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Prejudicial Error--The Measurement of Reversal by Boards of Review and the U.S. Court of Military Appeals

Albert M. Kuhfeld

PREJUDICIAL ERROR — THE MEASUREMENT OF REVERSAL BY BOARDS OF REVIEW AND THE U.S. COURT OF MILITARY APPEALS

MAJ. GEN. ALBERT M. KUHFELD †

IN discussing the standards by which errors of law are examined to determine whether or not reversal is warranted, the role of Boards of Review and the Court of Military Appeals must be considered at the outset. Boards of Review strive to follow the precedents announced by the Court of Military Appeals in much the same way as the United States Courts of Appeal follow the precedents set by the United States Supreme Court. Therefore, any comments concerning the measurement for reversal arising from errors of law are applicable to both levels of these appellate tribunals.[1]

Any discussion of the yardstick for reversal of courts-martial findings or sentences because of errors of law must begin with the congressional mandate on the subject found in the Uniform Code of Military Justice: "A finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." [2] Thus, Congress provided a "harmless error" rule for use by the Armed Forces in the administration of military justice. This is essentially the same as Rule 52 of the Federal Rules of Criminal Procedure.[3]

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† Judge Advocate General, U.S. Air Force.

[1] This presentation is not intended to be a comprehensive coverage of the sphere of operation of prejudicial error as opposed to harmless error, nor does it cover the myriad situations where these principles have been applied.

[2] UNIFORM CODE OF MILITARY JUSTICE art. 59(a), 10 U.S.C. § 859(a) (1958).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 87(c), engrafted the following limitations on the "harmless error" rule sanctioned by the Congress: "The test to be applied in determining whether an error materially prejudiced the substantial rights of the accused is this: An error prejudicial to the rights of the accused must be held to require the disapproval

The Court of Military Appeals, itself a creature of the Congress, has stated that it is "required to interpret the Code and to enforce the provisions according to the intent of Congress." [4]

The Congressional intent behind Article 59(a), reflected in the House Report on the Uniform Code of Military Justice,[5] was that a finding of guilty should not be set aside for technical reasons or for minor errors of law which did not prejudice the rights of the accused.

The Court of Military Appeals first applied Article 59(a) in November of 1951, when it held that " 'substantial rights' means not seeming or imaginary, not illusive, but real, solid and firm rights." [6] The Court then followed the United States Supreme Court in *Kotteakos v. United States* [7] by considering harmless those errors which did not influence or had but slight effect at the trial level. This adoption, though, had the effect of superimposing two further limitations on the "harmless error" rule, *i.e.,* the error would not be considered harmless if it consisted of failure to conform to "a constitutional norm or a specific command of Congress. . . ." [8] Shortly thereafter, the court suggested another possible limitation on the "harmless error" rule by announcing the doctrine of "military due process." [9]

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of a finding of guilty of an offense, or the part thereof, to which it relates unless the competent evidence of record is of such quantity and quality that a court of reasonable and conscientious men would have made the same finding had the error not been committed.

"Regardless, however, of the test in the subparagraph above, if the error is such a flagrant violation of a fundamental right of the accused as to amount to a denial of due process . . . the finding must be disapproved regardless of the compelling nature of the competent evidence of record."

[4] [Jan.-Dec. 1957] COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEP'T OF THE TREASURY, ANN. REP. 33.

[5] *Hearings on H.R. 2498 Before House Committee on Armed Services,* 81st Cong., 1st Sess. 1174-75 (1949).

[6] United States v. Lucas, 1 U.S.C.M.A. 19, 23, 1 C.M.R. 19, 23 (1951).

[7] 328 U.S. 750 (1946).

[8] *Id.* at 764-65.

[9] United States v. Clay, 1 U.S.C.M.A. 74, 78, 1 C.M.R. 74, 78 (1951). "Under our powers as an appellate court we can reverse for errors of law which materially prejudice the substantial rights of the accused, and we need go no further than to hold that the failure to afford to an accused any of the enumerated rights denied him military due process and furnishes grounds for us to set aside the conviction."

A harbinger of discord on the court became apparent when the late Judge Brosman, after recognizing the clear mandate of Congress and the limitations adopted in the *Kotteakos* case, announced a further limitation by way of dicta.[10] This limitation was later to become known as "general prejudice." It required reversal without regard to the effect an error might have on the accused's rights whenever there was "an overt departure from some 'creative and indwelling principle'—some critical and basic norm operative in the area under consideration." [11] This doctrine was introduced into military jurisprudence in a case where the president of a general court-martial usurped the statutory functions and duties of the law officer. The evidence was compelling, and it was manifest that the conduct of the president did not influence the members of the court. Judge Brosman, with the Chief Judge concurring, stated that this was the proper backdrop for the application of "general prejudice" and the case was reversed, although no specific prejudice to the rights of the accused was found.[12] Judge Latimer, although concurring in the result, expressed dissatisfaction with the concept of "general prejudice" and stated that it was "contrary to the clear mandate of Congress." [13] He then searched the record and found specific prejudice to the accused [14] evidently a denial of "military due process" as envisioned in the *Clay* case. In this connection, it is interesting

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[10] United States v. Lee, 1 U.S.C.M.A. 212, 216, 2 C.M.R. 118, 122 (1952). "Whether this error should be deemed to constitute reversible error,—that is, whether there is a fair risk that it materially prejudiced the substantial rights of the accused—is, however, another matter." In regard to Article 59(a), Judge Brosman stated: "It seems to us that the mandate of this statutory directive is clear. We are not to reverse for error of law unless we are of opinion on the basis of the proceedings in their entirety that the substantial rights of the accused have been prejudicially affected." *Ibid.*

[11] *Ibid.*

[12] United States v. Berry, 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952).

[13] *Id.* at 242, 2 C.M.R. at 148. "The Court's opinion goes much further and rationalizes on general prejudice, which appears to me unnecessary in this setting, and contrary to the clear mandate of Congress. It is to reserve from my concurrence an approval of that concept which leads me to file this opinion." *Ibid.*

[14] "The accused was denied one of the principal safeguards erected to protect him, and . . . this denial was prejudicial to him." *Id.* at 244, 2 C.M.R. at 150.

to note that "military due process" was conceived in dicta, as was "general prejudice," and is now firmly entrenched in military jurisprudence, although its precise meaning and application have never been pinned down.

Later, these two diametrically opposed concepts were thoroughly explored. Judge Latimer, concurring in an opinion by the Chief Judge, completely divorced himself from the concept of "general prejudice" and referred to the previous decisions utilizing the doctrine as "decisions which I believe are calculated, however unwittingly, to confuse and muddle the administration of military justice. Not only are those decisions fraught with the likelihood of undesirable consequences, they ignore the plain wording of the Uniform Code of Military Justice, 50 USC §§ 551-736, and the experience gained by the Federal civilian courts over their full period of existence." [15] Judge Brosman, also concurring, said in regard to Judge Latimer's opinion, "I submit that on the basis of the record, it is sadly clear that my brother is waging what is essentially a war of tags and labels—a really pointless debate in the sphere of semantics." [16]

"General prejudice" has been relied upon to reverse a conviction even though it could be determined on other grounds that the accused was denied a fair trial.[17] But in a later case, Judge Brosman, the progenitor of the principle, determined that it was not necessary to "inquire into the desirability of a reliance on the notion of general prejudice where there is a 'finding of a probability of specific prejudice against the accused.' " [18] Also, it has been held that "general prejudice" precludes application of the "compelling evidence" rule.[19]

In July 1952, the court created an irrebuttable presumption of prejudice and invoked the rule of "general preju-

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[15] United States v. Woods, 2 U.S.C.M.A. 203, 215, 8 C.M.R. 3, 15 (1953).
[16] *Id.* at 209, 8 C.M.R. at 9.
[17] United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955).
[18] United States v. McClusky, 6 U.S.C.M.A. 545, 553, 20 C.M.R. 261, 269 (1955).
[19] United States v. Taylor, 5 U.S.C.M.A. 178, 17 C.M.R. 178 (1954).

dice" because the law officer had entered a closed session of the court-martial while it was deliberating on the sentence.[20] This irrebuttable presumption was applied even though the subject matter of the conference was beneficial to the accused.[21] Approximately two and one-half years later, the court determined that such an intrusion by the law officer no longer required the invocation of "general prejudice," and that in future cases, a standard of "specific prejudice" would be applied. The court, in addition, pointed out that in applying such a standard, a rebuttable presumption of prejudice would result from such an intrusion. Thus, the burden was thrust upon the government to show that the accused was not "specifically prejudiced." [22] In April of 1958, Judge Ferguson, writing for the majority of the court, recognized the rebuttable presumption theory but stated, "prejudicial error occurs when the law officer appears in closed session and refers the court-martial to outside legal sources affecting the sentence without affording the accused and his counsel the opportunity to object or request clarification of such matters." [23] Judge Latimer dissented and observed: "In cases involving unlawful communications with court members, I have watched the doctrine of reversal without prejudice ebb and flow but I had concluded it was laid to rest. . . ." [24] In his opinion, the proper standard would be "specific prejudice," and he concluded that the advice given by the law officer and the legal sources to which he referred the court-martial were correct and not misleading.

Throughout history, members of both general and special courts-martial had made liberal use of the Manual for Courts-Martial during open and closed sessions. In the first case in which the Court of Military Appeals commented on such practice, Judge Quinn, with Judge Ferguson concurring, stated that the Manual "has no place in the closed session

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[20] United States v. Keith, 1 U.S.C.M.A. 493, 4 C.M.R. 85 (1952).
[21] United States v. Smith, 1 U.S.C.M.A. 531, 4 C.M.R. 123 (1952).
[22] United States v. Allbee, 5 U.S.C.M.A. 448, 18 C.M.R. 72 (1955).
[23] United States v. Turner, 9 U.S.C.M.A. 124, 130, 25 C.M.R. 386, 392 (1958).
[24] *Ibid.*

deliberations of the court-martial." [25] In *United States v. Rinehart*,[26] the majority of the court prohibited the possession of the Manual during the course of a trial (except for the president of a special court-martial) or while deliberating on the findings and sentence, such prohibition to be effective thirty days after 27 November 1957, the date of the mandate. Judge Latimer, in a later case, referred to this decision as the case "which turned military procedure topsy-turvy. . . ." [27] During the thirty-day grace period, those cases wherein the Manual was used by members other than the president of a special court-martial were tested by the standard of "a fair risk of harm to the accused" or "specific prejudice." [28] After the grace period, the first case that involved the use of the Manual to be considered by the Court of Military Appeals was reversed, even though the president of the court-martial filed an affidavit to the effect that he did not refer to anything except the procedure guide.[29]

The law on the matter today is that it is "per se reversible error" for a court member to have access to the Manual in violation of the *Rinehart* directive.

The Court of Military Appeals has held consistently that any circumstances which give the appearance of improperly influencing the court-martial proceedings against the accused constitute error of the sort which must be condemned.[30] Such influence was detected in the pretrial proceedings of a case when the investigating officer's recommendation for trial by special court-martial was erroneously stated in the advice of the staff judge advocate to the convening authority.[31] Because of this, the Court of Military Appeals set aside the conviction. The Court of Military Appeals quite properly reached the same result in another case because of "pernicious suggestions" made by the convening authority to members of an

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[25] United States v. Boswell, 8 U.S.C.M.A. 145, 148, 23 C.M.R. 369, 372 (1957).
[26] 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957).
[27] United States v. Turner, *supra* note 23, at 131, 25 C.M.R. at 393.
[28] United States v. Vara, 8 U.S.C.M.A. 651, 25 C.M.R. 155 (1958).
[29] United States v. Dobbs, 11 U.S.C.M.A. 328, 29 C.M.R. 144 (1960).
[30] United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956).
[31] United States v. Greenwalt, 6 U.S.C.M.A. 569, 20 C.M.R. 285 (1955).

appointed court during the course of a pretrial conference with them,[32] and in still another case because command influence was present when the convening authority interfered with a law officer's ruling in granting a defense request for a continuance.[33] This concept has been applied to post-trial activities—reversal of an affirmance by a Board of Review was directed and a new staff judge advocate's review was ordered when it appeared that the original review of the staff judge advocate had been prepared by an assistant staff judge advocate who had previously acted as the law officer in the trial of a co-accused,[34] even though the review was concurred in by the staff judge advocate.

When inadmissible evidence is admitted during the course of a trial, the measurement for reversal used by the Court of Military Appeals is, as a practical matter, the "fair risk" rule. Under this rule, cases will not be reversed "unless the improperly admitted evidence presents a fair risk of prejudice to the accused." [35] Though only one of the three judges on the Court of Military Appeals subscribes to this standard, his views are controlling, because he occupies a central position between the views of the other two judges. They occupy the end positions in the arena: one has espoused the view that a reasonable *possibility* of prejudice should suffice for reversal,[36] while the other would require a reasonable *probability*.[37]

CONCLUSION

It should now be readily apparent that prejudicial error defies analysis on a completely mechanical basis. Error is relatively easy to recognize and, as a result, there is little divergence in opinion on that subject. However, whether or

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[32] United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953).
[33] United States v. Knudson, 4 U.S.C.M.A. 587, 16 C.M.R. 161 (1954).
[34] United States v. Turner, 7 U.S.C.M.A. 38, 21 C.M.R. 164 (1956).
[35] United States v. Johnson, 11 U.S.C.M.A. 384, 386, 29 C.M.R. 200, 202 (1960).
[36] United States v. Kelley, 7 U.S.C.M.A. 584, 589, 23 C.M.R. 48, 53 (1957).
[37] United States v. Nix, 11 U.S.C.M.A. 691, 694, 29 C.M.R. 507, 510 (1960).

not an error is prejudicial has become a subject of much controversy. The label applied to error has, to a disturbing extent, varied with the person who selected it. It seems apparent that prejudice, like perfection, is an absolute and is not subject to degrees. Either an error is prejudicial or it is not, and the adjective used in front of prejudice is not helpful or decisive. Congress was not as esoteric as the Court of Military Appeals. The prose employed in the Uniform Code is quite specific, and, in a given case, its provisions either are or are not violated; and, when violated, the resulting error is or is not prejudicial to the accused.

In spite of the Congressional mandate intended to prevent reversals where justice has been done, there has been a tendency by the Court of Military Appeals to reverse when the error might properly be considered harmless. The cases are legion in which the court has applied the label of "prejudice" when the conclusion is inescapable from the record of trial that the error could not have affected the substantial rights of the accused. The court shows no reluctance, when an error creeps into the record, to label it prejudicial and place the burden upon the government to demonstrate that the substantial rights of the accused were not prejudiced. This apparently is a throwback to the early years of this century before the adoption of a "harmless error" rule in 1919.[38]

Much of this article has been devoted to a consistent and systematic analysis of the decisions of the Court of Military Appeals. The decisions of the court are promulgated on Friday afternoons. On Monday mornings, somewhat like the "Monday morning quarterbacks," key staff officers together with the Judge Advocate General have a full discussion of the cases that were published the preceding Friday. As a result of these discussions, it has sometimes become necessary to issue special instructions to installations on a world-wide basis. This thorough analysis of the decisions on a weekly basis is conducted primarily to ensure that the chairmen of the Boards of Review and other key officers charged with

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[38] Act of Feb. 26, 1919, ch. 48, § 269, 40 Stat. 1181.

the administration of military justice are fully aware of the trends as they are developed. In this manner, the Air Force is able to react promptly to the mandates of the court as they are issued.

In summation, it seems that the Court of Military Appeals has made a most liberal interpretation of what will be categorized as "prejudicial error" (however that term is defined by the individual judge), and has been rather loath to apply or even to mention or refer to the harmless error rule envisaged by the Congress.

Judge Advocates in the Armed Forces are dedicated to the goal of a just result in every case processed under the Uniform Code of Military Justice. Comparatively speaking, they realize that our present system is still in its embryonic stage and that the Court of Military Appeals, during this short time, has been called upon to set the initial guidelines for a great number of controversial matters. The court will, in the future, have more time and better opportunity to examine the impact of the doctrines thus far pronounced and to clarify and modify them as may be appropriate. During this period of evolution, we can hope that the court will give special attention to the harmless error rule to the end that an error of law will not be grounds for reversal of a conviction unless the rights of the accused have, in fact, been substantially prejudiced.