

The Napoleon Series

The Bailen Enquiry Summary: the Legal Process and Judgements

By [Susan Howard](#)

Immediately after receiving the details of the Capitulation of Bailen, Napoleon wrote to his minister of War demanding to know what tribunal could judge those involved. The reply was:

“YM asks what tribunal should judge these generals and what penalties the laws inflict on such a crime. I have just searched those which are in force and I see nothing that provides for it unless it falls within the case stated in the 5th paragraph of article 101, Titre 13 of the organic Senatus-Consultum of 28 floreal year XII. In that case it is for the Imperial High Court to judge the guilty and, in the contrary case, I do not see what the law is that would apply to them and by virtue of which a conseil de guerre would pronounce.” The paragraph in question deals with “the fact of disobedience of generals on land or sea which contravenes their instructions.”

The question was passed to a military commission in September 1808 who suggested that it could be dealt with:

- 1) By a judgement passed by His Majesty.
- 2) By taking the accused before a conseil de guerre, formed according to the law of 13 Brumaire Year 5.
- 3) By taking them before a commission composed of the first military functionaries, in considerable number, to be judged.
- 4) Finally, before the National High Court.

“They judge that in the current circumstances the third method is the only one that can be adopted, but that a judgement should not be made until after the generals mentioned above have been heard.”

In December 1808 Napoleon wrote “My intention is that the generals Dupont, Marescot, Chabert and Vedel shall be taken before the High Court.” In January 1809 he appointed Regnaud to act as prosecutor to take the matter to the High Court and Regnaud, after carrying out interrogations, presented a report in August 1810 in which he presented the charges against the five accused and concluded that there were grounds for charging Dupont, Marescot and Villoutreys but that Chabert and Vedel had only been obeying orders. He insisted that more investigation was needed to establish the facts. He considered that the High Court was competent to judge the matter under article 101 of the Act of 18 May 1804 since a grand-officer of the Empire was being charged and also under the paragraph of the same article which covered disobedience by generals who contravened their instructions. Including Vedel in the capitulation seemed to be a violation of the instructions of a general in chief. It was not clear what punishment the High Court could impose but he was sure it would be proportional to the gravity of the offence.

In 1811 Regnaud's report was presented to a legal commission, chosen by the Emperor and presided over by the Arch-chancellor. The commission, while agreeing that the capitulation was "an act of the most inconceivable cowardice" which had "gravely compromised the security of the State" and that recalling the divisions Vedel and Dufour was an abuse of power, concluded that none of these things constituted a crime under the existing laws. They suggested that allowing the munitions of the divisions Vedel and Dufour to fall into the hands of the enemy could be judged by the military penal code of 1793. They saw difficulties in getting this past the judges of the High Court but thought that it would help if they could show that Dupont's conduct had been influenced by the loot of Cordova. For this, more evidence was needed. Marescot could be charged as an accomplice but, as a grand-officer of the Empire, he could only be judged by the High Court so it was necessary to bring Dupont before this court. Villoutreys would not be guilty if he had only acted as Dupont's agent but it was shown he had exceeded his orders. Vedel could only be charged with obeying Dupont's orders when he should not have done but it was uncertain whether he knew the position and Chabert had only acted under orders; however, it was necessary for the truth that they should both be put on trial. After a great deal of legal argument they concluded that the risk that the High Court would acquit the accused was too great. A few other options were considered but they ended by recommending that a form of grand jury composed of the grand dignitaries of the Empire should be assembled to hear and judge the prosecutor's report.

At the end of 1811 Regnaud was instructed to send his report to the Arch-chancellor; in it he insisted that the High Court was competent to judge the affair but that further enquiries were needed to establish the facts. Cambaceres then addressed a report to the Emperor in January 1812 in which he stated that the Act of the Constitution of May 18th 1804 was incomplete in the part which dealt with the Imperial High Court; it provided for *Senatus-Consultum* to regulate the organisation and the action of this Court but this had not yet been done. Bringing the case before this court could produce legal difficulties, sending it to the ordinary tribunals would be impossible because of Marescot's rank and because the affair touched on politics and on the honour of the nation. He also thought it better that the memory of the affair should not be revived by further publicity.

"To attain this aim, my opinion is that YM should not permit the convocation of the High Court and that he should order the formation of a Council of Enquiry, composed of the great personages of the state. Before this Council the prosecutor-general will present the accusation; the accused will be heard in person and without being assisted by defenders. There will be no question of a judgement to be given but of an advice to be submitted to YM, which will put him in the way of pronouncing in the knowledge of the facts which cannot be delivered to the proof of judicial debate."

"The Council of Enquiry will examine all the documents and will give its advice on the degree of culpability of the separate accused, also on the motives that could recommend some of them to your clemency. Finally, the Council, in its advice, without pronouncing any afflictive penalty, will be able to conclude that YM should be requested to withdraw from those judged truly guilty the titles, distinctions, the advantages that they hold from the Imperial bounty of YM."

Over three years after the event, the lawyers had failed to find any way of taking Dupont, let alone the others, before a legitimate tribunal with any expectation of a conviction.

Napoleon replied on February 12th 1812 enclosing a decree ordering the formation of the Council of Enquiry to be assembled on February 17th. The following day Cambaceres summoned the appointed members and they met on the 17th at the Tuileries. There were 13 of them, including Cambaceres, five of them, Berthier, Moncey, Bessieres, Clarke and Lacuée were military men; the others were mainly lawyers.

It can be seen that there is absolutely no justification for calling this a court-martial.

The charges against them were as follows, Dupont's ran to 20 clauses, the final clause being the significant one.

"In consequence, General Pierre Dupont, aged 47 years, general of division, comte de l'Empire, Grand-aigle of the Légion d'honneur, is accused of having compromised the external security of the State in signing a capitulation by which he delivered to the enemy not only his own division, his cannon, arms and munitions, but also the posts occupied by the division Vedel and thus opened the province of La Mancha and the road to Madrid to the army of General Castanos; a crime under article 77 of the penal code."

In the Penal Code of 1810 (Napoleon Series Research Section) Article 77 is in the section of Crimes and Delicts against the Exterior Safety of the State.

77: Whoever shall have practiced any manœuvres, or kept up any understanding, with the enemies of the state, for the purpose of facilitating their entry upon the territory and dependencies of the French empire, or of betraying to them the towns, fortresses, places, stations, ports, magazines, arsenals, ships or vessels belonging to France; or of providing the enemies with supplies of soldiers, men, money, provisions, arms or ammunition; or of advancing the progress of their arms against the French possessions or forces, by land or sea, either by shaking the fidelity of the officers, soldiers, seamen or others, towards the emperor and the state, or in any other manner, shall be punished with death, and confiscation of property.

"General Armand-Samuel Marescot, Grand-aigle of the Légion d'honneur, is accused of complicity for having been one of the instigators and signatories, although in the quality of a witness, of the aforesaid Capitulation and of having proposed and himself drawn up one of the articles of the Capitulation."

"General of brigade Theodore Chabert, commander of the Légion d'honneur, is accused of complicity in having discussed, agreed and signed the articles of the Capitulation."

"General of division Dominique-Honoré-Antoine Vedel, commander of the Légion d'honneur, comte de l'Empire, is accused of complicity in having recognised the authority of a general who had no more orders to give him since he was surrounded by the enemy and in consequence was no longer free; of having recognised the truce as common to his divisions, ceased fighting,

returned the prisoners that he had made and the cannon and flags that he had taken from the enemy; of not having continued his march from Ste Helene to Madrid on the 21st in spite of the letters of generals Dupont and Legendre containing orders that he should not have recognised.”

“General of brigade Francois-Marie-Guillaume Legendre, baron de l'Empire, chief of staff, is accused of complicity with General Dupont in having been the organ of orders given by the aforesaid general; of having written to General Vedel on July 21st that he should halt since he was included in the capitulation which had been made when it was not signed till the 22nd.”

“Cavalry Captain Charles Villoutreys, chevalier of the Légion d'honneur, Chevalier Grand-croix of the Union of Bavaria, is accused of complicity with General Dupont in having agreed the truce with Reding and Castanos without written conditions and without guarantee; in having taken part in the discussion and the conclusion of the Capitulation; in having, on the road from Bailen to Madrid, given advice and orders to the commandants, written to General Castanos in a manner to prevent them retiring to Madrid and to deliver to the enemy all the troops found in the Sierra-Morena, at Puerto del Rey and Madrideojos, and of having done all in his power to subject to the Capitulation a battalion which, in spite of him, escaped to Madrid.”

Since they are accused of complicity with Dupont, it is to be presumed that the others were all charged with treason and faced the death penalty. In 1810 Regnaud had considered that Chabert and Vedel should not be charged.

“General Legendre, Chief of Staff of the army, is also accused of complicity with Joseph Plauzoles, paymaster of the army of General Dupont, and with Augier Lereboure, paymaster of the division Dupont of having concerted the means of extracting more than 3000 francs from the public treasury, a crime under article 169 of the penal Code.”

Article 169: Every receiver, clerk in a receiver's office, depository, or person accountable to the public who shall have misapplied or embezzled, any public or private money, or credits, representing the value thereof, or any documents, titles, acts, or moveable effects, which were in his hands in consequence of his functions, shall be punished with hard labour for time, if the things misapplied or embezzled were of a value of above 3,000 francs.

There is no need to discuss the charges against Legendre, Plauzoles and Lereboure since they were not called before the Enquiry and later investigations cleared them.

On the first three days the Enquiry heard the Prosecutor's opening speech and the Act of Accusation and the documents were read out. Only then were the accused called in and heard the charges against them for the first time. They were allowed to make a verbal reply and were then sent back to prison with a copy of the Act of Accusation to prepare their written defences. They had one day to do this and presented their defences, individually, on February 22nd. They were allowed to ask to be confronted with their co-accused and to question them. This was only allowed with the permission of the Council which was not denied. They were not allowed to call witnesses. The Prosecutor asked some further questions and an unidentified member

of the Council asked for Marescot and Villoutreys to be examined together over some points concerning the Capitulation: following this Villoutreys asked to be confronted with Chabert who partially confirmed his statement. That was all the opportunity the accused had to defend themselves.

Next time the Council assembled it was to hear the closing speech of the Prosecutor who summarised the proceedings:

- 1) Does the Capitulation of Bailen constitute a crime against the State?
- 2) Are those whom I have accused guilty of it?
- 3) Are there differences between them in the degree of guilt?
- 4) Of what do these differences consist?
- 5) What penalty can I indicate to your impartial justice as applicable to the several accused?
- 6) Can I, from this moment, invite you to pronounce on all the accused as accomplices of General Dupont?
- 7) Finally, should you pronounce on the last accusation made against General Legendre and the Sieurs Plauzoles and Lereboure?

He told them that it was advice they had to give, not a judgement; that he had cited the Penal Code but "it is not that I had the intention of demanding against the accused the rigorous and inexorable consequences. How could the Prosecutor of HM decide on an action which so strongly contradicts the sentiment of indulgence which contrasts in the decree with the needs of justice. It is not possible for HM to leave unpunished guilty acts whose consequences have been to extensive, so long, so terrible, however, his goodness has sheltered the accused from the inflexible severity of the law by sending them in front of you."

He returned to this point in his conclusion when he came to the penalties to be imposed. "In a monarchy there are penalties that the sovereign can inflict on this of his subjects whom, though guilty, he does not wish to abandon to the invariable rigour of the Tribunals and the Law but whose impunity would injure justice. The deprivation of dignities, of rank, of honours, of decorations, the distancing from the person of the Monarch, these are the penalties which, in monarchies, wound and strike great personages only too deeply, being unhappy enough in not being found innocent, and are the only ones which you can propose to inflict."

It is an ingenious presentation of events that makes bringing the accused before this Council instead of the Courts an act of Imperial indulgence.

The Arch-Chancellor made some interesting points in his address to the Council: that it was not their function to judge the military operations nor to consider facts "which only have indirect or distant connections with the principal accusations. I mean the thefts committed at Cordova and the disorder which may have slipped into the accounts of the paymasters of the army." This suggests that Cambaceres' legal conscience was troubling him a little. He also made it clear that "It was an error to believe that the High Court had not been convened because of doubts which had been raised about the guilt of the accused." If the instruction had been complete he was sure it would have been easy to demonstrate that all those involved had exposed themselves to the vengeance of the laws.

The members of the Council gave their opinions individually. They were unanimous that the Capitulation was a crime against the State and that all those involved were guilty but dismissed the charge of treason. Only Boulay de la Meurthe made the point that article 77 of the Penal Code of 1810 could not be applied because it was later than the events of the accusation: under the Penal code, *Article 1.4: No contravention, delict, or crime can be punished with any penalty not pronounced by the law before the commission thereof.*

They gave individual advice on the penalties to be imposed and then, after discussion, a joint decision was agreed.

They were unanimous that Dupont was the principal author and should be subjected to the penalties proposed by the Prosecutor, deprivation of rank and titles etc.

Marescot was held to be guilty but mainly through weakness, he received four votes for the full punishment and seven for a recommendation to the clemency of the Emperor.

Only one voice gave a definite guilty verdict on Chabert, the rest considered that he was obeying orders but was guilty of weakness; there were eleven votes for clemency, one for deprivation of rank etc. and one that he should be dismissed with a pension.

There was confusion over Vedel, he received five guilty verdicts but two of those were for his military conduct, one considered him not guilty and the others criticised him for weakness; there were two voices for full penalties, one for dismissal with a pension and the remainder for recommendation to clemency.

There was near unanimity over the guilt of Villoutreys and the verdicts were for full penalties apart from one for dismissal.

The final verdict was that:

“The Council is of the opinion that General Dupont should be deprived of his rank, dignities, honours, prerogatives, pay and pensions and declared incapable of serving HM the Emperor and King; that his decorations should be withdrawn from him; that he should be forbidden to take the title of comte, which title, with his dotations would pass at his death to his eldest son; that he should also be forbidden, under pain of being arrested and detained for one year for the first offence and double in the case of a second, from approaching within 20 leagues of the residence of HM the Emperor.”

“The Council is of the opinion that General Marescot is liable to the same penalties applied to General Dupont however, the Council recommends the aforesaid General Marescot to the clemency of HM the Emperor though he should continue to be suspended indefinitely from the exercise of his functions as First Inspector of Engineers, Grand-officier de l’Empire.”

“The Council is of the opinion that General Chabert is liable to the same penalties applied to General Dupont however, the Council recommends the aforesaid General Chabert to the clemency of HM the Emperor , only to be erased from the army lists, with a pension.”

“The Council is of the opinion that General Vedel is liable to the same penalties applied to General Dupont however, the Council recommends the aforesaid General Vedel to the clemency of HM the Emperor.”

“The Council is of the opinion that Captain Villoutreys is liable to the same penalties applied to General Dupont and in consequence the aforesaid Captain Villoutreys should be deprived of his honours and employments, that he should be erased from the army lists and declared incapable of serving HM; that the decoration of the Legion d’honneur should be withdrawn from him; that he should be forbidden to wear the Grand-Croix de l’Union de Bavière, and that he should equally be forbidden to approach within 20 leagues of the residence of HM the Emperor.”

Napoleon gave his opinion in a decree of March 1st 1812:

“General of division Pierre Dupont is dismissed from his military ranks; the decorations that have been granted to him are withdrawn; his name will be erased from the catalogue of the Légion d’honneur. He is expressly forbidden for the future to wear military costume, to take the title of comte and to make use of the heraldic arms that we attached to this title. The dotations that he holds from our bounty will be placed under sequester. He will be transferred to a State Prison to be detained until new orders.”

“General of division Dominique-Honoré-Antoine Vedel, general of division Armand-Samuel Marescot, general of brigade Theodore Chabert and the Sieur Charles Villoutreys are dismissed from their military ranks, erased from the catalogue of the Légion d’honneur, and sent under surveillance to communes of their choosing at more than 40 leagues from Paris.”

It will be seen that Napoleon added imprisonment to the punishments recommended by the Council for Dupont. This was not legal without a verdict from a legitimate tribunal. He made no distinction between the others in spite of the definite opinions of the Council on the scale of guilt and in spite of the opinion of Regnaud in 1810 that Chabert and Vedel had only been obeying orders and should not be charged.

Once it had been decided that the capitulation was shameful and had compromised the external security of the State, which was inevitable since Napoleon had already pronounced on this and the members of the Council knew what they had been convened for, it was also inevitable that Dupont would be condemned. The case against the others was very weak, even by these low standards: none of them could be convicted of anything but errors of judgement though Vedel might well have been found guilty by a conseil de guerre for his military conduct.

No evidence was ever produced that Villoutreys had given orders to the troops on the Madrid road that they should surrender, apart from his recommending the sick at Manzanares to the protection of Castanos. The abuse aimed at this junior officer seems to have been based on his own declaration which changed his initial story to the disadvantage of Dupont and added to his slanders on Marescot. The Council professed to be shocked by the fact that he had not told the Emperor the full truth from the beginning but I suspect the epithets of ‘vile and immoral’ thrown at him were

inspired more by a dislike of this recantation: to put it colloquially, no-one likes a snitch!

It cannot be disputed that Napoleon, as commander-in-chief, had the right to dismiss officers from the service if he disapproved of their conduct nor was it unreasonable that, as Emperor, he should withdraw favours he had granted, though it should be noted that Dupont's rank as general of division predated Napoleon's rank as Emperor. Why, in that case, did it take three and a half years, much legal argument and the pomposity of an assembly of the high dignitaries of the Empire to achieve this result? Presumably it was because Napoleon had been looking for a criminal conviction at the beginning and was reluctant to admit that he was not going to get one.

Why was the charge of treason added to the final accusation, when all the lawyers, including the Prosecutor, must have known that the Penal Code of 1810 could not be used against events occurring in 1808 and that the Council had no authority to impose a death sentence? It is likely that this was added on Napoleon's expressed instructions and suggests that he wanted a conviction on a specific criminal charge: the Prosecutor signalled strongly that the death penalty would not be imposed, so a conviction followed by an act of clemency may have been his intention. A historical precedent can be brought in here: at the trial of Moreau and others in 1804 when the judges withdrew to give their verdicts the Juge-Instructeur spoke first and pronounced Moreau guilty on the capital charge stating that he was persuaded that he would not be put to death but would receive grace.¹

Why was Napoleon so determined to get a criminal conviction in this case when he could have dealt with the military faults himself? The definitive statement, made in the *Moniteur* of September 5th, before any enquiry had been made, was:

... "All these successes, joined to the arrival of the King in Madrid, seemed to presage a happy and prompt issue to the affairs of Spain when General Dupont, after a series of events that we cannot describe since they must be the object of research, of reports and of interrogations, not only made the triple fault of letting his communications with Madrid be cut, and worse still, of letting two thirds of his forces separate, remaining six leagues out of communication, and finally of fighting on July 19th with a third of his force in a disadvantageous position, after a forced night march and without having had time to rest."

It was Napoleon's contention in his correspondence, contradicted by the reports of Joseph and Savary, that all had been going well in Spain and that it was Dupont's failure that had caused the setback, the evacuation of Madrid and all subsequent problems. The Prosecutor's opening speech referred to 'two divisions whose presence in La Mancha would have changed the fate of Spain and whose surrender caused the misfortunes and cost the blood of Europe and of France.' He developed this in his closing speech:

"One of the most important operations for the consolidation of the Continental System, the union of interest between Spain and the French Empire, for which some months of time, slight sacrifices and weak armaments would have

¹ "Opinion sur le Conspiration de Moreau, Pichegru et Autres. Lecourbe, Paris April 23 1814." These were independent judges and gave a majority for acquittal; they were then bullied to change the verdict and eventually a majority agreed to a guilty verdict on a lesser, non-capital, charge.

sufficed has already cost several years, great expense and much blood shed by fanaticism and perfidy.”

“In the political order it is from the importance of acts, from their consequences for the glory, the prosperity, the safety of empires, that form the scale where they are measured by the opinion of peoples and the justice of sovereigns. One can be guilty without being a traitor and there is, if I may speak thus, a political justice which carries another balance than the civil justice and which must show itself all the more severe in that it pronounces on the most important and general interests.”

This makes it plain enough: Napoleon, having blundered in his attempt to take over Spain and impose his brother as King, had suffered a blow to his military and political prestige and needed a scapegoat. Dupont must be burdened with the sins of others and driven out into the wilderness.

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