The United States Court of Military Appeals and Military Due Process

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TEN years ago Congress created the United States Court of Military Appeals. That action has been described as the "most revolutionary" ever taken by Congress in carrying out its constitutional responsibility "to make Rules for the Government and Regulation of the land and naval Forces."1 Establishment of the Court was revolutionary because, for the first time in American military law, it provided for direct review of courts-martial by a judicial tribunal composed entirely of civilian judges. Civilian review was regarded as "the 'most vital element' in the [new] reformation and unification of military criminal law...."2 Only the more serious cases, that is, cases in which a dishonorable or bad conduct discharge was imposed or in which the accused was confined for one year or more, were made subject to review by the Court of Military Appeals. It was contemplated, however, that the Court would function as the "Supreme Court" of the whole military justice system, which includes the summary court-martial which has no power to impose a sentence of the kind subject to review by the Court of Military Appeals, and that the decisions of the Court would be applied in all courts-martial.3

† Chief Judge of the Military Court of Appeals.
1 H.R. REP. No. 491, 81st Cong., 1st Sess. 6 (1949).
3 There are three courts-martial in the military system, the summary, the special, and the general court-martial. The first is composed of a single officer, and the trial is conducted on a very informal basis. The second is composed of at least three officers and enlisted personnel, if enlisted personnel are specially requested by the accused. The general court-martial is composed of at least five members. The "judge" in the special court-martial is the
In the decade that has passed since its creation, the Court of Military Appeals has been subject to searching critiques of its operations and decisions. The latter have been examined in depth by practicing lawyers, military and civilian alike, by professors and students of the law, and by others interested in military matters. As a new institution in the federal governmental structure, the Court itself has been both praised and damned. It has been the subject of a commendatory thesis for a doctoral degree in Government, and it has been excoriated by others because they believe the Court has usurped the prerogatives of the President of the United States. As Chief Judge, I welcome the careful and continued attention given to the Court by the general public and the bar. Not long after the Court published its first decision, I expressed the hope that the bar in particular would “follow closely” the work of the Court, and “tell the public, the services and us ... whether we [were] performing properly our task of enunciating principles worthy of existence...”

President of the court-martial, but his rulings on interlocutory questions are subject to objection by the other members. See United States v. Bridges, 12 U.S.C.M.A. 96, 30 C.M.R. 96 (1961). The judge in the general court-martial is the law officer; his rulings on interlocutory matters, except on a question of insanity or a motion for a finding of not guilty, are not subject to objection by a court member. Uniform Code of Military Justice art. 51(b), 10 U.S.C. § 851(b) (1958) [hereinafter cited as UCMJ]. The course of review of a conviction varies according to the court and the sentence adjudged. All cases are reviewed initially by the convening authority. UCMJ art. 64, 10 U.S.C. § 864 (1958). Thereafter, review of summary and special court convictions in which the sentence does not include a bad conduct discharge is in the Office of The Judge Advocate General of the accused's armed force. Special and general court convictions resulting in a punitive discharge, or confinement at hard labor for one year or more, or cases affecting a general or flag officer are reviewed by a board of review appointed by The Judge Advocate General of the accused's service. Cases reviewed by the board of review are either appealable to the Court of Military Appeals or subject to mandatory review. UCMJ arts. 65-67, 10 U.S.C. §§ 865-67 (1958).


6 Quinn, The Court's Responsibility, 6 Vand. L. Rev. 161, 162 (1953).
articles and commentary on the Court and its work is happy realization of that hope.

The current compliments and criticisms of the Court of Military Appeals parallel those attending its creation. The Court was established in the crucible of controversy. The controversy has ebbed and flowed through the first years of its existence. One student of the conflict has concluded that the Nation's experience with the Court has established civilian review of courts-martial as a fixed principle of military law. Even one of the most outspoken critics of the Court has said that the "country is simply not going back to any system of military justice which lacks that safeguard." I share that view entirely apart from my position as Chief Judge of the Court. It is appropriate, therefore, to review some of the decisions of the Court in its formative years—years, incidentally, which encompassed full-scale war conditions in Korea; the emergency situation in Lebanon, with its accompanying combat alert for a considerable part of our military forces; and the stationing of our land, naval and air units all over the world. These decisions are the foundation of the administration of military justice in the years ahead, whether those years be years of peace; years on the brink of war; or years of war itself.

DEVELOPMENT OF MILITARY DUE PROCESS

Fundamental to the American system of law is the idea of due process. The idea itself defies easy definition and, more often than not, is recited in terms of specific prohibitions on the sovereign or as rights of the individual. In any event, it is the responsibility of the courts to give effect to the doctrine. As the highest court in the military judicial system, the Court of Military Appeals is intrinsically responsible for the military's observance of, and compliance with, the limitations and the rights embraced in the principle

7 Feld, op. cit. supra note 4, at 222.
of due process. The responsibility is emphasized by the fact that, on completion of appellate review, a court-martial conviction is "binding" upon all "departments, courts . . . and officers of the United States. . . ." 9

Judged by its first opinion on the subject, the Court's approach to due process appeared to be a narrow one. In *United States v. Clay*, 10 the prosecution was for two minor offenses. The accused, a hospitalman in the Navy, was charged with breach of the peace for fighting with some Koreans in Pusan, Korea, and with improperly wearing the uniform. Brought to trial before a special court-martial, he entered a plea of not guilty to the first charge and a plea of guilty to the other. Article 51(c) of the Uniform Code of Military Justice requires that before the court-martial deliberates on the findings it must be instructed on the elements of the offenses charged, the presumption of innocence, and on the burden of the government to establish guilt beyond a reasonable doubt. No such instructions were given. The accused was convicted, and the conviction was in due course affirmed by a board of review in the Navy. The Court of Military Appeals reversed the conviction because the accused was denied "necessary elements of military due process." 11 Just what the Court meant by prefacing "due process" with the word "military" became a matter of considerable debate. The point in issue was whether "military due process" was limited to the provisions of the Uniform Code of Military Justice, and was something apart from the constitutional due process which prevailed in the federal civilian courts.

Those who argued that military due process was something apart from the regular federal due process relied

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9 UCMJ art. 76, 10 U.S.C. § 876 (1958). It should be noted that a court-martial conviction, like a conviction in a civil court, is subject to collateral attack on the ground of lack of jurisdiction in the broad sense, which includes deprivation of a fundamental right. Note, *Military Law—Due Process—Review of Courts-Martial on Petition for Habeas Corpus*, 21 Geo. Wash. L. Rev. 492 (1953). There are also other means of collateral attack such as suit in the Court of Claims to recover a fine or forfeiture. See *Johnson v. United States*, 280 F.2d 856 (Ct. Cl. 1960).


11 Id. at 82, 1 C.M.R. at 82.
upon certain language in the Clay opinion. The opinion said that the Court did not "bottom" the due process requirements for military courts on the United States Constitution but "base[d] them on the rights granted by Congress to military personnel." This language was interpreted as a ruling that the Uniform Code of Military Justice was the sole source of due process rights in the military justice system. Whether the advocates of this restricted concept of statutory due process read too much into the Clay opinion need not detain us. A significant supplement to the Clay case was the opinion in United States v. Lee which the Court handed down some three months later.

In the Lee case the question before the Court was whether the trial counsel, who acts as the prosecuting attorney, was disqualified because he made an informal investigation of the facts before the filing of charges and had signed the formal charge sheet against the accused. Article 27(a) of the Uniform Code prohibits a person who has acted as the investigating officer in a formal investigation of charge from thereafter acting as trial counsel. Proceeding on the assumption that trial counsel should have been disqualified because of his previous connection with the case, the Court went on to consider what errors of procedure would justify reversal of a conviction where there is a statutory provision, as there is in the Uniform Code, that a conviction shall not be reversed for error of law "unless the error materially prejudices the substantial rights of the accused." It noted with approval the general rule that errors of substance fall into two categories, the first being "a recognizable departure from a constitutional precept, and, [the] second, where it constitutes a departure from an express command of the legislature." This was implicit acknowledgment that constitutional precepts were constituent elements of due process in courts-martial. The remainder of the opinion which deals with

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what came to be called the doctrine of general prejudice added force to the acknowledgment.

Judge Brosman, who wrote the opinion of the Court, conceived the phrase "general prejudice" to describe certain rights of an accused which were neither constitutional nor statutory. He had an unusual command of language and a flair for the dramatic, but it was not these qualities which led him to propose the new terminology. He spoke of general prejudice as existing when there was an "overt departure from some 'creative and indwelling principle'—some critical and basic norm operative in the area under consideration," without regard to whether the departure also constituted "a violation of constitutional or legislative provisions." \(^{15}\) The opinion indicates a conviction that due process in courts-martial does not rest exclusively on statute. That was the real lesson of the *Lee* case. At the time, its meaning was not fully understood. Part of the reason perhaps was the close parallel between the rights accorded an accused in the military by the Uniform Code and those granted to defendants in a civil criminal prosecution by constitutional due process.\(^{16}\) Usually, therefore, it was unnecessary to look beyond the Uniform Code of Military Justice and the supplementary provisions of the Manual for Courts-Martial, United States, 1951, which were promulgated by the President in accordance with the authority granted by Congress to prescribe the "procedure, including modes of proof in cases before courts-martial" \(^{17}\) for the delineation of military due process rights. About a year after the *Lee* case, however, the Court was faced with an ostensibly conflict between a provision of the Uniform Code and a principle of civilian due process. The case was *United States v. Sutton*.\(^{18}\)

Marine Corps Private Alton D. Sutton was charged with shooting himself in the hand in order to avoid military

\(^{15}\) *Id.* at 217, 2 C.M.R. at 123.
\(^{16}\) *United States v. Clay*, *supra* note 10, at 77-78, 1 C.M.R. at 77-78.
\(^{17}\) UCMJ art. 36(a), 10 U.S.C. § 836(a) (1958).
service, and with two other offenses. At his trial by general court-martial in the United States, the prosecution intro-
duced in evidence the answers to written interrogatories obtained from a Government witness stationed in Korea. Neither the accused nor his counsel was present at the taking of the deposition, although defense counsel had been given the opportunity to submit written cross-interrogatories. The deposition procedure was allegedly sanctioned by Article 49 of the Uniform Code. In pertinent part, that article provides that any party may take an oral or written deposi-
tion upon giving reasonable notice of the time and place for the taking to the other party. Elaborating on this provision, the Manual for Courts-Martial directs that, in the case of a deposition on written interrogatories, the party desiring the deposition shall submit to the opposing party a list of the questions to be propounded and allow him a reasonable time to submit cross-interrogatories and ob-
jections. A majority of the Court held that, while the accused was not accorded the right to confront the witness against him, the procedure did not violate military due process. While a majority agreed on the result, each judge advanced a basically different reason for agreement.

The principal opinion held that the “source and strength” of the military due process was the Uniform Code, and that the Code could limit constitutional due process. I dissented strongly from that view; and I warmly approved the statement by Chief Justice Vinson in Burns v. Wilson that “military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights.” Judge Brosman, who joined in the principal opinion, upheld the deposition procedure on the ground that it was a “necessary” exception to the constitutional right of confrontation.

The Sutton case sustained a procedure which had no counterpart in the federal courts, but the separateness of the grounds upon which concurrence in the result was

obtained did not wipe out the significance of the Lee case. The Constitution was still the primary point of reference for military due process. Forthright reaffirmation of that dogma was set out in the separate opinions in United States v. Ivory.\(^1\) And, more than such reaffirmation, a later re-examination of the deposition procedure resulted in unequivocal rejection of the Sutton decision.\(^2\)

It can be said, therefore, that military due process begins with the basic rights and privileges defined in the federal constitution. It does not stop there. The letter and the background of the Uniform Code add their weighty demands to the requirements of a fair trial. Military due process is, thus, not synonymous with federal civilian due process. It is basically that, but something more, and something different. How much more and how much different is indefinable in general terms for all possible situations. A discussion of the Court of Military Appeals' approach to specific rights and procedures in courts-martial will serve to illumine the nature and the scope of due process in the military judicial system.

United States v. Clay listed twelve basic rights, ranging from the right to be informed of the charges to the right to appellate review of the legality of the findings of guilty and the sentence. The Court expressly noted that the listing was not "intended . . . [to be] all-inclusive."\(^3\) In the decade since the Clay case other rights, such as the right to have the court-martial free from the influence of command order, policy, or psychological pressure,\(^4\) have been added to the list, and rights previously listed have been given wider application to effectuate the spirit and the letter of provisions of the Uniform Code.\(^5\) Detailed

\(^{3}\) 1 U.S.C.M.A. 74, 78, 1 C.M.R. 74, 78 (1951).
\(^{5}\) One of the rights enumerated in the Clay case is the right to exclusion of an involuntary confession from consideration by the court-martial. The fifth amendment provides that no person shall be compelled in any criminal case to be a witness against himself. The right is enlarged by Article 31
consideration of even the original enumeration of basic rights is much beyond the scope of this article. Two rights of wide application have been selected for review.

**THE RIGHT TO COUNSEL**

A passage from the opinion of the United States Supreme Court in *Powell v. Alabama*,\(^26\) is frequently quoted in cases concerning the constitutional right to have assistance of counsel in defending against a criminal charge. It is that an accused "requires the guiding hand of counsel at every step of the proceedings against him."\(^27\) There are three main steps in a criminal prosecution, namely, the pretrial proceeding; the trial itself; and appellate review. That the accused is entitled to legal assistance during the trial is well-settled and well-known. Less clear, and certainly less known, is the operation of the right in the pretrial and

of the Code. Besides reiterating the constitutional provision, it provides as follows: "No person subject to this code may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." UCMJ art. 31(b), 10 U.S.C. § 831(b) (1958).

No similar requirements exist in the federal courts, although as a matter of practice, agents of the Federal Bureau of Investigation advise a suspect that he need not say anything, but if he does speak, anything he says may be used against him in a trial by court-martial." UCMJ art. 31(b), 10 U.S.C. § 831(b) Counsel and to Prompt Arraignment, 27 BROOKLYN L. REV. 24, 64-65 (1960). But cf. United States v. Holder, 10 U.S.C.M.A. 448, 28 C.M.R. 14 (1959). The purpose and policy of Article 31 have led the Court to reverse a conviction where evidence has been admitted in violation of the requirement of advice, without regard to whether the other competent evidence of guilt is compelling. United States v. Williams, 8 U.S.C.M.A. 443, 24 C.M.R. 253 (1959). At the same time, it should be noted that despite the broad language of the article, which applies to all persons subject to the Code, the Court has held that the interrogation leading to a statement by the accused must be of an official nature, and of a kind which is concerned with the search for evidence of crime. If the accused makes an incriminating statement in response to a question put to him by a person acting in a private capacity, as distinguished from an official capacity, or in an investigation other than that looking to obtain evidence of crime, the statement is admissible without the preliminary requirement of advice. See United States v. Souder, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959).\(^28\)

\(^{26}\) 287 U.S. 45 (1932).

\(^{27}\) Id. at 69.
post-trial proceedings. In fact, the right to counsel's assistance during a preliminary investigation by law enforcement agents in the pretrial proceeding has only recently come before the United States Supreme Court. The right to counsel in this critical period is, however, clearly marked out in military law by both the Uniform Code and the decisions of the Court of Military Appeals.

The right to counsel was expressly incorporated by Congress into the Uniform Code regarding offenses to be tried by general court-martial, the highest trial court in the military justice system. Article 32 provides that no charge may be referred to a general court-martial for trial until "a thorough and impartial investigation" of the charge has been made. A loose analogy between this pretrial investigation and the customary preliminary hearing in the civilian criminal law may be drawn. There are also important differences. As in the civilian community, a determination in the preliminary hearing that the available evidence against the accused is insufficient to support a conviction does not bar further proceedings. Just as the grand jury may return an indictment, despite the defendant's discharge at the hearing, the recommendation of the investigating officer that the charge be dropped, is not binding upon the court-martial authority who ordered the investigation; the decision to refer a charge to trial to a particular court-martial or to dismiss it, is his alone. In the civilian community the accused has, at best, only a limited right to discover before trial the evidence available against him; in military practice he is given a copy of the entire pretrial investigation, including the statements of witnesses and other evidence considered by the investigating officer. The pretrial investigation is, therefore, an

29 See note 3 supra.
important means of discovery, since the accused is accorded the right to have the investigating officer call all "available witnesses" and to cross-examine those witnesses. If a verbatim record of the testimony is made, the transcript is admissible in evidence at the trial should a witness die or be unable to attend the trial because of illness or distance.\textsuperscript{34} It is apparent, therefore, that the pretrial investigation in the military is no mere formality, but a substantial right of, and protection to, the accused. It is so "integral" a part of the court-martial proceedings, that a material departure from its requirements will, upon the accused's timely objection, entitle him to reversal of his conviction.\textsuperscript{35}

Given the purposes and the consequences of the pretrial investigation, it is not surprising to find that the accused is accorded the right to be represented by counsel at the investigation. He has three choices. First, he may select his own counsel from the civilian community. The person chosen must be a member of the bar, whether that bar is the bar of the highest court of any state of the United States, the bar of a federal court, or the bar of a foreign country.\textsuperscript{36} If the accused exercises that choice, he

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\item United States v. Eggers, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953). Normally no counsel is appointed to represent the Government in the Article 32 investigation. As a result, it has been argued that a transcript of a witness's testimony would be inadmissible against the Government. To overcome the defect, it has been suggested that the accused move for appointment of counsel to represent the Government if he "anticipates use at the trial of the transcript" of the testimony. Feld, A Manual of Courts-Martial Practice and Appeal, § 23, p. 40.
\item See United States v. Sears, 6 U.S.C.M.A. 661, 20 C.M.R. 377 (1956). The fact that civilian counsel may be a member of the bar of a foreign country can be a matter of considerable importance to an accused. The Uniform Code operates worldwide; that is, it attaches to our Armed Forces wherever they are stationed, whether in outlying possessions of the United States or in foreign countries and territories. UCMJ art. 5, 10 U.S.C. § 805 (1958). See Duke & Vogel, The Constitution and the Standing Army; Another Problem of Court-Martial Jurisdiction, 13 Vand. L. Rev. 435 (1960), which questions the right of Congress to make certain civilian type offenses triable by court-martial in time of peace. Consequently, the accused's freedom to choose counsel from among the bar of a foreign country in which he is stationed is a valuable right. At the same time, this liberality of choice poses
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must pay the fees of his counsel. Second, the accused may select military counsel of his choice. The option here is subject to counsel's reasonable availability. Third, if the accused does not desire either civilian or military counsel of his own choice, he has the right to have counsel appointed for him. Whether selected or appointed, defense counsel in a general court-martial must be professionally qualified.

Pretrial investigation is of course not limited to the formal preliminary hearings under Article 32 of the Uniform Code. As in the civilian community, informal investigation by law enforcement agents is the initial, and perhaps, most important means of obtaining evidence against the accused. Military police investigations are generally circumscribed by the same constitutional and statutory safeguards that protect an accused in the civilian community. For example, evidence obtained by unlawful search or by wiretapping is inadmissible in a court-martial on the same bases that forbid introduction of such evidence in a prosecution in a federal district court. As for the right to counsel, military law, like the regular federal law, does not give a suspect the right to have counsel appointed to assist him during interrogation by the police. He cannot, however, be "precluded from obtaining necessary legal advice," and to have his own lawyer "present with him during [his] interro-

a problem in a prosecution involving the disclosure of classified material. Ordinarily, the accused cannot be deprived of his right to counsel of his own choice on the ground that the lawyer he chooses does not have a security clearance. United States v. Nichols, supra note 33. Whether this rule applies where the accused selects counsel from a country "behind the Iron Curtain" has never come before the Court of Military Appeals, and it may be considered an open question.

39 It is appropriate to point out that the analogy is not wholly applicable so far as judicial "policy" safeguards are concerned. Thus, the rule of Mallory v. United States, 354 U.S. 449 (1957) which prohibits admission into evidence of a confession obtained from the defendant during an unreasonable delay between arrest and preliminary hearing has not been carried over into court-martial practice. United States v. Moore, 4 U.S.C.M.A. 482, 16 C.M.R. 56 (1954); United States v. Dicario, 8 U.S.C.M.A. 353, 24 C.M.R. 163 (1957).
Denial of these rights will make a confession obtained from the accused in the course of the interrogation inadmissible in evidence at the trial.\textsuperscript{41}

Turning to the right to counsel on appeal from a conviction, Rule 44 of the Federal Rules of Criminal Procedure indicates that a convicted accused can obtain appointed counsel only if he lacks the pecuniary ability to pay for an attorney of his own choice.\textsuperscript{42} No such limitation exists in the military. Congress, through the Uniform Code has accorded full sweep to the right of assistance of counsel, and has given the accused the same right to appointed military counsel for the purpose of appeal as he has for the formal pretrial proceedings, and for the trial itself, without consideration of his ability to pay for a civilian lawyer.\textsuperscript{43} The right to appointed counsel extends to all levels of appellate review.\textsuperscript{44} The right to the assistance of counsel means more than having a lawyer stand or sit beside the accused. It means that counsel must truly assist; he must actually represent the accused. If the representation of counsel is so lacking in diligence or competence as to reduce the proceedings to a sham, the accused

\textsuperscript{40} United States v. Gunnels, 8 U.S.C.M.A. 130, 133, 135, 23 C.M.R. 354, 357, 359 (1957).

\textsuperscript{41} United States v. Gunnels, supra note 40. Cf. Escute v. Delgado, 282 F.2d 335 (1st Cir. 1960). A number of states have statutes granting an accused the right to communicate and consult with counsel whenever he is placed in restraint or under interrogation by the police. A violation of such a statute is generally not regarded as making inadmissible an incriminating statement made during the interrogation. H. B. & E. A. Rothblatt, \textit{Police Interrogation: The Right to Counsel and to Prompt Arraignment}, 27 \textit{Brooklyn L. Rev.} 24, 61 n.174 (1960).

\textsuperscript{42} See United States v. Arlen, 252 F.2d 491 (2d Cir. 1958). Cf. Lee v. United States, 235 F.2d 219 (D. C. Cir. 1956) which appears to hold that a defendant is entitled to appointed counsel if he either cannot or does not select his own.

\textsuperscript{43} UCMJ arts. 38(c), 70, 10 U.S.C. §§ 838(c), 870 (1958).

\textsuperscript{44} Depending upon the court and the court-martial power of the convening authority, there are either three or four such levels of review. See note 3 supra. For the nature of, and the limitations on, appellate review see UCMJ arts. 66-67, 10 U.S.C. §§ 866-67 (1958). Feld, \textit{Manual of Courts-Martial Practice}, §§ 87, 97, 102, 118.
is entitled to reversal of his conviction. The rule also applies to representation at the appellate level.

Special provisions in military practice give rise to certain qualifications of the general rule. Unlike the usual situation in civilian courts, an accused in the military can be brought to trial on offenses which are entirely dissimilar in nature and which were committed at different times. The military rule is that all known offenses should be joined in a single charge sheet and referred to trial at the same time. Also the court members, who in the main act like the jury in the civilian court, not only determine the accused's guilt or innocence, but also impose the sentence. As a result, it is possible for inadequacy of representation to extend only to one of several charges, or only to the sentence but not the findings of guilty. To understand this limited effect of inadequate representation, it must first be understood that ineffectiveness of counsel does not deprive the court-martial of the power to proceed to verdict and sentence. In other words, lack of effective assistance of counsel is not jurisdictional in the sense that the proceedings are wholly void. Rather,

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45 There is no definite standard by which to judge the incompetency or inadequacy of counsel. Each case depends upon its own facts. A few illustrations will suffice to show the variety of possible situations. A lawyer who concedes guilt in final argument, although the accused entered a plea of not guilty and testified on the merits offering a valid defense, deprives the accused of effective assistance of counsel and reversal of the accused's conviction is required. United States v. Walker, 3 U.S.C.M.A. 355, 12 C.M.R. 111 (1953). Similarly, a lawyer who sits silently throughout the trial, offering nothing and saying nothing on behalf of the accused, although the record shows the ready availability of substantial evidence favorable to the accused, does not provide the degree of competent assistance to which an accused is entitled. United States v. McFarlane, 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957). Counsel may not represent an accused when such representation conflicts with his obligation to another client who is a government witness. United States v. Thornton, 8 U.S.C.M.A. 57, 23 C.M.R. 281 (1957). See also Avins, The Duty of Military Defense Counsel to an Accused, 58 Mich. L. Rev. 347 (1960).


48 It should be noted that there is a difference in "jurisdiction," from the standpoint of power to proceed to verdict, and "jurisdiction" from the standpoint of collateral attack upon the validity of a conviction by means of habeas corpus. In the latter situation jurisdiction is given an expanded meaning. See United States v. Vanderpool, 4 U.S.C.M.A. 561, 10 C.M.R. 135 (1954).
they may be considered voidable to the extent they are affected by counsel’s inadequacy. Two cases decided by the Court of Military Appeals provide good illustrations of the way the limitation operates.

In *United States v. Gardner* they may be considered voidable to the extent they are affected by counsel’s inadequacy. Two cases decided by the Court of Military Appeals provide good illustrations of the way the limitation operates.

In *United States v. Gardner* the accused was charged with three specifications of larceny, and with one specification of failing to obey an order. He pleaded guilty to two of the larcenies, but not guilty to the third larceny and to the charge of violating an order. The meaning and effect of the plea of guilty were fully explained to him and he was advised he did not have to plead guilty. Still, he persisted in the plea of guilty to the two larcenies. The trial proceeded as to the offenses to which the accused pleaded not guilty. The court-martial found the accused guilty of the third larceny, but acquitted him of the order offense. On review of the case, the Court of Military Appeals held that it was unmistakably clear from the record that defense counsel’s knowledge of trial practice “was so deficient as to result in inadequate representation.” However, it went on to point out that the offenses to which the accused had pleaded guilty were completely unrelated to the contested issues. It further noted there was no claim that the accused had entered the plea of guilty on the mistaken advice of counsel, or that he had any defense to the charges to which he pleaded guilty. It concluded that, in these circumstances, reversal of the findings of guilty based on the free and voluntary plea of guilty was not justified. Accordingly, it set aside only the findings of guilty as to which the accused had pleaded not guilty and it directed a rehearing on these charges and the sentence.


50 To the uninitiated in military practice, the disposition directed by the Court probably needs some explanation. In civilian practice, error as to one or several counts of a multiple count indictment ordinarily presents no special problem. The appellate court either ignores the error and sustains the sentence because it is supported by the “good” counts; or it merely dismisses the “bad” count, and returns the case to the lower court for resentencing of the accused on the remaining counts. Also sentence is imposed on each count which may be made to run consecutively or concurrently. Under military law,
The second case is United States v. Winchester. There the accused was brought to trial with a co-accused. He entered a plea of guilty to four charges including one of larceny of government rifles for the purpose of sale in Mexico. He was represented by individual military counsel whom he had specially requested. The co-accused entered a plea of not guilty. The prosecution and the co-accused proceeded to present their respective cases. When they had rested, the accused, against his own counsel's advice, insisted on taking the stand. He gave an account of his dealings with his co-accused which amounted to a confession of the larceny charge. However, the accused attempted to take the blame for originating the idea of the theft and for persuading the co-accused to join him in the undertaking. His counsel thereupon moved to be relieved from further participation in the case because he had "reason to believe that [the accused had] perjured himself." He also added that if he continued as defense counsel he would labor "under certain mental difficulties" in presenting the case for the accused on the sentence. These remarks were made in the presence of the court members who, as indicated earlier, pass on both the findings and the sentence. Counsel was not relieved, and the accused was convicted and sentenced. The case came before the Court of Military Appeals on petition for review filed by the accused in which he contended he was denied due process because his lawyer was so lacking in diligence and professional competency as to make his trial a sham. The Court held that the accused's voluntary plea of guilty and sworn testimony

the sentence is single; it embraces all the offenses of which the accused is convicted; and, as previously indicated in the text, unrelated offenses can be and, in fact, are required to be brought to trial at the same time. Moreover, intermediate appellate courts have power to reduce or modify the sentence. As a result, in a case in which there is error affecting only some of several charges against the accused, the findings of guilty affected by the error may be set aside, along with the sentence, and a rehearing directed as to those findings and the sentence. Consideration will be given during the sentence proceedings to the previously affirmed findings of guilty. United States v. Field, 5 U.S.C.M.A. 379, 18 C.M.R. 3 (1955); see also United States v. Oakley, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957).

showed there could be no possibility of prejudice because of his counsel's alleged inadequacy in regard to the findings of guilty. It reached a different conclusion as to the sentence. Considering the remarks made by defense counsel in open court, the Court held that his representation of the accused during the sentence stage of the proceedings had "the appearance of perfunctory formalism."

Professional competency raises the question of the accused's right to reject the counsel appointed for him. The accused has no right to refuse appointed counsel because counsel is newly admitted to the bar, and the accused thinks he is not capable of representing him. However, where there is genuine difference of opinion affecting the merits of the case, or where there is an honest clash of attitudes and personalities between the accused and his appointed counsel, which makes preparation of the defense case difficult, substitution of counsel is proper.

THE RIGHT TO A FAIR HEARING

Even the most skilled and ingenious counsel is worth little to an accused, if the trial is before a court that is prejudiced against him. Due process demands a fair hearing. A variety of circumstances may make the hearing unfair. It is familiar learning, for example, that a biased judge is disqualified from presiding at the trial. We may argue over the source of our ideals of justice and fair play but we are all convinced of the need for them in the administration of the law.

The standards of fairness that obtain in the federal courts also obtain in courts-martial. In fact, the comprehensive revision of military law effected by the Uniform Code of Military Justice plainly indicates that courts-

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52 Spaulding v. United States, 279 F.2d 65 (9th Cir. 1960).
54 Chief Justice Earl Warren of the United States Supreme Court has said that due process is rooted in our "American ideal of fairness." Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
martial are to be guided by the principles of law and proceedings recognized in the federal courts.\textsuperscript{55} Starting with its first case the Court of Military Appeals has looked to the federal courts for precedent. But, it has not followed the federal precedents without independent reappraisal of their validity. As Judge Brosman pointed out, the Court is "freer than any in the land—save . . . the Supreme Court—. . . to seek, newfledged and sole, for principle . . . unburdened by precedents demonstrated by the test of time and experience to be unrealistic, ill-devised, or out-moded."\textsuperscript{56} Indeed, it has anticipated the Supreme Court in some instances.\textsuperscript{57}

While it can be said that military courts apply the same criteria as the federal courts to determine the fairness of the hearing accorded the accused, there is a difference in emphasis and scope. Some of the differences merit particular attention.

An unbiased jury is, of course, a \textit{sine qua non} for a fair hearing. The requirement is basic in courts-martial, but the requirement is more difficult to apply. Although the function of the court members is substantially like that of jurors in the civilian court, they do not act like jurors.\textsuperscript{58} Jurors in a civil trial seldom ask questions, and almost never call for a witness not previously called by one of the parties. The practice is different in the military. Court members are authorized to participate in the trial. Article 46 of the Uniform Code provides that the court shall have "equal opportunity" with the Government and the accused to obtain witnesses. In practice, they call new witnesses

\begin{itemize}
\item \textsuperscript{55} UCMJ art. 36, 10 U.S.C. \textsection 836 (1958).
\item \textsuperscript{56} Brosman, \textit{The Court: Freer Than Most}, 6 \textit{VAND. L. REV.} 166, 167-68 (1953).
\item \textsuperscript{58} In some respects the powers of court members are much different from jurors. A court member can overrule the law officer of a general court-martial on a motion for a finding of not guilty, the equivalent of a directed verdict. UCMJ art. 51(c), 10 U.S.C. \textsection 851(c) (1958); United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956); United States v. Berry, 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952). A number of proposals to deprive court members of this right and to make them virtually like civilian jurors have been presented, but no action has been taken by Congress to amend the Uniform Code.
\end{itemize}
and they often question the witnesses called by the Government and the defense.\textsuperscript{59} Such participation always raises the question of bias and partisanship. Where does an impartial interest in eliciting facts for a better informed judgment on the accused's guilt or innocence leave off, and an interest in proving the prosecution's case begin? That is not an easy question to answer, especially since nuances in voice and gesture are not readily apparent in the pages of the record of trial. Judge Latimer recently noted that when "court members decide to try their hands at the art of cross-examination they usually select the witnesses favorable to the defense as their victims," and thereby become subject to the charge of being "pseudo-prosecutors seeking to salvage a case for the Government."\textsuperscript{60} Even a single question or remark may indicate bias.\textsuperscript{61} Consequently, the appellate tribunal reviewing the record of trial must be particularly sensitive to the questions asked by the court members in order to safeguard the accused's right to a fair trial.\textsuperscript{62}

Until recently, other conduct by court members also had to be examined carefully for possible bias. Under the provisions of paragraph 55 of the Manual for Courts-Martial if the court members believe that the evidence presented by the prosecution is either insufficient to convict or shows the commission of an offense other than that charged, it may suspend the trial and ask the convening authority for further instructions. Several serious objections to the propriety of this procedure are apparent. Among other things, it appears to constitute "the court an advisory body for the convening authority."\textsuperscript{63} However, a majority of the Court on first consideration of the procedure did not

consider it to be unfair to the accused. As a result, whenever there was a suspension of proceedings under the Manual provision, it was necessary to scrutinize what transpired to determine if the court members had aligned themselves with the prosecution. Recent re-examination of the practice in light of added experience with it resulted in its rejection. In United States v. Johnpier a question arose over whether the evidence showed the accused had committed the offense of suffering a prisoner to escape, the offense charged, or the offense of releasing a prisoner without proper authority. The proceedings were suspended under paragraph 55 to obtain further direction from the convening authority. About a month later, the court-martial was reconvened on direction from the convening authority to continue the trial on the offense charged. The law officer thereupon declared a mistrial. One of the reasons he gave was that it was apparent that there was a conflict of opinion between him and the convening authority as to the nature of the offense shown by the evidence; and he believed that his position as the judge of the court was seriously compromised by the convening authority's direction. The Court upheld his ruling. It said:

Since one of the two reasons given by the law officer is plainly sufficient to support his ruling, there would ordinarily be no need to discuss the remaining reason. However, suspension of the proceedings under paragraph 55 of the Manual is too important a matter to be passed over without comment. In United States v. Turkali, 6 USCMA 340, 20 CMR 56, the concurring opinion alluded to some of the dangers inherent in the procedure. It was pointed out that the procedure is "one-sided" and, therefore, unfair, in that it gives the Government a preliminary "advisory opinion" on the court's attitude toward the evidence. This case confirms the present-day inappropriateness of the procedure, and gives substance to the idea that it tends to make the law officer a "mere figurehead" in the trial.

Appellate defense counsel contend that since the procedure of suspension is sanctioned by the Manual and by the decision of the

majority of this Court in the *Turkali* case, there was no possible justification for the law officer’s conclusion that his authority was undermined by the convening authority’s direction to continue with the trial. There are, however, “nuances” in the atmosphere of a trial which cannot be fully depicted in the cold pages of the record of trial. United States v. Gori, 282 F.2d 43 (CA 2d Cir.) (1960). One of the nuances in this case indicates rather clearly that the law officer was convinced the convening authority’s direction seriously compromised his position as the judge of the court, and gave rise to substantial doubt whether the court-martial would remain uninfluenced by the apparent “victory” of the convening authority on a point of law. Cf. United States v. Knudson, 4 USCMA 587, 16 CMR 161. The pages of the record confirm his feeling. Also, the law officer was a member of the Field Judiciary Division, and a stranger to the command which convened the court. It is not at all fanciful to imagine that, as the situation developed, he lost not only “face” but also control over the court. We have no difficulty, therefore, in concluding that on this ground, too, the declaration of a mistrial was justifiable. Moreover, we are convinced that the paragraph 55 procedure for suspension of trial in order to obtain the views of the convening authority is both archaic and injudicious. It is contrary to the express language of Article 51, and violates the spirit of the Uniform Code and the purposes for which it was enacted. Accordingly, the contrary view set out in United States v. Turkali, supra, is overruled.65

One of the severest criticisms of the court-martial process was that it was essentially a tool of command; that both the court-martial and the subordinate commander were inordinately sensitive to a superior officer’s desires and responded readily to his requests. Such pressure and influences on the court-martial and the subordinate commander were described as “command control.”66

The Uniform Code sought to stamp out the pressure. Article 37 provides in part that no person subject to the Code “may attempt to coerce or, by any unauthorized

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means, influence the action of a court-martial. . . .” 67 No case has been before the Court of Military Appeals in which a person has been charged with a violation of this article. But, there are many cases in which the Court and service boards of review found the presence of command control which deprived the accused of a fair hearing. 68

Command control may take many forms. Most obvious is the conference before the start of trial in which the commander's views about the accused or the offense are brought directly home to the court members. 69 Subtle psychological pressures, at all levels of the court-martial process, are less direct, but just as effective. Some elements of pressure which have been condemned by the Court of Military Appeals are worth mentioning.

One of the most troublesome forms of indirect pressure is the policy statement. A policy can be framed as a positive order; or it may be phrased an indicating what is merely desirable. As members of a hierarchical system, with promotion and type of duty largely dependent upon the rating of superiors, military personnel would naturally tend to regard all policy as mandatory. In the discharge of their executive and administrative responsibilities uncritical acceptance of policy is probably beneficial to both the service and the individual. In a judicial proceeding such ready tractability would violate the requirements of a fair hearing.

The court-martial process is judicial in nature. 70 Article 37, which prohibits interference with, or improper influence upon, the convening authority or the reviewing authority speaks of their “judicial acts.” The court-martial tries and sentences a person for a criminal act. It has


69 United States v. Littrice, supra note 68.

70 In making this statement, I have not overlooked the apparently contrary opinion of Mr. Justice Black in Reid v. Covert, 354 U.S. 1, 36 (1957). He described courts-martial as "simply executive tribunals whose personnel are in the executive chain of command." Cf. Runkle v. United States, 122 U.S. 543 (1887).
the power to imprison the accused and to impose fines and forfeitures upon him. Under the so-called Hiss Act a conviction by court-martial has the same effect as a conviction by a federal district court in denying the accused pension and retirement benefits which he would otherwise be entitled to receive from the federal government.\textsuperscript{71} Manifestly, therefore, any external pressure or influence which dictates conviction or sentence has no place in the court-martial process.

Policy is important at the very threshold of the court-martial proceeding. Earlier it was observed that the final decision to refer a charge for trial before a summary, special or general court-martial is the responsibility of the officer exercising general court-martial jurisdiction over the accused. A number of factors may be considered by him in reaching his decision. One is the severity of the offense. In theory, he can refer a minor offense, such as being disorderly in quarters for which the maximum penalty is forfeiture of two-thirds pay for one month and confinement for one month, to a general court-martial, but he is not likely to do so.\textsuperscript{72}

A second circumstance of substantial importance is the policy of a superior commander or of the President of the United States, as set out in the Manual for Courts-Martial or other executive orders or directives. Consideration, however, cannot be dictation. The policy statement


\textsuperscript{72} Strictly speaking no offense committed by a commissioned or non-commissioned officer can be considered minor. A commissioned officer sentenced to confinement is also usually dismissed. Any sentence to confinement or to hard labor without confinement imposed upon a non-commissioned officer results in automatic reduction to the lowest enlisted grade. UCMJ art. 58(a), 10 U.S.C. § 859(a) (1958), added in July, 1960 to change the effect of the decision in United States v. Simpson, 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959). Also, a minor offense may have the consequences of a major delict if the accused has previously been convicted by court-martial. Two previous convictions within one year authorize imposition of a bad conduct discharge; and three previous convictions within that period authorize a dishonorable discharge and confinement at hard labor for one year, without regard to whether the offense of which the accused stands convicted carries that punishment. Manual for Courts-Martial, United States, 1951, para. 127c, § B, as amended by Exec. Order No. 10565, 19 Fed. Reg. 6299 (1954).
cannot be made mandatory upon the court-martial authority. Rather, it must leave him free to follow or to disregard it, in the exercise of his judicial discretion.\textsuperscript{73}

Injection of policy in the trial proceeding may come about in many ways. In most instances there is no permissible basis for calling the attention of the court members to the policy, and consequently reference to the policy is manifestly unfair to the accused.\textsuperscript{74} Two ostensibly valid means of bringing policy before the court were used in the years immediately following enactment of the Uniform Code.

One medium of entry was the doctrine of judicial notice under which a copy of an official publication and general order and circular is admissible in evidence.\textsuperscript{75} The other method was use of the Manual for Courts-Martial as a trial guide and source of instruction. Both means of entry are now closed.

After some preliminary warnings that the policy pronouncements set out in the Manual exerted an unfair influence upon the court-martial, the Court of Military Appeals held that the Manual could not be used in a court-martial case in any way that appeared to deprive the accused of a fair hearing. In the landmark opinion in \textit{United States v. Rinehart} \textsuperscript{76} the Court said:

One further matter merits discussion. In the recent case of \textit{United States v. Boswell}, 8 USCMA 145, 23 CMR 369, we voiced our disapproval of the practice of permitting court members to consult "outside sources" for information on the law. We there said that "the Manual is no different from other legal authorities. It, too, has no place in the closed session deliberations of the court-martial."


\textsuperscript{75} \textit{MANUAL FOR COURTS-MARTIAL, UNITED STATES}, 1951, para. 147a.

It was pointed out that court members may not understand the Manual's passages thereby creating an atmosphere of confusion and doubt during the closed deliberations. What was prophesied in Boswell, supra, has now come to pass. The prosecution in closing argument had directed the court's attention to paragraphs 76a(5) and 33h of the Manual. The court-martial in closed session, and on its own initiative, "discovered" paragraphs 76a(3) and 76a(4) of the Manual, neither paragraph being material in arriving at an appropriate sentence. Thus a virtual race to the Manual had begun in spite of the fact that the law officer had fully and adequately instructed the members on the applicable law pertaining to the sentence.

We cannot sanction a practice which permits court members to rummage through a treatise on military law, such as the Manual, indiscriminately rejecting and applying a myriad of principles—judicial and otherwise—contained therein. The consequences that flow from such a situation are manifold. In the first place, many of the passages contained therein have been either expressly or impliedly invalidated by decisions of this Court. [Citing cases.]

Secondly, we have consistently emphasized the role of the law officer in the instructional area. In United States v. Chaput, 2 USCMA 127, 7 CMR 3, we said that, "It is fundamental that the only appropriate source of the law applicable to any case should come from the law officer."

Thirdly, the great majority of court members are untrained in the law. A treatise on the law in the hands of a non-lawyer creates a situation which is fraught with potential harm, especially when one's life and liberty hang in the balance. We have absolutely no way of knowing whether a court-martial applied the law instructed upon by the law officer or whether it rejected such instructions in favor of other material contained in the Manual. In United States v. Chaput, supra, we reversed a conviction where a law officer had referred the court members to several board of review decisions to permit them to determine for themselves the applicable legal principles involved.

In civilian practice it would constitute a gross irregularity to permit jurors to consult outside legal references.
We see no compelling reason why a similar rule should not be adopted in courts-martial practice. All the law a court-martial need know in order to properly perform its functions must come from the law officer and nowhere else.

We are fully aware that the change in the system of military law occasioned by this decision represents a substantial departure from prior service practices. However, we cannot but feel that such change was imperatively needed if the system of military law is to assume and maintain the high and respected place that it deserves in the jurisprudence of our free society. Prior to the Code courts-martial were neither instructed on the elements of the offense charged nor the principles of law applicable to the case. The deliberations of the court were in camera and a genuine need then existed for the use of the Manual by the court members in determining the law to be applied. However, with the advent of the Uniform Code of Military Justice many of the problems which previously existed under the old system disappeared. Congress created the role of law officer and fashioned him in the image of a civilian judge. He was charged with the responsibility of instructing the court on the elements of the offense and the applicable principles of law in order that informed and intelligent findings and sentence could be reached. In a word, he was made a fountainhead of the law in the court-martial scheme of things. The sum total of these and other remedial changes inaugurated by the Code was to bring court-martial procedure, wherever possible, into conformity with that prevailing in civilian criminal courts. We believe that military law under the Code has come of age and the time has come when the use of the Manual by the court-martial must end.

Congress gave the President the right to fix the maximum punishment for offenses under the Uniform Code, but we do not believe that Congress intended the President to sit with the court members when they adjudge a sentence in a given case. As a matter of fact, the President himself clearly did not expect to be brought into every trial. He expressly provided that the rules of evidence normally applicable to findings are also applicable to sentence, except as they may be relaxed to a limited extent by the law officer or the president of the special court. Paragraph 75c(1), Manual, supra. See also United States v. Strand, 6 USCMA 297, 20 CMR 13.77

77 Id. at 406-08, 24 C.M.R. at 216-19.
The influence of policy has also been carefully circumscribed in connection with the review of a conviction by the convening authority. Article 61 of the Uniform Code gives the convening authority nearly unlimited power over the findings and sentence. If he so desires, the convening authority can set aside the findings of guilty and the sentence, and dismiss the charge, irrespective of the sufficiency of the evidence of guilt and the appropriateness of the sentence adjudged by the court-martial. In the exercise of this discretion, he can consult anyone he pleases for information about the accused, including as Judge Brosman picturesquely put it "a guy named Joe." A policy directive is, therefore, a matter that may properly be considered by him. But, as in the case of reference of the charges to trial, policy statements cannot dictate the result. Consequently, if it appears that the convening authority believes he must act in any particular way because of his own policy or the policy of his superior commander, his action in the case will be set aside, and the record of trial will be returned for reconsideration.78

Before acting on the sentence, the convening authority usually obtains a great deal of information about the accused's military and civilian background and his character that is not shown in the record of trial. The information is generally obtained by his staff judge advocate or legal officer,79 and is set out in what is called the post-trial advice or review. This advice consists of a comprehensive summary and analysis of the legal issues raised by the record of trial, and of recommendations to the convening authority on the findings and the sentence.80 As regards the extra-record information on the accused's background, the review is in a general way, like the probation report to the sentencing judge in a civilian criminal case. Since there is this re-

79 The terminology varies according to the service. In the Army and Air Force, the legal advisor is called the staff judge advocate; in the Navy, Marine Corps, and Coast Guard he is described as the legal officer.
semblance between the review and probation report, it was originally thought that the accused had no right to deny or rebut new adverse matter contained in it. The Court of Military Appeals, however, regarded the accused's right to a fair hearing in broader terms. It held that the accused is entitled to an opportunity to explain or deny new unfavorable information included in the staff judge advocate's post-trial advice. It spelled out the right in United States v. Griffin. Shortly thereafter, in United States v. Vara it laid down general guidelines for changes in the practice which would assure preservation of the right. These cases show clearly the deep dimensions in military law of the requirements of a fair hearing.

Failure or refusal to accord the accused the opportunity to rebut or explain adverse new matter in the post-trial advice is ground for setting aside the action taken by the convening authority in reliance upon the advice. Not every deprivation of the right, however, is ground for reversal. If the adverse matter is of a minor nature, and it reasonably appears that the convening authority was not influenced by it, the error is not prejudicial and may be disregarded.

Closely related to the right to an opportunity to rebut new matter, is the accused's right to have the advice itself prepared by an impartial person. Trial counsel and the law officer have each a special interest in the outcome of the prosecution, and are, therefore, ineligible to prepare or to assist in the preparation of the post-trial advice. Disqualification also exists if the person preparing or assisting in the preparation of the advice previously acted in a companion case in an inconsistent capacity. The reason for the exclusion was stated by the Court of Military Appeals in United States v. Hightower as follows:

Realistically then, the accused and Moye were coaccused, tried

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separately for the same offense. Moye was convicted. Captain Hudson was the successful Trial Counsel. Having so acted, would he acquire a "frame of reference" which would improperly influence him in a review of the accused’s case? See United States v. Stringer, supra, page 503. The Government maintains that he would not. It contends that one of the fundamental qualities of the legal profession is a highly refined capacity to exercise objectivity and judicial discipline. We are quite willing to accord this quality to most members of the profession, but we believe that an impartial observer would conclude that personal convictions formed in the prosecution of one accused would tend to influence the prosecutor in his relations with the coaccused.

We have no doubt that Captain Hudson, having been instrumental in convicting Moye, would be personally convinced of the accused’s guilt. Since the conviction is founded on personal experiences, it would certainly be more deep-seated than an opinion formed only on the basis of an official evaluation of the record. A fixed opinion of this kind manifestly affects the impartiality of the review. One consequence of it is to deny the accused the benefit of any doubt regarding the correctness of rulings by the law officer. See United States v. Floyd, 2 USCMA 183, 7 CMR 59. A second consequence is the sentence phase of the review. There is a distinct risk that the sentence recommendation would reflect unrecorded prejudices formed during the reviewer’s prosecution of the coaccused. See United States v. Bound, 1 USCMA 224, 2 CMR 130. Thus, since the charges are alike and there is a substantial basis for “overzealous prosecution,” we believe that the Moye case and the present proceeding constitute the “same case” within the meaning of Article 6(c).

Of course, in reaching our conclusion, we do not imply that Captain Hudson intentionally deprived the accused of an unbiased review. On the contrary, we are sure that he was honest and sincere in his belief that he could act dispassionately. Moreover, Congress intended to remove all possibility of bias; it did not contemplate ferreting for motives and delicate balancing of previous influences against objective fairness. Cf. United States v. Deain, 5 USCMA 44, 17 CMR 44. We must insist on adherence to the Congressional policy directed against conduct tending to impair the impartiality of the post-trial review.

One final point urged by the Government requires consideration. The Government contends that inasmuch as Captain Hudson prepared the report as Assistant Staff Judge Advocate, he was, essentially, only an amanuensis for the Staff Judge Advocate. The
latter had no previous connection with either case, and, consequently, there is no violation of Article 6(c). This argument was adopted by the board of review below. However, some months after publication of the opinion by the board of review, this Court decided United States v. Crunk, 4 USCMA 290, 15 CMR 290. In that case, the person who had acted as law officer at the trial later prepared the post-trial review, in conjunction with a civilian attorney. There, as here, the staff judge advocate noted that he concurred in the opinions and recommendations of the reviewers. In a unanimous opinion, we held such conduct to be prohibited by Article 6(c).88

CONCLUSION

Military service is not an isolated and occasional occurrence in American life. The "cold war" has kept the Armed Forces at record peacetime levels. Millions of civilians work closely with, and for, the military establishment. The points of contact between the civilian community and the Armed Forces are today so numerous and so intimate that it can truly be said that military life is an immediate and integral part of American life.

Part of our heritage of freedom is the complex of the basic rights embraced within constitutional due process. Those same rights are inseparably interwoven into due process of military law. Other fundamental protections against arbitrary and unjust action have been added by Congress through the Uniform Code of Military Justice. As the Supreme Court of the military justice system, the United States Court of Military Appeals has the unique responsibility to protect and preserve due process in courts-martial. However, pronouncements by the highest court of legal doctrine are sterile exercises in semantics, if there is only grudging compliance with the letter, and little regard for the spirit, of the law. It is, therefore, the responsibility of the legal profession, both in and out of the military service, to uphold the meaning and importance of due process in the administration of military law, and to help make military law an integral part of American jurisprudence.

88 Id. at 388-89, 18 C.M.R. at 12-13.