

MILITARY LAW: COLLATERAL ATTACK OF COURTS-MARTIAL IN THE COURT OF CLAIMS

THE UNIFORM CODE OF MILITARY JUSTICE provides for a system of review of decisions of military tribunals, with final appeal to the Court of Military Appeals.¹ A necessary corollary to this independent judicial structure is that determinations of military tribunals are not directly reviewable by civil courts.² However, judgments of military tribunals have been collaterally attacked in civil courts by writ of habeas corpus³ or suit for back pay in the Court of Claims.⁴ In such instances, the federal courts, including the Court of Claims, have considered only the question of jurisdiction of the military court, disclaiming any authority to review questions of military law.⁵

In a recent case, *Johnson v. United States*,⁶ the Court of Claims departed from this rule of review of military tribunals and refused to give effect to a rule of military law promulgated by the Court of Military Appeals. Johnson had been found guilty of larceny and was

¹ Uniform Code of Military Justice, 64 Stat. 108 (1950), 10 U.S.C. § 801 (1958) [hereinafter cited as UCMJ].

² See *Burns v. Wilson*, 346 U.S. 137 (1953); *Hiatt v. Brown*, 339 U.S. 103 (1950); *Shaw v. United States*, 209 F.2d 811 (D.C. Cir. 1954); EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 304 (1956); Craig, *Double Jeopardy and Cumulative Sentencing in the Military*, 48 GEO. L.J. 43, 46 (1959).

³ E.g., *Burns v. Wilson*, *supra* note 2; *Hiatt v. Brown*, *supra* note 2; *In re Yamashita*, 327 U.S. 1 (1946); *Fischer v. Ruffner*, 277 F.2d 756 (5th Cir. 1960). See EVERETT, *op. cit. supra* note 2, ch. 18; 1 MOORE, *FEDERAL PRACTICE* ¶ 0.5 (2d ed. 1960). See generally Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. (pts. 1 & 2) 493, 699 (1951); Annot., 15 A.L.R.2d 387 (1951).

⁴ E.g., *Moses v. United States*, 137 Ct. Cl. 374 (1957); *Graham v. United States*, 136 Ct. Cl. 324 (1956), *cert. denied*, 353 U.S. 917 (1957); *Lucas v. United States*, 121 Ct. Cl. 819 (1952); *Fly v. United States*, 120 Ct. Cl. 482, 100 F. Supp. 440 (1951); *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947). See also *McLean v. United States*, 73 F. Supp. 775 (W.D.S.C. 1947) (district courts have concurrent jurisdiction).

⁵ See, e.g., *Hiatt v. Brown*, 339 U.S. 103 (1950); *Fischer v. Ruffner*, 277 F.2d 756 (5th Cir. 1960); *Dickenson v. Davis*, 245 F.2d 317 (10th Cir. 1957); *Easley v. Hunter*, 209 F.2d 483 (10th Cir. 1953); *Griffiths v. United States*, 172 F. Supp. 691 (Ct. Cl.), *cert. denied*, 361 U.S. 865 (1959); *Graham v. United States*, *supra* note 4; *Sima v. United States*, 119 Ct. Cl. 405, 96 F. Supp. 932 (1951). *But see* *Jackson v. McElroy*, 163 F. Supp. 257 (D.D.C. 1958) (decisions of Court of Military Appeals not binding on federal district courts, but persuasive).

⁶ 280 F.2d 856 (Ct. Cl. 1960).

sentenced to six months hard labor with partial forfeiture of pay and a bad conduct discharge.⁷ Following the sentence, he was reduced in rank from sergeant to airman basic under a provision⁸ in the Manual for Courts-Martial⁹ which provides that non-commissioned officers sentenced to confinement shall be reduced to the lowest enlisted grade

⁷ Many common law crimes are recognized as offenses triable by courts-martial. UCMJ arts. 77-134, 10 U.S.C. §§ 877-934 (1958) (the punitive articles). Congress has given the President power to prescribe maximum sentences. UCMJ art. 56, 10 U.S.C. § 856 (1958). The maximum limits of punishment are set out in U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 127 (1951) [hereinafter cited as MCM].

⁸ The Air Force policy of "automatic-reduction" as a consequence of conviction for offenses which carry a sentence of confinement was based upon MCM ¶ 126e as amended by Executive Order 10652, January 10, 1956, 21 Fed. Reg. 235. "[A] sentence which . . . includes (1) dishonorable or bad conduct discharge . . . , (2) confinement, or (3) hard labor without confinement, immediately upon being finally approved . . . shall reduce . . . [an] enlisted person to the lowest enlisted pay grade . . ."

Following the *Simpson* case, the Air Force announced a new policy:

"The effect of this decision is that unless a reduction to the lowest enlisted grade or to an intermediate grade is included in the court-martial sentence, accused will be retained in his present grade and pay status even though he may be in confinement, or performing hard labor without confinement, or awaiting punitive discharge." Letter from the Staff Judge Advocate, (ARTJA) (1959).

On July 12, 1960, Congress enacted UCMJ art. 58a, ch. 633, 74 Stat. 468 which legislatively overruled the *Simpson* case and reinstated the practice of automatic reduction:

"(a) Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes—

- (1) A dishonorable or bad-conduct discharge;
- (2) confinement; or
- (3) hard labor without confinement;

reduces that member to pay grade E-1, effective on the date of that approval."

The portion of MCM ¶ 126e which permits a court-martial to order a reduction in pay grade as an integral part of the sentence remains unquestioned and unimpaired in effect.

⁹ Under UCMJ art. 36, 10 U.S.C. § 836 (1958), the President is given authority to prescribe regulations for the conduct of courts-martial not inconsistent with the Code. By Executive Order 10214 of February 8, 1951, the President ordered publication of the MANUAL FOR COURTS-MARTIAL. In *United States v. Brasher*, 2 U.S.C.M.A. 50, 52, 6 C.M.R. 50, 52 (1952), the Court of Military Appeals stated that "the Act of Congress . . . and the act of the Executive . . . function at the same authoritative level." In *United States v. Clark*, 1 U.S.C.M.A. 201, 204, 2 C.M.R. 107, 110 (1952), the Court of Military Appeals exercised power to construe a provision of the Manual and held that if a provision of the Manual should conflict with the Code the latter would control. In *United States v. Wappler*, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953), the court first held invalid a provision of MCM as in conflict with the UCMJ (bread and water as punishment).

immediately upon approval of sentence.¹⁰ The Court of Military Appeals denied review.¹¹ However, in *United States v. Simpson*,¹² decided shortly after Johnson's appeal was denied, the court held the automatic-reduction provision invalid.¹³

Relying on the *Simpson* case, Johnson brought suit in the Court of Claims,¹⁴ demanding reimbursement for the loss in pay suffered as

¹⁰ The commanding officer who convened the court-martial approved the bad conduct discharge. See UCMJ art. 64, 10 U.S.C. § 864 (1958) (approval of sentence). Johnson was then reduced to the lowest enlisted grade. Later the bad conduct discharge was remitted and he was retained in the Air Force. *United States v. Johnson*, 280 F.2d 856 (Ct. Cl. 1960).

Designation of persons with authority to convene a general court-martial is found in UCMJ art. 22, 10 U.S.C. § 822 (1958). The commanding officer of a separate wing of the Air Force is one such person.

¹¹ A.C.M. 13535, *Johnson*, review denied *sub nom.* *United States v. Johnson*, 8 U.S.C.M.A. 773 (1957) (mem.).

¹² 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959). The *Simpson* case is noted in 35 NOTRE DAME LAW. 159 (1959), but the "automatic-reduction" point is not discussed. *Simpson*, an Air Force sergeant, was convicted of larceny by check and sentenced to a bad conduct discharge. The convening authority approved the sentence but suspended execution of discharge. The accused was reduced to airman first class by the convening authority, unless the suspension of the discharge was vacated, in which event the accused would be reduced to the lowest enlisted grade. *United States v. Simpson*, *supra* at 231, 27 C.M.R. at 305. *Cf.* *United States v. Varnadore*, 9 U.S.C.M.A. 471, 26 C.M.R. 251 (1958) (long term confinement without punitive discharge); *United States v. Choate*, 9 U.S.C.M.A. 680, 26 C.M.R. 460 (1958) (Navy policy).

¹³ The court, in setting aside the reduction in grade, stated that the provision was an integral part of the sentencing process. It held that the power to impose a reduction in this manner is essentially judicial in its nature and, as such, may be imposed only by a court-martial. Once sentence is pronounced by a court-martial any subsequent "automatic-reduction" by a reviewing authority is invalid, for it operates improperly to increase the severity of the sentence by a non-judicial act. 10 U.S.C.M.A. at 232, 27 C.M.R. at 306. *Accord*, *United States v. Hare*, 10 U.S.C.M.A. 309, 27 C.M.R. 383 (1959); *United States v. Chatman*, 10 U.S.C.M.A. 262, 27 C.M.R. 336 (1959); *United States v. Littlepage*, 10 U.S.C.M.A. 245, 27 C.M.R. 319 (1959); *United States v. Lane*, 10 U.S.C.M.A. 241, 27 C.M.R. 315 (1959). See UCMJ arts. 62, 67, 10 U.S.C. §§ 862, 867 (1958). *Cf.* *United States v. Castner*, 3 U.S.C.M.A. 466, 13 C.M.R. 22 (1953).

In *United States v. Armbruster*, 11 U.S.C.M.A. 596, 29 C.M.R. 412 (1960) the Court of Military Appeals, all judges concurring, reaffirmed that "automatic-reduction" was invalid under the UCMJ. The *Armbruster* decision was rendered while the *Johnson* case was pending before the Court of Claims.

Of course, the substantive rule announced is no longer law since the enactment of UCMJ art. 58a, ch. 633, 74 Stat. 468 (1960). See note 8 *supra*.

¹⁴ The authority of the Court of Claims to entertain suits for back pay is based on its jurisdiction to try claims against the United States based upon an act of Congress or regulation of an executive department, claims for damages not sounding in tort,

a result of his reduction in rank. The Court of Claims declined to follow the ruling of the Court of Military Appeals in *Simpson* and dismissed the claim, holding that the "automatic-reduction" provision was administrative rather than judicial, hence a valid exercise of presidential power as Commander-in-Chief.¹⁵ The court stated that adoption of plaintiff's view would "tread heavily on long established patterns of procedure within the military." Furthermore, the court professed that judicial restraint required non-intervention, since Congress had not made the Court of Claims an "overseer of the military."¹⁶

On its face, the opinion adopts a "hands-off" attitude toward making decisions in the field of military law. Notwithstanding its announced intention, the Court of Claims considered and refused to enforce a rule of military law enunciated by the highest court of the military.¹⁷

and claims for damages by any person unjustly convicted of an offense against the United States and imprisoned. 28 U.S.C. §§ 1491, 1495, 2513 (1958).

A suit based on unjust conviction involves showing a right to recover by means of a certificate of innocence or a pardon, not present here. See *Roberson v. United States*, 129 Ct. Cl. 581 (1954).

UCMJ art. 75, 10 U.S.C. § 875 (1958) provides for restoration of rights and property affected by an executed sentence which has been set aside or disapproved by higher military authority. No provision is made to allow a person such as Johnson (whose court-martial the Court of Military Appeals declined to review) to take advantage of subsequent favorable decisions.

A person who is reduced automatically under the new Code provision is entitled to restoration of rights and privileges if the sentence as finally approved does not include any punishment giving rise to the reduction. UCMJ art. 58a (b), ch. 633, 74 Stat. 468 (1960).

A person convicted by court-martial has an administrative remedy independent of the direct review provided in UCMJ. Congress requires each military department to maintain a board for correction of military records. 10 U.S.C. § 1552 (1958). An adverse decision may be reviewed by the Court of Claims. *Friedman v. United States*, 158 F. Supp. 364 (Ct. Cl. 1958). Cf. *Cross v. United States*, 135 Ct. Cl. 193 (1956); *Boruski v. United States*, 155 F. Supp. 320 (Ct. Cl. 1957).

¹⁵ U.S. Const. art. II, § 2.

¹⁶ See *Orloff v. Willoughby*, 345 U.S. 83 (1953) (the military is a specialized community governed by a separate discipline from that of the civilian).

¹⁷ In *United States v. Armbruster*, 11 U.S.C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960), the Court of Military Appeals asserted that Congress had made it the "supreme court of the military justice system." *Accord*, *Shaw v. United States*, 209 F.2d 811 (D.C. Cir. 1954).

The statutory jurisdiction of the Court of Military Appeals is found in 10 U.S.C. § 867 (1958).

Congress has indicated the weight to be given decisions of the Court of Military Appeals in UCMJ art. 76, 10 U.S.C. § 876 (1958). "The appellate review of records of trial provided by this [Code is] binding on all departments, courts, agencies, and officers of the United States . . . final and conclusive."

In so doing it stepped beyond the established limits of civil-court review of determinations of military tribunals.¹⁸

The federal courts consistently have held that they have no power to inquire into ordinary questions of fact and law previously determined by courts-martial.¹⁹ They have only the power to review the jurisdiction of military tribunals²⁰ and to consider alleged infringement of constitutional rights.²¹ In the past, the Court of Claims has confined

See generally EVERETT, *op. cit. supra* note 2, ch. 17; Walker & Niebank, *The Court of Military Appeals—Its History, Organization, and Operation*, 6 VAND. L. REV. 228 (1953); Waltz, *Court of Military Appeals: An Experiment in Judicial Revolution*, 45 A.B.A.J. 1185 (1959).

¹⁸ See cases cited at notes 3 and 4 *supra*. While these cases are distinguishable from the instant decision in that they concern a denial of constitutional guarantees by a military tribunal, they demonstrate unmistakably the reluctance of the civil judiciary to consider questions of substantive military law.

In a leading case, *Ex parte Reed*, 100 U.S. 13 (1879), the Supreme Court stated that the sole question for consideration in a petition for habeas corpus was whether the military tribunal had jurisdiction. This has been the consistent position of the Supreme Court and remains the general rule. *E.g.*, *Hiatt v. Brown*, 339 U.S. 103 (1950). Recent years have witnessed an increasing tendency on the part of the federal courts to broaden the scope of their review to encompass claims of denial of constitutional guarantees. *Burns v. Wilson*, 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953) (separate opinion by Frankfurter, J.).

Two recent restrictive developments in the jurisdiction of military tribunals may be compared. In *Toth v. Quarles*, 350 U.S. 11 (1955) the Supreme Court held improper an attempt to try a civilian by court-martial for an offense allegedly committed while in uniform. In *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court invalidated military jurisdiction over civilian dependents accompanying servicemen abroad. See generally, Everett, *Military Jurisdiction Over Civilians*, 1960 DUKE L.J. 366.

¹⁹ See, *e.g.*, *Fischer v. Ruffner*, 277 F.2d 756 (5th Cir. 1960); *Dickenson v. Davis*, 245 F.2d 317 (10th Cir. 1957); *Easley v. Hunter*, 209 F.2d 483 (10th Cir. 1953); *Richards v. Cox*, 184 F. Supp. 107 (D. Kan. 1960); *Alley v. Chief, Finance Center*, 167 F. Supp. 303 (S.D. Ind. 1958); *Jackson v. Sanford*, 79 F. Supp. 74 (N.D. Ga. 1947).

²⁰ See *Hiatt v. Brown*, 339 U.S. 103 (1950); *McClellan v. Humphrey*, 181 F.2d 757 (3d Cir. 1950). If the court-martial were legally constituted, had jurisdiction over the person and over the offense, and if the sentence imposed were within the maximum authorized by the President, the petition should be dismissed. *Wurfel*, *supra* note 3, at 713.

²¹ See *Burns v. Wilson*, 346 U.S. 137 (1953); *Suttles v. Davis*, 215 F.2d 760 (10th Cir. 1954). In *Burns*, two airmen convicted by a court-martial contended that they had been denied due process and that military review was inadequate to resolve their claims. The Supreme Court held that where the military tribunal had dealt "fully and fairly" with the allegations, the petition should be dismissed; indicating, moreover, that a federal court ought not to issue habeas corpus merely to review the evidence. The Court pointed out, however, that federal courts have jurisdiction to hear such applications, for the guarantee of due process is adapted to protect soldiers from in-

itself broadly to this standard.²² Even where the court-martial involved a denial of due process, the Court of Claims rationalized in terms of "jurisdiction" its decision in favor of the claimant.²³

The brief opinion of the Court of Claims in *Johnson* makes no attempt to reconcile that decision with the *Simpson* case. However, in holding that the automatic-reduction provision is administrative rather than judicial, the court seems to imply that the Court of Military Appeals did not have "jurisdiction" to invalidate this practice.²⁴ Ad-

justice, notwithstanding the fact that Congress has provided that courts-martial determinations are "final" and "binding" upon all courts. See generally, Craig, *supra* note 23; Wurfel, "Military Due Process": *What is It*, 6 VAND. L. REV. 251 (1953); Comment, *Strict Construction by U.S. Supreme Court of Jurisdiction of Courts-Martial*, 10 SYRACUSE L. REV. 365 (1959).

²² See cases cited at note 4 *supra*.

²³ *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947). The Court of Claims went further than the jurisdictional test and paralleled the development of the *Burns v. Wilson* test. See note 20 *supra*. In *Shapiro*, the court inquired whether due process had been afforded when an army officer was given less than two hours notice of his trial, was denied a continuance, and was not represented by counsel. In allowing recovery, the Court of Claims held the decision "void" with respect to claimant's right to compensation for lost pay and allowances, on the ground that the court-martial by its manifestly unfair action had "lost jurisdiction to continue." Compare *Krivoski v. United States*, 136 Ct. Cl. 954, 145 F. Supp. 239, *cert. denied*, 352 U.S. 954 (1956). See also Note, *Collateral Attack on Courts-Martial in the Federal Courts*, 57 YALE L.J. 483 (1948).

²⁴ In the *Johnson* opinion, the Court of Claims does not make clear the argument advanced by the Government. However, the Government's position was probably built on the following points:

(1) The question of validity of the automatic reduction provision is an administrative issue, since such a reduction is an administrative action. See separate opinion of Latimer, J., in *United States v. Simpson*, 10 U.S.C.M.A. at 233, 27 C.M.R. at 307 (1959). The Comptroller General, in a letter of reply to this question when posed by the Secretary of Defense, said: "We believe that the automatic reduction provision of paragraph 126e is administrative rather than judicial in character . . ." Comptroller General's Decision, No. 139988, August 19, 1959, p. 2. However, the Court of Military Appeals in *Simpson* expressly held that reduction in grade following court-martial is judicial, not administrative. See note 13 *supra*.

(2) The Court of Military Appeals is a court of limited jurisdiction and "shall take action only with respect to matters of law." 10 U.S.C. § 867(d) (1958).

(3) Since the issue is administrative, and not a question of law, the Court of Military Appeals had no jurisdiction to decide the question; thus, the Court of Claims is not bound by the decision in *Simpson*. In *United States v. Armbruster*, the Court of Military Appeals recognizes that the Government was advancing this argument. 11 U.S.C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960).

This line of reasoning suggests the question: "Does the Court of Military Appeals have power to determine its own jurisdiction?" The court would answer affirmatively. See note 9 *supra*. See also Brosman, *The Court: Freer Than Most*, 6 VAND.

mittedly, the court's decision in *Simpson* is of questionable merit,²⁵ strong policy considerations support the automatic-reduction practice.²⁵ Nevertheless, it is submitted that the Court of Claims in *Johnson*,²⁶ by refusing to adopt the ruling of the Court of Military Appeals, failed to exercise the judicial restraint it professed to be employing.²⁶ The very

L. REV. 166 (1953) (author was a Judge of the Court of Military Appeals, 1951-1955).

²⁵ The practice of "automatic-reduction" has been in effect for half a century, and is said to be an important morale factor in that confinement of NCO's would have a deleterious effect upon the prestige of and respect shown to the non-commissioned ranks. Also, it is argued, the presidential power to ensure good order and discipline in the armed services encompasses discretion to command such a reduction. See *Johnson v. United States*, 280 F.2d 856, 858 (Ct. Cl. 1960); *United States v. Simpson*, 10 U.S.C.M.A. 229, 233, 27 C.M.R. 303, 307 (1959) (separate opinion of Latimer, J.); Comptroller General's Decision No. 139988, August 19, 1959; H.R. REP. NO. 1619, 86th Cong., 2d Sess. 4 (1960) (letter from Joseph V. Charyk, Acting Secretary of the Air Force); *Hearing on H.R. 12200 Before the Committee on Armed Services, United States Senate*, 86th Cong., 2d Sess. 27, 29 (1960); Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861, 883-88 (1959).

²⁶ Rather than the frontal attack upon and rejection of the *Simpson* decision, the Court of Claims might more easily have posited its decision on the ground that, while the *Simpson* rule is valid, it has prospective effect only. See H.R. REP. NO. 1619, 86th Cong., 2d Sess. 3 (1960). The Judge Advocate General of the Army adopted this view: "In view of the [*Simpson*] decision, subpar 30b, AR 624-200 is rescinded effective 20 February 1959 and reduction of enlisted members purportedly accomplished pursuant to par 126e, MCM, 1951, on or after that date are invalid and records will be changed accordingly. However, the decision mentioned does not have retroactive effect, and, accordingly, reductions effected pursuant to par 126e, in cases in which appellate review was completed prior to February 20, 1959 are valid." JAGA 1959/2258, March 5, 1959, 9 Dig. Ops. No. 2, Sentence and Punishment § 33.1.

As introduced, H.R. 12200 would have provided pay in their higher grades for persons falling under the *Simpson* decision, from Feb. 20, 1959, to date of enactment. However, this section was not enacted. H.R. REP. NO. 1619, 86th Cong., 2d Sess. 3 (1960). The Senate Committee on Armed Forces failed to report the remedial portion of the bill. S. REP. NO. 1737, 86th Cong., 2d Sess. 2 (1960). Apparently Chairman Russell was concerned that such a provision would enable Johnson to win his suit in the Court of Claims. Johnson's claim was for pay for the whole period from his reduction in 1952. *Hearing on H.R. 12200 Before the Committee on Armed Services, United States Senate*, 86th Cong., 2d Sess. 27, 31 (1960).

The Air Force, by administrative action, adjusted the pay grade to equal their higher rank for persons who retained their stripes under the *Simpson* decision, but had not been paid in that grade in accordance with Comptroller General's Decision No. 13988, August 19, 1959. This directive did not apply to airmen reduced under UCMJ art. 58a, ch. 633, 74 Stat. 468 (1960), see notes 8 and 14 *supra*, nor to airmen discharged punitively or held in confinement as of the operative date, Dec. 16, 1960. Letter, *Clarifying the Status of Personnel Affected by the Simpson Decision*, Headquarters USAF (AFDPD), Nov. 14, 1960.

existence of a separate system of military law and procedure recognizes that the problems and needs of military life are vastly different from those of the civilian sphere.²⁷ In addition, recent changes in the scope and direction of military law²⁸ accentuate the need for certainty in this specialized branch of the law. This need can be effectively satisfied only if other courts recognize and give effect to pronouncements by the Court of Military Appeals on questions of military law.²⁹

²⁷ See notes 16 and 25 *supra*.

²⁸ See Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861 (1959); Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953). Perhaps the emphasis placed on vindication of the rights of the accused is an over-correction of the abuse of command control over military justice in the days during and prior to World War II.

²⁹ The civil courts should adopt the decisions of the Court of Military Appeals subject only to the test of "jurisdiction" which comprehends matters related to the authority of a court-martial to act (note 19 *supra*) and the test of "due process" (notes 20 and 22 *supra*). Undoubtedly, decisions of the Court of Military Appeals are subject to review by the Supreme Court on constitutional issues. The Court of Military Appeals recognizes this limitation on its authority. *United States v. Armbruster*, 11 U.S.C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960). *But see* Everett, *op. cit. supra* note 2.