

The United States Court of Military Appeals

Robinson O. Everett

INTRODUCTION

OF ALL THE CHANGES wrought by the Uniform Code of Military Justice, the creation of the Court of Military Appeals was viewed by a Congressional Committee which reported on the Code as "the most revolutionary."

Under existing law all appellate review is conducted solely within the military departments. This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly on matters involving military justice.

It was to counteract this criticism that Congress established a civilian court "completely removed from all military influence or persuasion."¹

THE AUTHOR (A.B., 1947; LL.B., 1950, Harvard) is a Commissioner of the United States Court of Military Appeals. He was formerly on the faculty of the Duke Law School.

The Uniform Code took effect on May 31, 1951. The court commenced its official operations

in July of that year, heard its first case in September and rendered its first opinion in November.

The Court of Military Appeals has three Judges for the initial appointees, who were nominated by President Truman. The terms of office vary, but subsequent appointments or reappointments to the court will be for fifteen years. The Chief Judge, serving a fifteen-year term, is Robert E. Quinn, who at the time of his appointment was a Superior Court Judge in Rhode Island and had previously been Governor of that State. A Captain in the Naval Reserve, he had served during World War II as legal officer for the First Naval District. Judge George W. Latimer, named to a ten-year term, had been serving as a Justice of the Utah Supreme Court.

¹ See Report of House Committee on Armed Services, HR 4080, pp. 6-7. Prior to the Uniform Code the Army and Air Force, in addition to their Boards of Review, had a Judicial Council to review the more serious cases tried by court-martial. The Judicial Council was composed of three general officers from the service concerned. The desire for civilian review of courts-martial triumphed over the suggestion that final appellate review be retained in the Judicial Council, or in a new council to be composed of the Judge Advocates General of the Army, Navy, and Air Force.

Previously he had practiced law in Utah, and during World War II, as an Army Colonel, had been Chief of Staff of an Infantry Division in the South Pacific. Judge Paul W. Brosman, a Colonel in the Air Force Reserve, was on active duty with the Continental Air Command Staff Judge Advocate shortly before he received an appointment to a five-year term on the court. During 1944-45 he had been Chief of the Military Justice Division, Army Air Forces, before returning to his civilian post as Dean of the College of Law at Tulane University. Each of these three judges, under the judicial pay raise of 1955, receives an annual salary of \$25,500—equal to that of a federal court of appeals judge, but the latter is appointed for life.

“For administrative purposes”—and for those purposes only—the court is under the Department of Defense.² Thus, that department handles for the court certain routine chores such as running security checks on court personnel who, in reviewing records of trial, may come into contact with classified information. The Defense Department makes disbursements for the court, but the court's funds are separately appropriated by Congress. Thus the Defense Department exercises no real control over the judicial purse strings.

Contrary to the supposition of many, the court is not quartered in the Pentagon but instead has its own building, situated at Fifth and E Streets, N.W., in Washington, and formerly occupied by the Court of Appeals for the District of Columbia. Its personnel totals 41 persons, and as of February 28, 1955, 3397 attorneys (of whom 1706 were civilians) had been admitted to practice before the court.

THE PROCEDURE OF THE COURT

Before a record of trial reaches the Court of Military Appeals, it will have been carefully reviewed at two levels within the armed service in which the case arose. First, it will have been examined by the legal adviser to the officer who exercises general court-martial jurisdiction over the accused. At this level not only issues of law but also those of fact can be considered, and action can be taken to reduce a sentence which seems too severe, though within the maximum, for the crimes of which the accused has been convicted. Later the record will have been acted upon by a Board of Review of at least three lawyers appointed by the Judge Advocate General. While these Boards can include civilians, normally all the members are officers. A Board of Review is permitted to

²Uniform Code of Military Justice (hereafter cited UCMJ), Article 67(a)(1), 50 USC § 654(a)(1).

weigh the sentence and pass on the appropriateness of the sentence, as well as rule on prejudicial errors of law.³

The Court of Military Appeals receives a case from a Board of Review in one of three ways: (1) through mandatory review of capital cases or cases affecting a general or flag officer, (2) by certification on the part of the Judge Advocate General and (3) upon grant of an accused's petition for review. As of December 31, 1954, when the court had been in operation less than three and one-half years, there had been docketed 6061 cases. Of these, 5934 involved petitions—3980 from the Army, 1047 from the Navy, 890 from the Air Force and 17 from the Coast Guard. The cases certified to the court totalled 180: Navy—95, Army—67, Air Force—13 and Coast Guard—5. A Judge Advocate General may wish to certify a question to the Court of Military Appeals if he disagrees with the decision of the Board of Review as to some legal issue involved, if there exists a conflict of opinion between different boards of review or with another armed service or if a definitive ruling is desired on some point considered to have special significance. Of course the Judge Advocate General may certify questions arising from the same case in which the accused has petitioned for review and vice versa, but the case will only be docketed once in the court.

As of December 31, 1954 the court's mandatory jurisdiction had provided 24 cases, several of which involved more than one accused. Of these cases 23 came from the Army and one from the Air Force. Only one concerned a general or flag officer⁴—the remainder involving death sentences which had been affirmed by Boards of Review. Even after affirmation by the court, these capital cases must be acted on by the President before the sentences can be ordered into execution. As of March 1, 1955 only four persons tried under the Uniform Code of Military Justice had been put to death.

Of the more than 6,000 cases docketed up to December 31, 1954, 5946 had been completed—599 of them with published opinion, an annual average of approximately 57 opinions per Judge. The total burden of the court, including the cases disposed of without opinion, is substantial indeed.⁵ The workload and output of the court are also attested by

³ UCMJ, Article 66, 50 USC § 653 deals with Boards of Review, their membership jurisdiction, and powers.

⁴ *United States v. Grow*, 3 USCMA 77, 11 CMR 77. The celebrated case of the General who was too careless with his diary.

⁵ In appraising the workload and output of the Court of Military Appeals the following statistics from the Annual Report for 1954 of the Director of the Administrative Office of the United States Courts are significant. During 1954 the number of cases terminated per judgeship in the Court of Appeals was about 49 and during the last decade it has usually been between 45 and 50 per year. The median time from filing of complete record in a Court of Appeals to the final disposition of the case was 7.1

the fact that its opinions, published under an arrangement with the Lawyers' Cooperative Publishing Company of Rochester, New York, already fill four bound volumes, with a fifth in the offing.⁶ The court's celerity is both a virtue and a necessity since the Code requires that decisions on petitions for review be reached within 30 days.⁷

The court's procedure, which is typical of any appellate tribunal, may be traced in connection with an accused's petition for review. The petition, accompanied by the trial record and brief of counsel, is usually transmitted to the court through military channels via the Office of the Judge Advocate General of the particular force in which the case originated. The petition is filed in the office of the clerk of the court, and a docket number is immediately assigned to the case. A receipt for the petition is returned to the Judge Advocate General and a carbon copy is sent to civilian counsel, if the accused has retained such counsel. Civilian counsel may be in addition to or in lieu of the appellate defense counsel in the Office of the Judge Advocate General. The latter are officers assigned to the accused without cost to represent him both before the boards of review and before the Court of Military Appeals. The caliber of these officers has been generally quite high.

Government appellate counsel have 15 days to file a reply to the original petition for review.⁸ The 30-day period within which the Court must act on the petition is deemed to commence only after receipt of the Government reply. To facilitate prompt and efficient disposition of the case, members of the court's staff provide memoranda on issues raised by the petition and Government reply. These staff members also note points of law, other than those raised by the accused, which they think merit the Court's attention. In several instances review has been granted to consider those points. Thus the accused receives an additional benefit that would not be given by those appellate tribunals which are reluctant to consider unassigned error.

months during 1954, a figure which varies little from the median time during the last decade. See Report, pages 84-85. During their 1953 term, the nine Justices of the Supreme Court disposed of the cases before them "with the customary promptness. The median time interval from filing to disposition of all cases disposed of on the merits was 6.1 months. The same interval for cases in which certiorari was granted was 7.1 months and for all cases terminated after an oral argument the median was 7.3 months. Cases terminated by decision not to review were mostly decided in less than 60 days." 107 cases were disposed of by the Supreme Court through the 65 "opinions of the Court" and through per curiam opinions or orders — an average of 12 per Justice. Report, pp. 81-82.

⁶These reports are cited USCMA. In addition, the court's opinions, along with those of the Boards of Review, are published in the Court-Martial Reports, cited CMR.

⁷UCMJ, Article 67(c), 50 USC § 654(c).

⁸Rule 21(a), United States Court of Military Appeals — hereafter cited USCMA. These rules are at the front of volume 1 of the court's reports.

Except by court order, oral argument is not permitted on the petition for grant of review⁹—just as the Supreme Court does not entertain argument on a petition for certiorari. Allowance of a petition for grant of review demands a majority vote of the three judges.¹⁰ The accused, however, has a safeguard in the practice of the present judges to grant a petition for review if one of them strongly wishes that an issue of law raised thereby be considered.

If the judges determine that the accused has failed to show "good cause" for granting his petition—as demanded by Article 67(b)(3) of the Code¹¹—and so deny his petition, no opinion is filed, and no court mandate issues.¹² Under these circumstances it is rather difficult to draw from the denial of the petition valid conclusions concerning the court's views on all the legal problems that might be posed by the petitioner's case, the situation in this respect being somewhat akin to that existing when the Supreme Court denies a petition for certiorari.¹³ If the petition for review is denied, the accused may request reconsideration during a period of five days after his counsel receives notice of the court's action.

Should the petition for review be granted, the grant will usually be limited to specified issues of law. Sometimes, however, there is an "open grant" under which the accused may raise any issue of law assigned in his petition for review. After the entry of the order granting review the petitioner has 30 days to file a brief, and 20 days thereafter is allowed for the Government's brief.¹⁴ Finally the case is set for a hearing, wherein counsel for the Government and for petitioner may present oral argument. Occasionally *amici curiae* also are allowed to enter an appearance at these hearings, as when an armed service other than that of the accused wishes to offer its views on some legal issue vital to that service.¹⁵

Immediately after the hearing, the three judges confer on the case. At that time the writing of the opinion is tentatively assigned—whenever

⁹ Rule 42, USCMA.

¹⁰ Rule 5, USCMA.

¹¹ 50 USC § 654(b)(3).

¹² Rules 56, 57, USCMA.

¹³ See *Brown v. Allen*, 344 US 443, 452 (1953).

¹⁴ Rule 41, USCMA.

¹⁵ An interesting example is *United States v. Hooper*, 5 USCMA 391, 18 CMR 15. The accused, a sailor, had been tried by an Air Force general court-martial; but, as is required in such situations, the case was reviewed by a Navy Board of Review. This board concluded that the court-martial had lacked jurisdiction. When the case reached the court on questions certified by the Judge Advocate General, both the accused and counsel representing the Navy appeared to agree that the board's conclusion was correct. Therefore, the Air Force and the Army asked leave to appear as *amici curiae* to argue that the court-martial had possessed jurisdiction, and their position was ultimately accepted by the court. Rule 7, USCMA.

practicable on a rotation principle. Ten days after the rendering of the opinion, the court issues its mandate to the Judge Advocate General concerned and the record of trial is returned to him. The parties have five days after receipt of notice of the court's decision in which to request rehearing, modification, or reconsideration.¹⁶

The processing of a certificate for review is quite similar. Here the accused is deemed the appellant, unless the Judge Advocate General has certified a Board of Review decision which sets aside a finding of guilty.¹⁷ Whether the case is heard on certificate or petition, the judges have the power to review matters of law which, though unassigned as error, materially affect the rights of the parties.¹⁸ Of course, in instances of mandatory review—the capital cases and those affecting general or flag officers—the court must always comb the trial record for any error that might have injured the accused.¹⁹

The Court of Military Appeals, in reviewing a trial record, is limited to issues of law. It can neither weigh the evidence nor determine whether the sentence, if within the maximum imposable, is too severe for the offense. There is, however, one phase of its activities—the disposition of petitions for new trial—in which the court does possess fact-finding powers. These petitions are acted on by the court if the record of trial is at the time pending there. Of the 60 petitions for new trial which had been submitted to the court by December 31, 1954, 47 had been denied; 2 granted; and 9 disposed of in other ways. No oral argument is heard on a petition for new trial, unless the court orders to the contrary.²⁰ Should it deem the facts presented in the petition for new trial sufficient to warrant further investigation, the court may refer the matter to a referee, who will probably be some member of the court's staff. He, as he deems appropriate, may investigate, take evidence, and present recommendations to the court.²¹ If a petition for new trial is submitted before the case has reached the Court of Military Appeals, the court may rule on issues of law involved in the petition, but it would lack fact-finding authority as to that petition.²²

The jurisdiction of the Court of Military Appeals extends only to

¹⁶ Rule 46(a), USCMA.

¹⁷ After the certificate for review is filed, appellant has 20 days to file a brief; then the appellee gets 20 days for a reply brief. Rule 39, USCMA.

¹⁸ Rule 4, USCMA. See, e.g., *United States v. Crusoe*, 3 USCMA 793, 14 CMR 211.

¹⁹ The defense receives 30 days to file an assignment of errors and another 30 days to support that assignment with a brief. The Government's brief is to be filed within 20 days more. Rules 24, 40, USCMA.

²⁰ Rule 55, USCMA.

²¹ Rule 52, USCMA.

²² *United States v. Thomas*, 3 USCMA 161, 11 CMR 161.

courts-martial.²³ Therefore, it cannot review the actions of the various types of military boards²⁴ and courts of inquiry. Such boards have been used frequently by the Armed Services in dealing with loyalty cases, security risks, "brainwashed" prisoners of war and the like. Sometimes, as a result of board action a serviceman may receive an undesirable discharge, but this is not reviewable by the court. Nor can it review the action of military commissions or provost courts which do not derive their authority from the Uniform Code of Military Justice. Typical of such tribunals are the military commissions which tried the German saboteurs during World War II and, later, certain war criminals.²⁵ The court's jurisdiction is not, however, limited to service personnel. Many civilians, e.g. those "serving with, employed by, or accompanying the armed forces" in certain overseas areas, are subject to military justice and can be court-martialled. If their approved sentence is sufficiently severe, the record of trial can be reviewed by the Court of Military Appeals. Many civilians are also subject to trial either by a general court-martial or other military tribunal under the law of war. While it has not been expressly decided as a general proposition, it seems quite likely that, if a civilian is tried by a general court-martial convened under the law of war, his case is reviewable.²⁶

Since the Court of Military Appeals can only review records of trial that have been acted on by a Board of Review, its jurisdiction is defined by that of the boards. Under Article 66(b) of the Code a Judge Advocate General must refer to a board any record of trial in which the sentence, as it has been approved, "affects a General or Flag Officer, or extends to death, dismissal of an officer, Cadet, or Midshipman, dishonorable or bad conduct discharge, or confinement for one year or more."²⁷

²³ The jurisdiction extends not only to cases tried before that time but which had not reached the Judge Advocate General or a Board of Review before that date. *United States v. Sonnenschein*, 1 USCMA 64, 1 CMR 64; *United States v. Musick*, 3 USCMA 440, 12 CMR 196.

²⁴ Other of course than the Boards of Review created by the Uniform Code for the review of trials by court-martial.

²⁵ See, e.g., *Ex Parte Quirin*, 317 US 1 (1942); *In re Yamashita*, 327 US 1 (1945).

²⁶ See *United States v. Schultz*, 1 USCMA 512, 4 CMR 104. If the premise is correct that a civilian tried by a general court-martial under the law of war would be entitled to review by the Court of Military Appeals, while a civilian tried by some other type of military court or commission, but also under the law of war would not be able to receive such review, then the military authorities can really determine an accused's appellate rights by their choice of the type of military tribunal that will try him. Civilians can also become subject to trial by the military when martial law obtains. Apparently in that event military authorities can use whatever type of court or commission they see fit—presumably including a general court-martial. Query: If a general court-martial is used would the case be reviewable by the Court of Military Appeals?

²⁷ A civilian was sentenced to eight months confinement and fined. Upon non-pay-

Therefore, such cases are also within the court's jurisdiction. It should be mentioned that an officer cannot be confined unless he is sentenced to dismissal; nor can he be sentenced by a court-martial to reduction in rank. Moreover, enlisted personnel cannot be sentenced to confinement for more than six months unless a punitive discharge—bad conduct or dishonorable—is also imposed.²⁸

Any record of trial reviewed by a Board of Review under Article 66(b) of the Code can thereafter reach the Court of Military Appeals either upon petition by the accused or upon a certificate of review. Under Article 69²⁹ the Judge Advocate General can also refer to a Board of Review a record of trial by general court-martial wherein the sentence imposed would not bring the case within the board's jurisdiction under Article 66(b). However, by the terms of the former Article, such a case can only be transmitted to the court from the board pursuant to certification by the Judge Advocate General—and not by an accused's petition.

Until a petition for review or a certificate has been filed with the court, jurisdiction of a case remains with the Board of Review. During that time the board is free to reconsider or modify its original decision.³⁰ If such a motion for reconsideration is filed, there is delayed the commencement of the 30-day period within which a petition for review from the accused or certified questions must be filed with the court in order to be timely.³¹ The requirement that an accused file his petition within 30 days is rigorously enforced.³² Moreover, the court and the Judge Advocates General have recommended that Congress shorten from 30 to 15 days the period within which the petition must be filed. This recommendation was designed to avoid "unnecessary delays, as well as other difficulties in the handling of cases, and in the assignments to penal institutions," and to lessen administrative duties which do not produce any commensurate advantage to the accused.³³

A petition for grant of review has been "filed" when it has been

ment, he was again confined for five months. *Held*, he could petition the court for review since his sentence extended to confinement for a year or more. *United States v. Garcia*, 5 USCMA 88, 17 CMR 88.

²⁸ For these and other restrictions on sentences see *Manual for Courts-Martial*, 1951, paragraphs 126*dj*, 127*b*.

²⁹ 50 USC § 656.

³⁰ *United States v. Sparks*, 5 USCMA 453, 18 CMR 77; *United States v. Reeves*, 1 USCMA 388, 3 CMR 122; *United States v. Jackson*, 2 USCMA 179, 7 CMR 55.

³¹ *United States v. Sparks*, *supra*, note 30; *United States v. Sell*, 3 USCMA 202, 11 CMR 202.

³² *United States v. Ponds*, 1 USCMA 385, 3 CMR 119. However, this case also held that a documentary waiver of his appellate rights signed by the accused would be treated as a nullity.

³³ See the Joint Report submitted for June 1, 1952 to December 31, 1953, at page 8.

placed in military channels for transmittal to the Court of Military Appeals—a date which is usually fairly easy to ascertain. However, a question may sometimes arise as to the date when the 30-day statutory period began to run. One such situation concerned an accused who had been sentenced by special court-martial to a bad-conduct discharge, which had thereafter been affirmed by a Navy Board of Review. The accused was purportedly discharged from the Navy—an event which under the Code is not to take place until the discharge has been reviewed by the court or until the period has expired within which the accused could petition for such review. No receipt, however, had been obtained from the accused to show that he had ever been personally served with the decision of the Board of Review, if such had been the case. Many months after his “discharge,” the accused received a letter from the Department of the Navy enclosing a copy of the board’s decision and stating that he had 30 days to petition therefrom. He took the Navy at its word, submitted a petition within that time, and maintained in an affidavit that he had not before then been informed of the board’s decision. Under the circumstances of this case, the court accepted the accused’s allegations and held that the 30-day period does not start running if an accused is not notified of the action of the Board of Review.³⁴

In addition to its typical judicial role, the court is directed by the Uniform Code to meet annually with the Judge Advocates General to survey operations under the Code and report thereon to the Committees on Armed Services of the Senate and House of Representatives and to the secretaries of the department concerned.³⁵ Two critics considered this requirement the “only hope in the Code.” Be that as it may, these reports on operations of the Code promise to be productive of some further reforms in military justice, and their preparation has received careful attention from the three judges.³⁶

SCOPE OF REVIEW AND GROUNDS FOR REVERSAL

The court has decided that its power to review is in nowise affected by the circumstance that, during the appellate process, the accused passes beyond the category of persons subject to the Uniform Code of Military Justice. Thus, the case of an Air Force Colonel whose commission ex-

³⁴United States v. Marshall, 4 USCMA 607, 16 CMR 181. The court entertained the accused’s petition even though it was informally prepared. Accord: United States v. Jackson, 2 USCMA 179, 7 CMR 55.

³⁵UCMJ, Article 67(g), 50 USC § 654(g).

³⁶The first such report covered May 31, 1951 through May 31, 1952; the second, June 1, 1952 through December 31, 1953. The third report, dealing with 1954, is now near release and hereafter reports will be submitted on a calendar year basis.

pired by operation of law during the appellate review was not removed from the court's jurisdiction.³⁷ A related question is as to the point at which a case becomes moot. In one instance the bad-conduct discharge of an accused who had petitioned the court for a grant of review was thereafter remitted by military authorities. This remission was not a disapproval of the correctness of the original sentence but was purely an act of executive clemency. The accused was subsequently granted an honorable discharge. The Government moved to dismiss the petition on the ground that no justiciable question of law remained to be decided. The court denied the motion on the ground "that a decision on the issue raised is of importance to all of the services."³⁸ If this criterion is adhered to, the doctrine of mootness will have little importance in military law.

Actually the court could have rested its result on the less sweeping pronouncements of two previous decisions. In one it was held that the remission of an accused's bad-conduct discharge by the military as an act of clemency did not make his case moot, because in that state of affairs the accused's service record would indicate, despite the remission, that a bad-conduct discharge had in the first instance been properly adjudged.³⁹ In the other case, it was decided that the legality of a sentence which had been served before completion of appellate review could be considered by the court on a certificate from the Judge Advocate General, since a judicial determination that part of the sentence served had been illegal might affect the accused—for instance, as to computation of leave and of longevity increases in pay and re-enlistment allowances.⁴⁰

The court has recognized, however, that its role as a court requires that it avoid dealing with issues that are too abstract. Thus, it refused to answer certain questions certified by the Judge Advocate General of the Navy, because it considered them non-justiciable, being too hypothetical and requiring the rendition of an advisory opinion.⁴¹ If, on the other hand, the questions posed by a certificate from a Judge Advocate General are sufficiently concrete, the court will consider them, even though its determination may not bear on the result reached by the Board of Review.⁴²

The Court of Military Appeals has repeatedly emphasized that its review and that by the Board of Review must be based on the record of trial.⁴³ In no instance can evidence outside the record be used to sustain

³⁷ *United States v. Sippel*, 4 USCMA 50, 15 CMR 50.

³⁸ *United States v. Blue*, 3 USCMA 550, 13 CMR 106.

³⁹ *United States v. Murgaw*, 2 USCMA 369, 8 CMR 169.

⁴⁰ *United States v. Prescott*, 2 USCMA 122, 6 CMR 122.

⁴¹ *United States v. Thompson*, 2 USCMA 460, 9 CMR 90.

⁴² *United States v. Engle*, 3 USCMA 41, 11 CMR 41.

⁴³ *United States v. Gordon*, 2 USCMA 632, 10 CMR 130.

a conviction.⁴⁴ And, as a general rule, neither the court nor a Board of Review may go beyond the record of trial even to aid the accused.⁴⁵

There are, of course, exceptions. For example, the accused may, in attacking the jurisdiction of the court-martial, adduce evidence which was not introduced at the trial. Evidence (though outside the record of trial) which bears on the accused's sanity may also be introduced during the course of an appeal.⁴⁶ Moreover, in reviewing a record of trial, the court has generously applied the doctrine of judicial notice.⁴⁷ Still another way of bringing in facts not contained in the record of the trial proper is by way of a petition for new trial. This petition, however, must be submitted within one year from the time the case is originally acted on by the officer who convened the court-martial.⁴⁸ And, its submission is hedged in by requirements of due diligence.⁴⁹

One other method of supplementing the original record of trial has been indicated in a recent case.⁵⁰ Here the several accused had been convicted of mutiny by a general court-martial and given heavy sentences. A transcript of undisputed accuracy later revealed that the day before the trial the court members had received an "indoctrination" given under the auspices of the commander who had appointed the court. There was a likelihood that the pretrial lecture had materially influenced the results of the trial. Yet the pretrial lecture had not been mentioned at the trial itself, and it was questionable whether, under the circumstances of the case, it could be the subject of a petition for new trial. The three judges appear to have agreed that the court-martial was not ousted from "jurisdiction" by the pre-trial and unlawful influence to which it had been

⁴⁴ *United States v. Duffy*, 3 USCMA 20, 11 CMR 20. Nor can the admissibility of a record of previous convictions introduced against the accused be sustained by means of information contained in the briefs of counsel. *United States v. McKnight*, 4 USCMA 190, 15 CMR 190. A Board of Review has ruled that, as to jurisdiction, the original record of trial can be supplemented by evidence obtained later. *United States v. Patterson*, 16 CMR 295. In *United States v. Garcia*, 5 USCMA 88, 17 CMR 88, the Court of Military Appeals considered in connection with jurisdiction, evidence that had been submitted after the trial; but there jurisdiction was first questioned during the course of the appeal.

⁴⁵ *United States v. Whitman*, 3 USCMA 179, 11 CMR 179; *United States v. Harvey*, 2 USCMA 609, 10 CMR 107. However, the officer who convened the court-martial can go beyond the record of trial in acting on the case if to do so would aid rather than harm the accused. *United States v. Massey*, 5 USCMA 514, 18 CMR 138.

⁴⁶ See *United States v. Burns*, 2 USCMA 400, 9 CMR 30; *United States v. Smith*, 5 USCMA 314, 17 CMR 314; *United States v. Kunak*, 5 USCMA 346, 17 CMR 346.

⁴⁷ See, e.g., *United States v. McCrary*, 1 USCMA 1, 1 CMR 1.

⁴⁸ UCMJ, Article 73, 50 USC § 660. It has been proposed that this period be increased to two years. See Report, *supra*, note 35, pp. 8-9.

⁴⁹ Manual for Courts-Martial, *supra*, note 28, paragraph 109*d*.

⁵⁰ *United States v. Ferguson*, 5 USCMA 68, 17 CMR 68.

subjected. Judge Latimer concluded, therefore, that nothing could be done about the error. Judge Quinn reasoned that the command influence could be considered because it involved "questions of a general public nature affecting the interest of the state at large." Judge Brosman concluded, *inter alia*, that the command control could be raised by a writ of error coram nobis so long as the petitioners were confined or were subject to an unexecuted bad conduct or dishonorable discharge.

This suggestion by Judge Brosman is especially interesting. In the civilian scene the writ of error coram nobis has come increasingly into vogue of late.⁵¹ If it is held to exist in military law, then an entirely new area of activity for the Court of Military Appeals may come into existence. In a sense this jurisdiction would be at the expense of the habeas corpus jurisdiction of federal district courts. This can be illustrated in terms of the case just discussed. If no military tribunal had the power to deal with the well-founded contentions of the accused that they had been tried by a tribunal that had been subjected to pre-trial command control, what would have been the next development? Almost inevitably the several accused would have asked a federal court to grant a writ of habeas corpus. The scope of review by federal civilian courts of court-martial action has increased materially in recent years.⁵² Whether or not the federal civilian courts would accept the view of the Court of Military Appeals that the command influence does not affect jurisdiction, it is quite unlikely that, where such influence clearly existed, the court-martial's findings and sentence would be left intact.

The Uniform Code directs that the court "shall take action only with respect to matters of law."⁵³ What then is a "matter of law"? The court has indicated clearly that it does not always consider itself bound by a characterization on the part of a Board of Review as one of "fact."⁵⁴ In various instances the court has carefully scrutinized the opinion of the board to see if that opinion in some way rested on a misunderstanding or misapplication of the law.⁵⁵ Occasionally a case has been remanded to

⁵¹ See, e.g., *United States v. Morgan*, 346 US 502 (1954). There it was held that the post-trial remedies provided by 28 USC § 2255 were not intended to exclude in proper cases the use of the writ of error coram nobis.

⁵² *Burns v. Wilson*, 346 US 137 (1953), would go beyond the onetime scope of review of courts-martial which was that adopted in the concurring opinion of Mr. Justice Minton at page 146.

⁵³ UCMJ, Article 67(d), 50 USC § 654 (d).

⁵⁴ *United States v. Benson*, 3 USCMA 351, 12 CMR 107.

⁵⁵ In *United States v. Josey*, 3 USCMA 767, 14 CMR 185, the court reversed a Board of Review decision which it considered to have been based on a misapprehension of the legal effect of circumstances showing a possibility, but not a probability, that an accused's statement had been involuntary. In *United States v. Wilcher*, 4 USCMA 215, 15 CMR 215, the board's decision was held reviewable because it was concluded

the board for clarification. Clearly then, the court has adopted a broad policy of review which encompasses many "mixed" questions of law and fact.⁵⁶

Moreover, in examining the legal sufficiency of the evidence to sustain a conviction, the court has rejected any narrow "scintilla evidence" or "substantial evidence" rule of review in favor of a broader principle. Under this principle the court examines the record of trial—including uncontradicted and not inherently improbable evidence presented by the defense—to see whether reasonable men would agree that the evidence was consistent with any hypothesis other than that of guilt.⁵⁷ As there are several well-recognized standards for determining the sufficiency of evidence, it seems consistent with the general spirit of the Uniform Code of Military Justice that the court, to protect the accused serviceman, should adopt the standard permitting the broadest civilian review of the record. Certainly this choice has proved less subject to criticism, since the court has demonstrated unmistakably that it does not propose to become a super-jury to retry the facts for the benefit of the accused.⁵⁸

On the contrary, the court's appraisals of the credibility of witnesses have redounded chiefly to the detriment of the accused. For example, the general rule in military law is that the law officer, who in a general court-martial plays the role of the civilian trial judge, must instruct the court members *sua sponte* on any lesser offense reasonably raised by the evidence. In some instances testimony which would tend to raise a lesser offense and thereby require such an instruction has been denied that effect by the court because it found the testimony inherently incredible or improbable.⁵⁹ In other instances, after examining claims of error the court has determined that they would not justify reversal because the evidence against the accused was so compelling, or for like reasons.⁶⁰

Interestingly, however, certain errors have been deemed to be of a

that the board had relied on a misinterpretation of the sufficiency of Government evidence to show consent to a search whereby incriminating evidence had been obtained.

⁵⁶ In a like vein, the court has adopted the broader of two conflicting rules about reviewability of a determination at the trial level of a witness' expertise. *United States v. Hagelberger*, 3 USCMA 259, 12 CMR 15.

⁵⁷ *United States v. O'Neal*, 1 USCMA 138, 2 CMR 44; *United States v. Shull*, 1 USCMA 177, 2 CMR 83.

⁵⁸ *United States v. Whitley*, 3 USCMA 639, 14 CMR 57; *United States v. Armstrong*, 4 USCMA 248, 15 CMR 248; *United States v. Wilson*, 4 USCMA 3, 15 CMR 3.

⁵⁹ See, e.g., *United States v. Benavides*, 2 USCMA 226, 8 CMR 26; *United States v. Lee*, 3 USCMA 501, 13 CMR 57; *United States v. Marriott*, 4 USCMA 390, 15 CMR 390.

⁶⁰ See, e.g., *United States v. Haimson*, 5 USCMA 208, 17 CMR 208; *United States v. Williams*, 5 USCMA 406, 18 CMR 30.

nature to demand reversal irrespective of what was revealed by the evidence against the accused. A possibility of such error would be one which went to jurisdiction—in which event the trial itself would be a nullity. Up to this point the court has taken a rather narrow view—much narrower than that of some Boards of Review—as to what constitutes jurisdictional error.⁶¹ Other errors have been deemed by the court so important as to involve a deprivation of what the court terms “military due process.” For example, a failure by the law officer to instruct members of a court-martial concerning the elements of the principal offense charged deprives the accused of “military due process” and, absent a plea of guilty or a judicial confession by the accused, will necessitate reversal—however abundant the evidence of guilt.⁶²

It was under a broad, but very practical, interpretation of the “harmless error” provisions in Article 59 of the Uniform Code that the court concluded that even a failure to instruct on the elements of an offense would not necessitate reversal if the accused has pleaded guilty.⁶³ This same Article, however, was not considered by a majority of the court, over bitter dissent, to preclude use of a doctrine of “general prejudice.”⁶⁴ “General prejudice may be regarded as embracing rights only slightly less important and specific in quality than those embodied in the concept of military due process.”⁶⁵ In instances where the record of trial reveals “general prejudice,” the court will normally reverse automatically without inquiring to what extent, if at all, the finding of guilt was affected by the matter creating “general prejudice.”

When all is said and done, “general prejudice” is little more than a “big stick” which the court has wielded to insure adherence to the reforms instituted by the Uniform Code. This technique is familiar in civilian jurisprudence. For instance, the doctrine of “due process” reflects an insistence on observance of certain minimal standards of decency and fair play. Under this doctrine if a confession is obtained from an accused by “third degree” tactics and is introduced at his trial, the appellate courts will reverse without splitting hairs about the extent to which the confession was untrustworthy or the conviction was supported by other evidence.⁶⁶ “General prejudice” relates to rights of somewhat lesser impor-

⁶¹ See, *e.g.*, *United States v. Ferguson*, 5 USCMA 68, 17 CMR 68. *United States v. Hutchison*, 1 USCMA 291, 3 CMR 25.

⁶² *United States v. Clay*, 1 USCMA 74, 1 CMR 74.

⁶³ *United States v. Lucas*, 1 USCMA 19, 1 CMR 19.

⁶⁴ See, *e.g.*, *United States v. Woods*, 2 USCMA 203, 8 CMR 3.

⁶⁵ *Id.* at page 208.

⁶⁶ See, *e.g.*, *Malinski v. New York*, 324 US 401 (1945).

tance than the right not to be forced to make a confession. To say this is not to imply that it is improper to enforce those rights with vigor.

Certainly Congress intended the court to exercise a purifying influence on military justice and to insure adherence to the norms set up by the Uniform Code. It was with this end in mind that the court was given the unique responsibility of surveying operations under the Code and reporting annually to the Committees on Armed Services. Therefore, it is not so extraordinary — despite contrary claims by some critics of the court — that a majority of judges chose to use a rather drastic method of enforcing compliance. It might be noted that the use by an appellate court of a prophylactic method in achieving a statutory goal has at least some authoritative precedent. For example, this method appears to have been used by the Supreme Court in the *McNabb* case, which held that a confession must be excluded from evidence if made while a suspect was being confined in violation of the Federal Rules of Criminal Procedure.⁶⁷

Several illustrations of "general prejudice" can be given. Article 31 of the Uniform Code demands that, before taking a statement from a suspect, the military investigator warn him of his right to remain silent. To receive in evidence a statement obtained in violation of this requirement would constitute "general prejudice" and lead automatically to reversal.⁶⁸ It was also held at one time that if a law officer, the trial judge, participated in the deliberations of a court-martial, reversal would automatically follow findings of guilt.⁶⁹

The Court of Military Appeals has been freer than many appellate

⁶⁷ *McNabb v. United States*, 318 US 332 (1943).

⁶⁸ *United States v. Wilson*, 2 USCMA 248, 8 CMR 48. The accused would also appear to be "generally prejudiced" if the law officer at the trial abdicated many of his functions to the president of the court-martial. See *United States v. Berry*, 1 USCMA 235, 2 CMR 141.

⁶⁹ Interestingly, that rule no longer holds true. The court has recently stated that it no longer finds it necessary to invoke the doctrine of "general prejudice" in this area. *United States v. Allbee*, 5 USCMA 448, 18 CMR 72. This prospect of transition was envisaged from the first. See *United States v. Keith*, 1 USCMA 493, 4 CMR 85. To some the change has seemed anomalous. However, this contention is less plausible if it is recognized that the concept of "general prejudice" merely reflects the court's exercise of its fundamental supervisory authority over the administration of military justice. Understandably, in the exercise of that supervisory authority, the court could find that conditions had changed and that less severe remedies would suffice to insure general compliance with the intentment of the Uniform Code. When it laid aside "general prejudice" with respect to conferences between a law officer and members of the court-martial, the court based its action on the premise that such conferences had become a rarity. In the unusual case where an improper conference did for some reason take place, treatment could be on an individualized basis — which is the way the federal civilian courts apparently would handle this type of error — rather than on the basis of a hard-and-fast rule that this error would invariably require reversal of a conviction.

tribunals in reviewing matters not raised by defense counsel at the trial level, or perhaps not even in the petition for review. This liberality seemed appropriate since many of the defense attorneys were somewhat inexperienced in trial practice and since some of the procedures instituted by the Uniform Code were new even to veteran military lawyers. However, from the first, limitations have been set by the court. For instance, it will not review "an assignment of error based on the inadmissibility of evidence where it clearly appears that the defense understood its right to object except in those instances of manifest miscarriage of justice . . ." for "to hold otherwise would result in an inefficient appellate system, interminable delays in the final disposition of cases, and careless trial representation."⁷⁰ But, "Whenever, to do substantial justice, it becomes necessary to note an error, then objection or no objection, so far as we are concerned that error will be noted."⁷¹

The Court of Military Appeals may affirm a conviction of a lesser included offense raised by the evidence as to which it does not believe any error committed would have had effect.⁷² When the court affirms a finding of guilt of a lesser offense included in the finding affirmed by a Board of Review, the record of trial goes back to the Board for reassessment of sentence, and like action can be taken if the court disapproves some but not all of the findings of guilt.⁷³ Also, in the latter event, the case can be sent back to another court-martial which can retry the charges on which findings of guilt were reversed, and then resentence the accused on the basis of new findings of guilt and the old findings that were approved.⁷⁴ Not infrequently the court leaves open for the Judge Advocate General a choice between ordering a rehearing on some of the original charges and, on the other hand, remanding the case to the Board of Review for reassessment of sentence as to the findings of guilt which have been approved. In other instances, the court may itself order a rehearing when it is apparent that the interests of justice would not be satisfied by a rehearing. If a finding of guilt disapproved by a Board of Review has been certified by the Judge Advocate General, that finding can be reinstated by the Court of Military Appeals. No former jeopardy in favor of an accused is created by an error of a Board of Review on a "matter of law."⁷⁵

⁷⁰ *United States v. Masusock*, 1 USCMA, 32 1 CMR 32.

⁷¹ *United States v. Fisher*, 4 USCMA 152, 15 CMR 152.

⁷² See, *United States v. Gibson*, 3 USCMA 512, 13 CMR 68.

⁷³ *United States v. Goddard*, 1 USCMA 475, 4 CMR 67; *United States v. Keith*, 1 USCMA 442, 4 CMR 34.

⁷⁴ *United States v. Field*, 5 USCMA 379, 18 CMR 3.

⁷⁵ *United States v. Zimmerman*, 2 USCMA 12, 6 CMR 12.

The Court of Military Appeals is directed by the Code to dismiss the charges against an accused if the record of trial fails to indicate that there would be sufficient admissible evidence to sustain a finding of guilt in the event of a rehearing.⁷⁶ Of course, such dismissal does away with the charges once and for all. In some instances, the court has, in the exercise of its supervisory authority, dismissed in the interests of justice even though the record of trial showed that the Government at a rehearing would have had enough competent evidence to permit a valid finding of guilt.⁷⁷

THE COURT IN PERSPECTIVE

Before concluding, something should be said about some of the major accomplishments of the court, a few of its most pressing problems, and its position in the judicial hierarchy. As to the accomplishments, perhaps the chief one is the inroad that the court has made on "command control" of courts-martial. At one time courts-martial were thought of in military law only as tools of the commanding officer for maintaining discipline. They merely gave a semblance of legality to a commanding officer's determinations about whom to punish and to what extent. Under this view justice to the accused serviceman "played second fiddle" to the needs of discipline. It was not extraordinary for a court-martial member who had passed on a case in accord with his oath and on the evidence before him to receive a letter of reprimand from the commanding officer who disagreed with the court's decision. Yet that commander has not heard the testimony and might have prejudged the case on the basis of inaccurate information. This type of pressure on court members was something that had little counterpart in the civilian scene.

While direct command control of a court-martial seemed unhealthy and unfair to the serviceman, Congress was urged by the Armed Services not to divorce the commanding officer completely from military justice. His, after all, is the responsibility for discipline among his troops; his is the blame if those troops are disorganized, undisciplined, and lawless. To reconcile conflicting demands of justice and of discipline was difficult and was considered by Congress "perhaps the most troublesome question which we have considered" in connection with drafting the Uniform Code.⁷⁸

Under the Code the commander is allowed to appoint the members of the court-martial, and he refers the charges to that court for trial. How-

⁷⁶ UCMJ, Article 67(e), 50 USC § 654 (e).

⁷⁷ See, e.g., *United States v. Perna*, 1 USCMA 438, 4 CMR 30; *United States v. James*, 1 USCMA 379, 3 CMR 113.

⁷⁸ See Report of House Committee, *supra*, note 1, page 7.

ever, he is directed not to "censure, reprimand, or admonish" members of the court nor to "attempt to coerce or, by any unauthorized means, influence the action of a court-martial."⁷⁹ In those instances where a commander has gone beyond his allotted role and expressed to the court members an implied opinion of the merits of a case, the Court of Military Appeals has been swift to reverse. For instance, although the commander has been allowed to give general information to prospective court members about the state of discipline in a command and the prevalence of certain offenses, he has been deterred from creating bias against a particular accused awaiting trial.⁸⁰ He cannot emphasize to prospective court members just before trial that the charges have been thoroughly investigated and would not have been referred to trial unless the investigators considered that the accused was guilty. He cannot imply to the court members that they will not receive good efficiency ratings or fitness reports unless they vote to convict and to impose heavy sentences.

It must be confessed that there are some critics who feel that the court still has not gone far enough in eliminating command control. Indeed, this seems to be the position of Judge Brosman in two interesting dissents.⁸¹ However, it must always be kept in mind that to let a commander play the part which Congress intended to permit him and yet keep his views from affecting those of the court members is a goal difficult to attain.

Another accomplishment of the court has been in spelling out the role of the law officer under the Uniform Code. The old Articles of War provided for a law member who sat with the members of the court-martial and deliberated with them on the findings and the sentence. Under the Uniform Code the status of this lawyer has been changed, and he is to play a role much more like that of a judge in a federal civilian court. He is to sit apart from the court members and give them full instructions on the elements of the offenses charged. He is not to participate in their deliberations. However, the law officer has not been completely equated by the Code to a federal trial judge. He is not allowed to impose sentence on the accused—that task being left for the court members deliberating without his participation. He may not make the final rulings on challenges to members of the court-martial.

There are many problems connected with the law officer's function which either were not specifically foreseen by the draftsmen of the Uni-

⁷⁹ UCMJ, Article 37, 50 USC § 612.

⁸⁰ *United States v. Ferguson*, 5 USCMA 68, 17 CMR 68; *United States v. Littrice*, 3 USCMA 487, 13 CMR 43; *United States v. Zagar*, 5 USCMA 410, 18 CMR 34.

⁸¹ See *United States v. Isbell*, 3 USCMA 782, 14 CMR 200; *United States v. Navarre*, 5 USCMA 32, 17 CMR 32.

form Code or were left to be coped with by the Court of Military Appeals. During the time that has elapsed since the court began operating, it has resolved many of those problems.⁸² Moreover, the court has compelled the law officers to maintain high professional standards and has continually emphasized the importance of their judicial role and the need for complete independence, impartiality, and objectivity on their part.⁸³

An indirect but almost necessary result of the professional competency required of law officers has been an enhanced professional attitude on the part of defense counsel. Knowing that the legal points which they raise will be dealt with in a lawyerlike fashion, these attorneys have felt that there is much more reason thoroughly to prepare their cases. Gone is the feeling of futility that, before the Uniform Code, was sometimes felt by lawyers assigned to represent accused servicemen before a court-martial.

The changes in the milieu of military justice wrought by the Code and the court have not met with uniform satisfaction. It is not surprising that some of the severest criticism of the court has come from officers in the Armed Forces. This, in turn, has created for the court one almost unique problem. Unlike most, if not all other appellate courts, the Court of Military Appeals is continually faced with a campaign for its abolition and a return to the system of military justice that preceded the Uniform Code. For example, in recent public pronouncements the Judge Advocate General of the Air Force has made such a suggestion. Actually the prospects that the Congress will adopt this proposal and try to "turn back the clock" are slight. But the court will undoubtedly feel that it is better able to perform its duty when all the Armed Services accept less grudgingly the concept of civilian review of military justice.

Another major problem facing the court concerns the pressures that a long-continued mobilization would bring. The workload on the three judges under such circumstances would presumably be astronomical. To some critics of the court the strain that mobilization and increase in the Armed Forces would bring furnishes an argument that the Court of Military Appeals is cumbersome and should be abolished. Others consider rather that this possibility merely supports some existing proposals to increase the membership of the court. Still others would conclude that perhaps the present number of judges should be retained but careful plans made for expansion in the event of mobilization.

Concerning the status of the Court of Military Appeals in the judicial hierarchy, perhaps the best guide is the statement in Article 76 of the

⁸² Some of the most difficult problems have concerned the instructions that the law officer was required to give, either *sua sponte* or upon defense request.

⁸³ See, e.g., *United States v. Walter*, 4 USCMA 617, 16 CMR 191; *United States v. Knudson*, 4 USCMA 587, 16 CMR 161.

Uniform Code that the appellate review provided by the Code "shall be final and conclusive."⁸⁴ Accordingly, the United States Court of Appeals for the District of Columbia recently denied a petition that it review a ruling by the Court of Military Appeals.⁸⁵ In answer to the petitioner's argument that the latter court was only an "administrative agency" whose action might be directly reviewed by a federal court of appeals, it was pointed out: "Certainly Congress intended that in its dignity and in its standards of administering justice the Court of Appeals should be assimilated to and equated with the established courts of the federal system."

So far as is known by the writer, the Supreme Court has not been petitioned to grant certiorari of a decision by the Court of Military Appeals, but he knows of no authority for entertaining such a petition. Another route by which the finality of review by the Court of Military Appeals could be circumvented would be through collateral attack by writ of habeas corpus in a federal district court or a suit for back pay or unjust imprisonment brought in the Court of Claims. In view of the Supreme Court's latest decision in point this alternative also seems unpromising for an accused.⁸⁶ Thus, in almost every sense, the Court of Military Appeals is really "the GI's Supreme Court."

⁸⁴ 50 USC § 663.

⁸⁵ *Shaw v. United States*, 209 F.2d 811 (D.C. 1954).

⁸⁶ *Burns v. Wilson*, 346 US 137 (1953).