress in the exercise of the constitutional power contained in Article I, Section 8, Constitution of the United States, "to make rules for the government and regulation of the armed forces." That code had its inception when the second Continental Congress on June 14, 1775, resolved that a military force should "be immediately raised" and on the same day appointed a committee consisting of George Washington, Philip Schuyler, Silas Dean, Thomas Cushing, and Joseph Hewes "to prepare rules and regulations for the government of the Army." On June 28 of that year a code of sixty-nine articles was presented to the Congress and adopted by that body. The duties of the committee were apparently not arduous because it seems that the code presented was substantially a copy of that in effect in the British service, the articles of which had their inception in remote antiquity.<sup>3</sup>

Over the nearly two centuries which have passed since the adoption of our first code, our Army and Navy and more recently, our Air Force, developed procedures, under specific authority of Congress, which each service deemed essential to the operation of military discipline in its own service. The effectiveness of any code of military justice is tested by operation in time of war. Accordingly, from time to time and especially after the various wars, the procedures were reviewed and changed to meet modern war conditions.

The most recent change in the law on this subject was the Act of Congress passed in 1951 entitled The Uniform Code of Military Justice.<sup>4</sup> Under authority of that statute there was published The Manual for

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<sup>3</sup> WINTHROP, MILITARY LAW AND PRECEDENTS 17-22 (2d ed. 1920).

<sup>4</sup> 10 U.S.C. §§ 801-940 (1958).

Court-Martial 1951, a relatively small publication which was intended as a guide for carrying out the law. The effective date of the code and the manual was May 31, 1951, on which date all previous manuals and codes were superseded. One of the principal purposes of the legislation was to bring all our military services under one uniform disciplinary code. Among the more important changes were: the provision of a single Court of Military Appeals; a provision requiring that all law officers (formerly law members) of general courts-martial be lawyers; a provision permitting enlisted men on trial before general or special courts-martial to be entitled to have enlisted men sit as members of the court, and a provision that in all general courts-martial both the trial counsel and defense counsel be lawyers who are qualified, licensed to practice and certified by the Judge Advocate General of their service to be competent. There is a further related provision which requires that when the trial counsel of a special court-martial is a qualified lawyer, the defense counsel be likewise qualified. There are a number of other changes of consequence, both as to the law and as to procedure.

The most far-reaching of the changes was the establishment of a United States Court of Military Appeals. The eligibility of a member of the armed forces for appointment to the court is precluded by the requirement that the court "shall consist of three judges appointed from civil life." A further restriction is provided by the language of the statute which provides that "Not more than two of the judges shall be appointed from the same political party." The code provides that except in somewhat rare instances wherein the action by the president or a secretary of a service is required, the action of the appellate court shall be final on all questions of law.

The underlying purpose of codes of military justice is to provide a fair and just procedure whereby persons charged with military offenses may be brought to trial promptly, the records of trial in the case of those found guilty expeditiously examined for legal sufficiency, and that whatever sentence is approved be executed without delay. It should be noted that admission of persons to bail is unknown in the military establishment. Long delays for any reason, though undesirable, are not fatal to the administration of military justice in time of peace. However, in time of war it is imperative that all phases of military justice operate with a minimum of delay consistent with justice. Delays such as was witnessed in the recent case of Chessman in California, in time of war, would seriously impair military discipline. Any avoidable delays which would operate to load up the military establishment with persons awaiting trial or approval of sentences might lead to grave consequences.

After every war it appears to have been customary to investigate military justice during the preceding war period. The primary complaints have been that the proceedings were unduly expedited and that the sentences were severe. To these complaints the military has answered that in time of war expeditious justice is essential to military discipline and that sentences should be sufficiently severe to compel immediate compliance with directives. The military points out that all sentences should be reviewed, adjusted and equalized, by appropriate authority at a subsequent time, and that in practice it always has been done. At such investigations it has been frequently urged that final control be taken from the military and placed under civilian auspices. The present code had that objective in view and has placed final control as to the law in the Court of Military Appeals. This was a step forward in that, appeal on the law to an independent judiciary is permitted in military cases. The military has no cause for complaint since the system relieves military authorities from a responsibility which has sometimes been onerous. Operation under the new code has been in effect since 1951 and has proved to be highly satisfactory to all concerned.

Some appreciation of the extent of the practice of criminal law in the armed forces may be gleaned from the fact that in the calendar year 1957, 181,171 cases were tried by courts-martial. To be sure, as in the operation of the criminal courts in civil administration, the vast majority of those cases were disposed of by summary courts-martial. Nevertheless, a very considerable number of the cases were finally passed upon by the Court of Military Appeals. Already, nine volumes of Reports of the Court of Military Appeals have been published. An indication of the number of lawyers who are or expect to be engaged in one phase or another of the court-martial procedure is indicated by the fact that 7,500 lawyers have been admitted to practice before the Court of Military Appeals. The civilian attorneys admitted to practice before that court far outnumber those in the armed forces, and all of the fifty states are represented.

Coming now to the matter of military evidence, Article 36 of the Uniform Code authorizes the President to prescribe procedures, including modes of proof, in cases before courts-martial, by regulations which "so far as he deems practicable, (shall) apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts. . . ." This is not a new provision since it has been the law and the general practice for many years. Over the centuries of military experience, there have been developed many offenses of purely military character which have no counterpart in civil administration. Offenses of this character are illustrated by the military offenses of desertion, conduct unbecoming an officer

and a gentleman, malingering, and forcing a safeguard. There is also a catch-all article known as the "General Article" which proscribes "all disorders and neglects to the prejudice of good order and military discipline in the armed forces, (and) all conduct of a nature to bring discredit upon the armed forces. . . ." Under the customs of the service, and long practice, there has been built up a body of rules of evidence which is distinctive, and in many respects is at variance with the rules applicable in the United States District Court.

Although some of the saber rattling, which formerly characterized courts-martial, has largely disappeared, much formality continues and at all levels the courts operate with full military dignity. Civilian attorneys trying cases before military tribunals sometimes find themselves embarrassed by unfamiliarity with procedure and the rules of military evidence. For example, since every record of trial is subject to an automatic review on the facts as well as the law, the failure to make timely objection and to take prompt exception to what is considered an adverse ruling of law by the court does not have quite the serious effect that it does in civil proceedings. Frequent objections on minute technical matters, taken in the manner customary in civil courts, has a tendency to irritate members of courts-martial who are not familiar with civilian practice and they are prone to consider repeated trivial objections as annoying and unnecessary interruptions.<sup>5</sup>

The rules of military evidence are binding upon every military tribunal from the summary court-martial, the lowest echelon, to the Court of Military Appeals. Members of summary and special courts-martial are not required to be lawyers and, in practice, normally the officers selected have not had the benefit of a formal legal education. With the exception of the law officer, this applies to the membership of the general court-martial. However, every effort is made to select men for these duties who have had long experience in disciplinary matters. All have received training intended to fit them for this duty, and many whom

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<sup>5</sup> In the case of the trial of General Yamashita before a war crimes tribunal in the Phillipine Islands after World War II, the prosecutor and the defense counsel and their assistants were Army officers who were experienced civil lawyers. The procedure followed neither the military nor the civil practice, but the court was composed of military personnel. Each side made frequent objections in the approved civil court fashion. Some of the objections were taken in a heated manner. Many were overruled by the use of the phrase "not sustained." General Muto, who was the Chief of Staff for General Yamashita, was present at the trial. He understood no English and was wholly unfamiliar with American military or civil legal procedures. He concluded that the word "objection" had some reference to a civilian whose name was "Mr. Jackson." He asked the Japanese interpreter, "Who is this Mr. Jackson Captain Reel is always talking about? He always jumps up and says 'Jackson.'" When it was ascertained that "Jackson" was General Muto's understanding of the frequently voiced word "objection" he was informed by the interpreter that "Jackson's last name was 'Not sustained.'" (Case of Yamashita by Captain A. Frank Reel).

this reviewer has known have been truly expert in the limited field in which they are called upon to act. The system of automatic review is extensive. Every case receives at least one review. The more serious cases are reviewed at successive echelons up to and including the Board of Review in the Office of the Judge Advocate General of the service concerned. At these various levels the examination is by lawyers who are expert in their field. Cases involving contested questions of law and certain other classes are taken on appeal to the Court of Military Appeals. It has been said that this elaborate system of automatic examination and review insures that an innocent man is never convicted. It has been said also, that by the same token, the system is such that precious few guilty persons escape conviction.

All career lawyers in the armed forces have available to them adequate research facilities with which to perform their duties. Non-lawyers, especially in the lower echelons, have only a minimum of research facilities available to them since their limited practice of law is only one of many important functions they are called upon to perform. However, free legal advice is always available to them and it is surprising to learn the extent to which these laymen avail themselves of that advice.

In their publication, *Military Evidence*, Captain Munster and Captain Larkin, both of the United States Navy, have sought to produce a volume which will meet the needs of the non-lawyer in the lower echelon as well as the professional lawyer, whether in civil life or in the military service. The authors have succeeded admirably in their endeavor. The format of the book is excellent. It covers the field well and is carefully written in simplified language which can be readily understood by laymen and at the same time may be perused by professionals with great profit. It is well annotated, and is a work which could only have been accomplished after painstaking research. The extreme care in preparing the index makes it a most usable publication. In the opinion of this reviewer, there is a definite field for this publication, it is timely, and, in Navy terms, it is entitled to the salute of "Well Done."

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