Lore of the Corps

The Trial by Court-Martial of Colonel William "Billy" Mitchell

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On 1 September 1925, three Navy seaplanes flying from Los Angeles to Hawaii crashed into the Pacific Ocean. Two days later, the Navy dirigible USS *Shenandoah* fell from the skies—killing fourteen men, including its skipper. Constructed at a cost of $2.7 million, the *Shenandoah* was a "national treasure" and its destruction, and the death of so many men, was front page news.[1] Americans everywhere asked how these air disasters could have happened and who was responsible for the loss of men and materiel.

On 5 September 1925, Colonel (COL) William "Billy" Mitchell invited six newspaper reporters into his quarters in San Antonio and handed them a nine-page single-spaced typewritten statement. This was Mitchell's answer to the question on the lips of Americans everywhere:

> I have been asked from all parts of the country to give my opinion about the reasons for the frightful aeronautical accidents and the loss of life, equipment and treasure that has occurred during the last few days. My opinion is as follows: These incidents are the direct result of the incompetency, criminal negligence, and almost treasonable administration of our national defense by the Navy and War Departments."[2]

Mitchell's incendiary words were read by millions of Americans. A headline in the *Chicago Tribune* screamed "[Mitchell] Brands Air Rule 'Criminal.'" "Flyers Killed by Stupid Chiefs' Propaganda Schemes, Col. Mitchell Charges" proclaimed the *Washington Star*.[3] Since Mitchell was known as "a dashing war hero and unreserved advocate of airpower,"[4] his criticisms of the Army and Navy were believed by many and public opinion was solidly behind him. In the War Department, Army leaders were "stunned" by Mitchell's words, which they considered to be "outrageous"[5]—and insubordinate. Believing that his remarks had brought "discredit upon the military service" in violation of the Articles of War, the Army ordered COL Mitchell to Washington, D.C. to stand trial. What follows is the story of Mitchell's court-martial and the judge advocates who played important roles in it.

Born in Nice, France, in December 1879, William Lendrum "Billy" Mitchell was the oldest of ten children. After his American parents moved back to their home state of Wisconsin when Mitchell was three years old, he lived a privileged life in a wealthy and politically prominent family.

When the Spanish-American War broke out in 1898, Mitchell dropped out of Columbian University (today's George Washington University) and enlisted as a private in the infantry. Seven days later, he was a Signal Corps second lieutenant. He subsequently served in Cuba and the Philippines. In 1915, then–Captain Mitchell was assigned to the aerial section of the Signal Corps. The following year, he learned to fly—and began his remarkable career as the Army's "first truly vocal supporter of airpower and its role on the battlefield."[6]

After the United States entered World War I in April 1917, Mitchell was appointed air officer of the American Expeditionary Force (AEF) and promoted to lieutenant colonel. He later became the first U.S. officer to fly over enemy lines and the first to be awarded the French Croix de Guerre. In September 1918, now–COL Mitchell led a raid of 1500 airplanes against the St. Mihiel salient. A month later, after being promoted to the temporary rank of brigadier general (BG), Mitchell led additional massed bombing raids against German units during the Meuse-Argonne offensive.

After the war, BG Mitchell returned to Washington, D.C., where he was assistant chief of the Air Corps. This position, which allowed him to retain his temporary one-star rank, also served as a platform for Mitchell to begin lobbying for an independent U.S. air force. Mitchell insisted that the next war would be fought in the air—not on the ground or at sea. Mitchell believed that success in future wars would come to those nations that adopted strategic bombing as their principal method of warfare. Moreover, as the corresponding development of military aviation meant that the Army and Navy would be vulnerable without airplanes as the first line of defense, only the unified control

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[1] DOUGLAS WALLER, A QUESTION OF LOYALTY 11 (2004).

[2] U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 144–45 (1975) [hereinafter ARMY LAWYER].

[3] WALLER, *supra* note 1, at 24.

[4] Rebecca Maksel, *The Billy Mitchell Court-Martial*, AIR & SPACE MAG., July 2009, at 46.

[5] WALLER, *supra* note 1, at 25-26.

[6] *William "Billy" Mitchell 321 (1879–1936)*, HISTORICAL DICTIONARY OF THE U.S. ARMY (Jerold E. Brown ed., 2001).

of air power in a separate and distinct air force could provide the required defense. In Mitchell's view, the only logical course of action was to establish an American air force akin to Great Britain's Royal Air Force.

Mitchell proved that even large ships could be destroyed from the air (four captured enemy ships, including one battleship, were sunk in a demonstration off Norfolk, Virginia in 1921) and some senior Army and Navy leaders agreed with Mitchell that airpower had altered the nature of war. But Mitchell "was viewed by many as a vain, egotistical, self-publicizing grandstander, and his fiery temperament eventually alienated him from nearly all whom he hoped to influence."[7]

When Mitchell made his intemperate remarks in September 1925, he was serving as the air officer of the VIII Corps in San Antonio, Texas—and wearing eagles on his collar. This was because when Mitchell left his job in Washington, D.C., as assistant air chief—a one-star billet that permitted Mitchell to continue to wear stars as a temporary BG—and was sent to Fort Sam Houston, Mitchell reverted to his permanent grade of colonel. This is why Mitchell was wearing colonel's rank when he appeared before a court-martial in Washington, D.C., on 28 October 1925.

While the War Department had hoped for minimum publicity, the Mitchell "trial was the biggest media event in the country . . . press tables were jammed . . . with about forty reporters and photographers."[8] Additionally, some five hundred people lined up to get some of the few courtroom seats available for members of the public.

Due to Mitchell's seniority, twelve generals had been chosen by the War Department to sit on the panel, including Major General (MG) Douglas MacArthur, who would later serve as Army Chief of Staff and achieve great fame in World War II and Korea. The "law member," the forerunner of today's military judge,[9] was COL Blanton Winship, who had been decorated with the Distinguished Service Cross and Silver Star for combat heroism in 1918. Like MacArthur, Winship also had a bright future: he would serve as The Judge Advocate General from 1931 to 1933 and Governor of Puerto Rico from 1934 to 1939.[10] These panel members all knew Mitchell, some personally (including Winship and MacArthur), and some had publicly expressed opinions on his airpower theories. They were hardly impartial or neutral in their attitudes. Two were excused for bias and one on a peremptory challenge—leaving nine general officers (plus COL Winship) to hear the evidence against Mitchell.[11]

The trial judge advocate was COL Sherman Moreland, a fifty-seven year old judge advocate who was "mild mannered and polite to a fault in a courtroom."[12] He was assisted by Lieutenant Colonel (LTC) Joseph McMullen, a Virginia lawyer who had joined the Judge Advocate General's Department after World War I. Moreland and McMullen were joined later by Major (MAJ) Allen Gullion, who was "one of the most skilled and aggressive prosecutors" in the Army. Gullion, too, was destined for greatness as a judge advocate: he served as TJAG from 1937 to 1941 and as Army Provost Marshal General from 1941 to 1945. But

> Gullion was a bit of an eccentric. Though he played polo and enjoyed watching boxing matches, he smoked heavily (always with a cigarette holder) and thought exercise could be bad for his health. He read the newspaper in bed wearing white gloves so the print wouldn't soil his hands. On car trips from Washington back to Kentucky, he would stop at each railroad crossing and order his son out to inspect the track both ways and then signal him to pass over it . . . Officers who acted in an ungentlemanly or unprincipled manner deeply offended him. He came down hard on them in court—

[7] John Lehman, *Rank Insubordination*, WASH. POST, Oct. 31, 2004, at 5.

[8] WALLER, *supra* note 1, at 46–47.

[9] While the law member was indeed the forerunner of the military judge, his role and authority were markedly different in 1925. The law member was tasked with ruling "in open court" on all "interlocutory questions." The 1921 *Manual for Courts-Martial*, paragraph 9a(5), defined "interlocutory questions" as "all questions of any kind arising at any time during the trial" except those relating to challenges, findings and sentence. But the law member's rulings were only binding the court when the interlocutory question concerned the admissibility of evidence. On all other interlocutory questions, the decision of the law member could be overturned by a majority vote of the members. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 89a(2), (3) (1921) [hereinafter MCM 1921]. But note: since the law member also had "the duties and privileges of other members of the court," he participated in all votes taken by the members, including findings and sentencing. Thus, Colonel (COL) Winship participated in *all* votes in the Mitchell general court-martial. *Id.* ¶ 89(a)(6). In 1925, the law member was the result of a recent reform in favor of the accused; during the First World War, a court-martial panel had received its legal advice from the prosecutor, who might be the only lawyer in the room. WALLER, *supra* note 1, at 86; MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 99 (1917); *see also* Fred L. Borch, III, *Anatomy of a Court-Martial: The Trial and Execution of Private William Buckner in World War I*, ARMY LAW., Oct. 2011, at 1 n.1.

[10] Winship is the only judge advocate in history to be awarded the Distinguished Service Cross (DSC) while an Army lawyer. While serving as the Judge Advocate of the 1st Army, COL Winship was given command of the 110th and 118th Infantry Regiments, 28th Division. His DSC was for "extraordinary heroism in action near Lachaussee, France, November 9, 1918." Headquarters, War Dep't, Gen. Orders No. 9 (1923).

[11] WALLER, *supra* note 1, at 53-60.

[12] *Id.* at 51.

> something he would now do with Mitchell.[13]

As for Mitchell's defense team, he was represented by civilian lawyer and Congressman Frank R. Reid and judge advocate COL Herbert Arthur "Artie" White. Reid, a largely unknown representative from Illinois who was in his second term in Congress, agreed to defend Mitchell for free—chiefly because Reid "knew the trial would quickly make him a national figure."[14] White, "a soft-spoken Iowan,"[15] had been serving as a judge advocate at Fort Sam Houston; the Army transferred White to Washington to serve as Mitchell's military defense counsel. Rounding out the defense team were Frank Plain, an Illinois state judge and friend of Reid's who was an expert on constitutional law, and William Webb, a young lawyer who did legal research and kept track of the thousands of pages of documents in the case.

Mitchell was charged with eight specifications of violating the Ninety-sixth Article of War, which made criminal "all disorders and neglects to the prejudice of good order and military discipline" and "all conduct of a nature to bring discredit upon the military service." The gist of the specifications was that Mitchell's 5 September statement about the causes of the seaplane and *Shenandoah* disasters, and follow-up comments he made to the media on 9 September, constituted insubordination and consequently conduct prejudicial to good order and discipline in violation of Article 96.[16] Trial began on 28 October, less than two months after the statements were made.

Mitchell's lead defense counsel, Frank Reid, first argued that the entire case should be thrown out because his client's statements were protected by the First Amendment. The law member, COL Winship, however, agreed with the trial judge advocate that Mitchell's military status made the First Amendment inapplicable, and denied Reid's motion to dismiss the charge and its specifications.[17] After the panel members agreed with Winship's ruling, the case moved to the merits. The prosecution case-in-chief took less than a day, and consisted simply of proof that Mitchell had made the statements and written the articles in question. On cross-examination, one government witness (the commander of VIII Corps) agreed that the publication of Mitchell's statements had not caused any "lack of discipline or insubordination" in his command. The defense then moved for a finding of not guilty,[18] claiming that the prosecution had not proven the statements were contrary to good order and discipline—that, for aught the evidence had shown, they were instead public-spirited efforts to *benefit* good order and discipline "by correcting the evils which [were] admittedly destroying it in the air service and in the War Department." On Winship's advice, the panel denied the motion.[19]

The same day the government rested its case, the defense presented the government with an extensive list of witnesses (more than seventy) and documents (thousands of pages) that it wanted produced. The court recessed for a week while witnesses and documents were gathered. The defense case then began—with Reid now arguing to the panel that Mitchell should be exonerated because his criticisms of the War and Navy Department were true. The court consistently declined to rule on whether this evidence was relevant on the subject of guilt, or only as mitigation.[20]

To prove that the military hierarchy was incompetent—as Mitchell had claimed—Reid called a number of prominent individuals to the stand, including then–MAJ Henry A. "Hap" Arnold and New York Congressman Fiorello H. La Guardia, both of whom had flown in combat in World War I.[21] Both men testified about the large number

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[13] *Id.* at 222.

[14] *See id.* at 37. Reid had served on the House Aircraft Committee, where he had seriously criticized the government's handling of the aircraft industry, and had expressed strong support for Mitchell's views on the need for an independent air force. *Id.* at 37–38.

[15] *Id.* at 52. Born in 1870, White entered the U.S. Military Academy (USMA) in 1891 and graduated four years later; he ranked eighth in a class of fifty-two cadets. Commissioned as a second lieutenant in the cavalry, White served in a variety of locations, including China and the Philippines. After completing the Army War College in 1912, he transferred to the Judge Advocate General's Department (White had previously received a law degree while stationed at Fort Myer, Virginia, as a cavalry officer). White and Mitchell had previously met each other at Fort Leavenworth, Kansas, in 1904 and, when he was ordered to Washington, D.C., to stand trial in 1925, Mitchell requested White as his defense counsel. "Artie" White retired in 1929 and then worked for a number of years for the United Services Automobile Association (USAA), first as USAA's attorney-in-fact and later as the organization's secretary-treasurer. White died at Fort Sam Houston, Texas, in December 1947. He was seventy-seven years old. *Herbert Arthur White*, ASSEMBLY, Jan. 1955, at 45.

[16] This punitive article, the forerunner of Uniform Code of Military Justice (UCMJ) Article 134, permitted punishment "at the discretion of the court." MCM 1921, *supra* note 9, app. 1, at 529. *See also* WALLER, *supra* note 1, at 37, 87–89.

[17] *Id.* at 85.

[18] *See* MCM 1921, *supra* note 9, ¶ 158c (providing for such motions). In modern practice, such a motion would be made under RCM 917.

[19] WALLER, *supra* note 1, at 110–16.

[20] *Id.* at 117, 261, 315. Under MCM 1921, findings and sentencing were decided at the same time; there was no announcement of findings in open court prior to deliberation on sentencing. MCM 1921, *supra* note 9, ¶¶ 294, 332a, Thus, the evidence would have been heard before findings regardless of how the court ruled on the question.

[21] Henry A. "Hap" Arnold (1886–1950) graduated from the USMA in 1907 and served as an infantry officer until transferring to the Signal Corps and learning to fly with the Wright brothers. He served on the Air Service staff in Washington during World War I, but his lack of combat experience in France did not harm his career: Arnold was appointed chief of the newly created Army Air Forces in 1941 and finished World War II as a five-star general. Fiorella H. La Guardia (1882–1947) served as an Army Air Service major on the Italian-Austrian front in World War I, where he

of fatal accidents in the Army Air Service and how "foreign countries" like France, Italy and Sweden were moving toward a "unified air force."[22] They also "testified to the unwarranted denigration of air power by the military hierarchy."[23]

Toward the end of the defense case, Mitchell took the stand himself, and was subjected to a full day of cross-examination. Questioned closely on specific details, such as the accident rates for fliers in different countries' air services or the cost of his proposed reforms, Mitchell did not know the numbers.[24] Major Gullion questioned Mitchell about a paper he had written on the "versatility of the Japanese submarine," and his statement that such submarines could carry "any size" of gun for surface warfare. This exchange followed:

> Mitchell: That was my opinion.
> Gullion: That was your opinion?
> Mitchell: That was my opinion.
> Gullion: Is that your opinion now?
> Mitchell: Yes.
> Gullion: Then, any statement—there is no statement of fact in your whole paper?
> Mitchell: No.[25]

Mitchell's credibility was severely damaged. To exploit the damage, the Government presented a three-week case in rebuttal, calling veteran fliers (including Arctic explorer Richard Byrd), surviving crewmen from the *Shenandoah*, the chief of the Army's Air Service, and the Army's Deputy Chief of Staff to dispute Mitchell's claims.[26] In his closing argument to the panel, which was about to consider both findings and sentence,[27] Major Gullion hammered home how Mitchell's opinions reflected both his arrogance and unfitness to serve:

> Is such a man a safe guide? Is he a constructive person or is he a loose-talking imaginative megalomaniac cheered by the adulation of his juniors who see promotion under his banner . . . and intoxicated by the ephemeral applause of the people whose fancy he has for the moment caught?
>
> Is this man a Moses, fitted to lead the people out of a wilderness which is his creation, only? Is he of the George Washington type, as [defense] counsel would have you believe? Is he not rather of the all-too-familiar charlatan and demagogue type?
>
> Sirs, we ask the dismissal of the accused for the sake of the Army whose discipline he has endangered and whose fair name he has attempted to discredit . . . we ask it in the name of the American people whose fears he has played upon, hysteria he has fomented, whose confidence he has beguiled, and whose faith he has betrayed.[28]

At the end of a seven-week court-martial, COL Mitchell was found guilty of all specifications and the charge. His sentence: to be suspended from rank, command, and duty and to forfeit all pay and allowances for five years.[29] Despite the result, the Mitchell court-martial stands alone, or nearly so, in court-martial history for the extent to which the defense was able to use the trial as a forum to debate policy questions and attack current military practice.[30]

Crushed by the trial results, Mitchell resigned from the Army on 1 February 1926. Newspapers that had favored his cause cooled in their support or turned against him. The

commanded a unit of Caproni Ca.44 bombers. La Guardia is best known, however, for his service as the mayor of New York City from 1934 to 1945.

[22] WALLER, *supra* note 1, at 181.

[23] ARMY LAWYER, *supra* note 2, at 145.

[24] WALLER, *supra* note 1, at 245, 248.

[25] ARMY LAWYER, *supra* note 2, at 145.

[26] WALLER, *supra* note 1, at 260–314. Major General Mason Patrick, Chief of the Army Air Service and an airpower advocate in his own right, gave mixed answers, sometimes favoring Mitchell's views and sometimes disagreeing. *Id.* at 300–04. By its nature this must have hurt Mitchell more than it helped; it showed him not as a speaker of truth to power, but as a man taking sides in controversies, and as such less justified in taking his case to the public.

[27] *See supra* note 20.

[28] ARMY LAWYER, *supra* note 2, at 146.

[29] The result offers an interesting parallel to the case of Lieutenant Colonel George Armstrong Custer in 1867. Custer, like Mitchell, was a flamboyant wartime general returned to a lower rank after the war and accused of indiscipline. He was tried for purely military offenses—absence without leave from his command, and several specifications of "conduct to the prejudice of good order and military discipline." And his sentence was a suspension without pay for one year. Unlike Mitchell, Custer did not resign his commission during his period of suspension, and went on to command troops in several Indian campaigns. *See* LAWRENCE A. FROST, THE COURT-MARTIAL OF GENERAL GEORGE ARMSTRONG CUSTER 99–100, 246 (1968).

[30] The usual fate of such efforts is complete failure. *See* United States v. New, 55 M.J. 95, 105–07 (C.A.A.F. 2001) (lawfulness of order to wear U.N. accoutrements was question of law for the judge; defense was not allowed to present any evidence on the subject to the panel in prosecution for disobeying that order); United States v. Huet-Vaughn, 43 M.J. 105, 114–15 (C.A.A.F. 1995) (accused attempted to defend against a desertion charge by contesting legality of the war; defense was not allowed to litigate that issue at trial); *see also* United States v. Rockwood, 48 M.J. 501, 507–09 (A. Ct. Crim. App. 1998) (accused claimed duty under international law to investigate human rights abuses at a civilian prison instead of being at his place of duty; trial court permitted expert testimony on the subject, but appellate court found this defense deficient as a matter of law).

public largely lost interest.[31] Mitchell, who died in 1936, did not live long enough to see many of his ideas and predictions about the importance of airpower come to fruition. In the long run, however, he won his case in the court of public opinion—especially after the Japanese attack on Pearl Harbor, and American unpreparedness for it, fulfilled some of his prophecies. Men who had testified for him at trial won renown in World War II and in the (finally independent) United States Air Force.

Today, the public generally and American airpower advocates in particular laud Billy Mitchell as one of the greatest airmen in history. There has, however, never been any formal exoneration of him—but not for want of trying. In March 1956, William L. Mitchell Jr., encouraged by the Air Force Association, filed a petition with the Air Force Board for the Correction of Military Records to "render null and void the proceedings, findings, and sentence" of his father's court-martial. As Mitchell's son put it: "I sincerely believe that a gross injustice was done to my father. History has vindicated him. I believe the United States Air Force cannot do less."[32] Apparently "top Army officials fiercely fought"[33] this petition from Billy Jr., arguing in part that the Air Force was a separate service and should not reverse a thirty-year old Army conviction.

Despite the Army's opposition, the Air Force Board recommended to Secretary of the Air Force James Douglas that COL Mitchell's court-martial conviction be set aside. In March 1958, however, Douglas declined to follow this recommendation, and no further legal action has ever been taken to overturn the proceedings in his case.[34]

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

[31] WALLER, *supra* note 1, at 328–29, 331, 334–35.

[32] Edmund F. Hogan, *The Case of Billy Mitchell*, A.F. MAG. (July 1957), http://www.airforce-magazine.com/MagazineArchive/Pages/1957/July%201957/0757billy.aspx.

[33] WALLER, *supra* note 1, at 358.

[34] Roscoe Drummond, *Where An Apology Is Due*, DESERET NEWS, Mar. 11, 1958, at 18A; WALLER, *supra* note 1, at 358.