JUDICIAL CHECKS ON COMMAND INFLUENCE UNDER THE UNIFORM CODE OF MILITARY JUSTICE*

Fair trials under the Uniform Code of Military Justice depend in large measure on the conduct of commanding officers. Commanders, vested with general responsibility for the maintenance of discipline within their commands, have the power to convene courts-martial, review the proceedings, and control efficiency reports, assignments, promotions, and leaves of the participants. These powers may be used to prejudice the rights of accused servicemen by the exertion of undue pressure on courts-martial.

During hearings on the Code, civilian authorities repeatedly urged Congress to meet this problem by limiting the commanding officer's powers of


2. "There is little difference between an Army court which has been influenced by its commanding officer and the Budapest tribunal which recently convicted Cardinal Mindszenty." Statement of Richard H. Wels, Hearings before Subcommittee of Committee on Armed Services on H.R. 2498, 81st Cong., 1st Sess. 641 (1949) (hereinafter cited as Hearings). See also Statement of Arthur E. Farmer, id. at 647.


4. UCMJ Arts. 22-28, 64 STAT. 115-117 (1950), 50 U.S.C. §§ 586-92 (Supp. 1952). The act of convening includes the appointment of the members of the court and the referral of specific cases to that court. For a general discussion of the effect of the Code on general, special, and summary court-martial procedure, see Mullally, supra note 1, at 2-9; Ward, UCMJ—Does It Work?, 6 VAND. L. REV. 186, 210-16 (1953).

5. UCMJ Arts. 60-65, 64 STAT. 127-8 (1950), 50 U.S.C. §§ 647-52 (Supp. 1952). A commanding officer in reviewing may not increase the sentence of a court-martial, although he may affirm or reduce the sentence, or dismiss the charges entirely.

6. See Re, supra note 1, at 178.

7. In the hearings on the Code attention was called to the misuse of these powers. See Statement of Frederick P. Bryan, Hearings, supra note 2, at 626-7. For a criticism of command influence prior to the adoption of the Code, see Farmer & Wels, Command Control—Or Military Justice, 24 N.Y.U.L.Q. REV. 263 (1949).

There is disagreement as to the extent of command influence since the Code went into operation in 1951. One writer has stated that in over 4,000 naval cases examined there were only three cases in which a possible reprimand by commanding officers to courts was present, and that command influence is no longer a problem. Ward, supra note 4, at 200, 224. See also Grimm, Criminal Justice in the Military Establishment, 37 J. AM. JUD. SOC'y. 14, 23 (1953). For an argument that the Code has not perceptibly cured the evil of command influence, see Mullally, supra note 1, at 26. See also McNiece & Thornton, Military Law from Pearl Harbor to Korea, 22 FORD. L. REV. 155, 165, 182 (1953).
appointment and review. The services successfully argued that maintenance of discipline required that these powers remain undiminished. Congress, however, did take some steps to check command influence. It provided in Article 37 that no convening authority may reprimand the court for its findings or sentence, and that no person may attempt to coerce or influence the decision of a court-martial. As an overall safeguard, it created the Court of Military Appeals (COMA), whose three civilian judges have the power to review court-martial proceedings.

8. See, e.g., Hearings, supra note 2, at 627, 641, 647, 634, 723-9.

9. See, e.g., statement of General Eisenhower: "This division of command responsibility and the responsibility for the adjudication of offenses and of accused offenders, cannot be as separate as it is in our democratic government. Somewhere along the line . . . the man who makes the final decision must have also on his shoulders responsibility for winning a war; and please never forget that." Hearings, supra note 2, at 837. See also id. at 702, 780-3. Congress, taking these arguments into account, rejected the proposals to limit the commander's powers of appointment and review as being impractical. H.R. REP. No. 491, 81st Cong., 1st Sess. 8 (1949).

10. 64 STAT. 120 (1950), 50 U.S.C. § 612 (Supp. 1952). The efficacy of Article 37 was questioned at the time of its adoption. See, e.g., Hearings, supra note 2, at 717. A violator of Article 37 is himself subject to prosecution under Art. 93(2), 64 STAT. 129 (1950), 50 U.S.C. § 692(2) (Supp. 1952). However, no such offender has been prosecuted.


12. COMA has evolved two approaches in reviewing the conduct of courts-martial. It will reverse for "specific prejudice" to the rights of an accused if an error is shown clearly to have influenced the result in a particular case. See, e.g., United States v. Bound, 1 U.S.C.M.A. 224, 2 C.M.R. 130 (1952) (member of special court-martial had acted as investigating officer); United States v. Rhoden, 1 U.S.C.M.A. 193, 2 C.M.R. 99 (1952) (mistake in stating elements of offense in charge to court). It will also reverse for "general prejudice," without proof of specific injury to an accused, when there has been departure from a principle so fundamental that affirmance would threaten to subvert future administration of justice. United States v. Berry, 1 U.S.C.M.A. 235, 240-1, 2 C.M.R. 141, 146-7 (1952), Note, 6 VAND. L. REV. 414, 415 (1953); United States v. Lee, 1 U.S.C.M.A. 212, 217, 2 C.M.R. 118, 123 (1952). Cf. Kotteakos v. United States, 323
In the recent case of United States v. Littrice, COMA met problems posed by command influence on courts-martial. A court had been convened to consider a charge of theft. Immediately prior to trial, the convening authority held a pre-trial conference with members of the court during which he cautioned them not to usurp the prerogatives of the convening authority. He read a headquarters command letter on the impropriety of retaining thieves in the army, including a statement that officers' proper performance of court-martial duties would be noted on efficiency reports. He stated that court-martial decisions received thorough review. COMA, reversing the subsequent conviction, found that the cumulative effect of all these statements amounted to command influence. References to "prerogatives" could only imply that the court-martial should delegate its sentencing powers to the commanding officer. References to efficiency reports and theft within the command, though generally unobjectionable, constituted a "veiled threat" to the court when addressed to the specific case of theft then in issue.

In United States v. Isbell, COMA substantially modified its earlier statement on command influence. Again the accused was charged with theft, and the same command distributed the same communication on retention of thieves and efficiency reports involved in Littrice. Moreover, a second publication discussed specific courts-martial held within the division, concluding that

U.S. 750, 764-5 (1946). Freedom from command influence is one such principle. See United States v. Berry, supra; United States v. Lee, supra.

In those cases where the law officer of the court-martial has participated in its secret deliberations before the sentence has been determined, Chief Judge Quinn and Judge Brosman will reverse for general prejudice. Judge Latimer, refusing to recognize general prejudice, requires that the accused show that the participation actually prejudiced him in the particular case. See, e.g., United States v. Woods & Duffer, 2 U.S.C.M.A. 203, 8 C.M.R. 3 (1953); United States v. Holland, 2 U.S.C.M.A. 314, 8 C.M.R. 114 (1953). For the application of this distinction to command influence, see notes 23, 40, 41 infra.

14. United States v. Littrice, 3 U.S.C.M.A. 487, 489, 13 C.M.R. 43 (1953). The pre-trial conference itself was authorized by § 38 of the Manual for Courts-Martial, United States (hereinafter referred to as MCM). § 38 declares that a convening authority may, through his legal officer "or otherwise," give general instruction on the rules of evidence to the personnel of a court-martial which he has appointed, preferably before any cases have been referred to the court for trial. This may include information as to offenses which have impaired efficiency and discipline within the command, and of measures which have been taken to prevent them. However, he may not violate Article 37.
16. 3 U.S.C.M.A. 487, 495-6. COMA found "external influences tending to disturb the exercise of a deliberate and unbiased judgment by the court." Id. at 496.
17. Id. at 493. The convening authority's reviewing power has been criticized on the ground that courts will impose the maximum sentence, relying on the "old man" to reduce the sentence to the extent he considers appropriate with the maintenance of discipline. See Re, The Uniform Code of Military Justice, 25 St. John's L. Rev. 155, 178-9 (1951).
twelve of seventeen acquittals should have resulted in verdicts of guilty. In addition, the president of Isbell's court admitted attendance at command conferences where improper acquittals were discussed. However, COMA rejected the accused's claim of command influence. Since the letter on retention of thieves had been distributed without reference to any particular court-martial, rather than read to a court immediately prior to the trial of an alleged thief, as in Littrice, the majority construed it merely as legitimate instruction for the guidance of all courts in the performance of their duties. And since the courts and officers accused of reaching incorrect verdicts were not identified, the disapproval of previous acquittals was held not to be a reprimand under Article 37.

The dissent in Isbell argued that the two publications, considered together, presented that "fair risk of danger" to the rights of the accused which required reversal. The same factors were made known to members of the court-martial in Isbell as in Littrice, and the fact that the command letter was read previously and in private was hardly sufficient to remove the "veiled threat" it contained. Moreover, the second publication, discussing improper acquittals, carried implications of unlawful reprimand absent in Littrice, because anyone in the command would know or could learn "which cases, which courts, and which officers had been singled out for overt disapprobation." The distinction between Littrice and Isbell laid down by COMA seems wholly formalistic. Commanding officers are apparently allowed to do whatever they wish to influence courts-martial, provided their acts cannot be linked to a specific case. This ignores the fact that general statements may affect particular verdicts: it is likely that the accused's rights in Isbell were prejudiced as substantially by the commander's forceful general communications as if the statements had been made at a pre-trial conference. Commanders, desiring to control courts-martial, can easily circumvent such a rigid test.

COMA has also attempted to determine the existence of command influence

21. 3 U.S.C.M.A. 782, 785-6. The defense counsel challenged the court's personnel for bias against the accused in a voir dire proceeding, but the members denied that they had been influenced. Id. at 786. The present system under which the court members themselves rule on challenges to each other raised in voir dire proceedings is criticized in Snedeker, The Uniform Code of Military Justice, 38 Geo. L.J. 521, 562 (1959); Note, 62 Harvard L. Rev. 1377, 1380 (1949). For grounds of challenge, see §62(e) and (f) of the MCM.
23. 3 U.S.C.M.A. 782, 787. In a concurring opinion Judge Latimer argued that the accused was not prejudiced because the members of the court-martial declared that they were not influenced by the two publications. Id. at 788. This apparently is in accord with his view that a reversal is dictated only by a showing of specific prejudice to the accused. See note 12 supra.
26. Id. at 789-91. Judge Brosman concluded that even if it were intended for guidance purposes, the publication, when considered with the letter on retention of thieves, prejudiced the accused's rights. Id. at 792.
27. See text at note 22 supra.
by the presence or absence of intent by the commander to exert pressure on a court-martial. Thus the attendance of a convening authority's legal officer at trial was held not to be a manifestation of command control, absent proof of some "preconceived plan of influence" by the convening authority.\(^{28}\) Intent is easier to find where a commanding officer addresses a court already convened, as in *Littrice*, than it is where he issues a general statement, as in *Isbell*. However, intent too is an unsatisfactory test, since commanding officers, with the most admirable of intentions to maintain discipline and improve courts-martial, may still exert such pressure upon courts-martial that the accused's rights are prejudiced.\(^{29}\) Moreover, requiring proof of a commander's specific plan of influence, unless this can be inferred from his conduct, imposes an unnecessarily heavy burden on an accused.\(^{30}\)

The cumulative effect doctrine of *Littrice*, insofar as it disregards intent and recognizes that innocent acts, when taken together, may be prejudicial, is better than the other tests adopted by COMA's majority. However, by its mention of a variety of factors without stating which of them were critical to the finding of command control, it is open to the misinterpretation that all the factors present in *Littrice* are required.\(^{31}\) In a given context, any one of them

\(^{28}\) United States v. Self, 3 U.S.C.M.A. 568, 13 C.M.R. 124 (1953). The accused also objected to the legal officer giving advice to the special court, but although COMA recognized that such conduct theoretically fell within the condemnation of general prejudice, it concluded that this was merely "an isolated incident in a trial which was otherwise marked by a commendable adherence to proper procedure." 3 U.S.C.M.A. 568, 574. COMA denied that the advice specifically prejudiced the accused, pointing out that in part it was helpful to him. *Id.* at 574-5.

For an example of more flagrant interference by the command's legal officer at a general court-martial, see United States v. Guest, 3 U.S.C.M.A. 147, 11 C.M.R. 147 (1953). There the legal officer secretly supplied the president of the court with information that enabled the court to overrule a ruling of the court's own law officer which was favorable to the accused. COMA, while condemning this conduct, reversed on other grounds. 3 U.S.C.M.A. 147, 150, 152.


\(^{30}\) COMA recognized early that it is impossible to read the mind of a commanding officer to see his intent, and that therefore an objective test is necessary. See United States v. Gordon, 1 U.S.C.M.A. 255, 2 C.M.R. 161 (1952). But in practice this may not be a substantial aid to the accused. While COMA stated in United States v. Self, 3 U.S.C.M.A. 568, 13 C.M.R. 124 (1953), that it was applying an objective standard, its language was often more suggestive of a search for subjective intent. See, e.g., Judge Brosman's reference to the legal officer's presence as not being "prompted by any sort of improper purpose"; Judge Latimer's declaration of no "desire to influence." 3 U.S.C.M.A. 568, 575, 576.

The accused may be denied access to other sources of information as to the commanding officer's intent. Court members dependent themselves on the commanding officer will be reluctant to accuse him of command influence except in extreme cases. See *Hearings*, supra note 2, at 719.

\(^{31}\) Thus, in United States v. Isbell, 3 U.S.C.M.A. 782, 14 C.M.R. 200 (1954), COMA was faced with the same factors present in *Littrice*, with the exception that the documents
could be sufficient. Thus a single statement by a staff judge advocate that failure to act firmly would lead to further mutinies in stockades was properly held to be an assertion of command control when made to a pre-trial conference held the day before the trial commenced.

The test for command influence should properly be formulated in terms of the effect of a commanding officer's conduct upon a court-martial. A commander may apply pressure in a variety of ways: by general communications, by statements made at pre-trial conferences, by the presence of his legal officer at trials, even by his unexpressed personal feeling in the outcome of particular cases. Any effective test must be flexible enough to recognize these subtle variations. References by commanders to proper performance of court-martial duties, efficiency reports, and offenses impairing discipline within the command, while generally proper in themselves, may in combination exert as much pressure as if the convening authority actually suggested the verdict. Statements by members of courts-martial that they were not actually influenced should be discounted, since these men may be unwilling or unable to recognize bias in themselves. Command influence should be found were read prior to the convening of a court, and COMA found no command influence. However the effect may have been equally damaging to the accused in both cases. See text at p. 883.

32. References either to efficiency reports or to the convening authority's reviewing powers come closest to being command influence per se. Judge Latimer characterizes the former as being the most offensive instruction in United States v. Littrice, 3 U.S.C.M.A. 487, 494, 13 C.M.R. 43 (1953). For a criticism of the commander's power to review, see note 17 supra.

33. United States v. Ferguson, 11 C.M.R. 251 (Board of Review), appeal denied, 12 C.M.R. 204 (1953). The statement, considered in the background of the rushed trial and the severe sentences imposed, gave rise to the finding of command influence.


37. United States v. Gordon, 1 U.S.C.M.A. 255, 2 C.M.R. 161 (1952). In Gordon, the accused had burglarized the home of the convening authority. Although the court-martial was considering a different burglary, COMA reversed the conviction because of the imputed "personal feeling" of the convening authority in the case. See also United States v. Marsh, 3 U.S.C.M.A. 48, 11 C.M.R. 48 (1953) (convening authority disqualified since violation of his order was charged against accused).

38. For a case where the convening authority suggested the verdict while discussing the accused's prior derelictions at a pre-trial conference, see United States v. Hunter, 3 U.S.C.M.A. 497, 13 C.M.R. 53 (1953). COMA's per curiam reversal contrasts sharply with the Board of Review's affirmation of the conviction. Even the Government conceded on appeal that the pre-trial conference materially prejudiced the substantial rights of the accused. Ibid. See United States v. Littrice, 3 U.S.C.M.A. 487, 495, 13 C.M.R. 43 (1953) (combination of events and statements denied accused a fair trial).

39. See note 23 supra.

40. While the members may honestly believe that they were not influenced, the danger is that their attitude toward the accused may have been affected, despite their opinion to
if external pressures have created an undue risk that a court-martial will not be able to reach an impartial verdict.\textsuperscript{41}

COMA, as an appellate court reviewing a relatively small number of cases\textsuperscript{42} cannot eliminate command influence by itself.\textsuperscript{43} Moreover, by virtue of the inherent nature of the military establishment, some degree of command control appears inevitable.\textsuperscript{44} However, some changes in court-martial procedures may aid COMA in minimizing its effect. Abolition of pre-trial conferences would eliminate a major opportunity for the exercise of command influence;\textsuperscript{45} since many court members have had experience with prior courts-martial,\textsuperscript{46} and legal advice can easily be made available,\textsuperscript{47} the claim that these sessions

the contrary. See United States v. Isbell, 3 U.S.C.M.A. 782, 789, 791, 14 C.M.R. 200 (1954) (dissenting opinion). The concept of general prejudice is implicit in this argument. If the test of specific prejudice is followed, it will be very difficult to find command influence without specific admissions by members of the court. See notes 12 supra, 41 infra.

41. Cf. Kotteakos v. United States, 328 U.S. 750, 764-5 (1946). See United States v. Isbell, 3 U.S.C.M.A. 782, 788, 14 C.M.R. 200 (1953) (dissenting opinion). See also United States v. Ferguson, 11 C.M.R. 251 (Board of Review), appeal denied, 12 C.M.R. 204 (1953). This test of "undue risk," without specific proof of actual influence, is the requirement of showing general prejudice. Since specific prejudice may be difficult to find in command influence cases, see note 40 supra, the general prejudice test would seem necessary to stop improper pressures. When called upon to enforce the Code's injunction against participation of the law officer in the secret deliberations of general courts, COMA's majority has uniformly applied the standard of general prejudice. See note 12 supra. Only by extending this standard of proof to the command influence cases will COMA be able to contribute to eliminating the latter form of interference.

42. It has been estimated that only about ten percent of the Board of Review cases are brought to COMA. See Walker & Niebank, The Court of Military Appeals—Its History, Organization, and Operation, 6 Vand. L. Rev. 228, 235 (1953). See also Grimm, Criminal Justice in the Military Establishment, 37 J. Am. Jud. Soc'y. 14, 22 (1953); Latimer, Military Justice, 3 Cath. U. L. Rev. 73, 79 (1953).

43. See Quinn, The Court's Responsibility, 6 Vand. L. Rev. 161 (1953). COMA, as an appellate court, is faced with the difficulty that it considers only an impersonal record. Moreover, the commander's pre-trial statements or conduct are not included in the record. See Hearings before Subcommittee of Committee on Armed Services on H.R. 2498, 81st Cong., 1st Sess. 629 (1949). A defense counsel is advised therefore to read any evidence he has as to command influence into the record in a voir dire proceeding before trial. If he waits until the case is on appeal to allege improper influence, he runs the risk of not being believed by the reviewing body. See United States v. Borner, 3 U.S.C.M.A. 313, 12 C.M.R. 69 (1953).

44. See Hearings, supra note 43, at 628, 688.

45. See, e.g., United States v. Hunter, 3 U.S.C.M.A. 497, 13 C.M.R. 53 (1953); United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953); United States v. Ferguson, 11 C.M.R. 251 (Board of Review), appeal denied, 12 C.M.R. 204 (1953). Even without the pre-trial conference, a commander desiring to influence a court may do so through his daily contact with the officers in his command. However, the conferences have been used for improper purposes so conveniently by convening authorities that their elimination seems advisable.

46. See, e.g., United States v. Ferguson, 11 C.M.R. 251, 257 (Board of Review), appeal denied, 12 C.M.R. 204 (1953).

47. For an argument that legal aid can be supplied to special courts-martial, see
have guidance value seems unimpressive.\textsuperscript{48} Allowing a legal officer independent of the commander to appoint the court from a panel of available officers selected by the commander \textsuperscript{49} and to pass on challenges to court members \textsuperscript{50} might eliminate other direct forms of pressure.\textsuperscript{51} However, until these statutory changes are enacted, the standards evolved by COMA, the court of final appeal except in extreme cases,\textsuperscript{52} will be the chief bar to command control.


The possibility of undue influence to special courts outweighs the value of any information which the commanding officer may impart at pre-trial conferences. For the view that special courts are highly susceptible to command influence, see Mugel, \textit{Military Justice, Command, and The Field Soldier}, 2 Buff. L. Rev. 183, 210 (1953). There is clearly no need for instruction to general courts-martial, where a law officer is always present to instruct on points of law. Art. 26, 64 Stat. 117, 50 U.S.C. \$ 590 (Supp. 1952).


\textsuperscript{49} See Keeffe & Moskin, \textit{Codified Military Injustice}, 35 Conn. L.Q. 151, 158, 163 (1949); Snedeker, \textit{The Uniform Code of Military Justice}, 38 Geo. L.J. 521, 535-6 (1959); \textit{Hearings}, supra note 43, at 627, 641, 728-9. The argument that such a step would weaken the commanding officer's responsibility for discipline is unimpressive since his power to punish summarily for misconduct would be unimpaired. See Art. 15, 64 Stat. 112, 50 U.S.C. \$ 571 (Supp. 1952). The proposal may be administratively infeasible, however, especially in time of war, since in small commands or on naval vessels the same men must always be assigned. See Statements of Professor Edmund M. Morgan and Hon. W. John Kenney, Under Secretary of Navy, \textit{Hearings}, supra, at 1113-4, 1124. Moreover, the few commanding officers who wish to “pack” the court could hand-pick the panel they submit.

While the Army has created an “independent” Judge Advocate General Corps, Congress has adopted a non-committal attitude with regard to forcing the Navy and Air Force to establish separate legal groups. \textit{See Pasley, A Comparative Study of Military Justice Reforms in Britain and America}, 6 Vand. L. Rev. 305, 313-6 (1953).

Conceivably, because of his power to appoint the defense counsel, the convening authority might exert pressure on him. \textit{See Hearings}, supra, at 684. However, an accused under the Code may choose his own counsel, who may be from another service or a civilian. \textit{See Art. 38, 64 Stat. 120, 50 U.S.C. \$ 613 (Supp. 1952).}

\textsuperscript{50} See note 21 supra.

\textsuperscript{51} Nothing can apparently be done to strengthen the sanctions against command influence, which up to now have never been used. \textit{See note 10 supra}. Proposals to make the courts-martial mandatory for offenders, or to have the officers tried in federal district courts are objectionable; they might ruin the careers of men whose illegal acts were more the product of ignorance or a sincere desire to improve the performance of courts than of any desire to prejudice the rights of an accused. \textit{See text at note 29 supra}. The latter proposal is also impractical, since the civilian courts are not the proper forum for this essentially military problem. \textit{See Statement of Gen. Franklin Riter, Hearings}, supra note 43, at 665-6.

\textsuperscript{52} The scope of habeas corpus review is narrower for COMA than for civilian courts. Although the Supreme Court in \textit{Burns v. Wilson}, 346 U.S. 137, \textit{rehearing denied},
Under its present tests, all but the most unwary commanders may influence courts-martial with reasonable impunity.

346 U.S. 844 (1953), recognized that habeas corpus hearings extended to more than mere jurisdictional questions the majority concluded that only when the reviewing military authorities had failed to consider the accused's contentions would it or the lower federal courts intervene. Justices Douglas and Frankfurter in dissents argued, respectively, that the Fifth Amendment (ban on forced confessions) applied to courts-martial, and that habeas corpus review for courts-martial was as broad as for civilian courts. Id. at 150, 844.

For a discussion of which sections of the Constitution are applicable to courts-martial, see Comment, 29 Tex. L. Rev. 651 (1951). See also Snedeker, Habeas Corpus and Court-Martial Prisoners, 6 Vand. L. Rev. 288 (1953).