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"MILITARY DUE PROCESS": WHAT IS IT?

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I. A Label or Catch Phrase

On November 27, 1951, the United States Court of Military Appeals, then some five months old, fashioned in the *Clay* case[1] what is characterized as a label. It embellished this label with quotation marks at least twice in the course of the opinion. This label, which was, in the language of the Court, used "for lack of a more descriptive phrase," was "military due process." This, and later use of the term by the Court in other opinions,[2] has caused some students of military law to speculate as to whether there is occurring the emergence of a new doctrine of law. Others incline to the view that old wine is being purveyed in a new bottle. The opinions of the Court up to now seem to indicate a trend to consider the term as alternative nomenclature for the process of finding and declaring reversible error.

The words "due process" are perhaps the outstanding contribution of the law to the dialectics of *Alice in Wonderland.* Fundamental, solid and useful though the general doctrine of due process is, the civil courts have repeatedly adverted to the difficulty encountered in endeavoring to define it.[3] Of the innumerable attempts to do so[4] perhaps one of the best so far as criminal law is concerned is that of the United States Court of Appeals for the Ninth Circuit which declared:

> "Due process of law in a criminal proceeding has been defined as consisting of 'a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial according to established procedure, and discharge unless found guilty.' "[5]

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1. United States v. Clay (No. 49), 1 CMR 74, 77 (U.S.C.M.A. 1951).
2. United States v. Welch (No. 196), 3 CMR 136 (U.S.C.M.A. 1952), discussed in Sec. III *infra.;* United States v. Bartholomew (No. 166), 3 CMR 41 (U.S.C.M.A. 1952); United States v. Carter (No. 159), 2 CMR 14 (U.S.C.M.A. 1952); United States v. Davis (No. 29), 2 CMR 8 (U.S.C.M.A. 1952).
3. *Ex parte* MacDonald, 76 Ala. 603 (1884); Davis v. State, 68 Ala. 58, 62, 63 (1880); People v. Tilkin, 13 Cal.2d 89, 90 P.2d 148, 152 (1939); Gilmer v. Bird, 15 Fla. 410, 421 (1875); Hodge v. Muscatine County, 121 Iowa 482, 96 N.W. 968, 971 (1903); Bardwell v. Collins, 44 Minn. 97, 46 N.W. 315, 317 (1890); *In re* Fuller's Estate, 34 Misc. 752, 70 N.Y. Supp. 1050, 1051 (Surr. Ct. 1901); Stuart v. Palmer, 74 N.Y. 183, 191 (1878); Jones v. Franklin County, 130 N.C. 451, 42 S.E. 144, 149 (1902); Hallenbeck v. Hahn, 2 Neb. 377, 403 (1872); Gaffney v. Jones, 44 Wash. 158, 87 Pac. 114, 116 (1906); State v. Sponaugle, 45 W. Va. 415, 32 S.E. 283, 284 (1898).
4. See case excerpts collected in 13 Words and Phrases 488-593, 105-61.
5. Simons v. United States, 119 F.2d 539 at 544 (9th Cir.), *cert. denied,* 314 U.S. 616 (1941).

Speaking through Justice Holmes, the Supreme Court has said, "that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation."[6]

Fortunately, our inquiry here need not extend over the entire scope of due process. It is limited not only to criminal proceedings, but has been drastically confined by definition by the United States Supreme Court which has said, "To those in the military or naval service of the United States the military law is due process."[7]

The addition by the Court of Military Appeals of the adjective "military" to the words due process does not necessarily bring their thought content into sharp focus. Whether "military due process" is simply the violation label which the Court will paste upon any error which it has already determined "materially prejudices the substantial rights of the accused,"[8] or whether the words possess in their own right some separate specific significance, is an open question which should be put at rest. Some of the considerations involved are presented in this article.

II. DOES THE COURT OF MILITARY APPEALS NEED A "MILITARY DUE PROCESS" CONCEPT TO DISPATCH ITS BUSINESS?

With rare exceptions[9] the business of the United States Court of Military Appeals is to examine records of trial in court-martial cases

6. In Moyer v. Peabody, 212 U.S. 78, 82, 84, 86, 29 Sup. Ct. 235, 53 L. Ed. 410 (1909), the Supreme Court declared: "This is an action brought by the plaintiff in error against the former governor of the State of Colorado, the former adjutant general of the national guard of the same state and a captain of a company of the national guard, for an imprisonment of the plaintiff by them while in office. . . .

"The complaint alleges that the imprisonment was continued from the morning of March 30, 1904, to the afternoon of June 15, and that the defendants justified under the Constitution of Colorado, making the governor commander in chief of the state forces, and giving him power to call them out to execute laws, suppress insurrection, and repel invasion. It alleges that his imprisonment was without probable cause. . . .

"In such a situation we must assume that he had a right, under the state constitution and laws, to call out troops, as was held by the supreme court of the state. The constitution is supplemented by an act providing that 'when an invasion of or insurrection in the state is made or threatened, the governor shall order the national guard to repel or suppress the same.' Laws of 1897, chap. 63, art. 7, sec. 2, p. 204. That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the body of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily (85) for punishment, but are by way of precaution, to prevent the exercise of hostile power. . . .

". . . the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus, summary proceedings suffice for taxes, and executive decisions for exclusion from the country. . . .

". . . the declaration does not disclose a 'suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States.'"

7. Reeves v. Ainsworth, 219 U.S. 296, 304, 31 Sup. Ct. 230, 55 L. Ed. 225 (1911).

8. 50 U.S.C.A. § 646 (1951).

9. Such exceptions normally deal with appellate powers. Representative are

to determine whether they contain reversible error which has not been corrected by action of the convening authority or by a board of review.[10] While the factual situations and legal problems thus presented are widely varied and highly complex the cases as ultimately resolved by the Court fall into five classifications. These are: First, cases in which there is no error except for the absence of substantial evidence to support the findings; Second, cases supported by substantial evidence in which there is no error present; Third, cases supported by substantial evidence in which error is present but is found by the Court to be not materially prejudicial to the substantial rights of the accused; Fourth, cases supported by substantial evidence in which error is present and is found by the Court to be materially prejudicial to the substantial rights of the accused; and Fifth, cases in which the court-martial was without jurisdiction. Cases determined to be in classification two or three must be affirmed, those determined to be in classification one or five must be resolved in favor of the accused,[11] and those determined to be in classification four must be reversed and either remanded for further appropriate proceedings or dismissed.[12] Conceivably situations one, four and five could all exist in a single case.

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the cases of United States v. Martin (No. 51), 1 CMR 82 (U.S.C.M.A. 1951), and United States v. Sonnenschein (No. 8), 1 CMR 64 (U.S.C.M.A. 1951), in which the Court declared itself to be without jurisdiction to entertain the appeals since the Judicial Council had undertaken their appellate determination prior to May 31, 1951, the effective date of the creation of the Court. In United States v. Reeves (No. 453), 3 CMR 122, 126 (U.S.C.M.A. 1952), it was held that "a board of review has the authority, when the application (for reconsideration) is not made by The Judge Advocate General, to reconsider its decision prior to the time a petition for review has been served and filed by an accused, or a certificate by a Judge Advocate General has been filed, or a record of trial in a case involving an automatic appeal has reached this Court." In United States v. Keith (No. 226), 4 CMR 34 (U.S.C.M.A. 1952), where it was necessary to reverse one of two convictions for different offenses and the original sentence imposed was still within the authorized limit for the single offense approved, the Court held it had no authority to determine as a matter of fact the appropriateness of the sentence and remanded the case to the board of review to make this determination. The same technique was used in United States v. Shepard (No. 343), 4 CMR 79 (U.S.C.M.A. 1952).

10. 50 U.S.C.A. § 654 (1951).

11. 50 U. S. C. A. § 654 (1951).

12. 50 U.S.C.A. § 654 (1951). In United States v. James (No. 551), 3 CMR 113 (U.S.C.M.A. 1952), the accused pleaded guilty to failure to obey a lawful order and not guilty to petty theft, was found guilty of both; the finding as to failure to obey was disapproved by the reviewing authority. The Navy Board of Review affirmed without opinion, noting that accused had pleaded guilty to the charge of theft. This moved the Court to take the Navy Board of Review to task in these words, "We are unable to understand this action. The record is perfectly clear that petitioner pleaded not guilty to this charge. There is little excuse for such obvious errors on the part of an appellate reviewing agency where the liberty and reputation of one convicted of a serious crime is at stake." This, and a failure of the president of the special court-martial to instruct on the elements of the offense to which the accused pleaded not guilty, so disturbed the Court that it not only reversed but, exercising its prerogative under Art. 67(e), 50 U.S.C.A. § 654 (1951), dismissed the charge, thus returning to the Navy immune from prosecution a person prima facie guilty of theft. In United States v. Perna (No. 684), 4 CMR 30 (U.S.C.M.A. 1952), also a theft case, the Court goaded by at least five different substantially prejudicial errors committed by a Navy special court-martial simply dismissed the charges

A.

The number of cases reaching the Court which fall into the first group in which the only vice is insufficiency of the evidence is small. Typical of these are *United States v. O'Neal*[13] and *United States v. Shull*,[14] both decided by a divided Court. In the former Air Force case the evidence was found insufficient to sustain a finding of guilty under Article of War 94[15] of making a false writing in furtherance of a claim against the United States. In the latter Army case the evidence was found insufficient to sustain a finding of guilty under Article of War 58[16] of absence without leave with intention to shirk important service. In each case Judge Latimer felt the evidence was sufficient to sustain the findings. These cases present no classification problem. The Court has not discussed due process in these opinions and it seems clear that the familiar doctrine of insufficiency of the evidence is alone adequate for their determination without resort to due process considerations.

B.

The second group of cases, supported by substantial evidence and in which the Court finds no error, is a large one. It embraces two principal situations. In one of these the sole question is the sufficiency of the evidence. The court has experienced considerable difficulty in determining its position as to its powers and limitations in reviewing evidence for sufficiency. Its first pronouncement on the subject was in the *McCrary* case in which Judge Latimer in the majority opinion of a divided Court found the evidence sufficient and held:

> ". . . if there is any substantial evidence in the record to support a conviction an appellate court . . . will not set aside the verdict. . . . In stating this rule we have not overlooked the converse principle that where there is no substantial evidence in the record to sustain the conviction the appellate court will set it aside. . . . [However], this [second] rule neither precludes those tribunals from drawing reasonable inferences from the evidence presented nor does it permit this court to set aside a conviction because we might have inferred differently."[17]

saying, at page 31, "The numerous errors committed . . . render undesirable any further proceedings." It would indeed be most unfortunate if the Court should make it a practice to vent its exasperation at the legal inaptitude of some court-martial personnel by returning suspect thieves to the services cloaked with immunity. Such is not the practice of the federal courts where error, even in flagrant form, is dealt with dispassionately and with due regard for the rights of the Government as well as those of the accused.

13. (No. 25), 2 CMR 44 (U.S.C.M.A. 1952). This case raises the important and interesting question of the quantum of evidence required by the Court to restrain it from reversing for insufficient evidence. Followed in United States v. Horst (No. 822), 4 CMR 44 (U.S.C.M.A. 1952), where conviction for cowardly conduct in the presence of the enemy was reversed for lack of evidence of cowardice.

14. (No. 45), 2 CMR 83 (U.S.C.M.A. 1952).

15. 41 STAT. 805 (1920).

16. 41 STAT. 800 (1920).

17. United States v. McCrary (No. 4), 1 CMR 1, 3-4 (U.S.C.M.A. 1951). Followed in United States v. Goodman (No. 16), 2 CMR 76 (U.S.C.M.A. 1952).

Judge Brosman concurred in this opinion but three months later apparently shifted his view and, writing for the changed majority in the *O'Neal* case, said, "we need not reverse unless we believe that reasonable men would be in accord in holding that a rational hypothesis other than that of guilt may be drawn from the evidence."[18] In a strong dissent Judge Latimer adhered to the position taken in the *McCrary* case.[19] A few days later in the *Shull* case Judge Brosman, again representing the majority of a divided court, wrote:

> ". . . it is clearly allowable that we weigh the evidence for the limited purpose of testing for substance and determining the reasonableness as a matter of law of inferences drawn by the fact-finders. . . . This action [setting aside the finding as based on insufficient evidence] is predicated on the position that the evidence before the court-martial did not permit a determination of the possession of such an intent on the part of the accused beyond a reasonable doubt and within the fair operation of reasonable minds."[20]

Judge Latimer again dissented. Less than a month later the Court achieved judicial harmony on this issue in the *Jacobs* case by saying:

> ". . . we find adequate evidence — the 'substantial evidence' regarded by us as necessary — to support the court-martial's conclusion that petitioner intended to and did in fact participate in the felony here charged. See *United States v. McCrary,* _____U.S.C.M.A._____, decided November 8, 1951; *United States v. O'Neal,* _____U.S.C.M.A._____, decided February 7, 1952; *United States v. Shull,* _____U.S.C.M.A._____, decided February 18, 1952. In the first of these cited cases the following language was used, which is here repeated with approval: [The Court then repeated the exact language from the *McCrary* case, quoted above.]"[21]

This bears all the earmarks of a *sub silentio* strategic retreat from the *O'Neal* case. A month later however in upholding a Navy desertion case the Court through Judge Brosman was still citing the *O'Neal* case:

> "Our inquiry, then, becomes one of whether the complex of evidence in this case permitted a determination, beyond a reasonable doubt and within

18. United States v. O'Neal (No. 25), 2 CMR 44, 54 (U.S.C.M.A. 1952).
19. In United States v. O'Neal (No. 25), 2 CMR 54, 55 (U.S.C.M.A. 1952), Judge Latimer, in dissent, wrote: "In view of the fact that I believe the opinion of the Court announces a rule which permits us to invade the province of the court-martial and weigh the evidence to arrive at a result, or function which Congress specifically denied us, I am compelled to dissent. . . ." And at page 57, "if we held that we can weigh the evidence on scales tilted in favor of the accused then we become the third fact-finding body in the military justice system and legislate into ourselves powers which a fully informed Congress specifically refused to grant." The reference here is to the last sentence of Art. 67(d) of the Code, 50 U.S.C.A. § 654 (1951), which provides, "The Court of Military Appeals shall take action only with respect to matters of law." The view expressed by Judge Latimer appears to possess superior merit.
20. United States v. Shull (No. 45), 2 CMR 83, 86, 89 (U.S.C.M.A. 1952).
21. United States v. Jacobs (No. 152), 2 CMR 115, 118 (U.S.C.M.A. 1952).

> the fair operation of reasonable minds, that the accused, at the inception of, or at some time during his unauthorized absence, possessed the intention permanently to abandon the naval service. See *United States v. O'Neal*, _____U.S.C.M.A._____, decided February 7, 1952; *United States v. Shull*, _____U.S.C.M.A._____, decided February 18, 1952; *United States v. Peterson, supra.* We are convinced that it did."[22]

Judge Latimer pointedly concurred in the result only. Then less than a week later a reconciled and unanimous Court speaking through Judge Latimer in an involuntary manslaughter case opined:

> "We are satisfied that any fair minded person could conclude the accused was guilty of culpable negligence and . . . there was sufficient evidence before the court to permit the members to find his conduct was reckless and in wanton disregard of the rights of the deceased."[23]

No attempt was made to define the required quantum of evidence, but after a careful review of the facts the Court simply stated its ultimate conclusion that the evidence was sufficient. Finally in a murder case we have a unanimous court declaring:

> "It is familiar learning that the guilt of an accused person may be established through circumstantial evidence. It is also recognized that the jurisdiction of this Court extends only to matters of law. See Uniform Code of Military Justice, Article 67(d), 50 U.S.C., Sec. 654. Our task, therefore, is to determine whether the findings of guilty in the case at bar . . . are based on some substantial evidence, as that term has been interpreted by us in previous decisions. We entertain no doubt that they are so based under the test applied in such cases as *United States v. McCrary*, _____U.S.C.M.A._____, decided November 8, 1951, and *United States v. O'Neal*, _____U.S.C.M.A._____, decided February 7, 1952. We are quite unwilling to disturb the findings in the present case."[24]

This magical and belated twinning of the *McCrary* and *O'Neal* cases is possibly an invitation to the military practitioner to take his choice or perhaps a caveat that things have changed and that the talisman has now become "some substantial evidence." This latter test has been applied in holding the evidence sufficient to support a conviction of a civilian employee in Japan for conduct bringing discredit upon the military service,[25] and to support a conviction of assault with a dangerous weapon.[26] That this issue is still in foment is indicated by the fact that in June, 1952, a bill was introduced in the House of Represen-

22. United States v. Ferretti (No. 213), 3 CMR 57, 59 (U.S.C.M.A. 1952). See also United States v. Peterson (No. 199), 3 CMR 51 (U.S.C.M.A. 1952).
23. United States v. Riggleman (No. 195), 3 CMR 70, 75 (U.S.C.M.A. 1952).
24. United States v. Jarvis (No. 94), 3 CMR 102, 105 (U.S.C.M.A. 1952).
25. United States v. Marker (No. 281), 3 CMR 127 (U.S.C.M.A. 1952).
26. United States v. Norton (No. 98), 4 CMR 3 (U.S.C.M.A. 1952). In United States v. Sperland (No. 366), 3 Sept. 1952 (U.S.C.M.A.), the evidence was held sufficient to sustain a conviction of misbehavior before the enemy by running away.

tatives to change Article 67(d) of the Uniform Code of Military Justice to read:

> "In any case reviewed by it, the Court of Military Appeals shall have authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."[27]

Should this become law the Court, within its sphere, will exercise powers not possessed by the Supreme Court of the United States nor other appellate tribunals. The significant fact for our present inquiry is that in none of these cases raising the sufficiency of the evidence has the Court felt any question of due process is involved. Nor has the Court used the term due process in any of these opinions, heavily laden with legal travail though they are.

The other cases falling in group two as being supported by substantial evidence and without error, are usually those in which the issue of the admissibility of a confession has been raised and determined adversely to the accused. In the *Monge* larceny case the Court held admissible a second voluntary confession given eleven hours after a first involuntary statement had been forcibly taken from the accused without warning him of his right against self-incrimination.[28] The court said:

> "If the fact-finders could reasonably conclude that the confession was voluntary, then we must affirm. . . . The question remains one of fact. . . . The relationship between the earlier and later confession is not so close that we must say the facts of the former control the character of the latter."[29]

Appellant further contended that failure to warn him at the time of the second statement that any prior involuntary confession could not be used against him itself required exclusion of the latter statement. The Court in rejecting this contention declared:

> "Congress has specifically required that an accused, before being questioned, must be warned of his right to say nothing and of the fact that anything he says may be used against him at trial. The effect of the defense argument is to require an additional warning, not provided by Congress. We are not disposed to add judicially to the warning deemed adequate by Congress unless there are impelling reasons for so doing. We find none here. . . . While the presence of a warning such as contended for by de-

27. H.R. 8395 reported in JAG Chronicle No. 29, page 125, July 18, 1952. This proposed wording, from "shall" on, is taken verbatim from Art. 66(c) of the Uniform Code which vested this power in boards of review. Congress not only has not conferred such power upon the Court, but in Art. 67(d) expressly provided, "The Court of Military Appeals shall take action only with respect to matters of law."

28. United States v. Monge (No. 9), 2 CMR 1 (U.S.C.M.A. 1952).

29. *Id.* at 4-6.

> fense may well be a factor in deciding that subsequent confessions are, in fact, voluntary, and while we may feel that such a warning is desirable, we cannot conclude that its absence must result in exclusion of a confession."[30]

In the *Sapp* larceny case the court held proper the admission of a second voluntary confession which followed by only four hours a first confession of another offense which had been obtained by coercion.[31] In the *Creamer* case, after finding the record contained substantial independent evidence of the *corpus delicti* of the offense of absence without leave, the Court in these words held a spontaneous confession admissible:

> "It is urged that the original declaration was involuntary because made to a uniformed air policeman, who identified himself as such, and who had not at the time warned the accused of his rights [against self-incrimination] under Article of War 24, *supra*. We are not impressed by these arguments. The testimony of Corporal Lewis that the accused's initial remark was volunteered and unsolicited was . . . wholly uncontradicted. . . . Thus we are required to ask whether an unrequested disclosure freely made during the course of a friendly and aimless conversation by an accused person to one of the same military grade is necessarily inadmissible as involuntary by virtue of the fact that the latter is a member of the military police. We think that it is not."[32]

The Court takes the position that if "the accused fairly possessed, at the time of the confession, 'mental freedom' to confess or to deny participation in the crime charged,"[33] then the confession is admissible. No resort to the language of "due process" has been made by the court in determining confession admissibility cases nor does the application of legal principles other than the normal rules of evidence appear to be required.

C.

The third category of cases in which error is present but is found to be "harmless" is a wide one. Not all error necessitates reversal. Congress has expressly provided that, "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."[34] The Court painstakingly applies this rule to each error which

30. *Id.* at 6.
31. United States v. Sapp (No. 14), 2 CMR 6 (U.S.C.M.A. 1952).
32. United States v. Creamer (No. 179), 3 CMR 1, 7 (U.S.C.M.A. 1952).
33. United States v. Webb (No. 370), 2 CMR 125, 128 (U.S.C.M.A. 1952). In this larcency case it was held that a statement made by the investigating agent in the same conversation in which the accused confessed, but afterwards, to the effect that another person who had confessed had received a relatively light sentence, did not make the confession inadmissible.
34. 50 U.S.C.A. § 646 (1951).

is paraded before it. In a given case if no error is found to be "materially prejudicial" it is affirmed, but if any one error is considered to be "materially prejudicial" to the substantial rights of the accused it is reversed and normally remanded for further proceedings. By way of definition the Court has said, " 'Substantial rights' means not seeming or imaginary, not illusive, but real, solid and firm rights."[35] The following imposing array of situations has already been declared by the Court to constitute error but not materially prejudicial error:

1. The charges were not sworn to as required by Article 30(a) of the Uniform Code.[36]

2. The admission of hearsay evidence, where apart from the hearsay there is ample evidence to support the conviction.[37]

3. The failure of the president of a special court-martial, after a plea of guilty, to instruct the court as to the elements of the offense and failure to vote upon the findings as distinguished from the sentence.[38]

4. The attempt of trial counsel in an embezzlement case to elicit from a government witness testimony concerning a separate offense of absence without leave committed by the accused, to which objection was sustained.[39]

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35. United States v. Lucas (No. 7), 1 CMR 19, 23 (U.S.C.M.A. 1951).

36. United States v. May (No. 241), 2 CMR 80 (U.S.C.M.A. 1952).

37. United States v. Doyle (No. 265), 4 CMR 137, 142 (U.S.C.M.A. 1952); United States v. Flores (No. 75), 1 CMR 42 (U.S.C.M.A. 1951); United States v. Isbell (No. 21), 2 CMR 37 (U.S.C.M.A. 1952). In the latter case at page 43, the Court stated: "We would not permit a finding to stand if it were based solely on hearsay evidence, but when, as here, each finding is based on substantial evidence and at the best the hearsay is either repetitious of the competent evidence, bolstered by cross-examination, fortified in part by defense testimony, or admissible as in exception to the hearsay rule, we cannot say that it prejudiced the defendant within the meaning of Article 59, Uniform Code of Military Justice, 50 USCA Sec. 646, which provides that the finding or sentence of a court-martial shall not be held incorrect on the grounds of an error of law unless the error materially prejudices the substantial rights of the accused. We must place some burden on counsel for the accused to police the record, know the issues, and object to incompetent evidence, unless they believe it to be beneficial. If it can be considered as either favorable or unfavorable and a gamble is taken on its effect, then the accused must accept the consequences." For a case in which the admission of hearsay was held to be prejudicial error see United States v. Kellum (No. 408), 4 CMR 74 (U.S.C.M.A. 1952).

38. See also United States v. Jones (No. 426), 3 CMR 10 (U.S.C.M.A. 1952); United States v. Lucas (No. 7), 1 CMR 19 (U.S.C.M.A. 1951); United States v. O'Brassill (No. 52), 1 CMR 27 (U.S.C.M.A. 1951); United States v. Bishop (No. 37), 1 CMR 29 (U.S.C.M.A. 1951); United States v. Goodrich (No. 36), 1 CMR 26 (U.S.C.M.A. 1951). These were all Navy cases. In the Lucas case, at page 24, the court astutely observed, "An accused is not presumed innocent after he has pleaded guilty."

39. United States v. Valencia (No. 308), 4 CMR 7 (U.S.C.M.A. 1952). The Court said: "Trial counsel is entitled to try a case as he sees it, and it would be ridiculous to argue that he is guilty of misconduct in every instance where an offer of evidence or the answer to a question in [sic] excluded by the law officer. Mistakes of judgment as to the law often occur, and such mistakes do not show an intention to deliberately flout established law in order to persuade the court to convict. The test to be applied must, therefore, have two

5. In a case controlled by the law effective before the Uniform Code of Military Justice in which the accused pleaded guilty where neither trial counsel nor defense counsel were admitted to practice law, the fact that trial counsel held a law degree and defense counsel did not.[40]

6. The appointment of a noncommissioned warrant officer to serve as trial counsel of a Navy special court-martial in which the accused pleaded guilty.[41]

7. The appointment of a noncommissioned warrant gunner as assistant defense counsel in a Navy special court-martial case in which the accused pleaded guilty and in which the assistant defense counsel did not participate.[42]

8. Where the evidence clearly established intent to avoid hazardous service rather than ordinary desertion, and the accused was charged with desertion with intent to avoid hazardous service, the giving of an instruction regarding intent to remain away permanently which is not an element of the offense charged.[43]

9. The admission in evidence of a confession not affirmatively shown to be voluntary.[44]

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branches. First, does the conduct indicate an intent to deliberately disregard the rules of evidence in order to influence the court, and, second, could the improper remarks have reasonably affected the court's deliberations on the findings and sentence? Or, to put it another way, we should reverse only for prejudicial misconduct on the part of the trial counsel. A mere error of judgment will not reach the level of misconduct; the erroneous statement or question may be such as to carry no prejudicial effect; and even if both of these tests are satisfied, there may be convincing evidence of guilt, which would also negate the effect of prejudice." 4 CMR at 10.

40. United States v. Phillips (No. 161), 3 CMR 50 (U.S.C.M.A. 1952).

41. United States v. Goodson (No. 424), 3 CMR 32 (U.S.C.M.A. 1952).

42. United States v. Hutchison (No. 425), 3 CMR 25 (U.S.C.M.A. 1952).

43. United States v. Moynihan (No. 278), 3 CMR 67 (U.S.C.M.A. 1952); United States v. Jenkins (No. 238), 3 CMR 63 (U.S.C.M.A. 1952). See also United States v. Boone (No. 320), 3 CMR 115 (U.S.C.M.A. 1952), in which the accused was charged with and found guilty of ordinary desertion and the court held the giving of instructions which also covered desertion to avoid hazardous duty and to shirk important service, was, under the evidence of that case, nonprejudicial error. At page 119, the Court said: "Because of the lack of evidence to support an inference of intent to shirk important service or avoid hazardous duty and the preponderance of evidence upon which to base an inference of intent to abandon the service, we believe this case falls within the rule announced in United States v. Jenkins, *supra,* and United States v. Moynihan, *supra.*"

44. United States v. Doyle (No. 265), 4 CMR 137 (U.S.C.M.A. 1952). The Court stated: "We are not here called upon to decide whether the improper reception in evidence of an involuntary confession will vitiate the proceedings regardless of other compelling evidence of guilt. Here, there is no indication that the confession was actually involuntary. The policy considerations which have led some courts to reverse convictions solely because of the use of involuntary confessions in evidence has no application here. We are aware of no similar policy consideration which requires that a failure to follow the prescribed procedure in introducing confessions should be, *per se,* fatal to the proceedings. In such a case, it is appropriate that we should be bound by the rule which prohibits reversal for error unless it is substantially prejudicial to the accused. Here, there is other and convincing proof of guilt." 4 CMR at 142.

10. Where the accuser also served as trial counsel.[45]

11. The imposing of a sentence reading, "to forfeit two-thirds pay per month for two months" instead of in specific terms of dollars and cents.[46]

12. Failure to afford defense counsel a formal opportunity for inspection of service record entries of previous convictions before their admission in evidence.[47]

The foregoing are representative examples of nonprejudicial error.

In at least one case the Court has held, by a two-to-one decision, that prejudicial error committed by a court-martial in considering evidence of a previous conviction which the law officer had erroneously excluded was purged by subsequent substantial reductions in the period of confinement by both the convening authority and the board of review.[48] The fact that the prior conviction in question was as a matter of law properly admissible perhaps influenced the Court considerably in this case.

The Court in its unanimous decision in the *Jenkins* case has well stated its approach to the problem of error:

> "Having determined that error is present, we are compelled to test the record for prejudice as Congress has decreed that we shall not reverse a finding of guilty for an error of law unless it prejudicially affects the substantial rights of petitioner. See Article 59(a), Uniform Code of Military Justice, 50 U.S.C. Sec. 646. In each previous desertion case involving the same error in instructions we have analyzed the facts to determine whether the impact of the error would in any way influence the court to the prejudice of the accused. Because in the previous cases the evidence on each type of intent was substantial and almost in equipoise, we concluded it was probable that reasonable men might be led to render a finding on an element of intent not framed by the specification and that a fair risk of substantial prejudice was present. In this instance, we arrive at a contrary conclusion.
>
> "While we desire to protect adequately the rights of an accused, we can not found prejudice on every inaccuracy in instructions. Technical errors and minor irregularities will creep into the trial of law suits and appellate courts can not administer justice fairly by failing to appreciate that the trial of criminal cases is a practical business, which can not be carried on with perfection. The best we can do is to place our stamp of disapproval

45. In United States v. Lee (No. 200), 2 CMR 118, 124 (U.S.C.M.A. 1952), the Court ruled, "The inquiry conducted by the accuser here did not constitute him an investigating officer and thus disqualified him."

46. United States v. Gilgallon (No. 286), 2 CMR 170 (U.S.C.M.A. 1952). The Court here reversed a Navy Board of Review.

47. United States v. Castillo (No. 449), 3 CMR 86 (U.S.C.M.A. 1952). In reversing a Navy Board of Review the Court said, at page 91, "At most a procedural irregularity transpired, which could have been rectified immediately upon application."

48. United States v. Jones (No. 79), 3 CMR 36 (U.S.C.M.A. 1952).

on the error and then affirm only those cases where the irregularity does not touch the merits of the findings."[49]

Another illuminating statement of the Court's thinking on this point is found in the *Lee* case:

"It is clear, however, that Article 59(a), as well as other similar Federal and State legislation, grew out of a widespread and deep conviction concerning the general course of review in American criminal cases, and the fear that our appellate courts in criminal cases had become in truth 'impregnable citadels of technicality.' See *Kotteakos v. United States,* 328 U.S. 750, 759-760, notes 11-14. The object of 'harmless error' legislation, we are told by Mr. Justice Rutledge in the *Kotteakos* case *supra,* is: 'To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record' [p. 760]."[50]

The Court has served notice on counsel that timely objection must be made to the admission of evidence. In the *Masusock* case it said:

". . . before this court will review an assignment of error based on the inadmissibility of evidence, where it clearly appears that the defense understood its right to object, except in those instances of manifest miscarriage of justice, there must be an appropriate objection or protest lodged before the trial court so that the court and opposing counsel will be put on notice that the admissibility is in dispute. Otherwise we will consider the objection waived. See paragraph 154d, Manual for Courts-Martial 1951. It should be apparent that to hold otherwise would result in an inefficient appellate system, interminable delays in the final disposition of cases, and careless trial representation."[51]

D.

In transition from group three to group four in this analysis of the business of the Court it may be appropriate to observe that error as it comes to the Court is initially a single undifferentiated pool. Not so limpid perhaps as that located in Yellowstone Park balanced on the continental divide, but akin to it in that from the single bosom of the latter one part flows to the Pacific and the other to the Mississippi, while from the error pool the Court directs one stream through the nonprejudicial or harmless channel to the sea of Affirmed and the other through the prejudicial channel to the sea of Reversed.

Among errors which the Court has found to be prejudicial are the following:

49. United States v. Jenkins (No. 238), 3 CMR 63, 65, 66 (U.S.C.M.A. 1952).
50. United States v. Lee (No. 200), 2 CMR 118, 122 (U.S.C.M.A. 1952).
51. United States v. Masusock (No. 15), 1 CMR 32, 34 (U.S.C.M.A. 1951).

1. Failure to put in evidence the record of two previous convictions where such previous convictions are essential to the validity of the sentence imposed. "That an excessive sentence is prejudicial is apparent."[52]

2. The refusal of the law officer in a rape case to grant the accused a continuance to obtain another witness, an interpreter, requested because of asserted surprise resulting from the exclusion of certain hearsay evidence regarding fresh complaint sought to be elicited from a witness who received the complaint through the interpreter.[53]

3. The exclusion of a dying declaration offered in evidence in behalf of the accused in a murder case.[54]

4. The admission in evidence in a sodomy case of testimony by the victim's mother as to the details told to her shortly after the event by the four-year-old twin brother of the victim. With this evidence excluded it was then prejudicial error to admit the accused's confession since no valid evidence remained tending to establish the *corpus delicti*.[55]

5. The proof before findings of prior offenses entirely unrelated to the offenses charged, and reference to other offenses not charged.[56]

6. Where the accused had burglarized the residence of two general officers, for one general to act as convening and reviewing authority in the case based upon the burglarly of the residence of the other general.[57]

7. The failure of the president of a Navy special court-martial to

52. United States v. Townsend (No. 597), June 23, 1952, 4 CMR 33 (U.S.C.M.A. 1952); United States v. Deweese (No. 633), 3 CMR 134 (U.S.C.M.A. 1952); United States v. Pruchniewski (No. 489), 3 CMR 62 (U.S.C.M.A. 1952); United States v. Hand (No. 450) 3 CMR 35 (U.S.C.M.A. 1952); United States v. Adams (No. 452), 3 CMR 9 (U.S.C.M.A. 1952); United States v. Schabel (No. 440), 3 CMR 9 (U.S.C.M.A. 1952); United States v. Trimiar (No. 413), 2 CMR 169 (U.S.C.M.A. 1952); United States v. Zimmerman (No. 261), 2 CMR 66 (U.S.C.M.A. 1952); United States v. Carter (No. 159), 2 CMR 14, 20 (U.S.C.M.A. 1952). These are all Navy cases.

53. United States v. Plummer (No. 235), 3 CMR 107 (U.S.C.M.A. 1952). Judge Latimer dissenting, said at page 113, "I would not scrutinize diligence so closely if the record showed substantial prejudice to the accused, but it does not. Prejudice ties in with the factor that accused must show the evidence was necessary for a just determination of the cause. The burden to establish both is on accused."

54. United States v. De Carlo (No. 32), 1 CMR 90 (U.S.C.M.A. 1951).

55. United States v. Mounts (No. 73), 2 CMR 20 (U.S.C.M.A. 1952).

56. United States v. Yerger (No. 122), 3 CMR 22 (U.S.C.M.A. 1952). The Court reversed the Coast Guard Board of Review and returned the record to the General Counsel for the Treasury Department for further proceedings.

57. United States v. Gordon (No. 258), 2 CMR 161 (U.S.C.M.A. 1952). At page 157 the Court stated, "the test should be whether the appointing authority was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter." The Court disposed of the case on the ground of prejudicial error, rather than jurisdiction.

instruct as to the presumption of innocence, burden of proof and the elements of an offense to which the accused had pleaded not guilty.[58]

8. The failure to instruct as to the elements of a lesser included offense where the evidence tended to establish guilt of the lesser included offense.[59]

9. The failure to instruct as to the elements of murder where accused was charged with the offense of assault with intent to commit murder.[60]

10. Where the accused, in Korea, was charged only with ordinary desertion, the giving of instructions which included the elements of desertion to avoid hazardous duty and to shirk important service, in a case where the evidence might have established any of the three of-

58. United States v. Clay (No. 49), 1 CMR 74, 81 (U.S.C.M.A. 1951). Although the square holding was that this failure to instruct was "error materially prejudicial to the substantial rights of the accused," this is the first opinion in which the Court discussed military due process. This aspect of the case will be considered later. The *Clay* case has been followed as to failure to instruct in United States v. Shepard (No. 343), 4 CMR 79 (U.S.C.M.A. 1952), and United States v. Keith (No. 226), 4 CMR 34 (U.S.C.M.A. 1952). In United States v. Rhoden (No. 153), 2 CMR 99 (U.S.C.M.A. 1952), the Court reversed for prejudicial error where the instructions given adequately covered only the elements of lesser included offenses and omitted necessary elements of the greater offenses of which accused was both charged and convicted. No objection was interposed on behalf of the accused at the time of trial.

59. United States v. Williams (No. 251), 2 CMR 137 (U.S.C.M.A. 1952). Accused was charged with assault with intent to commit murder and no instruction was given as to the elements of the offense of assault with a dangerous weapon. Followed in United States v. Avery (No. 809), 4 CMR 125 (U.S.C.M.A. 1952), and United States v. Drew (No. 422), 4 CMR 63 (U.S.C.M.A. 1952). Also United States v. Clark (No. 190), 2 CMR 107 (U.S.C.M.A. 1952), in which the accused, charged with voluntary manslaughter, was found guilty of negligent homicide and no instruction was given as to the elements of negligent homicide. Judge Quinn dissented, saying that the name of the crime of negligent homicide supplies its own definition. The majority, at pages 111 and 112, said: "Correct procedure under military law requires that, unless the evidence excludes any reasonable inference that a lesser crime was committed, the duty of the law officer is to carve out instructions covering the offense. He is the judge in the military system and he must furnish to the court the legal framework of all offenses which the evidence tends to establish. Unless he does so the accused has been denied a right which we conclude was granted by Congress and error as a matter of law follows." See, however, United States v. Ginn (No. 263), 4 CMR 45 (U.S.C.M.A. 1952), where the accused was charged with premeditated murder but was found guilty of voluntary manslaughter. The evidence did not raise the issue of self-defense and no instruction on self-defense was requested by defense counsel. The evidence supported the charge of murder and not the finding of voluntary manslaughter. In this case it was held not error not to have instructed on self-defense nor on the elements of the lesser included offense of voluntary manslaughter. See also, United States v. Quisenberry (No. 329), 9 Sept. 1952 (U.S.C.M.A., where the accused was charged with and convicted of unpremeditated murder, and under the facts of the case the absence of the instructions as to the elements of lesser included offenses was held not to be error.

60. United States v. Williams (No. 251), 2 CMR 137, 141 (U.S.C.M.A. 1952). See also United States v. Drew (No. 422), 4 CMR 63 (U.S.C.M.A. 1952), and United States v. Banks (No. 382), 4 CMR 71 (U.S.C.M.A.).

fenses. This result was reached even though no objection was made to the instruction at the trial.[61]

The *ratio decidendi* of all these cases was the presence of error materially prejudicial to the substantial rights of the accused which necessitated reversal.

E.

The fifth group of cases into which the business of the Court falls are those in which attack is made upon the jurisdiction of the court-martial. If jurisdiction is lacking the entire proceeding falls. The question of jurisdiction may, of course, be raised at any stage of the proceeding including appeal. Furthermore, jurisdiction is the sole aspect of a court-martial proceeding which may be considered in the regular federal courts and this only by way of collateral attack in a habeas corpus proceeding,[62] and then only after all military remedies of appeal and motion for new trial have first been exhausted.[63] The Supreme Court of the United States has succinctly stated court-martial jurisdictional requisites in these words:

> "The single inquiry, the test, is jurisdiction. . . . In this case the court-martial had jurisdiction of the person of accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decisions."[64]

The question of whether the court-martial was duly constituted, *i.e.*, "acted within its lawful powers," was before the Court in the following five cases. In the *Merritt* case,[65] the accused was brought to trial on June 6, 1951, before a summary court convened under the old Articles for the Government of the Navy and not in accordance with the requirements for a special court-martial, its successor, as set forth in the Uniform Code of Military Justice which became effective May 31,

61. United States v. R. L. Williams (No. 133), 2 CMR 92 (U.S.C.M.A. 1952). At page 94 the Court declared, "When a substantial right is denied we will not speculate as to the extent of the damage done. . . ." At page 95, the court said, "We cannot emphasize too strongly the necessity of objection at the proper time." To the same effect, on the instruction issue, see United States v. Justice (No. 1106), 28 Aug. 1952 (U.S.C.M.A.; United States v. Shepard (No. 343), 4 CMR 79 (U.S.C.M.A. 1952); United States v. Goddard (No. 331), 4 CMR 67 (U.S.C.M.A. 1952); United States v. Hemp (No. 290), 3 CMR 14 (U.S.C.M.A. 1952).

62. Hiatt v. Brown, 339 U.S. 103, 111, 70 Sup. Ct. 495, 94 L. Ed. 691 *rehearing denied*, 339 U.S. 939 (1950); *Ex parte* Reed, 100 U.S. 13, 23, 25 L. Ed. 538 (1879). For a detailed discussion of military habeas corpus see Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493-528 & 699-722 (1951). Footnote 210 thereof, at page 714, collects the Supreme Court authority on this point.

63. Gusick v. Schilder, 340 U.S. 128, 132-33, 71 Sup. Ct. 149, 95 L. Ed. 146 (1950).

64. Hiatt v. Brown, 339 U.S. 103, 111, 70 Sup. Ct. 495, 94 L. Ed. 691, *rehearing denied*, 339 U.S. 939 (1950).

65. United States v. Merritt (No. 53), 1 CMR 56, 63 (U.S.C.M.A. 1951).

1951. The Court held the Naval summary court was without jurisdiction. This situation was peculiar to the change-over period and presumably will not arise again.

In the *Emerson* case,[66] charges against the accused were referred for trial by indorsement to Navy special court "A". The case was in fact tried by special court "B", an entirely different court, convened however by the same convening authority. The Court held this procedural irregularity in bringing the case before the special court-martial did not divest it of jurisdiction.

In the *Hutchison* case,[67] the Court held that where the appointed assistant defense counsel of a Navy special court was a noncommissioned warrant gunner and thus not an officer as defined by Article 1(5) of the Uniform Code of Military Justice,[68] this did not operate to deprive the Court of jurisdiction and that if it did constitute procedural error it was harmless.[69] The question before the Court in the *Goodson* case[70] was whether the appointment of a noncommissioned warrant officer pay clerk, not an officer within the meaning of the Code, as trial counsel of a Navy special court-martial deprived it of jurisdiction. The Court answered this in the negative.[71]

The two joint accused in the *LaGrange* case[72] were hospitalmen as-

66. United States v. Emerson (No. 77), 1 CMR 43 (U.S.C.M.A. 1951).
67. United States v. Hutchison (No. 425), 3 CMR 25 (U.S.C.M.A. 1952).
68. 50 U.S.C.A. § 551 (1951).
69. United States v. Hutchison (No. 425), 3 CMR 25 (U.S.C.M.A. 1952). At pages 26 and 27, the Court in reversing a Navy Board of Review held: "Congress has not . . . conferred upon an accused an explicit and absolute right to have any assistant defense counsel appointed, nor to have such counsel, if appointed, be an officer. This case presents, therefore, no violation of a statutory right. Congress has laid out in the Uniform Code of Military Justice the framework within which military courts-martial must function, and a court must step outside that framework before it will lose jurisdiction already properly acquired under the statute. . . .

"'The 70th Article of War does not give the right of counsel to the person under investigation. Hence no jurisdictional defect can be claimed under a contention that a court-martial is not a court of general jurisdiction (Cf. Dynes v. Hoover, 20 How. 65, 80, 15 L. Ed. 838), but is a special proceeding requiring that compliance with each step in its attaining its jurisdiction must be shown.'

"There is here no violation of a mandatory requirement of the Code, and therefore no jurisdictional defect. . . . Even assuming that the appointment of Warrant Officer Chew constituted error, we fail to see how this error in any way harmed the accused."
70. United States v. Goodson (No. 424), 3 CMR 32 (U.S.C.M.A. 1952).
71. United States v. Goodson (No. 424), 3 CMR 32 (U.S.C.M.A. 1952). At pages 34 and 35, the Court said: "Congress did not intend to make otherwise valid court-martial judgments wholly void merely because of a technical noncompliance with a provision of the Code which is not an 'indispensable prerequisite' to concepts of military justice and a fair trial.

"Even though the defect we are considering is not jurisdictional . . . error was committed by the appointment of a noncommissioned warrant officer as trial counsel. Paragraph 6 of the Manual prohibits this action. As we have constantly reiterated, it is not every error which will cause reversal — prejudice must be shown. It is difficult to see how an accused in any case could be harmed by a noncommissioned warrant officer serving as counsel for the Government."
72. United States v. LaGrange and Clay (No. 313), 3 CMR 76 (U.S.C.M.A. 1952).

signed to the USS Haven. The commander of this ship, a Navy captain, personally formally accused them of violation of ship regulations in misusing drugs and forwarded the charges to his superior, the Commander of Naval Forces, Far East, who in turn referred the charges for trial to a naval base at Pusan, Korea, commanded by a Navy commander. The Court held under these circumstances that this special court was without jurisdiction since an officer junior to the accuser and one not in the normal chain of command did not have authority to appoint it. "Congress intended that if an officer authorized to convene a court is disqualified, a superior must assume the responsibility and convene the court."[73] The jurisdictional question in all of these cases was whether the court was duly constituted.

The issue of jurisdiction of the person was presented in the *Marker* case,[74] in which the accused was a GS-11 civilian employee of the Army in Japan convicted under Article of War 96 of conduct of a nature to bring discredit upon the military service by exacting substantial gifts from Japanese employees subordinate to him. The Court held the accused was "accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States" and so subject to court-martial jurisdiction under Article of War 2(d).[75]

Jurisdiction of the offenses was challenged in the *Snyder* case,[76] where the accused marine contended that his actions in attempting three times on a base to entice others to engage in intercourse with a female and of bringing her into a barracks in violation of a general order constituted no violation of the Uniform Code of Military Justice. The Court held the former to be an offense under Article 134[77] and the latter an offense under Article 92[78] and that each was supported by the evidence.

The final facet of jurisdiction was before the Court in *Carter*[79] and its companion cases[80] in which, due to erroneous consideration of prior convictions not properly in evidence, sentences including bad-conduct discharges were imposed where the court-martial only had jurisdiction

73. United States v. LaGrange and Clay (No. 313), 3 CMR 76, 79 (U.S.C.M.A. 1952).
74. United States v. Marker (No. 281), 3 CMR 127 (U.S.C.M.A. 1952).
75. 41 STAT. 787 (1920).
76. United States v. Snyder (No. 409), 4 CMR 15 (U.S.C.M.A. 1952). Cited with approval in United States v. Herndon (No. 570), 4 CMR 53 (U.S.C.M.A. 1952), where the Court held that a specification reading, "In that, George H. Herndon, lieutenant, junior grade, U.S. Navy . . . Yokosuka, Japan, did, at said station, on or about 23 July 1951, unlawfully receive about two hundred (200) pounds of coffee, of a value of about $140.00, the property of the United States Government, which property, as he, the said Herndon, then well knew, had been stolen. . . ." stated a disorder and neglect to the prejudice of good order and discipline in violation of Article 134, 50 U.S.C.A. § 728 (1951). See also United States v. Wade (No. 586), 4 CMR 51 (U.S.C.M.A. 1952).
77. 50 U.S.C.A. § 728 (1951).
78. 50 U.S.C.A. § 686 (1951).
79. United States v. Carter (No. 159), 2 CMR 14 (U.S.C.M.A. 1952).
80. Collected in footnote 52, *supra*.

to impose three days confinement and forfeiture of two-thirds pay for a like period for each day of the short unauthorized absence with which the accused were charged. As to that portion of a sentence imposed in excess of the maximum authorized by law a court is without jurisdiction.[81] In these cases the Court did not discuss lack of jurisdiction but contented itself with finding that the erroneous consideration of the prior convictions was prejudicial.

The preceding sampling of the business of the Court of Military Appeals is by no means exhaustive of the specific questions that have arisen, and will hereafter arise, but it is broad enough to establish the pattern made by the impact of that business. In this litigation the Court did not find it necessary to resort to due process considerations to reach a just result. The sturdy baskets labeled "insufficient evidence," "substantial evidence," "harmless error," "materially prejudicial error" and "with or without jurisdiction" served adequately to carry off these cases to their proper destinations. The question remains, is a "military due process" basket required?

III. "MILITARY DUE PROCESS" AS DEFINED BY THE COURT OF MILITARY APPEALS

The case chosen by the Court for its initial excursion into the field of due process was one in which a sailor named Clay was charged with wearing an improper uniform and with disorder.[82] To the first charge Clay pleaded guilty, to the second, not guilty. The president of the special court-martial failed to instruct at all as to the elements of the offense of disorder or as to the presumption of innocence or the burden of proof. Conviction followed, which was affirmed by the board of review and reversed by the Court. The Court, very properly, expressly found this failure to instruct constituted error materially prejudicial to the substantial rights of the accused.[83] Having done so it was its duty to reverse.[84] The Court was not content, however, to do this and no more. Perhaps having in mind the justice of the peace commissions which gave rise to *Marbury v. Madison*[85] and feeling that no set of facts is too trivial to provide the vehicle for expounding a judicial doctrine, it elected in this typical police court case to state, by way of dicta, its views regarding military due process. Since these views are the focal point of this discussion it is appropriate to set them forth at length.

> "There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be ob-

81. See *Ex parte* Reed, 100 U.S. 13, 23, 25 L. Ed. 538 (1879).
82. United States v. Clay (No. 49), 1 CMR 74 (U.S.C.M.A. 1951).
83. *Ibid.*
84. 50 U.S.C.A. § 646 (1951).
85. 1 Cranch 137, 2 L. Ed. 60 (U.S. 1803).

served in the trials of military offenses. Some of these are more important than others, but all are of sufficient importance to be a significant part of military law. We conceive these rights to mold into a pattern similar to that developed in Federal civilian cases. For lack of a more descriptive phrase, we label the pattern as 'military due process' and then point up the minimum standards which are the framework for this concept and which must be met before the accused can be legally convicted. The Uniform Code of Military Justice, *supra,* contemplates that he be given a fair trial and it commands us to see that the proceedings in the courts below reach that standard.

"Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, *we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress.* But, this does not mean that we can not give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other Federal Statutes.

"A cursory inspection of the Uniform Code of Military Justice, *supra,* discloses that Congress granted to an accused the following rights which parallel those accorded to defendants in civilian courts; to be informed of the charges against him; to be confronted by witnesses testifying against him; to cross-examine witnesses for the Government; to challenge members of the court for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the court instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review.

"By mentioning the foregoing rights and benefits, we have not intended to make the list all-inclusive, nor to imply others might not be substantial. We have merely enumerated those which are of such importance as to be readily catalogued in that category. In addition, *we disclaim any intent to classify these as jurisdictional or nonjurisdictional. 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.

"Previously adjudicated Federal court cases are a source from which we can test the *prejudicial effect* of denying an accused the rights we have set out as our pattern of 'military due process.'

"*True, we need not concern ourselves with the constitutional concepts,* but if the denial of these benefits to a defendant is of sufficient importance to justify a civilian court in holding that it denied him due process, it should be apparent to a casual reader that denial of a similar right granted by Congress to an accussed in the military service constitutes a violation of military due process. By adopting these principles we impose upon

military courts the duty of jealously safeguarding those rights which Congress has decreed are an integral part of military due process.

"Aside from the constitutional due process concept threading its way through Federal cases, *we find Federal appellate courts passing directly on the prejudicial error of failure of trial judges properly to instruct a jury.*

"It was for Congress to set the rules governing military trials. It legislated on the subject and not without adequate consideration. We are not concerned with the wisdom of the enactment, but we might suggest that there are many reasons which may have prompted Congress to demand that instructions be given to members of courts-martial. . . .

"We cannot better set out reasons why the error materially prejudiced the substantial rights of the accused than did Mr. Justice Frankfurter in the case of *Bruno v. United States,* 308 U.S. 297. Speaking for the Court, he stated (pp. 293-294):

" 'A subsidiary question remains for determination. It derives from the Act of February 26, 1919, 40 Stat. 1181, 28 U.S.C. Sec. 391, whereby appellate courts are under duty in criminal as well as civil cases to disregard 'technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' Is the disregard of the right which Congress gave to Bruno an error, the commission of which we may disregard? We hold not. It would be idle to predetermine the scope of such remedial provision as Sec. 391 by anticipating the myriad varieties of rulings made in trials and attempting an abstract, inclusive definition of 'technical errors.' Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him.'

"What we have previously stated goes with like effect to the failure of the court to instruct on the presumption of innocence and the burden of proof. We are not impressed with the argument made by the board of review that it was clothed with authority to determine the sufficiency of the evidence and that it found the failure to instruct was not prejudicial because the evidence overcame the presumptions of innocence; that the elements were established beyond a reasonable doubt; and that it was satisfied the court or the board of review could not have made a finding other than that of guilty. Assuming without deciding that the evidence compels such a finding, we are, nevertheless, required to hold the error materially prejudiced the substantial rights of the accused, for the reason that we can not say one of the historic cornerstones of our system of civil jurisprudence is merely a formality of military procedure. If Congress specifically grants what it considers to be a substantial right, we cannot deny the authoritative requirement by refusing to recognize it. . . .

"In applying the concepts we have discussed to this case we find the trial of the accused far short of what is deemed essential to military justice. In the final analysis, the record as a whole convinces us that the accused was denied those necessary elements of military due process by which *Congress* sough to protect him."[86]

86. United States v. Clay (No. 49), 1 CMR 74, 77-82 (U.S.C.M.A. 1951) (italics added).

A moment's reflection discloses that, by its own analysis, the due process of which the Court speaks is not that of the due process clause of the Fifth Amendment nor is it constitutional due process at all. Rather, it derives solely from the laws enacted by Congress and all of its component requisites are to be found by an inspection of the provisions of the Uniform Code of Military Justice. The absence of one or more of these components is not necessarily jurisdictional and such absence can be adequately dealt with by the Court exercising its power to reverse for errors of law which materially prejudice the substantial rights of the accused. The Court relies on the quotation from the *Bruno* case[87] in which Mr. Justice Frankfurter was concerned with the difference between technical error and prejudicial error and not at all with due process. From the *Clay* opinion there emerges our old friend, prejudicial error. Significantly, whereas Congress, in fashioning the Uniform Code of Military Justice, did not once use the words "due process" it most emphatically did say in Article 59 (a) "A finding or sentence . . . shall not be held incorrect . . . unless the error materially prejudices the substantial rights of the accused."

The next appearance of the term due process was again in the roll of dictum. In the *Davis* case,[88] tried before the effective date of the Uniform Code of Military Justice, none of the counsel were members of the bar and the record contained no affirmative statement that no officers so qualified were available. The Court rejected the contention that the absence of such a statement was fatal error, resting its decision on *Hiatt v. Brown*[89] and *Whelchel v. McDonald*,[90] two Supreme Court habeas corpus cases which had squarely held that the absence of an affirmative showing of nonavailability presented no jurisdictional defect. The Court of Military Appeals said:

> "It is recognized, of course, that the Federal authorities referred to in foregoing paragraphs were concerned with questions of jurisdiction, while we are not limited to review of this nature. It is certainly true in the present case that, without holding the court-martial to have been without jurisdiction to try Davis, it is legally and logically open to us to conclude that the failure of the record to reflect affirmatively the unavailability of lawyers under Article of War 11, 10 U.S.C.A., Sec. 1482, is reversible error. However, we are unwilling to do this."[91]

Having thus disposed of the only issue raised by the case, one which can no longer arise under the Uniform Code of Military Justice, the

87. Bruno v. United States, 308 U.S. 287, 293, 294, 60 Sup. Ct. 198, 84 L. Ed. 257 (1939).
88. United States v. Davis (No. 29), 2 CMR 8 (U.S.C.M.A. 1952).
89. 339 U.S. 103, 70 Sup. Ct. 495, 94 L. Ed. 691, *rehearing denied*, 339 U.S. 939 (1950).
90. 340 U.S. 122 at 126; 71 Sup. Ct. 146, 95 L. Ed. 141 (1950).
91. United States v. Davis (No. 29), 2 CMR 8, 13 (U.S.C.M.A. 1952).

Court, apparently by way of afterthought, in the last paragraph of its opinion declared:

> "Apart from the matters dealt with in preceding paragraphs, it should be said that we find no substantial evidence of neglect of the interests of the accused by defense counsel — much less that arising to the level of a denial of due process. Indeed, appellant's case has been presented to us solely on the basis of the general considerations discussed, and no slightest suggestion of specific neglect has been made."[92]

Under these circumstances this casual use of the term adds little to the literature of due process.

The third dictum use of the term military due process was in the *Carter* case in which trial counsel had read to the court-martial detailed information concerning two previous convictions of the accused without ever placing this data in evidence. In reversing, the Court used this language:

> "The question of prejudice can be disposed of with little comment. If, as we hold, the accused neither waived his right to assign insufficiency of the evidence as error, nor stipulated that the statement made by trial counsel could be considered as evidence of the previous convictions, then it follows that the sentence exceeds the limits permitted by the Manual. That an excessive sentence is prejudicial is apparent.
>
> "Our attention has been called to several service cases which have directly or indirectly considered this question. Without reviewing them in detail, we believe the rationale expressed in the case of *United States v. Arizona* (ACM S-1681), 1 CMR_____, of October 5, 1951, is more consistent with our views of military due process and trial procedure."[93]

Here the court found prejudicial error and proceeded to speak of military due process as roughly synonymous to proper trial procedure. The finding of prejudicial error alone had fully disposed of the case.

In the *Bartholomew* case[94] tried under the 1948 Articles of War, the Court affirmed a conviction of voluntary manslaughter. The principal ground upon which reversal was urged was that while neither counsel was a lawyer the trial judge advocate held a law degree and defense counsel had no formal legal training. In disposing of this contention the Court declared:

> "A clear violation of the express terms of Article of War 11 would certainly raise serious questions of military due process, if not of jurisdiction. Cf. *United States* v. *Clay*, ———USCMA———, decided November 27, 1951; *United States* v. *Berry*, ———USCMA———, decided March 18, 1952; *United States* v. *Bound*, ———USCMA———, decided March 13, 1952; *United States* v. *Lee*, ———USCMA———, decided March

92. *Id.* at 14.
93. United States v. Carter (No. 159), 2 CMR 14, 20 (U.S.C.M.A. 1952).
94. United States v. Bartholomew (No. 166), 3 CMR 41 (U.S.C.M.A. 1952).

13, 1952. We have, however, been reminded that 'courts sit as well to convict the guilty as to acquit the innocent, and complaint alone, without a showing that a fair trial has been denied, will not support a reversal.' *Couchois* v. *United States,* 142 F. 2d 1, 2 (C.A. 5th Cir.). Congress has implicitly recognized, through the Article of War so frequently cited herein, that an accused person may obtain adequate representation by a nonlawyer. Indeed, line officers have long been permitted to defend such persons before military courts-martial. *This background is persuasive that prejudice cannot be inferred solely from the fact that the prosecutor was legally trained, whereas defense counsel was not.* In view of these factors, and recalling that we find here at least a literal and technical compliance with the command of Congress, it is appropriate that we should scan the record to determine whether the accused's want of legally-trained counsel materially prejudiced him in this case. . . .

"After a painstaking search of the entire record, we find nothing whatever which would indicate that the accused was not accorded full, fair, and competent representation by his counsel. This being the case we can not at all say that he was materially prejudiced in any substantial right."[95]

Once more the reference to military due process is pure dictum. Again the Court based its decision on the absence of material prejudice and inferred that before there can be a want of military due process there must be a finding of prejudicial error.

The *Welch* case, the latest to evoke military due process language, was one in which the accused, a lieutenant, was convicted under Article of War 95 of cheating on an examination. In reversing, the majority opinion of the Court contained this statement:

"At the outset of the investigation, the officer conducting it did not fully advise petitioner of his rights under Article of War 24, *supra.* This was a clear violation of that Article. Nor did he advise petitioner of the nature of the investigation, or of the charges against him. This officer then conducted a searching and inquisitorial examination, utilizing all the devices of an expert prosecutor cross-examining a hostile witness, accompanied by shouting, accusations of falsehood, reprimands, and castigations of character. All these factors inevitably lead to the conclusion that petitioner was, in effect, compelled to incriminate himself. This smacks too much of Star Chamber proceedings. Petitioner did not have a free choice to admit or deny his guilt or to refuse to answer the questions asked.

"It follows automatically that the testimony given at this investigation should not have been received in evidence at the trial. Article of War 24, *supra,* and Article 31 of the Uniform Code of Military Justice, 50 U.S.C. Sec. 602, so command. Further, it matters not that there may be other evidence of guilt. The right here violated flows, through Congressional enactment, from the Constitution of the United States. Military due process requires that courts-martial be conducted not in violation of these constitutional safeguards which Congress has seen fit to accord to members of the Armed Forces, *United States v. Clay,* _____USCMA_____, decided November 27, 1951. These safeguards are for the protection of all who are brought within the military disciplinary system, and are not to be disre-

95. *Id.* at 45.

> garded merely in order to inflict punishment on one who is believed to be guilty."[96]

The majority here indicated that so far as military justice is concerned constitutional benefits are switched on and off by the legislative action of Congress. Technically, this differs from the position taken by the Court in the *Clay* opinion that military due process derives not at all from the Constitution but solely from Congress. Practically the result is the same under either concept since without the affirmative action of Congress no right exists. Judge Latimer, who authored the extended discussion of due process in *Clay* felt it necessary in *Welch* to file a separate concurring opinion setting forth reservations. He said:

> "I concur in the result. I do not concur outright because I have certain reservations concerning some of the concepts developed in the Court's opinion and, therefore, prefer to base my reversal on different grounds. . . .
>
> ". . . the provisions of both the Articles of War and the paragraph from the Manual . . . were violated. . . . Accordingly, the ruling of the law member in admitting the statement in evidence was error as a matter of law. This, then, poses the question of whether the error was prejudical. . . .
>
> "One fundamental difference between civilian practice and military practice which is of importance in this instance is that in the former the jury does not ordinarily sentence the defendant, while in the military system the members of the court-martial do. In testing prejudice in military tribunals consideration must be given to the probable impact on the minds of the members of the court both as to the findings and the sentence; and if the error itself substantially influenced the court, or if there is grave doubt as to its prejudicial effect, the findings and sentence should not be permitted to stand. . . .
>
> "Keeping in mind the considerations mentioned, there are at least three ways in which I believe the inadmissible evidence prejudiced the accused. . . ."[97]

Thus Judge Latimer expressly found a violation of the rights of the accused under Article of War 24, as indeed did the majority, that this error was prejudicial, and rested the reversal on prejudicial error and not at all on lack of due process.

To the date of writing the only other reference to due process by the Court was in the *Lucas* case[98] where its task in hand was a definition of the "substantial rights" of the accused, which if materially prejudiced necessitate reversal under Article 59(a). There the Court quoted from Section 87(c) of the *Manual for Courts-Martial 1951*:

96. United States v. Welch (No. 196), 3 CMR 136, 142 (U.S.C.M.A. 1952).
97. United States v. Welch (No. 196), 3 CMR 136, 138 (U.S.C.M.A. 1952).
98. United States v. Lucas (No. 7), 1 CMR 19 (U.S.C.M.A. 1951).

"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 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 (e.g., when the disloyalty of defense counsel directly aids the prosecution) the finding must be disapproved regardless of the compelling nature of the competent evidence of record."[99]

It will be remembered that in the *Lucas* case not only did the Court not pursue due process, but, in view of the plea of guilty of the accused, found that no prejudicial error existed, reversed the board of review and affirmed the court-martial conviction. It is significant that the only mention of due process in the *Manual for Courts-Martial* is contained in a discussion of materially prejudical error. In passing it might be noted that disloyalty of defense counsel, cited as an example of denial of due process would be an express violation of defense counsel's oath to perform his duties faithfully as required by Article 42(a)[100] and would constitute materially prejudicial error.

This examination of these opinions points to the conclusion that the Court, on those occasions where it employs the term "military due process" does so interchangeably with, and cumulative to, its application of the test of the presence or absence of "error materially prejudicial to the substantial rights of the accused."[101]

IV. What Military Due Process Is Not

A.

First of all the concept of military process, and even the concatenation of the words themselves, is not new. Currently there is some slight tendency to think that military justice originated on May 31, 1951, the effective date of the Uniform Code of Military Justice.[102] Such was not the case. British Articles of War reach back to the time

99. *Id.* at 23.
100. 50 U.S.C.A. § 617 (1951).
101. This conclusion is supported by United States v. Hunter (No. 359), 17 Oct. 1952 (U.S.C.M.A.), in which the Court affirmed a death sentence murder case. In disallowing an appellate contention that the legal representation afforded accused at his trial lacked the quality necessary to insure a fair trial, the Court, at page four of the advance sheet, said: "We believe the requirements of the applicable provisions of the Code and Manual, and of military due process were fully met. Those require that accused be afforded the help and guidance of military counsel with certain specified qualifications or of counsel of his own choice. Here he had both." This statement, with the words "and of military due process" deleted, correctly declares the applicable law.
102. 50 U.S.C.A., note preceding § 551 (1951).

of Glanvil and antedate Magna Charta itself by some twenty-five years.[103] If by military due process we mean procedural safeguards for the fundamental rights of the accused, this was a matter of concern in the Articles issued in 1621 by King Gustavus Adolphus of Sweden,[104] in 1672 by Prince Rupert,[105] in 1686[106] and in 1688[107] in the English Military Disciplines of James II, and by Parliament in the Mutiny Act of 1689.[103] Procedural protection was given the accused in Articles adopted by the Provisional Congress of Massachusetts Bay on April 5, 1775,[109] and by those adopted by the Second Continental Congress on June 30, 1775.[110] George Washington was a member of the legislative

103. Ordinance of Richard I, 1190, issued to prevent disputes between the soldiers and sailors in their voyage to the Holy Land. Reprinted in 2 WINTHROP, MILITARY LAW, Appendix 3 (1886).

104. Reprinted in 2 WINTHROP, MILITARY LAW, Appendix 8-23 (1886). Illustrative is: "144. All these Judges both of higher and lower Courts, shall under the blue Skies thus sweare before Almighty God that they will inviolably keep this following oath unto us: I. R.W. doe here promise before God upon his holy Gospell, that I both will and shall judge uprightly in all things according to the lawes of God: of our Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully, but judge him free that ought to be free, and doom him guilty, that I finde guilty: as the Lord of Heaven and Earth shall help my soule and body at the last day, I shall hold this oath truly."

105. Reprinted in DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES, Appendix A, 567-80 (3d ed. 1915). The 74th and last Article thereof reads: "Whatever is to be published, or generally made known, shall be done by beat of drum or the sound of trumpet, that so no man may pretend ignorance thereof.

"And after that whoever shall be found disobedient, or faulty, against what is thus published shall be punish'd according to these Articles, or the quality of the fact."

106. Reprinted in 2 WINTHROP, MILITARY LAW, Appendix 24-25 (1886). The following is a typical excerpt: "If the Council of War, or Court-martial be held to judge a Criminal, the President and Captains having taken their places, and the prisoner being brought before them. And the Informations read, the President Interrogates the Prisoner about all the Facts whereof he is accused, and having heard his Defence, and the Proof made or alleged against him, He is ordered to withdraw, being remitted to the care of the Marshal or Jaylor. Then every one judges according to his Conscience, and the Ordnances of the Articles of War. The Sentence is framed according to the Plurality of Votes, and the Criminal being brought in again, The Sentence is Pronounced to him in the name of the Council of War, or Court-Martial."

107. Reprinted in 2 WINTHROP, MILITARY LAW, Appendix 26-37 (1886), Article LXI thereof provides: "If any Person be committed by the Provost Martial's own Authority without other Command, he shall acquaint the General or other Chief Commander with the Cause within twenty-four hours, and the Provost-Martial shall thereupon dismiss him unless he have Order to the Contrary."

108. Statutes of the Realm 55, 1 W. & M., c. 5, Reprinted in 2 WINTHROP, MILITARY LAW, Appendix 38-39 (1886). Paragraph 10 directs: "And noe Sentence of Death shall be given against any offender in such case by any Court Martiall unless nine of thirteene Officers present shall concur therein. And if there be a greater number of officers present, then the judgment shall passe by the concurrence of the greater part of them so sworne, and not otherwise; and noe Proceedings, Tryall or Sentence of Death shall be had or given against any offender, but betweene the houres of eight in the morning and one in the afternoone."

109. Reprinted in 2 WINTHROP, MILITARY LAW, Appendix 61-67 (1886).

110. Reprinted in 2 WINTHROP, MILITARY LAW, Appendix 68-76 (1886).

committee[111] and at his suggestion[112] revisions were made in 1776 by a congressional committee composed of John Adams, Thomas Jefferson, John Rutledge, James Wilson and R. R. Livingston.[113] The next year John Marshall, then a twenty-two year old Captain-Lieutenant of infantry was appointed "Deputy Judge Advocate in the Army of the United States."[114] Thus, preconstitutionally, able American legislators and lawyers gave consideration to a fair system of military justice. The Constitution itself vested in Congress the power "To make Rules for the Government and Regulation of the land and naval forces."[115] In 1857 the United States Supreme Court, after citing the pertinent constitutional provisions, said:

> "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d Article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."[116]

Congress has consistently discharged this duty from the very beginning. The first Congress recognized the existing military establishment and provided that it should "be governed by the rules and articles of war which have been established by the United States in Congress assembled or by such rules and articles of war as may hereafter by law be established."[117] Congress adopted new articles of war in 1806,[118] 1874,[119] 1916,[120] 1920[121] and 1948,[122] and has repeatedly voted amendments thereto. When in 1950 Congress enacted the Uniform Code of Military Justice,[123] it engaged in no legislative innovation but simply

111. WINTHROP, MILITARY LAW AND PRECEDENTS 21 (2d ed. 1920).
112. DAVIS, A TREATISE ON THE MILITARY LAWS OF THE UNITED STATES 342 (3d ed. 1915).
113. WINTHROP, MILITARY LAW AND PRECEDENTS 22 (2d ed. 1920). Art. 8 of § XIV of these Articles of War of 1776, reprinted at page 968, provided: "No sentence of a general court-martial shall be put in execution, till after a report shall be made of the whole proceedings to Congress, or to the general or commander in chief of the forces of the United States, and their or his directions be signified thereon." Art. 2 of § XVIII, reprinted at page 970, provided: "The general, or commander in chief for the time being, shall have full power of pardoning or mitigating any of the punishments ordered to be inflicted, for any of the offenses mentioned in the foregoing articles; and every offender convicted as aforesaid, by any regimental court-martial, may be pardoned, or have his punishment mitigated by the colonel, or officer commanding the regiment."
114. 1 BEVERIDGE, THE LIFE OF JOHN MARSHALL 119, 138 (1916).
115. U.S. CONST. Art. 1, § 8, cl. 14.
116. Dynes v. Hoover, 20 How. 65, 79, 15 L. Ed. 838 (U.S. 1857).
117. 1 STAT. 95-96 (1789).
118. 2 STAT. 359 (1806).
119. REV. STAT. § 1342 (1878).
120. 39 STAT. 650-70 (1916).
121. 41 STAT. 787 (1920), 10 U.S.C.A. §§ 1471-1593a (1946).
122. 62 STAT. 627-44 (1948), 10 U.S.C.A. c. 36 (1950 Supp.).
123. Act of May 5, 1950, 64 STAT. 108, 50 U.S.C.A. c. 22 (1951).

discharged a recurring historic constitutional obligation.[124]

As we have already noted,[125] as early as 1911 the United States Supreme Court was called upon to determine whether an Army officer had been deprived of due process in the manner in which his commission had been terminated. In reversing a writ of mandate issued by the trial court, and upholding the action taken by military authorities, the Supreme Court said, "To those in the military or naval service of the United States the military law is due process."[126] The Supreme Court has twice had occasion to reaffirm this view of due process as applied to the military in officer elimination cases.[127] Furthermore, in the only two military justice cases to reach the Supreme Court in which it was contended that the accused had been denied due process and in which such a finding had been made by the United States Courts of Appeal,[128] the Supreme Court reversed, refused habeas corpus relief, and found that although extensive error had been committed there was no denial of due process.[129] Thus, consistently,

124. For a discussion of the historical background of military tribunals see, Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493-505 (1951).

125. Note 7, *infra*.

126. Reeves v. Ainsworth, 219 U.S. 296, 304, 31 Sup. Ct. 230, 55 L. Ed. 225 (1911).

127. French v. Weeks, 259 U.S. 326, 335, 42 Sup. Ct. 505, 66 L. Ed. 965 (1922), where the Supreme Court said, "As a Colonel in the Army, the relator was subject to military law and the principles of that law, as provided by Congress, constituted for him due process of law in a Constitutional sense. *Reeves v. Ainsworth*, 219 U.S. 296, 304." Also Creary v. Weeks, 259 U.S. 336, 344, 42 Sup. Ct. 509, 66 L. Ed. 973 (1922), "Without pursuing the subject further it is sufficient to repeat what was said by this Court in *Reeves v. Ainsworth*, 219 U.S. 296, 304: 'To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts.'"

128. Smith v. Hiatt, 170 F.2d 61 (3d Cir. 1948), *rev'd sub nom.* Humphrey v. Smith, 336 U.S. 695, 69 Sup. Ct. 830, 93 L. Ed. 986, *rehearing denied*, 337 U.S. 934 (1949); and Hiatt v. Brown, 175 F.2d 273 (5th Cir. 1949), *reversed*, 339 U.S. 103, 70 Sup. Ct. 495, 94 L. Ed. 691, *rehearing denied*, 339 U.S. 939 (1950).

129. In Hiatt v. Brown, 339 U.S. 103, 110-11, 70 Sup. Ct. 495, 94 L. Ed. 691 (1950), the Supreme Court explicitly stated: "The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process.

"The following instances of error in the military proceedings were cited by the Court of Appeals: '(1) Accused was convicted on the theory that although he was on duty as a sentry at the time of the offense, it was incumbent upon him to retreat from his post of duty. (2) Accused has been convicted of murder on evidence that does not measure to malice, premeditation, or deliberation. (3) The record reveals that the law member appointed was grossly incompetent. (4) There was no pre-trial investigation whatever upon the charge of murder. (5) The record shows that counsel appointed to defend the accused was incompetent, gave no preparation to the case, and submitted only a token defense. (6) The appellate reviews by the Army reviewing authorities reveal a total misconception of the applicable law.' 175 F.2d at 277.

"We think the court was in error in extending its review for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. Cf. *Humphrey v. Smith*, 336 U.S. 695 (1949). It is well settled that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the

through the years, the United States Supreme Court has refused to recognize that there is any such thing as military due process apart from the acts of Congress declaring what the military law is. Stated another way, although the concept of military due process is not new, it has never been subscribed to by the Supreme Court.

As a pertinent parallel it should be observed that the essence of the provision of Article 59 (a) of the Uniform Code of Military Justice that "a finding . . . shall not be held incorrect . . . unless the error [of law] materially prejudices the substantial rights of the accused," is not new to military law. Article of War 37 of the 1948 Articles in pertinent part provided that "proceedings . . . shall not be held invalid . . . for any error as to any matter of pleading or procedure unless . . . it shall appear that the error . . . has injuriously affected the substantial rights of the accused."[130] Its predecessor, Article of War 37 of the 1920 Articles,[131] contained exactly the same language. Thus for over thirty years Army boards of review have been reversing convictions where the record disclosed that error "injuriously affected the substantial rights of the accused." Whether under the present test of "materially prejudices," more serious error must be found to warrant reversal than was necessary under the old test of "injuriously affected" is conjectural. As a practical matter the legal result under either yardstick would probably be substantially the same, and the Court has so indicated.[132]

B.

A second thing military due process is not, and hence is to be distinguished from, is jurisdiction. The Court has drawn this distinction. In the *Clay* case it said:

> ". . . we disclaim any intent to classify these [rights] as jurisdictional or nonjurisdictional. 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. . . ."[133]

In the *Davis* case it stated,[134] "It is recognized . . . the Federal authorities . . . were concerned with . . . jurisdiction. While we are not limited to review of this nature." Finally in the *Bartholomew* case the Court, declared,[135] "A clear violation of . . . Article of War 11 would

proceedings of a court-martial.'" The six enumerated errors appeared in the Court's footnote number 6 at 339 U.S. 110.

130. 41 STAT. 794 (1920).
131. 41 STAT. 794 (1920).
132. United States v. Berry (No. 69), 2 CMR 141, (U.S.C.M.A. 1952).
133. United States v. Clay (No. 49), 1 CMR 74, 78 (U.S.C.M.A. 1951).
134. United States v. Davis (No. 29), 2 CMR 8, 13 (U.S.C.M.A. 1952).
135. United States v. Bartholomew (No. 166), 3 CMR 41, 45 (U.S.C.M.A. 1952).

certainly raise serious questions of military due process, if not of jurisdiction." Furthermore, when the Court has been confronted with real jurisdictional issues it has treated them as such without reference to due process.[136] This comports with the steadfast refusal of the Supreme Court to exalt asserted due process violations to the stature of jurisdictional defects in military habeas corpus cases.[137]

C.

Thirdly, military due process is not constitutional due process. The Court of Military Appeals speaking of due process has said,[138] "we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress," and further,[139] "we need not concern ourselves with the constitutional concepts. . . ." This conforms to the holding of the Supreme Court in *Creary v. Weeks*[140] that the due process clause of the Fifth Amendment does not apply to military tribunals.

Nor do the other provisions of the Bill of Rights apply to military law. The Court of Military Appeals has recognized this in holding that the Fourth Amendment prohibition "against unreasonable searches and seizures" does not in the military service require a search warrant, and does not make unlawful, searches conducted by a military commander or his authorized representatives where there is probable cause to believe an offense has been committed.[141] This result is quite different from that reached in civil life under the Fourth Amendment.

136. See Part II E, *supra*.

137. Humphrey v. Smith, 336 U.S. 695, 700-01, 69 Sup. Ct. 830, 93 L. Ed. 986 (1949), *rehearing denied*, 337 U.S. 934 (1949); and Hiatt v. Brown, 339 U.S. 103, 110-11, 70 Sup. Ct. 495, 94 L. Ed. 691, *rehearing denied*, 339 U.S. 939 (1950).

138. United States v. Clay (No. 49), 1 CMR 74, 77 (U.S.C.M.A. 1951).

139. United States v. Clay (No. 49), 1 CMR 74, 79 (U.S.C.M.A. 1951).

140. 259 U.S. 336, 343, 42 Sup. Ct. 509, 66 L. Ed. 973 (1922). "Thus is presented for decision the question whether the due process clause of the Fifth Amendment required that the relator should be given an opportunity to be heard before the finding was made by the board which required his discharge from the Army.

"The power given to Congress by the Constitution to raise and equip armies and to make regulations for the government of the land and naval forces of the country (Art. I, Sec. 8) is as plenary and specific as that given for the organization and conduct of civil affairs; military tribunals are as necessary to secure subordination and discipline in the army as courts are to maintain law and order in civil life; and the experience of our Government for now more than a century and a quarter, and of the English Government for a century or more, proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs (2 STAT. 359; *Dynes v. Hoover*, 20 How. 65). It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the classification and reduction in number of the officers of the Army, provided for in Sec. 24b. In its nature it belongs to the executive and not to the judicial branch of the Government."

141. United States v. Doyle (No. 265), 4 CMR 137 (U.S.C.M.A. 1952). The Court at page 141, stated, "[T]he action of the master-at-arms in searching petitioner's locker was, according to existing military and naval law, reasonable."

The Supreme Court has held that not only does the Fifth Amendment right to grand jury indictment, from which "cases arising in the land or naval forces" are expressly excepted, not apply to military prosecutions, but that the Sixth Amendment guaranty of the right to trial by jury is equally inapplicable to military prosecutions, even though the exception is not there spelled out. It has also held that the constitutional provision of Article III, Section 2, that, "The trial of all crimes, except in Cases of Impeachment, shall be by Jury" has no application to military tribunal prosecutions.[142] Even more sweepingly the Supreme Court has said,[143] "the power of Congress, in the government of the land and naval forces and the militia, is not at all affected by the fifth or any other amendment."

Citations are unnecessary for the proposition that the due process clause of the Fourteenth Amendment, directed at state action, has no application to the federal instrumentality of military justice.

D.

Military due process, fourthly, is not a totality of error doctrine, and cannot be brought into play by the cumulation of a number of nonprejudicial errors in a single case. The court of Military Appeals so held in the *Zimmerman* case:

> "Appellate defense counsel, admitting *arguendo* that, considered individually, none of the errors listed above prejudiced the accused, argues that their cumulative effect was such as to warrant a finding of prejudice. Counsel refers to several Federal cases in support of this proposition. Without analyzing those decisions in detail, we note that the individual errors in each of them contained some, although slight, possibility of prejudice. Such is not the case here. The errors discussed above are formal in nature and we fail to see how, individually or collectively, they could have in any way materially harmed the accused. Since we find no substantial prejudice, we are bound by Article 59 of the Uniform Code of Military Justice, 50 USCA Sec. 646, to hold that the errors considered by the board of review do not require disapproval of the findings and sentence."[144]

E.

Finally, military due process does not stem from a segregation of general prejudice as distinguished from specific prejudical errors. This differentiation has been undertaken by the Court of Military Appeals

142. *Ex parte* Quirin, 317 U.S. 1, 39-45, 63 Sup. Ct. 1, 87 L. Ed. 3 (1942). In 317 U.S. at 40 the Supreme Court said, "[W]e must conclude that Sec. 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury trial by military commission. . . ." Also Kahn v. Anderson, 255 U.S. 1, 8, 41 Sup. Ct. 224, 65 L. Ed. 469 (1920).

143. *Ex parte* Milligan, 4 Wall. 2, 138, 18 L. Ed. 281 (U.S. 1866).

144. United States v. Zimmerman (No. 261), 2 CMR 66, 68 (U.S.C.M.A. 1952).

but in its treatment of general prejudice no reference has been made to due process.

The development of the doctrine of general prejudice has pursued a curious course. Judge Brosman first spoke of it in a case in which the question certified was whether the fact that the accuser later served as trial counsel divested the court-martial of jurisdiction. The square holding on this single issue, in the language of the Court, was:

> "We have searched the record with care and find no suggestion whatever of *specific* prejudice — that is, of prejudice operating against the accused in this particular case. . . . We find, in short, no shadow of showing in the record that the accused in this case was or could have been prejudiced by the fact that the interests of the Government therein were represented by the accuser who had perforce conducted an informal presignature inquiry into its facts. . . .
>
> ". . . the inquiry conducted by the accuser here did not constitute him an investigating officer, and thus disqualified him — and we explicity so hold."[145]

Having thus disposed of the case, Judge Brosman then wrote:

> "Nor do we find a basis for the belief that what might be described as *general* prejudice should be deemed to exist by virtue of the fact that Lieutenant Barton, the accuser, also served as trial counsel. We are confident that our meaning in the use of this standard will not be misapprehended. Report has already been made of the limitations on the 'harmless error' formula set up in the *Kotteakos* case, *supra*. At this point it should be said that we are not at all sure that equal caution should not be exercised in the invocation of this otherwise wholesome principle in perhaps one further setting. We have in mind here a situation in which the error consists not in a violation of constitutional or legislative provisions, but involves instead an overt departure from some 'creative and indwelling principle' — some critical and basic norm operative in the area under consideration. Such a compelling criterion we find within the sphere of this Court's effort in the sound content of opposition to command control of the military judicial process to be derived with assurance from all four corners of the Uniform Code of Military Justice. Is this criterion violated by permitting the accuser to serve as trial counsel? We think not.
>
> "It has been suggested, however, that departure from a specific requirement of the Manual should, of itself, constitute 'general prejudice' of the type we are here discussing. We have no doubt that this may be true in a proper case if, but *only* if, the policy underlying the Manual requirement is so overwhelmingly important in the scheme of military justice as to elevate it to the level of a 'creative and indwelling principle.' The previous discussion should be persuasive that no such policy consideration exists here."[146]

Thus "general prejudice," like "military due process," was conceived in dicta. Judge Latimer concurred only in the result,[147] based patently upon a different premise.

145. United States v. Lee (No. 200), 2 CMR 118, 122, 124 (U.S.C.M.A. 1952).
146. *Id.* at 123-24.
147. *Id.* at 124.

In another case decided the same day, Judge Brosman quoted from the *Lee* case and then said:

> "Because of the finding of a probability of specific prejudice against the accused, it is unnecessary that we inquire into the presence of general prejudice growing out of the membership in the court-martial under the facts of the instant case [accused pleaded guilty] of one who was an investigating officer within the meaning of paragraph 64, Manual for Courts-Martial, United States, 1951. For this reason we express no conclusion on the subject at this time."[148]

This time the straw man does not even get to assume an upright position before being stricken down, but general prejudice is nutured by a dictum.

In the *Berry* case[149] the accused was tried in Korea on May 4, 1951, under the procedure established by the 1948 Articles of War. The President of the Court usurped the duties of the law member by ruling on motions to dismiss a specification, to exclude a confession and for findings of not guilty, and by advising the accused as to his rights. The Court addressed itself to the question of whether this error was prejudicial, and Judge Brosman writing the majority opinion said:

> "We have recently examined the content of the phrase 'material prejudice' in our opinion in the *Lee* case, *supra.* There we enunciated two approaches to the question of prejudice. The first and more obvious of these was denominated *specific* prejudice and described as that to be derived from the facts and circumstances of the particular case before the court and either more or less demonstrably operative against the accused there. . . . The second concept we termed *general* prejudice. This was characterized as the produce of an 'overt departure from some "creative and indwelling principle" — some critical and basic norm operative in the area under consideration.' *United States* v. *Lee, supra.* Such a compelling criterion — we there suggested by way of example — is to be found within the sphere of this Court's efforts in the 'sound content of opposition to command control of the military judicial process to be derived with assurance from all four corners of the Uniform Code of Military Justice.' The complete independence of the law member and his unshackled freedom from direction of any sort or nature are, we entertain no doubt, vital, integral, even crucial, elements of the legislative effort to minimize opportunity for the exercise of control over the court-martial process by any agency of command. It follows that any abdication by the law member of his statutory duties and an attendant usurpation of those functions by the president — much more directly a representative of the convening authority — must be viewed with stern suspicion. . . ."[150]

Here, the majority resolutely turned its back upon its tried and true prejudicial error formula of the specific variety and elected to base

148. United States v. Bound (No. 201), 2 CMR 130, 136 (U.S.C.M.A. 1952).
149. United States v. Berry (No. 69), 2 CMR 141 (U.S.C.M.A. 1952).
150. *Id.* at 146.

its decision on the general prejudice dicta from the *Lee* case. Judge Latimer, concurring in the result ouly, filed a separate opinion in which he ably and vigorously espoused, as the basis of decision, common garden variety prejudicial error. He wrote:

> "I agree that the cause should be reversed, but do so on the narrow ground that the trial before the court-martial was so lacking in the essentials of military judicial procedure that the rights of this accused were substantially prejudiced. 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.
>
> "Congress commanded that an accused have questions of law and preliminary questions of fact decided by a law member who possessed certain qualifications. Here that command was ignored. To say that bypassing the law member is not prejudicial to the man on trial is to say that any reviewer of trial or trier of fact can be eliminated without harm to the individual on trial.
>
> "I believe that when Congress authorized preliminary rulings by a legally trained person and that right is refused there is involved a prejudicial denial of a right of substance. It is more than a belief that some over-arching principle of general prejudice permeates the atmosphere of the court room. It is the refusal to grant to the accused a fundamental right guaranteed to him by the Articles of War. If we are permitted to reason by analogy with the civilian practice this, to me, smacks of a judge allowing the foreman of a jury to decide questions of law and admissibility of confessions. . . ."[151]

The very next day the Court in the *Gordon* case[152] held it was prejudicial error for a General whose quarters had been burglarized by the accused to be the convening authority of a general court-martial to try even another offense committed by this accused. Judge Brosman in a separate concurring opinion wrote:

> "I concur fully in the result in this case.
>
> "I do not understand Judge Latimer to evaluate the error it contains as jurisdictional—whatever exactly this term may mean. I do understand him to have concluded that the substantial rights of the accused were materially prejudiced. I am sure he is correct in this determination. Without, however, inquiring whether the record reflects a basis for a finding of specific prejudice as developed in *United States* v. *Lee*, ——— USCMA———, decided March 13, 1952, I prefer to bottom my concurrence on the concept of general prejudice, as applied by this Court in *United States* v. *Berry*, ———USCMA———, decided March 18, 1952. See also *United States* v. *Bound*, ———USCMA———, decided March 13, 1952."[153]

151. *Id.* at 148-50.
152. United States v. Gordon (No. 258), 2 CMR 161 (U.S.C.M.A. 1952).
153. *Id.* at 168.

This separate opinion relies on a dictum to reach by a separate route a result already arrived at by the Court by an application of the well-established prejudicial error doctrine.

From these four cases it is apparent that Judge Brosman is the progenitor of "general prejudice" and that Judge Latimer has refused to subscribe to it. The congressional mandate is "error materially prejudicial," without subdivision. It would seem that material prejudice, no matter how thinly sliced, would continue to be material prejudice and that multiplying the adjectives in front of prejudice is not helpful. In none of the cases in which it has been mentioned was it necessary to a finding of prejudicial error, to resort to the heady elixir of an "overt departure from some 'creative and indwelling principle' — some critical and basic norm operative in the area under consideration."[154] Congress is not so esoteric. The prose employed in the Uniform Code of Military Justice is quite specific, and in a given case, its provisions either are or are not violated, and where violated, the resulting error either is or is not materially prejudicial to the accused. As Judge Latimer has said, the finding of prejudice involves "more than a belief that some overarching principle of general prejudice permeates the atmosphere of the court room."[155]

In any event it is clear that when the Court speaks of due process it does not mean general, as distinguished from specific, prejudice, nor does it have reference to an "overt departure from some 'creative and indwelling principle' — some critical and basic norm operative in the area under consideration."

V. What Military Due Process Probably Is

"To those in the military or naval service of the United States the military law is due process."[156] "The Congress shall have power . . . to make rules for the government and regulation of the land and naval forces. . . ."[157] This "power of Congress . . . is not at all affected by the fifth or any other amendment."[158] "It was for Congress to set the rules governing military trials."[159] "[T]he only way by which Congress can make certain what it deems important is by saying so in its legislative pronouncement."[160] "[W]e are unable to escape the express mandate from Congress that we should not reverse except for an error materially prejudicing the substantial rights of the accused."[161]

154. United States v. Lee (No. 200), 2 CMR 118, 123 (U.S.C.M.A. 1952).
155. United States v. Berry (No. 64), 2 CMR 141, 149 (U.S.C.M.A. 1952).
156. Reeves v. Ainsworth, 219 U.S. 296, 304, 31 Sup. Ct. 230, 55 L. Ed. 225 (1911).
157. U.S. Const. Art. I. § 8, cl. 14.
158. *Ex parte* Milligan, 4 Wall 2, 138, 18 L. Ed. 281 (U.S. 1866).
159. United States v. Clay (No. 49), 1 CMR 74, 80 (U.S.C.M.A. 1951).
160. *Ibid.*
161. United States v. Lucas (No. 7), 1 CMR 19, 25 (U.S.C.M.A. 1951).

Military due process is not jurisdictional, it is not constitutional due process, it is not violated by a cumulation of nonprejudicial error, it is not general prejudice and it has not once been mentioned by Congress in the Uniform Code of Military Justice. By process of elimination then, any violation of a provision of the Uniform Code of Military Justice resulting in error which the Court finds materially prejudiced the substantial rights of an accused constitutes a want of military due process. Conversely, any military tribunal action, within its jurisdiction, supported by "some substantial evidence" in which the Court finds no error materially prejudicial to the substantial rights of the accused is one complying with military due process.

The formulas of the Court then become, "The case is reversed because of error materially prejudicial to the substantial rights of the accused, a failure to comply with military due process," and, "The case is affirmed because there is no error materially prejudicial to the substantial rights of the accused, a compliance with military due process." It is submitted that the addition of the final clause, in each case, to the formulas, adds nothing to their thought content. Accordingly, they should be deleted, unless one fully subscribes to the position taken by Judge Brosman in the *O'Neal* case that, "Words mean nothing in themselves; we have no desire to bog down in a morass of verbalism; and we regard the semantic aspect of the matter as of little importance into the bargain."[162]

VI. WHAT TO DO ABOUT IT

The Court of Military Appeals may make what it will of "military due process." So long as that Court avoids jurisdictional error adverse to an accused there is no judicial agency which can review its opinions.[163] It could, if it chose, say, "We find prejudicial error which violates the doctrine of '*ex bono et aequo*' and therefore reverse." A court with this practically unlimited power may, in appropriate cases, exercise the doctrine of self correction, even as does the Supreme Court.

Delicacy dictates discreetly decorous dissent from the use the Court has made of the words military due process. The writer would not go quite so far as did the Court when in speaking of *res gestae* it characterized it as "the bastard and unhelpful catchphrase *res gestae* of nebulous meaning. . . ."[164] Without casting aspersions upon the venerable ancestry of the words military due process, they may be aptly characterized as "the . . . unhelpful catchphrase *military due process* of nebulous meaning." If they have a separate significance the Court

162. United States v. O'Neal (No. 25), 2 CMR 44, 49 (U.S.C.M.A. 1952).
163. Hiatt v. Brown, 339 U.S. 103, 111, 70 Sup. Ct. 495, 94 L. Ed. 691, *rehearing denied*, 339 U.S. 939 (1950).
164. United States v. Mounts (No. 73), 2 CMR 20, 24 (U.S.C.M.A. 1952).

has not removed their nebulosity and this should be done. If they are simply another way of saying "no prejudicial error" they are tautological and should be excised.

It is hoped the Court will work out the destiny of military justice within the prescribed Uniform Code framework by continuing the very fine start it has made in applying to each case the congressionally imposed test of the presence or absence of error materially prejudicial to the substantial rights of the accused. This places the Court in no strait jacket. Rather it permits the Court to engage in each case in unlimited inquiry and in painstaking analysis as it has so ably done in the many cases in which it has applied the prejudicial error rule during the first year of its work. In the course of time the Court of Military Appeals will, in the words of Mr. Justice Holmes, "prick . . . out by the gradual approach and contact of decisions on the opposing sides"[165] the lines delimiting the boundaries of prejudicial error.

165. Noble State Bank v. Haskell, 219 U.S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112 (1911).