Volume 10 | Issue 1 Article 2

1956

The Military Law in Civilian Practice

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THE MILITARY LAW IN CIVILIAN PRACTICE †

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"TOO few persons realize it," recently said General B. W. Chidlaw, then Commandant of the Continental Air Defense Command, "but America has entered into a new way of life. For the first time in nearly a century, United States' homes are threatened directly by the scourge of war, and we must learn to live with this threat, for it promises to be with us indefinitely."

Whether we ourselves discount the imminence of the war-threat because of the recent *debout-face* of the Soviet high command in its strategy of approach toward world-domination, or believe that we should maintain an efficient striking-force in case the suddenly-friendly Russian bear should become ferocious again, it is manifestly the decision of our Department of Defense as well as our Commander-in-Chief to follow Kipling's injunction to "Beware of the truce of the bear."

As long as the selective service program continues to draft young men into the military establishment from every community, the medical procurement claims our young doctors for a part of their careers and the new reserve plan ties young Americans by the millions into the defense set-up, we must face the fact that we have the "military status" with us, and that it is governed by a different law from our civilian relationship.

Since we must "live with it," we must understand it, adjust ourselves to it and face the problems it presents. The administration of the Uniform Code of Military Justice, which is planned to meet the common legal requirements of the army, air force and navy and by which all three are governed, provides for a

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†This article has been developed from materials delivered before the Shreveport Bar Association on April 26, 1955.

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large number of military-lawyers. They must be accredited members of the bar of a federal court or of the highest court of a state,[1] and this applies to all trial counsel or defense counsel. To be law officer of a court-martial he must likewise qualify as a lawyer.[2] Of course, the need for lawyer-material to serve as staff judge advocate of the various units, installations and commands is very great.[3] The many positions of legal officer and law specialist likewise call for men trained and versed in the law.

THE YOUNG LAWYER

With this need to be filled, the young lawyer or law school graduate may, by energetic presentation of his qualifications and against strong competition, stand a good chance of wangling a commission in the Judge Advocate General's Department. If so, he may spend his time while on military duty in work allied with his profession.

May I strike a blow here for the young lawyer with orders to report for military duty?

If he is a young doctor he is assured of a commission and after a short six weeks of indoctrination in the military ethics and procedures, he goes to his post resplendent in his new first lieutenant's uniform, practices his chosen profession and gains valuable interne experience at the expense of the many GI's who answer sick-call. But if he is a young lawyer, he must take his chances at getting a Judge Advocate commission or else go to some duty entirely foreign to his life's work, come out at the end of his term rusty in the law and be faced with the task of starting all over again.

The various bar associations might well adopt the project of insuring the young lawyer an even chance with the young doctor in becoming a specialist during his military service.

If war comes, the military establishment needs and must have at once a corps of lawyers. When Pearl Harbor struck there were approximately 114 members of the Judge Advocate General Corps on duty, a number of whom faced early retirement.

[1] MANUAL FOR COURTS-MARTIAL Art. 27 (1951).
[2] MANUAL FOR COURTS-MARTIAL Art. 26 (1951).
[3] MANUAL FOR COURTS-MARTIAL Art. 34 (1951).

Before the final guns died away in the Pacific, more than 2,500 civilian lawyers had been integrated into the JAGD and a great many more soldier-lawyers had been pressed into various legal duties because of their education, training and aptitude. Another war would see that number enlarged to an even greater degree.

The second advantage that might be sought for the young lawyer facing his "call" is advance training at law school in military law, the UCMJ (Uniform Code of Military Justice) and the MCM (Manual for Courts-Martial, 1951) by the inclusion of a course on these subjects in the law schools of the land.

Faced with the fact that most young lawyers will be compelled to serve in the armed forces following their graduation from law school and the existence of an acute need for new men in the Judge Advocate General Corps of the services, a course on military justice should be required as a part of the regular law school curriculum.[4]

Under the encouragement of the Judge Advocate General of the Army a start has been made to install such courses in several of the law schools, but the real need is for the realization of *all* law schools throughout the country to grasp the opportunity of preparing their graduates for the inevitable brush with military law.

The Civilian Law Office

Quite apart, however, from the young member of the law firm and his fortunes is the question of the older practitioner and his contact with military law. No longer should he throw up his hands and confess his lack of knowledge.

That is the easy way for the practicing lawyer to lose business and drive clients away from his office when he might be able to serve them intelligently if he took the pains to inform himself and kept abreast of the situation as it develops.

Your valued client's boy is in trouble off at camp. He faces a court-martial for some offense that he has been charged with committing and your client wants you to drop everything and

[4] Joseph, *The Need for Including A Course on Military Justice in the Law School Curriculum*, 7 J. Legal Ed. 79 (1954).

go and defend him. You are allowed to do so.[5] With a little study you can prepare yourself to handle his case at the original trial, on its review locally [6] and in Washington and particularly when it reaches that high and august tribunal known as The Court of Military Appeals. That is an appellate body, consisting of three civilian judges, at whose bar the civilian lawyers should have no difficulty in feeling at home.

Or, suppose that your client's son who is in the service has been convicted by the trial court-martial, perhaps given a dishonorable discharge from the service and a penitentiary sentence? He may want you, as his trusted lawyer, to go down to Washington and fight the case to the last appeal. He is willing to pay for it well and will not look kindly upon your shunting him off to another lawyer who "knows all about this military law business."

Then, there comes the matter of dealing generally with clients or their sons who have been inducted into military service. Their presence may be desired in court as party or witness in a case you are handling. They may need wills drawn, affidavits and powers-of-attorney executed, depositions taken for use in civil suits or papers executed in the administration of estates handled while they are on duty in foreign parts.

Unless you have some knowledge of the laws, rules and regulations affecting the man in uniform you are at a loss to know how to handle these matters and lucrative business may have to be shared.

The Manual for Courts-Martial, 1951, should be in every law office library for reference when these military law questions arise.

Suppose the client's young son is killed or dies in the service? What about death benefits and insurance? Or suppose he needs hospitalization after discharge? Or his wife or parents wish to establish claim to pensions? Or there are minor children of his who have rights that should be protected?

Do you know where the closest Veterans Administration Office is located? Can you intelligently carry on a correspondence

[5] MANUAL OF COURTS-MARTIAL par. 48 at 67 (1951).
[6] MANUAL OF COURTS-MARTIAL at 70 (1951).

with it to secure the rights to which the soldier and his family are entitled? Can you perfect appeals from decisions you believe to be unwarranted or arbitrary?

Did you know that you can collect $150.00 from the government toward any honorably discharged veteran's funeral? Do you know that any honorably discharged veteran is entitled to free hospitalization? Where do you file a veteran's claim? Suppose you needed to secure an affidavit or deposition of a military person in Japan or Germany or elsewhere outside the United States? If they are on active duty and appear before the proper military person to administer oaths [7] this can be done anywhere under a federal statute found easily in the manual.

A client may come in and represent to you that his boy was deprived of his citizenship during World War II by a court-martial sentence and that he wishes the stigma erased from his name. He is willing to pay a very generous fee for restoration if you can accomplish this. It is possible that it can be done. If you are, however, unacquainted with military law and procedure you will likely shy away from an otherwise lucrative employment. A little study of the Manual for Courts-Martial and a bit of delving into military law may assist you in serving your client well and satisfactorily and earn the compensation that he is willing to pay.

Many times the use of army or veterans administration records in court becomes highly desirable to show physical or mental status and treatment during service or previous disablement. It may be introduced to prove some other fact that might materialy affect your client or your opponent's claim in a lawsuit. May you subpoena those records? Will you be allowed to examine them in advance to determine whether you wish to subpoena them (or to do all in your power to prevent them from being subpoenaed)?

The degree of difficulty that you have in answering the foregoing questions shows how strongly the military law problems thrust themselves into the civilian lawyer's practice and how little is known about them. The best answer to the question is: equip your library and yourself to meet these military matters

[7] MANUAL OF COURTS-MARTIAL Art. 136 (1951).

intelligently. If you will become proficient in handling them, and they increase, as undoubtedly they will as time goes on, you may handle much desirable business that otherwise you might pass up.

You will find upon investigation that military law is not some bugaboo of strange codes and procedures, practices and problems entirely alien to the civilian practice that you know so well and with which you feel at home. The offenses stem from the same basic infringements of human rights as do the civilian statutes and the rules of evidence are almost identical with those you use in your daily practice in state and federal courts. The procedures are laid down with simple exactness and you can readily understand them with a little study and experience with them.

After all, a great many of those with whom you come in contact in the administration of military law are reserve officers, civilians-in-uniform, sojourning there for a time and performing their duties according to a prescribed routine, which is printed out for them and for you to follow.

Habeas Corpus

A common civilian-military law problem that faces the practitioner is the use of the writ of habeas corpus issued out of a federal court to question the right of the military authority to confine a soldier for a specific offense. Such writs are sought by civilian lawyers.

These suits arise in peace as well as in war-time. In many instances the civilian lawyer finds that an error of interpretation of a law has crept in, that an authority has been exceeded or that some young judge advocate has not checked the federal cases and has missed the point of law. The writ in many instances will be granted. Here again it is good to have an understanding of military law or have some member of your firm who has some knowledge or familiarity with military procedure. A copy of the Manual of Courts-Martial in your library will prove useful in the preparation of your case.

To illustrate the close relationship of the military to the civilian law, one case that became famous during World War II in

both military and civil jurisdictions may be cited with interest.

Private First Class Frederick W. Wade, Co. K, 385th Infantry, on 14 March 1945, was charged jointly with another soldier of forcibly and feloniously having carnal knowledge of a German female against her will. The other soldier was acquitted, but Wade was convicted by a general court-martial and was given a dishonorable discharge and confinement for life at hard labor. The reviewing authority (the Army Commander), reduced the sentence to confinement for 20 years but otherwise affirmed it.

The trial was held at the headquarters of the 15th U. S. Army at Bad Neuenahr, Germany, and at the trial the defendant strenuously insisted upon his plea of former jeopardy. He contended that at Pfalzfeld, Germany, on 27 March 1945, he had been arraigned before a general court martial, called by the commanding general of the 76th Infantry Division, on the same charge.

After the evidence had been adduced by both sides in that trial, the Court closed to consider its verdict. When it reopened the trial judge advocate was advised that the court wished to hear, on its own motion, certain other witnesses, whom he was instructed to contact, procure and notify the court president when they were available and he was ready to present them.

Seven days later the 76th Division Commander withdrew the case from that court and transmitted it to headquarters of the 3d U.S. Army because he was moving with his division in the course of operations out of the area. On 18 April 1945, the case was referred to the commanding general, 15th U. S. Army and was called for trial on 26 April 1945. It was at that time that the defense counsel vigorously contended that there had been former jeopardy. The plea was overruled and the case proceeded to conviction.

The record went for review to the European Theater Board of Review at St. Cloud, France. That body of three senior judge advocate officers held that there had been former jeopardy and recommended that the decision be reversed. But the Assistant Judge Advocate General, Gen. E. C. McNeil, Staff Judge Advocate, in his recommendation to his commanding general, USF European Theatre (Main), APO 757, U. S. Army, did not con-

cur in the holding of the Board of Review. The General sustained him, affirmed the sentence and Wade was sent to the United States and began serving his 20-year term at Leavenworth.

His defense counsel, Major Richard T. Brewster, Cavalry, 15th Army Headquarters, had returned to civilian life and was practicing law at his home in Kansas City. Being still firmly convinced of the merit of the plea of double jeopardy he had made in Germany for Wade, he began a determined fight in the federal courts to reverse the army's decision.

He sued out a writ of habeas corpus in District Court D, Kansas, 1st Division and that court granted the writ on the grounds that the plea of former jeopardy was good and ordered the petitioner released from custody.[8]

The case was promptly appealed by the government to the U. S. Court of Appeals for the 10th Circuit, where a divided court, the chief judge dissenting, reversed the district court and remanded the cause with directions to enter a judgment denying petitioner's application for writ of habeas corpus and remanding petitioner to the warden at Leavenworth.[9]

The majority opinion held that "because the tactical situation made it impossible to produce the witnesses before the first court-martial within a reasonable time, the subsequent trial and conviction before the second court-martial could not subject the soldier to double jeopardy in violation of the 5th Amendment."

Brewster thereupon applied to the United States Supreme Court for a writ of certiorari but it was there refused with 3 justices dissenting.[10] Mr. Justice Black wrote the majority opinion which is quite full and long. He said among other things, "Courts should not attempt to review the Commanding General's on-the-spot decision that the tactical situation requires transfer of the charge." But Mr. Justice Murphy writing for himself and his two other colleagues said emphatically,

> Adaptations of military justice to the exigencies of tactical situations is the prerogative of the commander in the field, but the price of such expediency is compliance with the Constitution.

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[8] Wade v. Hunter, 72 F. Supp. 755 (1947).
[9] 169 F.2d 973 (1948).
[10] 336 U.S. 684 (1949).

And so, after much tortuous weaving and braiding of the civilian concept with the military view of former jeopardy, the question was begrudgingly settled, with learned and capable men disagreeing in the conclusions arrived at in every stage and step of the proceeding.

When, however, the compilers of the new Manual for Courts-Martial came along they recognized this harsh clash between the two systems and boldly wrote it out of existence in Article 44 of the Act of 5 May 1950, which statute contains the Uniform Code of Military Justice and said:

> (c) A proceeding which, subsequent to the introduction of evidence but prior to a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence of witnesses without any fault of the accused shall be a trial in the sense of this article.[11]

The hapless Wade, back once more in durance vile, could take some consolation from the fact that he had furnished a World War II *cause célèbre* and had brought about a change in the language and context of the book which the court-martial had, so to speak, thrown at him.

If the present world situation continues, and it gives few signs of abating, it will not be long until every law firm of any size and certainly every bench and bar will have a liberal sprinkling of those who are trained in military law, who know their way about in it and who can intelligently use its books and forms. In such a professional society can you afford to remain in ignorance of this important branch of the law and permit "the lawyer in the Smith Building" to siphon off the fees and clients that could well be yours?

We lawyers have always regarded Thomas Jefferson as a sort of patron saint of our sodality. He was a firm believer in the plan of the reserve officer and soldier and we would conclude your thinking upon this topic with his sound words:

> The Greeks by law and the Romans by spirit of their people never gave to their rulers a standing army. They made every man a soldier and obliged him to repair to the standard of his country when it was reared. This made them invincible.

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[11] MANUAL OF COURTS-MARTIAL at 428 (1951).

SOUTHWESTERN LAW JOURNAL

Published quarterly by the Southern Methodist University Law School
and the Southwestern Legal Foundation.
Subscription price $4.00 per year, $1.50 per single copy.