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THE COURT OF MILITARY APPEALS—
THE FIRST YEAR*

WILLIAM B. AYCOCK**

I. Scope of Review

There are three judicial bodies in the military legal system: The court-martial (trial court), the board of review (intermediate appellate forum) and the Court of Military Appeals (appellate court). The Court of Military Appeals, consisting of three civilian judges, officially began operating on July 25, 1951. The primary purpose of this article is to survey the work of the Court during its first year of operation.

The Uniform Code of Military Justice provides that the Court of Military Appeals shall review the record in the following cases:

1. All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;
2. All cases reviewed by a board of review which the Judge Advocate General orders forwarded to the Court of Military Appeals for review; and

*Although the first year would be technically for the period May 31, 1951 to May 31, 1952, the Court was not organized until July 25, 1951. In this paper the first year will be considered for the period July 25, 1951 through July 25, 1952. Actually the first written opinion published by the Court was on November 8, 1951.

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MANUAL FOR COURTS-MARTIAL UNITED STATES (1951) Ch. XVII, hereafter referred to as MANUAL. The Judge Advocate General performs certain functions in connection with review of court-martial cases, but his powers are not so broad as to make him a separate appellate forum. United States v. Reeves, No. 453 (May 15, 1952).

All opinions of the Court of Military Appeals will be cited in the volume and page of the Court Martial Reports in which they appear. If the opinion is available only in advance sheets, the docket number and date will be cited.

The three members are Chief Judge Robert E. Quinn, former Governor of Rhode Island and judge of the superior court; Judge George W. Latimer, former Associate Justice of the Utah Supreme Court; and Judge Paul W. Brosman, former Dean of Tulane University School of Law. All three judges have had military experience—Chief Judge Quinn in the Navy; Judge Latimer in the Army; and Judge Brosman in the Air Force. They were appointed to the Court on June 20, 1951. 1 CMR VII (1951).


Current articles in this general field are: Wurfel, Military Due Process, 6 VAND. L. REV. (December, 1952); Landman, One Year of the Uniform Code of Military Justice: A Report of Progress, 4 STAN. L. REV. 491 (1952); Comment, 50 MICH. L. REV. 1084 (1952); Latimer, Military Justice, 45 LAW LIB. J. 148 (1952).


The Government may use this device to seek reversal of a board of review in cases where a board of review has reversed a verdict of the court-martial for
(3) All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.\(^7\)

The extent of review in each of these three categories is further defined by Congress:

(1) The Court of Military Appeals shall act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review.

(2) In a case which the Judge Advocate General orders forwarded to the Court of Military Appeals, such action need be taken only with respect to the issues raised by him.\(^8\)

(3) In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review.\(^9\)

The right of an accused to petition the Court for review is subject to waiver only through failure actually to exercise the right. Any agreement executed by the accused purporting to waive this right is a "legal nullity."\(^{10}\)

Unlike the convening authority\(^{11}\) and the board of review,\(^{12}\) the Court is not authorized to review questions of fact. Congress specifically provided that the Court "shall take action only with respect to matters of law."\(^{13}\) A further limitation was imposed by Congress in the form of the so-called "harmless error" rule. A substantial number of the cases decided by the Court during its first year have been concerned with an interpretation of the manner in which the Court should operate within this framework.

II. APPLICATION OF THE HARMLESS ERROR RULE

A. Introduction

Violations of the provisions of either the Code or the Manual constitute error as a matter of law.\(^{14}\) But it does not follow that all errors will result in the Court ordering a rehearing. Each error must be tested in the light of the provisions of the "harmless error" rule:

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\(^{1}\) Code, Art. 67b.
\(^{2}\) Code, Art. 67d.
\(^{3}\) Code, Art. 66c.
\(^{4}\) Code, Art. 64.
\(^{5}\) Code, Art. 67d.
\(^{6}\) Code, Art. 67b.
\(^{7}\) United States v. Lucas, (No. 7) 1 CMR 19 (1951); United States v. Sturmer (No. 24) 1 CMR 17 (1951).
\(^{8}\) In United States v. Castillo, No. 449 (May 2, 1952) adv. op. p. 8, the Court stated "We have never hesitated to go beyond the question proposed by the Judge Advocate General on the exercise of our certificate jurisdiction, but have sought to review the entire record with care." Accord, United States v. Herndon, No. 570 (July 17, 1952).
\(^{9}\) Code, Art. 67d.
\(^{10}\) United States v. Ponds, No. 491 (May 9, 1951).
\(^{11}\) Code, Art. 64.
\(^{12}\) Code, Art. 66c.
\(^{13}\) Code, Art. 67d.
\(^{14}\) United States v. Lucas (No. 7) 1 CMR 21 (1951).
"A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."\(^\text{15}\)

Judge Brosman observed that this provision, as well as similar federal and state legislation, grew out of a fear that appellate courts in criminal cases had become "impregnable citadels of technicality." In stating the object of "harmless error" legislation the Court referred to the language of Mr. Justice Rutledge in *United States v. Kotteakos*:

"... To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record."\(^\text{16}\)

In making its initial determination of the test to employ in applying the "harmless error" rule, the Court again relied on the *Kotteakos* case:

"... The test must be what effect the error had or reasonably might be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

* * * * *

If when all is said and done; the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress ... The inquiry cannot be merely whether there was enough to support the result apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."\(^\text{17}\)

The application then of the "harmless error" rule indicates the necessity for finding of specific prejudice; that is, to use the language of the Court of Military Appeals, "prejudice operating against the accused" in a particular case.\(^\text{18}\) However, as will be subsequently shown, specific prejudice is not necessarily synonymous with actual prejudice.\(^\text{19}\)

Inasmuch as the court-martial also sentences the accused, it is nec-

\(^{15}\) Code, Art. 59a.

\(^{16}\) United States v. Lee (No. 200) 2 CMR 118 (1952), quoting from Kotteakos v. United States, 328 U. S. 750, 760 (1946).

\(^{17}\) United States v. Lucas (No. 7) 1 CMR 21 (1951), quoting from Kotteakos v. United States, 328 U. S. 750, 764-765 (1946).

\(^{18}\) United States v. Lee (No. 200) 2 CMR 118 (1952).

\(^{19}\) United States v. Rhoden (No. 153) 2 CMR 99 (1952); United States v. Clark (No. 190) 2 CMR 107 (1952); United States v. Hemp (No. 290) (April 8, 1952) (error "may have" affected the findings); United States v. Bound (No. 201) 2 CMR 130 (1952) ("probability" of specific prejudice).
necessary that the impact of the prejudice on the minds of the members of the court-martial be tested in respect to both the findings and sentence.\textsuperscript{20}

The United States Supreme Court in the \textit{Kotteakas} case suggested two possible limitations on the application of the "harmless error" rule. They are:

(1) where the error involves a recognizable departure from a constitutional precept, and

(2) where it constitutes a departure from an express command of the legislature.

These limitations were readily adopted by the Court of Military Appeals\textsuperscript{21} and it was deemed advisable by the Court to add a third:

(3) "We have in mind here a situation in which the error consists not in a violation of constitutional or legislative provisions, but involves instead an overt departure from some 'creative and indwelling principle'—some critical and basic norm operative in the area under consideration."\textsuperscript{22}

The last of these limitations is referred to by the Court as "general" prejudice as distinguished from "specific" prejudice.\textsuperscript{23}

B. Specific Prejudice

(1) Instruction of law officers

An important segment of cases involving the "harmless error" rule deals with the instructions of the law officer to a general court-martial. The law officer is the judge\textsuperscript{24} in the military system and his duties in this connection are contained in Article 51c of the Code:

"Before a vote is taken on the findings, the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court—

(1) that the accused must be presumed innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

(3) that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government."

\textsuperscript{20} United States v. Welch, No. 196 (May 27, 1952).

\textsuperscript{21} United States v. Lee (No. 200) 2 CMR 118 (1952).

\textsuperscript{22} Id. at 123.


\textsuperscript{24} United States v. Clark (No. 190) 2 CMR 107 (1952).
Paragraph 73b of the Manual goes further and requires these instructions be given even in cases where the plea is guilty. Therefore, it is error for the law officer to fail to instruct the court-martial whether the accused pleads guilty or not guilty. But if the accused pleaded guilty, it constitutes a waiver and in such case a failure to instruct will not constitute reversible error. If the law officer merely refers the court-martial to provisions in the Manual, such does not constitute an adequate instruction on the elements of an offense. It is error for the law officer to instruct the court-martial incorrectly.30

When and how the law officer shall instruct in the elements of lesser included offenses presents difficult questions. He must determine if there is some evidence from which a reasonable inference may be drawn that the lesser included offense is in issue. If so, he must instruct in the elements of all appropriate lesser included offenses. If not, he should refrain from doing so because, according to the Court, it would be misleading to the court-martial.

In Rhode31 one of the charges against the accused was the offense of willfully disobeying a lawful command of a superior officer. The specification reads as follows:

"In that [the accused] having received a lawful command from 1st Lt. John H. Stopyro, his superior officer, to stop talking and sit down did .... willfully, disobey the same."32

The law officer instructed the members of the court-martial on this specification in the following language:

"The court is advised that the elements of the offense are ...

That the accused received a lawful command from a certain of-
The court-martial rendered a verdict of guilty of wilfull disobedience—an offense greater than failure to obey. The verdict reached carried no limit as to the period of confinement where the offense, as here, occurred in the Far East Command; whereas the maximum sentence for failure to obey was six months. The misinstruction of the law officer permitted the court-martial to find the accused guilty of wilfull disobedience on a showing of mere failure to obey. Unquestionably, here was a clear-cut case of specific prejudice. The Court reversed the board of review which had affirmed the finding and sentence.

In Clark the law officer instructed the court-martial in the elements of the offense charged—i.e., voluntary manslaughter; and further he mentioned the lesser included offenses, among them negligent homicide, but failed to offer any instructions on lesser included offenses. The accused was found guilty of negligent homicide. In reversing the board of review which had affirmed the conviction, the Court found a "reasonable possibility" that without any instructions on negligent homicide the court-martial might have considered negligence as being something different or less than an appropriate instruction would have required. Chief Judge Quinn dissented. Assuming failure to instruct was error, he failed to find the required prejudice.

In Banks the accused was convicted of an assault with intent to murder. The law officer refused to instruct the court-martial on the lesser included offense of an assault with intent to commit voluntary manslaughter. The accused was the aggressor throughout the encounter, which had terminated when the accused shot at another soldier three or four times without hitting him. The Court stated the test in regard to the necessity of instructions on lesser offenses is whether the the lesser offense constitutes, under the evidence, a "reasonable alternative" to the offense charged. To constitute an assault with intent to commit voluntary manslaughter, the acts in question must have been done under such circumstances that, had death ensued, the offense would have been voluntary manslaughter. Here there was no basis to conclude the assault was for any offense less than murder—hence it was not error for the law officer to refuse such an instruction.

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36 Emphasis supplied.
37 Art. 92 carries maximum confinement of six months and a bad conduct discharge. MANUAL p. 221.
38 In United States v. Berry (No. 69) 2 CMR 141 (1952) the Court stated that specific prejudice was found in the Rhoden case. United States v. Goddard, No. 331 (July 24, 1952) (prejudicial error where charge on absence without leave and the finding was desertion).
39 (No. 190) 2 CMR 107 (1952). Negligent homicide is now an offense under the Code, Article 134 for all the services. United States v. Kirchner, No. 654 (July 24, 1952).
40 No. 382 (July 24, 1952).
In *Ginn* the Court adopted the same requirement for instructions to the court-martial on self-defense as for lesser included offenses. There must be some evidence from which a reasonable inference can be drawn that an affirmative defense was in issue.

When the offense charged is an assault with a specific intent to commit an aggravated offense, it is necessary that the offense itself be properly defined. For example, where the alleged offense is an assault with intent to murder, the court-martial must be informed of the meaning of murder as well as of assault.

(2) *Instructions of Law Officers in Desertion Cases*

Three of the several and distinct ways in which the offense of desertion might be committed are:

1. absence without leave with *intent* to desert the military service,
2. absence without leave with an *intent* to avoid hazardous duty, and
3. absence without leave with an *intent* to shirk important service.

Although each is based on a different mental attitude, boards of review have held that a specification which alleged the accused "deserted the service and remained absent in desertion until apprehended" permitted a court-martial to return a verdict of guilty of any of the

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43 In United States v. Jenkins, No. 238 (April 21, 1952) the Court rejected the argument that desertion with intent to remain away permanently was a lesser included offense of desertion with intent to avoid hazardous duty and stated that it was a separate arm of the same crime.

44 "It is likely that this Court would take judicial notice that all duty in a theater of operations, if not actually hazardous, would certainly invoke important service." United States v. Russell Williams (No. 133) 2 CMR 92 (1952).

45 "... the very fact that he left while on order to report to a post outside the continental United States brings into prominence an intent to shirk important service. It is well established in military law that absence without leave with knowledge of immediate overseas movement is sufficient from which a court may find desertion predicated on the intent to shirk important service." United States v. Hemp, No. 290 (April 8, 1952) adv. op. p. 9.

46 "Undoubtedly, service beyond the continental limits of the United States may, under certain circumstances, be considered 'important service,' but we believe that phrase as used in the Article of War and as explained in the Manual denotes something more than the ordinary everyday service of every member of the armed forces stationed overseas. If it does not, then absence without leave and desertion outside the continental limits of the United States would be synonymous." United States v. Boone, No. 320 (May 9, 1952) adv. op. pp. 4, 5.

three types of desertion proved by the facts. The Court rejected\textsuperscript{48} this view, and stated that it was better practice to place the burden on the prosecution to allege specifically the type of mental attitude to be used as a base for a finding of guilt rather than to require the accused to meet any of the three mental attitudes contained in a specification alleging general intent. Therefore, a specification which alleges "the accused deserted the service and remained absent in desertion until apprehended" is not a general allegation. It will be construed to allege only (1) \textit{supra}, i.e., absence without leave with intent to desert the military service.

In addition to requiring the prosecution to allege specifically the type of intent it would undertake to prove, the Court decided it was error for the law officer to instruct that the elements of proof consisted of an intent other than the one alleged.\textsuperscript{49} The proper procedure was to "tailor" the instruction to fit the intent charged.

The Court, after finding error, was still concerned with the additional question of whether error was materially prejudicial to the substantial rights of the accused.\textsuperscript{50} To decide this question the Court must analyze the facts of each case to determine if it was probable that reasonable men might be led to render a finding on an element of intent not framed by the specification. If so, the instruction constitutes error which is materially prejudicial to the substantial rights of the accused and therefore, reversible error. The manner in which the Court has determined the question of prejudice in these cases may be understood more clearly by dealing with two cases in which a contrary result was reached.

In \textit{Hemp}\textsuperscript{61} the specification under which the accused was tried is as follows:

"In that (accused) did, while enroute from Westover Air Force Base, Massachusetts, to McAndrew Air Force Base, Newfoundland, on or about 19 October 1950, desert the service of the United States, and did remain absent in desertion until he was apprehended at Springfield, Massachusetts, on or about 2 June 1951."

As previously indicated such a specification is regarded by the Court as charging only an intent to desert the service with intent not to re-

\textsuperscript{48} \textit{Ibid.} The Court also rejected the suggestion that an accused should be required to file a request for a bill of particulars if more specific allegations were desired. Among other things, the Court stated that a lack of time and the fact that military counsel usually had other duties to perform, particularly in combat areas made it unwise for the military courts to follow the civilian courts in this practice.

\textsuperscript{49} \textit{United States v. Russell Williams} (No. 133) 2 CMR 92 (1952).

\textsuperscript{50} \textit{Code}, Art. 59a.

\textsuperscript{61} No. 290 (April 8, 1952).
turn. The law officer, instructed the court-martial that the elements of proof were as follows:

"Proof: (a) that the accused absented himself without leave from his place of service, organization, or place of duty, as alleged; (b) that he intended, at the time of absenting himself, or at some time during his absence, to remain away permanently from such place or to avoid hazardous duty, or to shirk important service, as alleged. . . ."¹²

The accused was found guilty by the court-martial of desertion. After examining the facts, the Court found two possible intents were "interwoven inextricably" in the case.

"The evidence may preponderate in favor of an intent to abandon the service permanently, but the accused testified and denied that he so intended. No one contends that the court was bound to believe his testimony, and that it was therefore required to find some other intent or return a finding of not guilty. But the very fact that he left while on orders to report to a post outside the continental United States brings into prominence an intent to shirk important service."¹³

Here, according to the Court, the evidence was not "weighted overwhelmingly" in favor of an intent not to return as alleged in the specification, and further, the Court felt that the scales might tilt in favor of intent to shirk important service. Consequently, the law officer in his instruction interjected in the trial an intent not contained in the specification. Under the circumstances the court-martial might have concluded that proof of either intent was sufficient and could have convicted the accused of an offense beyond the fair confines of the pleadings. The result was an erroneous instruction which "may have affected the findings" and therefore, materially prejudiced the substantial rights of the accused. The conviction was reversed.

In Jenkins¹⁴ the specification on which accused was tried and convicted alleged:

"In that (accused) did, in the vicinity of Packtong-Ni Yongdu-Ri Area Korea on or about 7 March 1951, desert the service of the United States by absenting himself without leave from his organization, with intent to avoid hazardous duty, to wit; service with his unit in a combat area, and did remain absent in desertion until he was apprehended at Pusan, Korea, on or about 19 March 1951."

The law officer committed the same error which had occurred in the

¹² In United States v. Russell Williams (No. 133) 2 CMR 92 (1952) adv. op. p. 3 the Court rejected the argument that use of the words "as alleged" would preclude error. Emphasis supplied.
¹⁴ No. 238 (April 21, 1952).
Hemp case by instructing the court-martial in all three types of desertion although only one type was alleged in the specification. The record showed that the accused had been sent from his unit, which occupied a defensive position, to assist a litter team in carrying a wounded soldier to an aid station. The following morning he was discovered in the rear area and ordered forward with a food carrying party. He fled the first time the party was exposed to mortar and artillery fire. The Court observed that the specification and the theory of both the prosecution and defense were all directed toward one intent; i.e., to avoid hazardous duty. Although the Court conceded that an inference of an intent to remain away permanently might be drawn from the fact that the accused was apprehended two hundred miles from his unit; to draw such an inference would require the court-martial to overlook the obvious intent involved in the case. The Court found the error was not prejudicial and distinguished this case from the Hemp case in the following language:

In the Hemp case the pleadings, evidence, arguments and the entire proceedings weighted almost equally on both issues of intent. Reasonable minds might have determined that there was substantial evidence on both sides of the scale, and might have chosen either as a base for an inference of intent. Not so here. This whole proceeding is weighted so overwhelmingly with evidence indicating an intent to avoid hazardous duty that a reasonable mind would have to ignore one side of the scale which was heavily loaded to choose the other which held barely a scintilla. Our understanding of human behavior leads us to believe that when the scales are so obviously out of balance reasonable minds would not be confused or misled as to which intent could be inferred from the facts. In addition to the Hemp and Jenkins cases the Court has decided five other desertion cases involving a similar question of prejudicial error. Two were reversed and three were affirmed.

Offenses which occurred prior to the effective date of the Code and therefore charged as violations of the Articles of War, or the Articles for the Government of the Navy, or the disciplinary laws of the Coast Guard were triable after the effective date of the Code in accordance

The Court was distinguishing both the Hemp and Williams cases from the Jenkins case.

United States v. Jenkins (No. 238) (April 21, 1952), adv. op. p. 5.

United States v. Russell Williams (No. 133) 2 CMR 92 (1952); United States v. Moynihan, No. 278 (April 21, 1952); United States v. Boone, No. 320 (May 9, 1952); United States v. Cooke, No. 307 (June 3, 1952); United States v. Shepard, No. 343 (July 25, 1952).


with the procedure of the Code. Although the new procedure requires the law officer to instruct the court-martial, the older Manuals used in these cases do not contain appropriate provisions for this purpose. Undoubtedly, many of these errors may be attributed to the fact that law officers read instructions from the old Manual without considering that such instructions were inadequate. The Manual for Courts-Martial, 1951, has separate provisions describing desertion with an intent not to return from the other types. According to the Court, its use along with a careful analysis of the foregoing cases, should bring about a considerable reduction of such errors.

In Goddard the Court made it clear that even though a court-martial may infer an intent to desert from such prolonged absence, it is prejudicial error for the law officer to instruct in a manner which indicates that desertion would follow as a matter of law.

An experienced law officer will have difficulty in instructing a court-martial in a manner which will meet with the approval of the Court. This appears to be particularly true in respect to lesser included offenses. The president of a special court-martial, usually untrained in the law, is even less likely to fulfill the technical requirements involved in instructing the court-martial.

(3) Specific Prejudice in Cases Other Than Those Involving Instructions of Law Officers.

In Bound the accused was convicted by a special court-martial in the Navy for the wrongful appropriation of an automobile. One member of the court-martial, a lieutenant, as security officer on the night of the occurrence of the offence, had conducted an informal investigation. Although it was conceded that the lieutenant did not investigate the charges within the meaning of Article 32 of the Code, he was, nevertheless, in the opinion of the Court an investigating officer within the meaning of Paragraph 64 of the Manual. As such he was forbidden by Article 25d (2) of the Code to sit as a member of this special court-martial. Error was committed when he was allowed to continue sitting on the Court after his previous connection with the case had been disclosed. The Court decided at the outset that the error was not a recognizable departure from a constitutional concept or from an express command of the legislature. It then examined the record for specific prejudice. None was present in respect to the findings because the accused pleaded guilty and the error was thereby waived. But the
Court did find a “probability” of specific prejudice in the sentence. This conclusion was based on the reasoning that the lieutenant knew the facts of the case whereas the court-martial did not. Because of the plea of guilty, no evidence was introduced by the prosecution. Therefore, the lieutenant was in a position to influence the court-martial in imposing a more severe sentence than it might have given otherwise. The board of review had ordered a rehearing and the Court of Military Appeals affirmed.

Although it appears as an afterthought, the Court did not overlook the possibility of “general” prejudice. However, it decided to express no opinion on whether “general” prejudice was involved in this case inasmuch as it had found a “probability” of specific prejudice.

In Gordon two charges were considered initially: (1) an attempt to burglarize the home of General Lee and (2) burglarizing the home of another general. The accused confessed before trial. General Lee, with knowledge of the confession, issued an order convening the general court-martial which subsequently tried the accused. After the court-martial had been appointed but before trial, the charge of an attempt to burglarize the home of General Lee was dismissed because the pre-trial investigation failed to reveal any substantial evidence to corroborate the confession of the accused. The accused was convicted of the remaining charge and the board of review affirmed. The Judge Advocate General of the Air Force certified the following question to the Court of Military Appeals:

“Under the circumstances disclosed in this record of trial, was Brigadier General Lee disqualified to act as convening and reviewing authority in this case?”

The Court answered in the affirmative and stated that it was the intent of Congress that a court-martial should not be appointed by one who had a personal feeling or interest in the matter. Further, the test was not the animus of the convening authority but whether he was so closely connected with the offense that a reasonable person would conclude that he had a personal interest in the matter. Considering General Lee’s knowledge of the case at the time the court-martial was

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66 In the Navy conviction generally follows immediately after a plea of guilty. The Army practice is otherwise and trial counsel usually introduces sufficient evidence to make out a prima facie case. MANUAL, Par. 70a permits either practice. LEGAL AND LEGISLATIVE BASIS MANUAL FOR COURTS-MARTIAL (1951), p. 92.

67 Accused was sentenced to a bad conduct discharge and four months’ confinement. The maximum he could have received by this special court-martial was a bad conduct discharge and six months. The Court considered the sentence “relatively severe” but conceded it would have not so appeared had the trial been by a general court-martial.

68 Perhaps explainable because the doctrine first appeared on the same day this case was decided. United States v. Lee (No. 200) 2 CMR 118 (1952).

69 (No. 238) 2 CMR 161 (1952).
appointed, the Court believed the reasonable "probabilities" were that the impartiality demanded by Congress was not present. Moreover, the Court felt notwithstanding the fact that General Lee had reduced the sentence as reviewing authority, he might have reduced it more if he had been free from any connection with the controversy. Accordingly, it was the opinion of the Court that the substantial rights of the accused were materially prejudiced.

Judge Brosman concurred in the result and stated, "I prefer to bottom my concurrence on the concept of general prejudice . . . "

In Keith the accused was found guilty of two offenses: (1) misbehavior before the enemy and (2) desertion. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for five years. The law officer failed to instruct the court-martial in the elements of the offense of misbehavior before the enemy. This was prejudicial error and under the authority of the Clay case the finding of guilty of this offense was invalid. However, the valid conviction of desertion was sufficient to support the entire sentence. The Court was urged to adopt the general rule as applied in federal courts. The rule as stated by the Court is as follows:

"By its terms, if an accused is convicted under an indictment containing several counts—regardless of the character of the verdict—and a general sentence is imposed, which is either mandatory or appropriate in fact and law for a valid conviction under a single count, neither the verdict nor the sentence will be reversed for error in other counts."

The Court conceded that as to the sentence there could be situations in which there would be no prejudicial error in applying this rule. But the Court stated that to leave the findings undisturbed "may operate to prejudice materially—although collaterally—the rights of an accused military person quite apart from its possible effect on sentence quantum . . . " For instance, an invalid finding, uncorrected in the record, might cause an accused to be sent to a civilian prison instead of being retained in military control—the latter offering more generous provisions for good conduct time and opportunities for parole. Moreover, it could affect the rights of the accused before a clemency board, or perhaps cause a loss of certain rights applicable to convicted deserters, or in a subsequent trial it could possibly be counted against the accused as a prior conviction. For these reasons the Court rejected the rule and reversed the finding of guilty of misbehavior before the enemy. Inasmuch as the Court does not have the authority to change a sentence, the case was remanded for reference to the board of review for the

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69 No. 226 (July 3, 1952).
69a See note 83 infra.
purposes of giving that forum an opportunity to determine the adequacy of the sentence for the offense of desertion.

Prejudicial error was found where the law member (officer) denied a motion for a continuance made by the defense after it had been surprised by a ruling of the law member which excluded certain testimony.

C. Error not prejudicial

In *Lee* the Court decided it was not prejudicial for an accuser subsequently to act as trial counsel in the same case. To constitute prejudicial error it is necessary to show that the trial counsel was in fact "biased, prejudiced, or hostile."

Two cases certified to the Court by the Judge Advocate General of the Navy involved the qualifications of counsel in a special court-martial. In *Hutchinson* a non-commissioned warrant officer was the regularly appointed assistant defense counsel. He did not serve in the case. The Court assuming error found no "reasonable possibility" of prejudice and reversed the board of review which had set aside the findings and sentence. In *Goodson* the trial counsel was a non-commissioned warrant officer. The Court found error in appointing a person other than an officer as trial counsel but held that inasmuch as it was only a technical non-compliance with the Code, and since the accused had pleaded guilty, his rights were not substantially prejudiced. Again the decision of the board of review, which had set aside the findings and sentence, was reversed.

In *Doyle* the prosecution had failed to show a confession was voluntary. There was no evidence it was involuntary and there was other convincing proof of guilt. Therefore, the Court concluded the error did not substantially prejudice the rights of the accused and affirmed the finding of the board of review.

In *Bartholomew* the trial counsel was legally trained and the defense counsel was a high school graduate. Neither was a qualified lawyer. Article of War 11, applicable in this case, did not require counsel to be qualified lawyers and contained no provision for equality of training when counsel were non-lawyers. The Court found a technical compliance with the Article of War in this case but felt it was inconsistent with its spirit. However, the excellent manner in which defense counsel conducted the defense resulted in the Court finding

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*United States v. Plummer, No. 235 (May 7, 1952) (Judge Latimer dissent).*

*No. 200) 2 CMR 118 (1952).*

*No. 425 (April 9, 1952).*

*No. 424 (April 14, 1952).*

*No. 265 (May 20, 1952). A violation of Par. 174 Naval Courts and Boards and now a violation of MANUAL Par. 140a. See section V.*

*No. 166 (April 16, 1952).*
no specific prejudice. Because of a literal adherence to the standard set by Congress in Article of War 11, "as well as readily discernible reasons of a practical character", the Court did not regard this case as a proper one in which to apply the concept of "general" prejudice. Although this situation will no longer arise in a general court-martial, it may occur in a special court-martial. Whether the substantial rights of the accused were materially prejudiced may depend on the manner in which the defense counsel performed his duties.

In *Gilgallon* it was held to be only a minor irregularity that the court-martial announced the sentence in terms of two-thirds forfeiture of pay for two months instead of a specific number of dollars and cents as required by the Manual.

D. **Military Due Process**

On November 27, 1952, the Court announced it would regard certain errors as constituting a violation of what the Court termed "military due process." "Military due process" is analogous to "due process" in the civilian courts except that it is based on Acts of Congress; i.e., the Code rather than the Constitution of the United States.

The Court defined due process in the following language:

"Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights."

There are certain standards in the military system which have been "specifically set" by Congress and which the Court has stated must be observed in the trials of military offenses. To illustrate, the Court listed some, but not necessarily all, of the rights in the Code which parallel those accorded to defendants in civilian courts:

"To be informed of the charges against him; to be confronted by witnesses testifying against him; to cross-examine witnesses for the Government; to challenge members of the court for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the...

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76 See *MANUAL*, Par. 6b. Counsel must be qualified lawyers.

77 "Any officer not disqualified by reason of prior participation in the same case may be appointed trial counsel or defense counsel of a special court-martial. But if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel must be similarly qualified . . . ." *MANUAL*, Par. 6c.

78 (No. 286) 2 CMR 170 (1952).

79 United States v. Clay (No. 49) 1 CMR 74 (1951). The germ of this idea appears in the *MANUAL*, Par. 87c in connection with the review of the convening authority. This section was quoted by the Court in United States v. Lucas (No. 7) 1 CMR 21 (1951). For an excellent discussion of this subject see Wurfel, *Military Due Process*, 6 VAND. L. REV. (December, 1952).

80 United States v. Clay (No. 49) 1 CMR 74, 77 (1951).
court instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review.”

The Court pointed out the seriousness of such error in the following manner:

“... if the denial of these benefits to a defendant is of sufficient importance to justify a civilian court in holding that it denied him due process, it should be apparent to a casual reader that denial of a similar right granted by Congress to an accused in the military service constitutes a violation of military due process.”

For reasons not altogether apparent, the Court decided it would not deal with this type of error in terms of jurisdiction. Instead, it would use its powers as an appellate court to reverse for errors of law which materially prejudice the substantial rights of the accused.

Two “military due process” cases were decided by the Court during the first year.

In Clay the accused pleaded not guilty to a charge of disorder. The president of the special court-martial failed to charge the court on the elements of the offense, the presumption of innocence, and the burden of proof as required by the Code and the Manual. After the accused was found guilty, but before sentence, the defense counsel complained that no instructions had been given. The court-martial admitted procedural error had occurred but took no action except to attach an explanation to the record. The board of review found the failure to instruct was not prejudicial because of the sufficiency of the evidence to support a finding of guilty. The Court decided it was inappropriate to apply the test of specific prejudice and used the following language:

“Assuming without deciding that the evidence compels such a finding, we are, nevertheless, required to hold the error materially prejudiced the substantial rights of the accused, for the reason that we can not say one of the historic cornerstones of our system of civil jurisprudence is merely a formality of military procedure. If Congress specifically grants what it considers to be a substantial right, we cannot deny the authoritative requirement by refusing to recognize it.”

81 Id. at 77, 78.
82 Id. at 79.
83 (No. 49) 1 CMR 74 (1951); Notes, 20 GEO. WASH. L. REV. 490 (1952); 27 N.Y.U. L. REV. 163 (1952); 50 MICH. L. REV. 1084, 1089 (1952). See also for failure to instruct: United States v. Keith, No. 226 (July 3, 1952); United States v. Shepard, No. 343 (July 25, 1952) (Charge III only).
84 CODE, Art. 51c.
85 MANUAL, Par. 73b.
86 United States v. Clay (No. 49) 1 CMR 74, 81 (1951). The Court reached the same result in United States v. James, No. 551 (May 8, 1952).
It thus appears that material prejudice flows automatically from the mere commission of those errors denominated violations of "due process." This conclusion is further supported in *Welch*.

After the Court found that the accused had been denied the right against self-incrimination in an official pre-trial investigation, it stated:

"It follows automatically that the testimony given at this investigation should not have been received in evidence at the trial. Article of War 24 . . . and Article 31 of the Uniform Code of Military Justice . . . so command. Further, it matters not that there may be other evidence of guilt. The right here violated flows through Congressional enactment from the Constitution of the United States. Military due process requires that courts-martial be conducted not in violation of these constitutional safeguards which Congress has seen fit to accord members of the Armed Forces."

Both opinions indicate that "military due process" cases do not require a test of specific prejudice. Instead, such error per se constitutes specific prejudice and in effect is an exception to the "harmless error" rule. Errors which constitute a violation of "military due process" appear to be a departure from an express command of Congress and therefore a "recognizable departure from a constitutional precept."

The Court has announced it would use federal court cases as a source from which it could test the prejudicial effect of denying an accused the rights set out in the pattern of "military due process". The advantage in maintaining similar terminology may explain, at least in part, why the Court adopted the term "military due process".

There may be certain advantages in disassociating lack of due process from jurisdictional error. Should the Court develop a body of jurisdictional errors—as distinguished from the rare situation in which the court-martial had no jurisdiction over the person or the offense charged—it might thereby invite increased review of court-martial proceedings by federal courts in habeas corpus proceedings. The United States Supreme Court used the following language in *Hiatt v. Brown*:

"The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process. We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report,

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87 No. 196 (May 27, 1952).
88 Id. at 7.
89 Judge Latimer's concurring opinion in *Welch* indicates he would apply specific prejudice. Considering he wrote the opinion in the *Clay* case he must mean that the error per se constitutes specific prejudice.
90 United States v. Clay (No. 49) 1 CMR 74 (1951).
the sufficiency of the evidence to sustain respondent's convic-
tion, the adequacy of pretrial investigation, and the competence
of the law member and the defense counsel. . . . It is well settled
that, by habeas corpus the civil courts exercise no supervisory
or correcting power over the proceedings of a court-martial
. . . The single inquiry, the test, is jurisdiction.”

However, it does not follow that more serious errors committed during
trial will be considered non-jurisdictional. Always in the background
is the warning of Mr. Justice Douglas in Whelchel v. McDonald:62

“We put to one side the due process issue which respondent
presses, for we think it plain from the law governing court-
martial procedure that there must be afforded a defendant at
some point of time an opportunity to tender the issue of insanity.
It is only a denial of that opportunity which goes to the question
of jurisdiction.”

Another possible reason why it would be unwise to develop a body of
jurisdictional errors is that the Court of Military Appeals does not
have necessarily the last word on what constitutes jurisdiction. If a
question of jurisdiction is determined against an accused, it is possible
such question may come before the Supreme Court of the United States
in a review of a habeas corpus proceeding. In such event the voice
of finality on a question of jurisdiction is that of the Supreme Court
of the United States.

E. General Prejudice

In Lee,63 the Court developed by dictum a third limitation on the
“harmless error” rule which may be applied where the error “involves
an overt departure from some ‘creative and indwelling principle’—some
critical and basic norm operative in the area under consideration.” In
this area the doctrine of “general” prejudice will be applied as distin-
guished from the Court’s concept of specific prejudice.

By way of illustration the Court gives an example of what it has
in mind in creating this form of “general” prejudice:

“Such a compelling criterion we find within the sphere of this
Court’s effort in the sound content of opposition to command
control of the military judicial process to be derived with as-
surance from all four corners of the Uniform Code of Military
Justice.”64

Looking at the facts of the case the Court found that this criterion was
not violated when the accuser served as trial counsel in the case. Neither

2d 387 (1952).
63 (No. 200) 2 CMR 118 (1952).
64 Id. at 123. On command control see “Report of the Special Committee
76, p. 378 (1951).
did it make any difference that the accuser as such made a brief pre-
liminary inquiry into the facts of the case. The Court found no sug-
gestion whatever of specific prejudice—that is "of prejudice operating
against the accused in this particular case."\textsuperscript{96} The decision of the
board of review, which had set aside the findings and sentence on the
ground that the error was jurisdictional,\textsuperscript{96} was reversed.

In \textit{Berry},\textsuperscript{97} decided a few days after the \textit{Lee} case, the Court applied
the concept of "general" prejudice which it had announced in the \textit{Lee}
case. During a trial by a general court-martial the president of the
court-martial for reasons unexplained took over the duties of the law
member (officer) and ruled on motions, admissibility of a confession
and advised the accused of his rights. The Court held this was error
and ruled that it would not examine the record for specific prejudice
but instead it would apply the doctrine of "general" prejudice. The
reasons are stated in the following language:

"If the president of a general court-martial—freely selected as
he is by the convening authority, possibly more concerned with
military discipline than with law administration, and almost cer-
tainly less well informed within the latter sphere under ordinary
circumstances—is able to usurp the judgelike functions of the
law member, then, we are much afraid, at least one barrier inter-
posed by Congress in the path of what has been popularly char-
acterized as 'command influence' has been weakened, if not re-
moved."\textsuperscript{98}

In this case the Court concluded that the record disclosed "an inherently
and generally prejudicial disregard for an important segment of the
procedures deemed necessary by Congress in the establishment of a
scheme of military law administration more nearly in accord with the
American system of criminal justice". The action of the board of re-
view in approving the sentence of the court-martial was reversed.

As in the \textit{Lee} case, Judge Latimer concurred only in the result. He
stated that he was not ready to agree on the concept of "general" prej-
udice which he considered "unnecessary in this setting" and which
was contrary to the clear mandate of Congress. But he found specific
prejudice resulted from the error.\textsuperscript{99}

\textsuperscript{96} United States v. Lee (No. 200) 2 CMR 118 (1952).
\textsuperscript{97} United States v. Berry (No. 69) 2 CMR 141 (1952).
\textsuperscript{98} Judge Latimer stated: "I believe that when Congress authorized preliminary
rulings by a legally trained person and that right is refused there is involved a
prejudicial denial of a right of substance. It is more than a belief that some over-
arching principle of general prejudice permeates the atmosphere of the court room.
It is the refusal to grant to the accused a fundamental right guaranteed to him
by the Articles of War. If we are permitted to reason by analogy with the
civilian practice this, to me, smacks of a judge allowing the foreman of a jury
to decide questions of law and admissibility of confessions." \textit{Id.} at 149.
The foregoing cases indicate certain departures from a requirement of specific prejudice. The concept of "military due process" appears to carry with it the idea of prejudice per se. Once the Court discovers an error which comes within the scope of this label it will look no further for reversible error. Inasmuch as the Court has outlined in some detail what is meant by "military due process," the convening authority and boards of review should not be unduly handicapped in anticipating whether a case comes within this concept and accordingly should be able to take appropriate action in their review.

"General" prejudice is a concept more difficult to define than "military due process." Although we are told that command control comes within its sphere, there will be difficulty in anticipating what the Court considers command control. For instance, if the president of the court-martial usurps the functions of the law officer, there is, according to the Court, command control irrespective of the fairness of the rulings of the president; but if the convening authority was so closely connected with the case that a reasonable person would conclude that he had a personal interest in the case, the Court looks for one of its species of specific prejudice instead of finding "general" prejudice. It seems unlikely that many cases will be decided under general prejudice doctrine. Its proper area of application will continue to be one of speculation and conjecture.

Since only a limited number of cases will be subject to the concepts of "military due process" and "general prejudice," the great majority will be tested in terms of specific prejudice. If specific prejudice really meant "prejudice operating against the accused" and that only in a particular case, a reasonable guidepost for anticipating the attitude of the Court on this question would be available. Unfortunately, this is not necessarily true. Reversible error has been found where there was "probability," and a "reasonable possibility" that the substantial rights of the accused were materially prejudiced. If an officer on security watch makes an informal investigation and later sits as a member of the court-martial, there is "probability" of prejudice and reversible error; but if the trial counsel made a preliminary investigation and also served as accuser, the error is not a reversible one unless something more is shown in the way of bias or prejudice on the part of the trial counsel. This third departure from a requirement of actual prejudice is even more nebulous than "military due process" or "general" prejudice. At least we are given some notion of what the Court will consider "military due process" and "general" prejudice; but whether we may expect specific prejudice to be interpreted in terms of actual, a "probability" or a "reasonable possibility" of prejudice is completely
left to speculation inasmuch as the Court has not and cannot provide any criterion.

It is apparent that the Court considers error in the light of two considerations: (1) harm to the particular accused; (2) harm to the system of military justice without regard to the harm to a particular accused. Conceding that error should be tested in terms of protecting the accused and the system, a simple and adequate approach would have been to require actual prejudice with a single class of exceptions, i.e., all errors which harm the system. Instead, the Court has developed at least three types of exceptions to a requirement of actual prejudice: (1) "probability" or "reasonable possibility" of specific prejudice; (2) "military due process" (may or may not involve actual prejudice); and (3) "general prejudice."

III. JURISDICTION

The Court of Military Appeals, as other appellate tribunals, determines if the trial court was legally constituted throughout the trial and had jurisdiction over the offense and the person tried.

Jurisdictional questions relating to problems which arose in connection with the transition from the old procedure to the new were presented to the Court in several cases. Inasmuch as these questions are rapidly becoming academic they will be omitted in this discussion.

In Market\textsuperscript{100} the Court had little difficulty in deciding that the accused, a civilian employee of the Department of the Army as superintendent of a tire plant in Japan and engaged in work for the armed forces of the United States, was subject to courts-martial jurisdiction inasmuch as he was "accompanying or serving with the Army" during time of war.

In Emerson\textsuperscript{102} the charges were referred to a special court-martial for trial but the trial was conducted by a different special court-martial. The appointing order of this latter court-martial did not contain authorization for the trial of unarraigned cases already ordered to be tried before a previously appointed court. The board of review decided that this lack of a specific referral to the new court-martial for trial deprived it of jurisdiction. The Court reversed the board of review because Paragraph 33j of the Manual, which provides that "charges are ordinarily referred to a court-martial for trial by means of the endorsement on page 3 of the charge sheet," is not mandatory. And a failure

\textsuperscript{100}United States v. Merritt (No. 53) 1 CMR 56 (1951); United States v. Sonnenschein (No. 8) 1 CMR 64 (1951); United States v. McSorley (Nos. 1 and 2) 1 CMR 84 (1951); United States v. Martin (No. 51) 1 CMR 82 (1951); United States v. Sherwood (No. 3) 1 CMR 86 (1951).

\textsuperscript{102}No. 281 (May 19, 1952).

\textsuperscript{102} (No. 77) 1 CMR 43 (1951).
to follow the procedure set out in the Manual for "customary usage" did not constitute a defect of sufficient import to deprive the court-martial of jurisdiction.

In only one case in which the offense occurred since the effective date of the Code has the Court decided the court-martial was unauthorized to try the accused. In *La Grange*\(^{103}\) the commanding officer of a ship, a captain in rank, was the accuser. He disqualified himself as convening authority and forwarded the papers to his superior officer who in turn directed an officer, commander in rank, to exercise jurisdiction and to appoint a special court-martial. The question before the Court was whether an officer junior to the accuser and one not in the normal chain of command had authority to appoint the court-martial. Article 23b of the Code in such circumstances provides that the court-martial shall be convened by a "superior"\(^{104}\) competent authority; whereas the Manual\(^{105}\) requires "another" competent authority. The Court resolved the apparent conflict in the terms of the Code and Manual by concluding that the appointing authority must be "superior." Since the commander was junior to the captain there was a violation of the statutory conditions relating to the constitution of the court-martial and therefore, the court-martial was not authorized to try the accused. To hold otherwise, according to the Court, would open the door for command control through a subordinate; a situation which Congress intended to avoid by employing the word "superior" in the Code.

In *Hutchinson*\(^{106}\) the following question was certified to the Court:

"Was the special court-martial without jurisdiction and the proceedings therefore invalid, because the appointed assistant defense counsel, who did not act in the case, was not an officer within the meaning of Article 1 (5), Uniform Code of Military Justice?"

The Court found no express requirement in the Code that an accused be provided with assistant defense counsel or that an assistant defense counsel be an officer—the latter, if true, would have to be inferred from the Manual provision. Since the Court failed to find a violation of a mandatory requirement of the Code, there was no jurisdictional defect.

The same question involving qualifications of counsel soon arose again in a slightly different manner. In *Goodson*,\(^{107}\) the question certified was as follows:

\(^{103}\) No. 313 (April 24, 1952).
\(^{104}\) Code, Art. 1 (6). "Superior officer shall be construed to refer to an officer superior in rank or command."
\(^{105}\) Par. 5a (3) (made applicable to special courts-martial by Par. 5b (2)).
\(^{106}\) No. 425 (April 9, 1952).
\(^{107}\) No. 424 (April 14, 1952).
"Was the special court-martial without jurisdiction, and the proceedings therefore invalid, because the appointed trial counsel who acted in this case was not an officer within the meaning of Article 1 (4), Uniform Code of Military Justice?"

This time the Court faced the issue squarely and decided it was implicit in the Code, as expressed in the Manual, that appointed counsel of inferior courts-martial must be an officer in the sense of Article 1 (5) of the Code. Here was a violation of the Code! But any notion that every violation of a mandatory requirement of the Code constitutes jurisdictional error was promptly dispelled. Only some violations would constitute jurisdictional error. This was not one. It was not a provision which may be regarded as an "indispensable prerequisite" to concepts of military justice and a fair trial. It was reasonable to anticipate that the Court would reach this conclusion inasmuch as in May108 the Court had, in effect, held that a failure to have charges sworn before an officer authorized to administer oaths in violation of Article 30 of the Code did not constitute jurisdictional error.

The Court has also noted that Paragraph 61f of the Manual makes the equal qualification of counsel a jurisdictional requirement, insofar as membership in the Judge Advocate General's Corps or in the bar of a federal court or the highest court of a state is concerned. The Court did not pass judgment on this point but did observe that the Manual provision was based on the "mandatory" provisions of Article 27 of the Code.109

The Court stated that it was neither "necessary nor desirable"110 to set out explicitly those provisions which may be jurisdictional and those which are not. A clearer conception of what constitutes jurisdictional error apparently will come only through the slow process of judicial exclusion and inclusion. This process may be further retarded by the appearance of the concept of "military due process" in military jurisprudence. Some errors which constitute a violation of "military due process" might otherwise have been treated as jurisdictional errors. But the necessity for doing this has been avoided since the Court, as heretofore stated, deals with "military due process" cases in terms of prejudicial error. The Court has also announced it has no intention of classifying these errors as jurisdictional or non-jurisdictional.

108 (No. 241) 2 CMR 80 (1952).

A question involving jurisdiction was certified to the Court in United States v. Lee (No. 200) 2 CMR 118 (1952). The Court stated that the court-martial had jurisdiction. The opinion otherwise dealt with questions of prejudicial error.
In *McCrary*, the first written opinion of the Court, Judge Latimer, writing for the majority, set forth "a few well known principles of law" which would govern the scope of review:

1. The Court, as is usual with appellate tribunals, is limited to correction of errors of law.
2. If there is *any* substantial evidence in the record to support a conviction the Court, in the absence of other error, will not set aside the verdict or conversely, the Court will set aside a conviction where there is *no* substantial evidence to sustain the finding.
3. The principle of law requiring that the evidence must establish beyond a reasonable doubt that the defendant is guilty of the crime charged and the rule which states that the evidence must exclude every reasonable hypothesis of innocence are applicable to the trial forums and are not to be applied by the Court of Military Appeals.

Judge Brosman in a concurring opinion dealt primarily with the facts in the case and did not express his views on the principles governing review stated by Judge Latimer.

Chief Judge Quinn dissented. Although in agreement that the Court was limited to the correction of errors of law, he took issue with the other principles announced by Judge Latimer. His conception of the rule to be applied regarding circumstantial evidence was:

"... there must be substantial evidence consistent with guilt and inconsistent with any reasonable hypothesis of innocence. This rule has been laid down even more strongly to the effect that the evidence must exclude every reasonable hypothesis but that of guilt."

Unlike Judge Latimer, he did not regard this test in either of its versions as being confined to the trial forums but rather as an appropriate test to be applied by the Court of Military Appeals.

The issue in the *McCrary* case was whether the court-martial was justified in finding an intent to desert. Judges Latimer and Brosman concluded that the finding should be affirmed on the basis of the following facts which they considered were in evidence before the court-martial:

1. The accused who was stationed at Camp Stoneman, California
2. The station of the accused was in use as a staging area
3. The station of the accused was approximately 45 miles from the San Francisco Port of Embarkation

*1d.* at 12.

*Id.* at 12.
(4) The accused who was a member of an overseas replacement unit
(5) A sixty day absence without leave
(6) Termination of this absence at a point approximately 2,000 miles from the station of the accused
(7) A state of armed conflict existed in Korea involving United States Forces.

Judge Latimer was of the opinion there was substantial evidence to sustain the findings. Judge Brosman concluded that he could not say that this finding is based on no substantial evidence. Other than this we have no clue in the opinion as to whether Judge Brosman applied the technique later explained by him in the O'Neal case. Chief Judge Quinn's dissent sheds no light on how he would apply the "reasonable hypothesis" rule which he favored inasmuch as he disagreed with the majority on the facts which he considered were in the record. He concluded there was "no legal competent evidence to indicate that the accused intended permanently to abandon the military service."

It soon became apparent that the McCrary case raised but did not settle the issue of the test to be applied by the Court in determining whether circumstantial evidence was sufficient as a matter of law to sustain a conviction. Of the three judges only Judge Brosman had yet expressly to discuss his views. For this reason he was in a position to take the leadership in establishing the path for the Court to follow. This he undertook to do in writing the majority opinion in O'Neal—an opinion which at present is the leading case of the Court on the subject. Judge Brosman did not criticize the views of either of his colleagues. Instead, he took the position that he was merely explaining in more detail the principles set forth by Judge Latimer in the McCrary case. He has adhered to this position in subsequent cases notwithstanding the fact that his interpretation of the scope of review provoked a vigorous dissent by Judge Latimer in the O'Neal case and has at least, in part, caused Judge Latimer to dissent in one other case and concur only in the result in two others.

Judge Brosman approached the problem in the O'Neal case as follows:

"Among other principles of law relevant to the problem before us is that providing in substance that the evidence in a criminal case must establish beyond a reasonable doubt that the accused is guilty of the offense charged. To this must be added, of
course, the related proposition, often clothed in varying verbiage, to the effect that the evidence in such a case must exclude every reasonable hypothesis save that of guilt. All of these considerations were recognized by us in United States v. McCrary, supra, together with the observation that the two last mentioned rules exist primarily for the guidance of trial forums. However, we should not have said there, we did not intend to say there, nor did we say there, that their administration by such agencies is above and beyond the supervision of an appropriate appellate tribunal—by this Court, in fact, although limited to 'action only with respect to matters of law.' To hold the converse would effectively deprive appellate courts, including this one, of any sort of effective control over subordinate elements of the judicial scheme in an important area of law administration.”

Having established the authority of the Court to share with trial forums the technique of examining the evidence to determine if it is consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis of innocence, and with every other rational hypothesis except that of guilt, Judge Brosman was still confronted with the question as to whose judgment was to be applied in making this determination. His answer was “our judgment, as such, is not the standard for application, but rather our conception of the judgment of reasonable men.” Judge Latimer made it clear that he would not test the sufficiency of the evidence to determine whether he might conclude there was some hypothesis upon which the accused might have been found innocent. Instead he continued to adhere to his view as stated in the McCrary case.

“If there is some substantial evidence in the record which permits the court-martial to conclude the accused is guilty beyond a reasonable doubt then we are not permitted to reverse because one might or can draw a different conclusion.”

In the O'Neal case the accused was found guilty of making a false writing in furtherance of a claim against the United States. The facts were complicated but the issue was simple. Did the accused make the entry which resulted in his receiving money for separate rations to which he was not entitled? The majority, Judges Brosman and Quinn, admitted the evidence showed the accused had opportunity and motive for making the false writing. There was also a possible inference of guilt arising from the “quite loose similarity” between the method of adding the name of the accused to a document admittedly made by him and the manner in which the name of the accused was added to the document in question but denied by the accused. Beyond this, however, there

117 United States v. O'Neal (No. 25) 2 CMR 44 (1952).
118 Id. at 58.
was, according to the new majority, little to support the findings save "suspicion, conjecture and speculation." It was concluded further that opportunity was open to others to commit the offense and there was possibly a motive at least for one other. The conviction was reversed because the Court's conception of the judgment of reasonable men was that such men would find a reasonable inference other than that of guilt could be drawn from the evidence.

Judge Latimer, dissenting, found the evidence sufficient to sustain the conviction. Although he objected to the majority seeking out some hypothesis upon which the accused might be found innocent, he made it clear that his dissent was not based solely on his differing with the theory of review. In his opinion "the facts and circumstances do exclude every reasonable hypothesis of innocence."

All members of the court are in agreement that trial forums should be guided by the rules of reasonable doubt and that the evidence must exclude every reasonable hypothesis of innocence. If the evidence does not meet this test, the trial judge has a duty to set the conviction aside. The crux of the disagreement between the majority and Judge Latimer is the extent to which the Court should supervise the application of these rules by a court-martial. The majority clearly favor reversing a finding if the Court believes that reasonable men would be in accord in holding that a rational hypothesis other than guilt may be drawn from the evidence.

Adoption of this technique by the majority created a fear in the mind of Judge Latimer that it permitted the Court to "invade the province of the court-martial and weigh the evidence to arrive at a result." It would, according to Judge Latimer, make the Court a fact-finding body—a function specifically denied by Congress. He summarized his arguments on this point as follows:

"... I contend the Court's opinion [O'Neal] concedes that Congress, by express words, limited this Court to questions of law, but then escapes the effect of the limitation by adopting an artificial standard of proof which permits a review of the evidence, not for the purpose of determining whether there is some substantial evidence to permit reasonable men to return a finding of guilty, but for the purpose of determining whether there is sufficient to fill a mold which is tailored to meet this Court's specifications."

Judges Brosman and Quinn do not believe that to "supervise" the inferences of a court-martial violates the "clear legislative directive away from the fact finding power." The necessity of supervision is implied by Judge Brosman in the O'Neal case in which he wrote of the rela-

\(^{119}\) Id. at 55.  \(^{120}\) Id. at 57.
tionship between the "unhealthy ascendency that the jury has obtained over the trial judges" and the increasing power of appellate courts to supervise the findings of juries. He pointed out that in this development many courts have applied the techniques favored by the majority of the Court of Military Appeals.\(^{121}\)

To undertake to define the differences between the majority and Judge Latimer by stating they preferred the "reasonable hypothesis" rule and he favored the "substantial evidence" rule would indulge in an over-simplification which the Court itself has avoided. Judge Brosman admitted the approach he favored is "occasionally" called the reasonable hypothesis rule but he does not know whether this approach is a new rule in competition with that demanding substantial evidence, or whether it is merely a specific application of the substantial evidence rule.

In Shull\(^{22}\) a court-martial found the accused guilty of absence without leave with intent to shirk important service, to wit, shipment to the Far East Command. Accused was stationed at Fort Campbell, Kentucky, and had volunteered for overseas duty. He was informed that he would be transferred to the replacement pool at that station. His request for a three day pass to go home and deal with a "family difficulty" was granted with a warning of the seriousness involved if he should overstay his pass. Approximately two weeks after the expiration of the pass he was apprehended in his home town. During this two weeks period of absence, orders had been issued transferring him to the replacement pool and a contingent of enlisted men had departed from the pool to Camp Stoneman, California. Judges Brosman and Quinn agreed that the evidence before the court-martial did not permit a determination of an intent on the part of the accused to shirk important service in the Far Eastern Command beyond a reasonable doubt and within the fair operation of reasonable minds. They further concluded that beyond the transfer order to the pool "there is little to support the findings save suspicion, conjecture, and speculation."

Judge Latimer, again dissenting, found the evidence sufficient to permit the court to find that accused knew "or should have known" that any absence over and beyond the leave period probably would result

\(^{121}\) Art. 51b of the Code provides that a motion for a finding of not guilty shall be treated as an interlocutory question. But if any member of the court-martial objects to the ruling of the law officer (president of a special court-martial) the court-martial shall decide this question by a majority vote.

The convening authority and boards of review are authorized specifically to weigh the evidence and dismiss or reverse if they find the evidence is insufficient. Code, Arts. 64, 66 (c).

\(^{22}\) (No. 45) 2 CMR 83 (1952).
in his missing the shipment; and that an absence of from ten days to two weeks would, with reasonable certainty, bring that result.

In this case the company commander testified that earmarked contingents ordinarily cleared the pool within "ten days, two weeks or so." The treatment given this testimony by the majority and the dissent divulges an essential point of difference between them. The majority stated that they found no evidence in the record to show that the accused was aware of this procedure; whereas the dissenting judge was of the opinion that one who had been at Fort Campbell for some time, as had the accused, and one who had volunteered for overseas duty and had been partially processed for such duty knew or should have known the maximum time he could rely on between the time of selection for overseas duty and departure from the pool.

Another point of difference which developed in the Court was that the majority did not regard shipment to the Far East Command as having its "measurable origin" in the order transferring accused to a replacement pool at Fort Campbell, Kentucky, and that the necessary subsequent steps for one to be sent overseas provided a lane in which "there are just too many possible turnings . . ." The dissenting judge disagreed on this point because he felt that once the journey was started there was little likelihood that there would be any permanent interruption.

The Court heard oral arguments in Peterson and Ferretti on the same day. In each case the accused was found guilty by a court-martial of desertion and the board of review had affirmed the finding. The prosecution presented evidence of an unauthorized absence of forty-six days in one case and forty-eight days in the other. In each case the accused took the stand and undertook to explain his absence. The only issue before the Court in these cases was whether the evidence was sufficient to support a finding of intent to desert the military service. In the Peterson case the conviction was reversed. The majority found some evidence but not enough for the reason that it was as consistent with innocence as with guilt. Judge Latimer concurred in the result because he found the inference drawn by the court-martial was "wholly unsupported by any evidence." In the Ferretti case the finding of guilty was affirmed. The majority stated that they could not believe that reasonable minds, as triers of fact, would be in agreement that "reasonable hypotheses" other than guilt could be drawn from the evidence. Judge Latimer concurred in the result without writing an opinion.

The majority in the Ferretti case stated that the difference in result

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123 No. 199 (April 17, 1952).
124 No. 213 (April 18, 1952).
in these two cases was attributable to the differences in fact. In the Peterson case this same majority had already announced:

"... in this area ... the presence or absence of facts—or perhaps even a single fact—may lead to divergent results."\textsuperscript{\textsuperscript{126}}

Judge Brosman wrote the opinion for the Court in both cases and stated the essential differences of fact were as follows:

"In the Peterson case, the accused assigned as the explanation for his unauthorized absence the fact that his parents had received news of the death of his brother in Korea, and that he wished to be near them in their grief. In the present case [Ferretti], however, petitioner admitted that he was without reason for his failure to return. His only explanation of the lengthy absence was that it was "just one of those things." Secondly, Peterson remained at his home of record during the entire period of the offense, and thus could have been apprehended with ease and returned to military control. On the other hand—although his home was in California—this accused spent the period of his misconduct at various points along the eastern seaboard. Finally, Peterson voluntarily returned to his station and surrendered himself, whereas Ferretti was arrested by civilian authorities for vagrancy at a considerable distance from his duty station. Accused stated that he was 'heading for base' when picked up for vagrancy in Miami, Florida—apparently en route from the northeast to Camp Lejeune [North Carolina] via Miami!"\textsuperscript{\textsuperscript{128}}

Prior to these decisions the Court had announced in the O'Neal case that it would consider the testimony of the accused in testing the sufficiency of the evidence. But a warning was subsequently given by the Court to the effect that such testimony would not necessarily avoid reasonable inferences arising from operative facts proposed or established by the prosecution. It would be "merely one item to be considered with and in the light of all other evidence."\textsuperscript{\textsuperscript{127}} In reversing the finding of desertion in the Peterson case the Court stated that a "prominent factor" in their thinking was the uncontradicted and not inherently improbable account given by the accused of his conduct and motives. On the other hand, in sustaining the finding of desertion in the Ferretti case the Court stated:

"... in view of the Government's case and the very content of the accused's own testimony—together with the inferences logically and reasonably deducible therefrom—the court-martial was permitted to reject his denial of an intention to desert."\textsuperscript{\textsuperscript{128}}

\textsuperscript{126} United States v. Peterson, No. 199 (April 17, 1952) adv. op. p. 4.
\textsuperscript{127} United States v. Ferretti, No. 213 (April 18, 1952) adv. op. pp. 3, 4.
\textsuperscript{128} United States v. Peterson, No. 199 (April 17, 1952) adv. op. p. 6.
\textsuperscript{128} United States v. Ferretti, No. 213 (April 18, 1952) adv. op. p. 6.
If the accused testified that the motive for his absence was to attend to family difficulties, the court-martial was not precluded from finding he had an intent to desert. Nevertheless, these two cases illustrate the value of this type of defense testimony. Both Peterson and Ferretti testified they intended to return. Peterson further testified concerning his family difficulties. Ferretti had no such testimony to offer. This, together with the fact that Peterson voluntarily returned to the service whereas Ferretti was apprehended, was sufficient, in the opinion of the Court, to justify the court-martial in believing Peterson's statement that he intended to return and disbelieving Ferretti's similar statement.

In eight cases involving rape, robbery, manslaughter, larceny and wrongful disposition, unpremeditated murder, assault, embezzlement and failure to obey respectively, the Court was unanimous in upholding the evidence as sufficient to warrant a finding of guilty. This result may be attributed to a combination of factors including stronger prosecution evidence and the fact that the area of disagreement between Judges Brosman and Quinn on one side and Judge Latimer on the other concerning the proper method to test the sufficiency of the evidence has not proven to be as great in practical application as it appears in theory. However, the difference in theory is still extant. In Horst decided July 9, 1952, the accused, a litter bearer, complained of sickness while serving in Korea. He was ordered "back on the hill." To this command the accused replied: "I can't make it, I won't go." In a per curiam opinion with Judge Latimer not participating, the Court reversed a finding of guilt of the offense of cowardly conduct on the ground that the evidence was insufficient to support a finding of guilty of this offense. The Court applied the test of sufficiency of the O'Neal case and cited no other case in the opinion. Nevertheless, the fear entertained at one time by Judge Latimer that the approach of his colleagues in the O'Neal

\[129\] United States v. Slozes (No. 12) 1 CMR 47 (1951).
\[130\] United States v. Jacobs (No. 152) 2 CMR 115 (1952).
\[133\] United States v. Jarvis, No. 94 (May 6, 1952).
\[134\] United States v. Norton, No. 98 (June 2, 1952).
\[135\] United States v. Valencia, No. 308 (June 3, 1952). Distinctions between larceny and embezzlement do not exist in military law.
\[136\] Chief Judge Quinn would not have voted to affirm the conviction in the McCrary case if he had agreed with the theory advanced by Judge Latimer. Judge Latimer would have voted to affirm the conviction in the O'Neal case had the majority applied his theory.
\[137\] United States v. Horst, No. 822 (July 9, 1952).
case would result in the Court becoming another fact-finding body has not materialized.139

The first two140 sufficiency cases came to the Court by way of a certified question from the Judge Advocate General of the Air Force. Subsequent cases came to it on the petition of the accused.

V. CONFESSIONS

A confession following inducements calculated to arouse either hope141 or fear is just as untrustworthy in a court-martial as it is in a civilian criminal court. The Manual142 provides that the burden is on the prosecution to prove the voluntary nature of a confession. The basic question is "whether the accused possessed, at the time of the confession, 'mental freedom' to confess or deny participation in the crime."143 The issue of voluntariness is usually one of fact. And a more difficult one where the confession in question is preceded, by another, clearly involuntary, confession.

In Monge144 two soldiers, acting on suspicion, entered the barracks of the accused and pulled him from bed at four o'clock in the morning. He was forced to lie on the floor; a bayonet was held at his back and after being questioned, he admitted the theft of money. During the questioning one of the soldiers searched the clothes of the accused and found large sums of money. On the afternoon of the same day, the accused, after being advised of his right to remain silent, made a written confession to Criminal Investigation Division agents. None of those who were present at the time of the oral confession were present at the interrogations. Four days later the accused executed a second written confession in more detail.

The court-martial admitted the written confession and the accused was found guilty of larceny. The Court outlined its scope of review in the following language:

"To fulfill our appellate responsibility, it is incumbent upon us to review independently the circumstances surrounding the allegedly involuntary confession. But where there is disagreement as to whether claimed improper acts actually occurred or where admitted facts permit different inferences, the trial forum is not only better equipped but has the legal duty to weigh the evidence and decide whether the confession is, in fact, volun-

139 H. R. 8395 introduced in Congress on June 22, 1952 would authorize the Court of Military Appeals to review controverted questions of fact.
140 United States v. McCrary (No. 4) 1 CMR 1 (1951); United States v. O'Neal (No. 25) 2 CMR 44 (1952).
141 United States v. Webb (No. 370) 2 CMR 125 (1952).
142 Par. 140.
143 United States v. Monge (No. 9) 2 CMR 1 (1952).
144 Ibid. Accord, United States v. Sapp (No. 14) 2 CMR 6 (1952); United States v. Creamer, No. 179 (April 3, 1952) (unrequested disclosure in a friendly and aimless conversation to an air policeman admissible).
We must accept the determination of the triers of fact on
the question of voluntariness whenever it is supported by sub-
stantial evidence, regardless of whether we, as individuals, might
resolve the conflict otherwise, or draw different inferences from
the facts. If the fact finders could reasonably conclude that the
confession was voluntary, then we must affirm."

The Court relied on United States v. Bayer, a decision of the
United States Supreme Court, in dealing with the rule, which, in effect,
states that the influence of a prior improper inducement is presumed to
continue during the subsequent confession until the prosecution estab-
lishes the contrary. According to the Court, the issue was still one of
fact and the prior confession was a “weighty” factor to be considered
with other things such as the mental character of the accused, the nature
and degree of the influence, the time intervening between the confessions
and all circumstances surrounding the subsequent confession. On the
basis of all the facts it was concluded that the triers of fact had reason-
able basis for finding that the prior improper influences had been dis-
pelled.

The Court refused to require, as had several prior decisions of
boards of review, that the accused be warned that prior involuntary
confessions could not be used against him. On this point, it is suf-
ficient that the accused be warned of his rights to remain silent.

An accused cannot legally be convicted upon his uncorroborated con-
fusion or admission. In Uchihara the Court considered the doc-
trine which requires corroborating evidence (corpus delicti) of a con-
fession. In this case Government counsel had argued that proof of
absence without leave was sufficient to corroborate the confession of
the accused of desertion with intent to avoid hazardous duty. Judge
Brosman in writing the majority opinion with which Judge Latimer con-
curred did not deal with this contention. Instead, he assumed that
proper admission of the confession required evidence other than the
confession itself of every element of the charge of desertion. Looking
at the record he concluded that sufficient evidence was present in this
case inasmuch as the morning report (properly in evidence) revealed
the camp and unit to which the accused was assigned in Japan. The
court-martial with knowledge of the camp and unit could take judicial
notice that such unit was a “pipeline” for Korean combat. Judge

145 United States v. Monge (No. 9) 2 CMR 1 (1952). Accord, United States
v. Webb (No. 370) 2 CMR 125 (1952).
146 331 U.S. 532, 540-541 (1947) (six months between first and second con-
fessions).
147 MANUAL, Par. 140a. United States v. Mounts (No. 73) 2 CMR 20 (1952);
United States v. Gordon (No. 258) 2 CMR 161 (1952). A confession of one ac-
cused cannot be considered against another accused. United States v. Wooten,
No. 369 (May 9, 1952).
148 (No. 60) 2 CMR 29 (1952).
Latimer thought evidence in the record concerning efforts of the accused to remain in Japan was sufficient in itself to establish probable intent not to go back to Korea.

Chief Judge Quinn in a strong dissent met the contention of Government counsel squarely and stated that the Manual and the better reasoned federal decisions are "irreconcilable with the Government claim that the corpus delicti of desertion is made out solely by a showing of the unauthorized absence alleged." He referred to the majority opinion as only "timidly" intimating instead of clearly recognizing that the Manual requires corroboration of a pre-trial confession. Moreover, he strongly reiterated an objection, first made in his dissent in the McCrary case, to stretching "the record to plug loop-holes in deficient prosecution cases by the expedient of judicial notice."

Although the majority seem to think the requirement of corroboration evidence is really unnecessary if the rule demanding volition as a condition to the admission of a confession is carefully enforced, it appears likely that the Uchihara case has established the pattern to be followed by the Court in future cases. Although an accused will not be convicted on his uncorroborated confession, the quantum of evidence necessary to meet the test of probability required by the Court is small. The majority have twice announced that the record should show what facts, if any, were judicially noticed by the court-martial. It is reasonable to conclude the Court will insist that this requirement be met in future cases.

VI. Evidence

A. Hearsay

In Kellum an agent of the Criminal Investigation Division and a sergeant were permitted to testify to a matter which another witness (also an accused) had told them about the accused. This was clearly hearsay. Was it prejudicial? The Court concluded that for all practical purposes these witnesses were permitted to pyramid into great importance the version offered by another accused and to do so was prejudicial where the facts, as here, were in dispute.

The general rule is that statements made through an interpreter

149 Id. at 35.
160 Id. at 36. See United States v. Jackson (No. 141) 2 CMR 96 (1952) (judicial notice of record of trial by another court-martial).
151 The 1949 MANUAL required "substantial evidence." For cases applying provisions of the 1949 MANUAL: United States v. Brooks (No. 18) 1 CMR 88 (1951); United States v. Goodman, No. 16 (February 11, 1952); United States v. Evans (No. 143) 2 CMR 113 (1952). In United States v. Creamer, No. 179 (April 3, 1952) it is stated: "His prolonged absence without leave—from January 17, 1946, to February 10, 1951—together with the manner and place of its termination, are factors from which the court could have reasonably inferred the requisite intent to remain away permanently").
152 No. 408 (July 25, 1952).
may be proved only by the testimony of the interpreter. The Court stated there is a well recognized exception where the interpreter may be considered the agent of the person making the statement. In Plum-
emer\textsuperscript{153} the alleged victim of rape reported to a medical doctor at an Army aid station and made certain statements to the interpreter of the doctor. Although the case was decided on other grounds, the Court stated there were circumstances which would indicate that the interpreter was acting for both parties and thereby implied it would in appropriate cases give recognition to the broadest view of the agency doctrine.

(1) \textit{Spontaneous Exclamations}

To qualify a spontaneous exclamation as an exception to the hearsay rule, there must be other evidence of the event. In Mounts\textsuperscript{154} the mother of two small children testified concerning what her sons had told her about the alleged offense of sodomy. Her testimony was hearsay and it was not admissible as an exception to the rule on the ground that the statements were spontaneous exclamations because the record was totally devoid of other evidence of the shocking event.

(2) \textit{Dying Declarations}

In DeCarlo\textsuperscript{155} the accused asked a Korean boy, employed in the service of supply, for some candy. He was told there was none and a "good-natured argument in bantering words with no serious overtones" ensued. Finally the accused stated, "If you don't give me some candy, I'll shoot you," or words to that effect. A shot from the rifle of the accused hit the Korean. While \textit{in extremis}, the boy stated that it was an "accident." This statement was offered in evidence as a dying declaration, but objection was made on the grounds that it was opinion evidence and of such nature that the deceased could not have so testified had he been living. The Court concluded that the opinion rule was not violated because the testimony was a "collective statement of fact" based on the observations of the deceased who was in a position to know the circumstances of the shooting. Accordingly, it was error not to have admitted the statement as a dying declaration.

(3) \textit{Official Documents}

In Masusock\textsuperscript{156} the Court decided it was desirable to announce the principles governing the introduction in evidence of official military documents. It reiterated a long recognized fact that morning reports were official records and that extract copies properly authenticated by the officer having custody thereof are properly admissible in evidence. The Court then set forth the principles governing the signing and certi-
fication of morning reports and concluded the commanding officer could designate an officer who was not a member of the unit to sign the reports. Further, it would be presumed that authority for another officer to sign the morning report was properly delegated, hence affirmative evidence need not appear in the record. One who challenges the delegation must produce evidence sufficient to rebut the presumption of regularity. The Court has held also that such delegation may be made to a warrant officer.

In Parlier the extract copy of the morning report failed to show that it had ever been signed by anyone. The Court decided the presumption of regularity discussed in the Masusock case did not extend to a presumption that the original entry was signed in accordance with regulations. Without a signature the original was not an official document and, therefore, an extract copy thereof was not admissible in evidence.

Service records are official documents. Unlike the Army and Air Force which use the morning report to show an unauthorized absence, the Navy relies on extracts from the service record for this purpose. In Harris the law officer directed that certain extracts from the service record be marked as exhibits. No objection was made by the defense counsel; in fact, there was express consent. A Navy board of review excluded the evidence on the ground that the record did not show it actually was introduced in evidence. The Court reversed this finding after deciding that the statement of the law officer may be construed to be a reception in evidence of the questioned documents. To hold otherwise, according to the Court, would be “to unduly emphasize form over substance.”

B. Searches and Seizures

In Doyle the Court noted that military law excludes from evidence the products of “unlawful” searches. In testing the lawfulness of a search the fundamental inquiry is whether the search was “unreasonable.” The Court recognized the power of a commanding officer to search military property within his jurisdiction. This implied power

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167 Accord, United States v. Lewandowski (No. 91) 1 CMR 40 (1951); United States v. Flores (No. 75) 1 CMR 42 (1951).
168 United States v. Clements (No. 82) 1 CMR 39 (1951).
169 No. 347 (June 13, 1952).
170 In United States v. Creamer, No. 179 (April 3, 1952) a morning report dated 17 January 1947 was admissible to show the inception of an unauthorized absence thirty days previous to that time. The Court held that it was a question of weight and not admissibility.
171 Manual, Par. 164a.
172 No. 448 (June 11, 1952).
173 No. 1265 (May 20, 1952). In connection with the search of a private car the Court applied the rule of Harris v. United States, 331 U.S. 145 (1947) (exploratory searches).
could be expressly delegated. The Court indicated but did not decide that such power should be limited by a requirement that a reasonable cause therefor be shown where there was no express delegation. Inasmuch as an eyewitness had informed the master-at-arms that the accused had in his possession the clothing of another, he had reasonable and probable cause to believe that an offense had been committed by the accused.

C. Competency of Witness

In Sloses a thirteen year old Korean girl upon being questioned about her religion replied, "I have no religion." Instead of being affirmed she was sworn as a witness for the prosecution. The Court took the position that the purpose of the oath was primarily a solemn reminder to the witness of his special obligation to tell the truth and concluded that the oath administered was sufficient to include the required affirmation. In respect to the competency of the child witness the Court stated that the true test was intelligence and not age. The determination of competency is for the trial court and such finding will not be disturbed on review unless it clearly appears that there was an abuse of discretion or that the action was based on a mistake of law. Although the Court was not "entirely satisfied" with the manner in which the court-martial dealt with the questions of competency and qualifications, it finally concluded that the record sufficiently revealed the witness had an appreciation of the moral responsibility to speak the truth.

VII. Waiver

In Masusock the Court adopted the waiver rule announced by the federal courts in cases in which error is asserted for the first time on appeal. It was stated, in part, as follows:

"The admitted normal rule is that an appellate court will not consider matters which are alleged as error for the first time on appeal, and this is true of criminal as well as civil cases. However, an exception exists in criminal cases where the alleged error would result in a manifest miscarriage of justice, or would seriously affect the fairness, integrity, or public reputation of judicial proceedings."

Applying this rule the Court has held that in the absence of an objection it will not review an assignment of error based on the inadmissibility of evidence where it appears that the defense understood its right to object and where it was inappropriate to apply the exception.

104 (No. 12) 1 CMR 47 (1951).
105 (No. 15) 1 CMR 32 (1951).
106 Ibid. Quoted by Court from Smith v. United States, 173 F. 2d 181, 184 (9th Cir. 1949).
107 United States v. Masusock (No. 15) 1 CMR 32 (1951).
Although the Code requires that the charges and specifications shall be signed by an officer of the armed forces authorized to administer oaths, it has been held that if charges are signed by an unauthorized person or not signed at all, such error is a defect in form rather than substance. Hence, failure to object to this type of error constitutes a waiver.

Perhaps the most significant development in applying the waiver rule is concerned with the exception to the rule and the manner in which it has been applied in cases involving errors by law officers. It has been held that if the law officer fails to instruct the court-martial, or if he fails to instruct it in appropriate lesser included offenses, or if he fails to instruct on all the essential elements of the offenses alleged and embraced within the evidence, the Court will consider the error on appeal notwithstanding the fact that no objection or exception was taken to the errors by the defense. It is doubtful whether the right of an accused to have the law officer instruct the court-martial is subject to waiver, inasmuch as a failure to give instructions at all if the accused pleads not guilty constitutes a violation of "military due process." With the exception of the few cases in which the Court has applied "military due process" or "general" prejudice, as heretofore indicated, a showing of specific prejudice is required. If the defense counsel fails to object, the Court is under no obligation to examine the facts on review to determine whether prejudice resulted from the error. In such case unless the effect of the error is obvious to the Court, failure to object may result in a waiver; whereas if objection is properly made the Court will examine the facts and may find prejudicial error. Proper objection will protect the rights of the accused and also will provide ample opportunity for the error to be corrected and thereby avoid delay inherent in a retrial or other subsequent proceeding.

The Court has hinted that it may be less lenient in overlooking waiver for failure to object in respect to clarification of instructions, theories of the parties, specific points developed through the evidence and special defenses.

Several cases have followed the rulings announced in Lucas to

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168 Code, Art. 30a.
169 United States v. May (No. 241) 2 CMR 80 (1952).
170 United States v. Marcy (No. 260) 2 CMR 82 (1952).
171 United States v. Russell Williams (No. 133) 2 CMR 92 (1952).
172 United States v. Clark (No. 190) 2 CMR 109 (1952).
174 United States v. Clay (No. 49) 1 CMR 74 (1951).
175 United States v. Russell Williams (No. 133) 2 CMR 92 (1952).
176 Ibid.
178 (No. 7) 1 CMR 21. (1951).
the effect that if after a full and fair explanation of the effect of a plea of guilty, the accused insists on the plea, his rights are not substantially prejudiced by failure of the law officer to instruct the court-martial or by failure of the president of the court-martial to close the court and take a vote on the question of guilt. The plea of guilty, in effect, amounts to a waiver of rights provided in the Code.

An accused may waive right of counsel at the pre-trial investigation and the privilege against self-incrimination. However, he must be fully and adequately informed of those rights if his actions are to be deemed a waiver. It is possible for an accused to waive an objection to an investigating officer sitting as a member of the court-martial. Such waiver must be an express one and failure to challenge when given an opportunity to do so does not constitute an express waiver—at most, it is a mere failure to challenge.

VIII. **PUNITIVE ARTICLES**

Article 77 of the Code, which defines principals, was involved in two cases. In *Jacobs* the accused accompanied others in a breaking and entering and participated in the assault which preceded the robbery. The question was whether the accused was an aider and abettor and hence a principal to the robbery offense. The Court made it clear that presence was not enough and guilt by association must be avoided. But here the evidence was sufficient to justify the court-martial in inferring that the accused shared a common purpose in the robbery. In *Wooten* the accused was not present during the commission of the offense. The Court found that he had counseled the other accused. Consequently he was guilty as an accessory before the fact at common law and therefore a principal under Article 77.

In *Jackson* the accused was tried by a summary court-martial in Taegu, Korea, for a minor offense. During the trial he did not disclose that he was absent without leave. Subsequently, the accused was tried for absence without leave and it was contended on his behalf that the temporary exercise of military control by the summary court-martial

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172 United States v. Goodrich (No. 36) 1 CMR 26 (1951).
176 United States v. Bound (No. 201) 2 CMR 130 (1952). The Court was reluctant to find waiver because this may not have been a question of challenge but rather a flat statutory rule of disqualification.
177 (No. 152) 2 CMR 115 (1952).
178 United States v. Branch (No. 131) 2 CMR 95 (1952).
179 United States v. Branch (No. 131) 2 CMR 95 (1952).
terminated the unlawful absence. The Court decided that the unlawful absence would not terminate unless the accused disclosed his status or the military authorities could by reasonable diligence obtain knowledge of his true status. Since neither had occurred in this case the conviction was affirmed.

In *Brooks* the Court held that the existence or non-existence of a state of hostilities is not a necessary element of the offense of desertion and need not be specifically alleged.

Article 92 (1) makes it an offense to violate or fail to obey any lawful general order or regulation. Neither the Code nor Manual expressly state that knowledge (actual or constructive) of the order or regulation is an essential element of the offense. In *Snyder* the accused was alleged to have failed to obey a camp regulation. The Court interpreted "general order or regulation" to include orders ranging from those issued by a Department down to and including those promulgated by the commander of a post, ship or station. The question then arose whether knowledge on the part of the accused was an element of the offense. The Court decided that it was unnecessary to allege knowledge of the camp regulation but that such knowledge was an element which had to be proved during the trial. In another case the Court held the same requirement was applicable to a post regulation.

In the *Snyder* case there was also the question whether a specification which alleged the accused did "wrongfully and unlawfully attempt to entice [name of person] to engage in sexual intercourse with a female to be directed to him by the said Snyder" was sufficient to allege an offense under Article 134. In reversing the board of review the Court stated that although simple fornication may not be an offense in military law, it does not follow that enticement or an attempt to enticement may not be. In this case the accused was charged with three such attempts and his conduct was prejudicial to good order and discipline. A solicitation to make a false statement in a pre-trial investigation and receiving stolen property of the United States with knowledge of its character were also held to constitute conduct prejudicial to good order and discipline and were consequently a violation of Article 134. In

198 (No. 18) 1 CMR 88 (1951).
199 No. 409 (June 5, 1952).
200 United States v. Wade, No. 586 (July 11, 1952). These cases are consistent with the MANUAL Paragraph 154 (4) which requires knowledge either actual or constructive of any regulation or directive of any command inferior to the Department of the Army, Navy, or Air Force, or the Headquarters of the Marine Corps or Coast Guard, or inferior to the headquarters of a territorial, theater or similar area command. Although Article 87 (missing movement) does not appear to require knowledge on the part of the accused, the Court appears to have made it an element. United States v. Jones, No. 426 (April 4, 1952).
201 United States v. Isbell (No. 21) 2 CMR 37 (1952).
202 United States v. Hernadon, No. 570 (July 17, 1952) (although an offense may be laid as a crime or offense not capital, it does not have to be).
Marker\textsuperscript{193} another clause of Article 134 was involved. A civilian employee of the armed services, who was supervisor of a Japanese Corporation operated under the direction of the Army, used his official position to secure gifts from the Japanese owners of the plant. His conduct was determined to be of such nature as to bring discredit upon the armed services and he was therefore guilty of violating Article 134.

IX. Proving Prior Convictions

After verdict and before sentence, the trial counsel introduces evidence of any previous conviction of the accused by a court-martial which has occurred during the current enlistment\textsuperscript{194} and during the three years next preceding the commission of any offense of which the accused stands convicted. Proof of two prior convictions operates to increase the maximum authorized punishment which a court-martial may give in certain cases.\textsuperscript{195} For example, a dishonorable discharge or bad conduct discharge is not a permissible sentence if the accused has been convicted of absence without leave for less than sixty days but when there is proof of two prior convictions a bad conduct discharge is authorized.

In Carter\textsuperscript{196} the accused pleaded guilty to a charge of absence without leave for five days. After a finding of guilty had been voted, the trial counsel made a detailed unsworn statement concerning two previous convictions. On being asked if there was any objection to the statement of the trial counsel, the defense counsel replied in the negative. No further effort was made to prove the two prior convictions. The court-martial accepted the oral statement of trial counsel and rendered a sentence which, unless the evidence of prior convictions could properly be considered, was in excess of the maximum permitted by the Manual and accordingly prejudicial.

The procedure outlined in the Manual for proving prior convictions is susceptible to two interpretations. One would permit the trial coun-

\textsuperscript{193} No. 281 (May 19, 1952).

\textsuperscript{194} MANUAL, Par. 75b provides "The evidence must, however, relate to offenses committed during a current enlistment, voluntary extension of enlistment, appointment, or other engagement or obligation for service of the accused, and during the three years next preceding the commission of any offense of which the accused stands convicted."

\textsuperscript{195} MANUAL, Par. 127c, section b.

\textsuperscript{196} No. 159 (January 18, 1952). Several subsequent cases have similarly reversed the board of review when it has failed to find reversible error. United States v. Trimiar (No. 413) 2 CMR 169 (1952); United States v. Schabel, No. 440 (March 28 1952); United States v. Adams, No. 452 (April 3, 1952); United States v. Prunchniewski, No. 489 (April 18, 1952); United States v. DeWeese, No. 633 (May 23, 1952); United States v. Townsend, No. 597 (June 23, 1952); United States v. Hand, No. 450 (April 14, 1952). Unlike prior cases in that only one previous conviction was involved and accused was tried for an offense for which a bad conduct discharge was authorized without consideration of prior offenses.
sel, as in the Carter case, to relate the prior convictions to the court-martial and any further effort to prove such convictions is required only if the accused objects. Another interpretation would require that the trial counsel introduce in evidence competent proof of prior convictions such as the service record or extract copy thereof or the order publishing the result of trial after he had recited the prior convictions to the court-martial whether the accused objected or not. The Court chose the latter interpretation and held that in all cases the accused is entitled to have introduced in the record competent evidence of previous convictions. In order to avoid any tendency on the part of the trial counsel to forget to offer the exhibit after he had read it, the Court suggested that a departure from the sequence of events as outlined in the Manual would be helpful:

“As a matter of practice, it would appear to be more desirable to have the document marked as an exhibit, shown to the accused, its admissibility determined, and if admitted in evidence, then permit the trial counsel to read it to the court...”\(^{107}\)

Although the Court offered as one of its objections to the procedure in the Carter case the fact that the record would not contain evidence for examination by the Court on appeal, it also held\(^{108}\) that such erroneous procedure would not be cured by merely attaching a copy of previous convictions to the record inasmuch as it had no way of knowing that the appended material was the source from which the trial counsel read to the court-martial. On the other hand, where evidence of prior convictions had properly been introduced, the Court did not consider it fatal error because the record failed to reveal that the defense actually saw the documents.\(^{109}\)

Although unsworn testimony\(^{200}\) of trial counsel is not sufficient to prove prior convictions, sworn testimony should be permitted as a primary source of proof. But if sworn testimony merely gives the contents of documents it is necessary to show that these documents were executed in substantial compliance with the rules and regulations applicable to documentary evidence.\(^{201}\) Sworn testimony of the trial counsel is not mandatory either as a primary source of proof, or as a necessary predicate to documentary evidence.\(^{202}\)

In Jones\(^{203}\) the court-martial disregarded the ruling of the law officer which had excluded one of the two prior convictions offered in

\(^{107}\) United States v. Carter (No. 159) 2 CMR 14 (1952).
\(^{200}\) United States v. Carter (No. 159) 2 CMR 14 (1952).
\(^{201}\) Ibid. See MANUAL, Par. 143a for procedure in proving the contents of a writing.
\(^{203}\) United States v. Jones, No. 79 (April 14, 1952).
evidence by the trial counsel. The law officer had been incorrect in his ruling. The Court, in a divided opinion, considered the action of the reviewing authorities which reduced the sentence from twenty-five to ten years as sufficient to cure the prejudicial effect of improper consideration of the prior offense after it had been excluded by the law officer. Inasmuch as Chief Judge Quinn concurred in the result and Judge Brosman dissented, it is extremely doubtful whether the Court will give its unqualified approval to a practice in the Army which permitted reviewing authorities to cure the prejudicial effect of an improper consideration of prior offenses by reducing the sentence adjudged by the court-martial.

In Yerger\textsuperscript{204} proof of prior convictions came before the Court in a setting different from that heretofore discussed. Over defense objection the trial counsel elicited from witnesses evidence of previous convictions of the accused. The Court applied the general rule that evidence of other misconduct is generally not admissible against the accused. None of the exceptions to the rule were present in the case and hence the rights of the accused were thereby prejudiced.

Reversible error could, but not necessarily, result from the trial counsel asking questions relating to prior convictions even though proof was not permitted in evidence.\textsuperscript{205} In this situation the Court will look to see if the conduct of trial counsel indicates an intent to disregard deliberately the rules of evidence in order to influence the court-martial as distinguished from a mere error of judgment; and secondly, whether the improper remarks could have reasonably affected the deliberations of the court-martial. The Court further stated that even if both of these tests are satisfied, there may be convincing evidence of guilt, which would negate the effect of prejudice.\textsuperscript{206}

X. Punishment

Although the Court cannot increase the severity of a sentence affirmed by a board of review,\textsuperscript{207} it does have authority to review a sentence for the purpose of determining whether it exceeds the maximum legal limits.\textsuperscript{208} In Downard\textsuperscript{209} an officer was tried under the Code for the offense of conduct unbecoming an officer and a gentleman. The offense had occurred when the Articles of War were in effect. The punishment under the Articles of War\textsuperscript{210} for such offense was mandatory

\textsuperscript{204} No. 122 (April 7, 1952) (decided on other grounds).
\textsuperscript{205} United States v. Valencia, No. 308 (June 3, 1952) (Court found a possible mistake of judgment).
\textsuperscript{206} Ibid.
\textsuperscript{207} United States v. Gilgallon (No. 286) 2 CMR 170 (1952).
\textsuperscript{208} United States v. Keith, No. 226 (July 3, 1952).
\textsuperscript{209} No. 266 (April 28, 1952).
\textsuperscript{210} Article of War 95.
dismissal from the service whereas the Code permits punishment within the discretion of the court-martial. A Presidential Executive Order provides that if the maximum punishment prescribed by the Code is less than that fixed by the Articles of War, and if the offense occurred under the Articles of War but is tried under the Code, the new and not the old maximum punishment is applicable. Notwithstanding this Order the law officer instructed the court-martial that the mandatory punishment was dismissal. The Court found this instruction constituted prejudicial error and reversed. In this case the law officer could have correctly instructed the court-martial that they might assess punishment at their discretion, not in excess of dismissal.

Although the Manual requires a forfeiture of pay to be stated in terms of dollars and cents, the Court held that this requirement is to simplify bookkeeping. Therefore, a sentence such as forfeiture of two-thirds pay per month for two months is a valid sentence because it can be reduced to dollars and cents by easy computation.

A court-martial is not authorized to adjudge close order drill as punishment, but a commanding officer may order additional drill as a corrective for apparent want of discipline and lack of self-control as long as the purpose of such drill is training and not punishment.

A court-martial may not adjudge confinement at hard labor for more than six months, forfeiture of pay at a rate greater than two-thirds of the monthly pay of an accused or a forfeiture of pay in an amount greater than two-thirds of his pay for six months without also including in the sentence a punitive discharge. The Court held that this provision is not violated where a convening authority suspended a bad conduct discharge and ordered into execution the remainder of the sentence which included total forfeitures and confinement for ten months. This result was predicated on the reasoning that the punitive discharge was still a part of the sentence even though it has been suspended.

XI. SUMMARY

In the one hundred and eight cases herein considered the majority

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211 Code, Art. 133.
212 Executive Order, February 8, 1951, Manual, p. IX.
213 Manual, Par. 126h (1).
214 United States v. Gilgallon (No. 286) 2 CMR 170 (1952).
216 Manual, Par. 127b.
218 The Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces for the Period May 31, 1951 to May 31, 1952 states that 814 cases were docketed from August 1951 through May 1952. 559 of these cases were completed prior to May 31, 1952. There was a written opinion in eighty-nine of the completed cases. This Report gives a detailed breakdown on the disposition of cases.
opinions were written as follows: Judge Brosman—thirty three; Chief Judge Quinn—thirty two; and Judge Latimer—thirty one. The remaining twelve were per curiam opinions. There were only eight dissenting opinions. Seventy six cases came to the Court on petition. The other thirty two cases were before the Court on questions certified by the Judge Advocates General as follows: Navy—twenty eight; Air Force—three; and one from the General Counsel of the Treasury Department (Coast Guard case). The Court affirmed the boards of review in fifty per cent of the cases and reversed\textsuperscript{219} the other half either in whole or in part.

\textsuperscript{219} Several cases were reversed on the same point of law.