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# Military Justice

# Trial Procedure


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# MILITARY JUSTICE

## TRIAL PROCEDURE

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# CHAPTER I

# INTRODUCTION

*References:* Article I, Section 8, Clause 14, United States Constitution; Article 36, 140, Uniform Code of Military Justice; Executive Order 10214, February 8, 1951, page ix, Manual for Courts-Martial, 1951.

**1. General.** This text is designed primarily for the lawyer participating in a general court-martial. It is entitled "Trial Procedure" for want of a better description. Perhaps, "Legal Administration of Courts-Martial" would be a more accurate title, since it is doubtful that in criminal trials there exists a true dichotomy of "substance" and "procedure".[1] The subject matter does concern itself with definite rules affecting the presentation of the case, however, rather than with suggested tactics and techniques. Because the law is a seamless web, there is some unavoidable overlapping with other arbitrarily-drawn compartments of the general subject of military justice: Evidence,[2] Substantive Criminal Law, Jurisdiction, and Appellate Review[3] and Penology. An understanding of these other areas is necessary to appreciate the reasons underlying the rules governing the trial itself.

**2. Format.** This text takes up the proceedings from the time the charges are referred to trial. After discussing the appointment of the court, several chapters are devoted to the duties and qualifications of the actors in the drama that is then, in subsequent chapters, developed in the chronological order that events normally occur in a military trial, and ends with the sentence. This organization necessarily posed problems, because the Code and the Manual for Courts-Martial, which are the principal sources of the law of military criminal procedure, themselves are not set forth with a view to such development. Thus it is hoped that one principal accomplishment of this text has been to collate, at one pertinent place in the text, the various rules scattered throughout the Code and the Manual, together with relevant case law.

The case law itself is, wherever possible, within limitations of space and relative importance, cited verbatim to illustrate the proposition of the textual materials. Often, to save the lawyer time, these cases are digested. In areas of developing law the text poses frequent hypothetical questions, thus lending itself as a teaching vehicle. Law review articles, germane to the subject matter, are cited to assist in further research.

**3. The Rule-Making Power.**[4] Vital to an understanding of this text is an appreciation and evaluation of the source of the rules of procedure and of the nature of the rule-making power. Only in this way can the reader begin

[1] For instance, only Congress can define crimes. Defenses thereto are thus "substantive." "The inclusion therein [in the Manual] of any such statement of substantive law generates no validity for the same. Such is quite unlike the Executive promulgation of a mode therein, pursuant to the authority conferred by Congress in the Uniform Code. United States v. Smith, 13 USCMA 105, 32 CMR 105. "United States v. Smith, 13 USCMA 471, 33 CMR 3 (1963), at 475, 476. Yet Congress indirectly has permitted the President to define crimes through his command prerogative of issuing disciplinary and administrative regulations. See Article 92 UCMJ. While Congress, under Article 36, has permitted the President to prescribe rules of procedure, these rules must not be inconsistent with the rules of procedure which Congress itself has enacted (see, *e.g.*, Articles 40-47, UCMJ), many of which are based on the Constitution; [Burns v. Wilson, 346 US 137 (1953),] and which constitutes the framework of military due process. Thus the rules which guarantee the military accused a fair trial—as for example, the right to be represented by an appointed military lawyer at the trial of a serious offense—are "procedural" in nature, although they confer "substantive" rights upon the accused.

[2] DA Pam 27-172 (1962).

[3] DA Pam 27-175-1 (1962).

[4] For a detailed discussion of the President's rule-making power see Wood, "The Rule-Making Power," an unpublished thesis submitted to The Judge Advocate General's School, U.S. Army (1963).

to assess the validity of the rules and prophesy the outcome of cases.

Initially, the *"power"*—or physical capacity to make and enforce procedural rules—must be distinguished from the *"right"*—or legal authority to do so. The latter is derived from the Constitution which gives the Congress the right "to make Rules for the Government and Regulations of the land and naval Forces".[5] Although some writers argue the contrary,[6] unless Congress itself has used this authority in given area, the President may act under the authority delegated to him by Congress in Article 36 of the Uniform Code of Military Justice.[7] This article provides in part:

> (a) The procedure, including modes of proof, in cases before courts-martial . . . may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this Code.

Although Article 140 of the Code apparently authorizes in broad terms the redelegation of the Article 36 rule-making authority, at least one judge of the Court of Military Appeals believes that Article 140 permits redelegation of only administrative, as distinguished from judicial, functions.[8] The President has exercised his authority under Article 36 in promulgating the Manual for Courts-Martial,[9] together with various subsequent amendments thereto.

*a. Manual contrary to Code.* Since Congress has prohibited the President from making rules of procedure "contrary to or inconsistent with [the] Code", such rules are invalid.[10] In deciding whether such conflict exists, certain Code articles which are written in broad terms,[11] permit correspondingly broad interpretation by the Court of Military Appeals. Here the transition from the rule-making "right" to the rule-making "power" may begin: There is no direct review of the Court's decision;[12] if the Court decides to reverse a conviction, by finding that the Manual provision in question conflicts with the Code, the Government has no remedy from even an arbitrary ruling, other than the impractical one of refusing to release a confined prisoner and defending a subsequent habeas corpus proceeding. Thus, in practical effect, the Court of Military Appeals has the rule-making *power*, at least where it can enforce its edicts through the negative device of reversing convictions which come to it for review under provisions of the Code.[13] Where, however, affirmative, collateral administration action would be the sole method of attempting to enforce its rules, such power is lacking because the Court does not possess the essential administrative machinery and personnel.

*b. Manual and Code silent.* Where neither the President nor Congress has prescribed a rule to cover a procedural question, probably the best source of guidance would be the applicable Federal rule. Here, unlike the Manual statement expressly applying such a rule, on an *evidentiary* question,[14] the Manual is silent as to the applicable source of law for procedural rules when neither the Code nor the Manual provide express guidance. Nevertheless, the Court of Military Appeals has shown a propensity to look first to the Federal rule, and

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[5] U.S. Const., Art. I, § 8, Cl. 14.

[6] See Snedeker, "Military Justice Under the Uniform Code" (1953 ed.), at 39: The complete rule-making power is in Congress, and the President may make rules governing procedures before courts-martial only when expressly authorized to do so by Congress.

[7] United States v. Smith, 13 USCMA 105, 32 CMR 105 (1962); and see Everett, "Military Justice in the Armed Forces of the United States" (1956 ed.), at p. 8: The President, as commander in chief, may promulgate certain orders relating to military justice, such authority being based on Art. II, Sec. 2 of the Constitution. The Uniform Code of Military Justice will henceforth be referred to as "UCMJ" or the "Code."

[8] See Judge Quinn's opinion in United States v. Hooper, 5 USCMA 391, 18 CMR 15 (1955).

[9] The Manual for Courts-Martial, 1951, will henceforth be referred to as the "Manual" or "MCM," 1951.

[10] For instance, para. 55 of the Manual allows the court members to seek the convening authority's advice on the question of whether the evidence is at fatal variance with the allegation. This provision of the Manual was held to conflict, illegally, with Article 51 of the Code, giving the law officer the right to rule on interlocutory questions. United States v. Johnpier, 12 USCMA 90, 30 CMR 90 (1961).

[11] E.g., Article 37, prohibiting unlawful command influence; Art. 38, guaranteeing an accused appointed "counsel"; Art. 51, requiring the law officer to make "interlocutory" rulings.

[12] Burns v. Wilson, 346 U.S. 137 (1953).

[13] For instance, in United States v. Hardy, 12 USCMA 513, 31 CMR 99 (1961) the Court directed a new post-trial review because the Army had not been able to comply with the Court's previous request to obtain an affidavit from a staff judge advocate whose post-trial review was being attacked on appeal. The court, itself, of course, had no facilities to obtain such an affidavit.

[14] Para. 187a, MCM, 1951.

then apply it, if it is compatible with the military community.[15]

*c. Code silent; Manual rule Conflicts with Federal rule.* There have been no express holdings by the Court in this area, probably because it can "interpret" the Code[16] to find an implied limitation on the Manual rule; in addition, the underlying concept of military due process sets a minimum level that the Manual rule must reach. Nevertheless, in dictum the Court has indicated that it would apply the Federal rule in such a case, where no cogent military practise would militate against doing so.[17] Such an attitude seems to have at least some support in the pertinent phrasing of Article 36 which provides that the President's rules of procedure "shall, *so far as he deems practicable,* apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts. . . ."[18]

The question naturally arises as to whether the emphasized portion of Article 36 is intended to limit the President's discretion in promulgating rules of procedure: that is, where the peculiar structure of the military community provides no valid reason for a Manual procedural rule that departs from a recognized rule of Federal criminal procedure, is the Manual rule invalid? This question has not yet been squarely answered in a situation arbitrarily labelled "procedural" (as distinguished from an "evidentiary" one), although the Court's approach to the problem raised by a Manual rule of evidence should be of equal assistance.

In this connection, in the landmark case of *United States* v. *Smith,*[19] the Government asked the Court to reject a Manual rule of evidence[20] that required, as corroboration of a confession, some evidence—independent of the confession—of every element of the offense charged, except the identity of the accused. Government appellate counsel correctly pointed out that the applicable Federal rule[21] required less corroboration. In refusing to reject the Manual rule, Judge Kilday pointed out that the particular rule

> not being contrary to or inconsistent with the Code, and not conflicting with other Manual provisions or principles of military justice is a valid exercise of the delegated power [under Article 36] and has the force of law.[22]

While agreeing with Judge Ferguson that the military structure presented unique reasons for rejecting the Federal rule, Judge Kilday refused to adopt such a rationale as a basis for his decision, preferring to give the Manual provision binding effect. On the other hand, from his dissent, it appears that Chief Judge Quinn—absent compelling reasons to the contrary—would reject a Manual rule of procedure in favor of a recognized Federal rule:

> As early as my dissent in United States v. Uchihara [1 USCMA 123, 2 CMR 29 (1952)] I acknowledged that the Manual's procedural statement in this specific area "is binding upon us." But the particular command of the Manual is a command to follow the rule "of common application in the Federal courts". . . . That rule was settled by the United State Supreme Court in the *Opper* case. In accordance with the Manual provision and with the dictate of Article 36 . . ., that as far as practicable the President shall prescribe "rules of evidence generally recognized" in the regular Federal courts, I would follow the Federal rule.[23]

**4. Hypothetical problems.** *a.* During time of war, the President, by an Executive Order, delegated to the Secretary of Defense his powers under Article 36. The Secretary of Defense, pursuant to this Presidential authority, then

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[15] See United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954), at 590: "We have repeatedly held that Federal practice applies to courts-martial procedures if not incompatible with military law or the special requirements of the military establishment."

[16] *E.g.*, United States v. Kraskouskas, 9 USCMA 607, 26 CMR 387 (1958): The Court interpreted the word "*counsel*" in Article 38, UCMJ to mean a *lawyer*, when defending before a general court-martial. This holding was in the face of a long practice of permitting accused, in addition to his right to be represented by an appointed military lawyer, also to be represented by a lay officer.

[17] United States v. Knudson, *supra* note 15.

[18] Emphasis supplied.

[19] 13 USCMA 105, 32 CMR 105 (1962).

[20] Para. 140*a*, MCM, 1951.

[21] As set forth in Opper v. United States, 348 U.S. 84 (1959).

[22] 13 USCMA 105, 122, 123, 32 CMR 105, 212, 223.

[23] 13 USCMA 105, 122, 123, 32 CMR 105, 212, 223.

promulgated a Manual Amendment forbidding all civilian counsel from entering active combat areas (Area A). Private X subsequently is charged with a rape committed in Area A, where it is essential to try the case. His request for civilian counsel is denied because of the Secretary's directive. As appellate defense counsel, what are your arguments for reversing X's conviction? *Consider:* The applicability of Constitutional rights to the military. (See United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960); the extent of the Code right to representation by civilian counsel. CM *Griffiths* 18 CMR 854 (1955); the legality of the President's delegation of the rule-making authority.)

*b.* What would be the efficacy of an amendment to the Code (a) enacting into law those procedural rules made by the President and reported 90 days beforehand to Congress and (b) making such rules "binding on the United States Court of Military Appeals"?

# CHAPTER II

# APPOINTMENT OF COURTS-MARTIAL

*References:* Arts. 22–24, 25(d)(2), 29, 34, UCMJ; para. 5*a*(5), 33*j*, 35*a*, 36, 37, 41*c*, App. 4, MCM, 1951.

## Section I. INTRODUCTION

A trial is the adjudication of a dispute by a court which had jurisdiction over the parties and the dispute. "Jurisdiction" is simply the *power* to decide and dispose of the contest. Because the disposition of a criminal trial may involve jailing a defendant or putting him to death it is crucial that the court have power to do so.

Any Federal court's power to try criminal cases and impose punishment is the sovereign power of the United States. Civilian Federal criminal courts derive their power from Article III of the Constitution as judicial courts of the United States.[1] A court-martial, however, derive its authority from *Congress'* power to "make Rules for the Government and Regulation of the land and naval Forces."[2]

Civilian Federal criminal courts are established by Congress.[3] The Judges are appointed by the President with the advice and consent of the Senate, and have tenure during good behavior.[4] Congress, however, has delegated to the President, the Secretaries of the military departments and various *commanding officers* in the Armed Services the power to convene courts-martial and appoint all the personnel thereof.[5]

When a civilian Federal court is established it remains continuously in existence. Whether it is in session or in vacation, it may handle various aspects of any case before it, pursuant to its established rules of procedure. It generally has power to hear and determine all Federal criminal cases arising within its district. The court-martial, however, is an *ad hoc* tribunal which springs into existence only on the order of a commander authorized to convene it (the "convening authority"). Although in theory it exists indefinitely thereafter,[6] in practise it acts only on one or more cases referred to it and then is permanently adjourned. It must be composed only of qualified persons who have been properly appointed to it by the convening authority.[7] Indeed, the court-martial *is*

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[1] U.S. Const. art. III, § 2, "The Judicial Power shall extend to all cases . . . arising under . . . the Laws of the United States."

[2] U.S. Const. Art I, § 8. The establishment of courts-martial is "necessary and proper for carrying into Execution the foregoing Powers." It is possible that the President has some inherent power to establish courts-martial in virtue of his constitutional responsibility as Commander in Chief. See U.S. Const. Art. II, § 2; United States v. Swaim, 28 Ct. Cls. 221–22 aff'd. 165 U.S. 553 (1886) (President had power to convene court-martial without specific Congressional authorization). The locus of power to establish courts-martial may thus lie on one of those hazy and undefined borderlines between legislative and executive. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1951). Any such "inherent" Presidential power in this area, however, probably remains in abeyance to the extent that Congress has occupied the field by legislation. *Cf.* UCMJ, Art. 36, providing that the President may prescribe the rules of procedure and modes of proof before courts-martial, so long as they are not contrary to or inconsistent wtih the Code. The President exercised this power in Executive Order 10214, February 8, 1951, by prescribing the Manual. Although the Court of Military Appeals has attempted to reconcile the Code and Manual provisions whenever possible, [see United States v. Lucas, 1 USCMA 19, 1 CMR 19 (1951),] it has judicially reviewed and nullified those provisions of the Manual that it has found inconsistent with the Code. See, *e.g.*, United States v. Varnadore, 9 USCMA 471, 26 CMR 251 (1958); United States v. Price, 7 USCMA 590, 23 CMR 54 (1957); United States v. Jenkins, 7 USCMA 261, 22 CMR 51 (1956); United States v. Rosato, 3 USCMA 143, 11 CMR 143 (1953).

[3] U.S. Const. Art. III, § 1.

[4] U.S. Const. Art. II, § 2; Art. III, § 1.

[5] UCMJ, Arts. 22–24.

[6] See Model Form for Orders Appointing General Court-Martial, MCM, app. 4, para. (a)(1) at 462.

[7] UCMJ, Arts. 25–27.

that group of persons, no more and no less.[8] Likewise the court-martial has power to try only the *particular charges* against an accused that the convening authority *refers to it* for trial. It is apparent that every court-martial is a unique creation and that many factors determine whether a particular court-martial has been legally brought into existence. All these factors are potential issues in every case. Unless the court-martial was legally created and the particular charges were properly referred to it for trial, it cannot exercise the power of the United States to try a criminal case and impose punishment.

"It is generally true that military courts-martial must be convened strictly in accordance with the statute." . . .[9] It is not always clear what those requirements are, however, or whether a particular procedure is required, or merely advisable. This chapter will analyze the proper procedure for appointing and convening a court-martial, and referring charges to it for trial. Since the court-martial *is* the personnel assigned to it, section III of this chapter will discuss the effect of various changes in the personnel of the court-martial after its initial establishment.

## Section II. INITIAL ESTABLISHMENT OF THE COURT-MARTIAL

**1. Convening authority.** *a. General.* Under the Code, only those persons designated in Articles 22–24 have the power to appoint and convene courts-martial.[10] Before the present Code, following World War II, there were numerous complaints of unfairness concerning the military justice system. Many believed that one of the only solutions was to take from the hands of commanding officers the power to appoint and convene courts-martial.[11] When enacting the UCMJ, Congress did not go quite that far, acceding only to the military plea that administrative convenience required retention of the commander's power to appoint and convene courts-martial.[12] However, Congress attempted to insure that the system would be operated impartially and reponsibly, and that its mechanics could not be used to affect the outcome of cases.[13]

*b. Power to appoint cannot be delegated.* The Code requires that the convening authority shall appoint as court "members . . . such persons, as, *in his opinion*, are best qualified for the duty by reason of age, education, training experience, length of service, and judicial temperament."[14]

Thus, the selection of members of a court must be based on the personal opinion of the convening authority. Staff members or other subordinates may not make the decision for him,[15] although they may make recommendations. The convening authority may, therefore, base his choice upon a list of prospective members submitted by an impartial official. According to a board of review decision,[16] if the convening authority *personally acts* upon such a list, his exercise of discretion may not be chal-

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[8] As an *entity*, the court-martial in actual practice thus resembles the civilian jury—a particular group of persons appointed for one or more trials of cases that may be referred to it, brought together ("convened") for the particular trial or trials, and then disbanded.

[9] United States v. Emerson, 1 USCMA 43, 1 CMR 43 (1951).

[10] See UCMJ, Arts. 22–25; MCM, para. 5, 86; AR 310–10, para. 57. (20 Sep. 61).

[11] See Vanderbilt Committee Report, para. 6 at pp. 9–10; *House Hearings* at 622–38 (views of the New York City Bar Association), at 634–36 (New York County Bar Association), at 715–24 (American Bar Association). *But see* House Hearings at 788–800 (views of Col. Frederick B. Wiener), at 1121–24, (W. John Kenney, Under Secretary of the Navy), at 1113–15 (Prof. Edmund M. Morgan, Jr., Harvard Law School Chairman of the committee that drafted the Code, as proposed legislation, at request of Secretary of Defense).

[12] See H.R. Rep. No. 491, 81st Congress, 1st Session at 7–8 (1949). Sen. Rep. No. 486, 81st Congress, 1st Session at 8–6 (1949). Both committees thought there was no practicable alternative.

[13] See UCMJ, Art. 37 (proscribing unlawful command influence of court-martial proceedings). Whoever knowingly and intentionally fails to comply with Article 37 thereby himself commits an offense triable by court-martial. See UCMJ, Art. 98.

[14] UCMJ, Art. 25(d)(2) (emphasis supplied). For qualifications of members, see *infra*, chapter V, section II.

[15] See UCMJ, Art. 25(d)(2); MCM, para. 5; United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955) (dictum).

[16] CM 400981, Owens, 27 CMR 658 (1959). The board of review stated that the decision was solely within the discretion and responsibility of the convening authority, and so long as he *personally* acted, the board could not presume to review his mental operations, nor should the board speculate that he had not conscientiously fulfilled his responsibility simply because he availed himself of the staff assistance "furnished him by law and regulations for the purpose of facilitating the performance of his duties." 27 CMR

lenged on the grounds that his action appeared to be undiscriminating, or hasty.[17]

A convening authority may not, however, rely on a list of prospective members submitted by one who has an interest, official or personal, in the outcome of the case. A convening authority's discretionary choice to accept an entire list, although innocent in itself, must be held suspect when that list was prepared by a presumably biased person. Thus, it was held prejudicial error for the convening authority to rely on a list of names furnished by the *trial counsel* for the forwarding signature of a subordinate commander.[18] This ruling supports the spirit of the Code and is consistent with civilian precedents, in which the prosecutor's participation in selection of the jury panel has been expressly condemned as raising a suspicion that the trial was tainted.[19]

*c. Selection of personnel.*

(1) *General.* Although ordinarily the members of the court are members of the convening authority's immediate command, he may appoint a court for each geographically separated subordinate command, composed of personnel of the subordinate command.[20] The court members are usually officers.[21] If, however, an accused enlisted person has submitted a written request therefore, prior to the convening of the court, at least one-third of the members of the court that tries him shall be enlisted men, provided they are available within the command.[22]

(2) *Large panels.* The appointment of a large panel, with subsequent attendance of only some of the members, sullies the dignity that should clothe the court-martial. It makes the convening of the members appear a casual affair based purely on convenience and expediency.[23] Mass appointment is also suspect since it could shelter a *sub rosa* procedure by which, from among the members chosen by the convening authority, some subordinate officer is actually selecting the particular composition of the court that will try an accused.[24]

(3) *Enlisted members—right to request.* The Code and the Manual give an enlisted accused the right to request enlisted members on the court.[25] He must make this request in writing prior to the convening of the court.[26] If he makes a timely request, and if sufficient enlisted persons are available, the court may not be convened unless at least one-third of the members then sitting are enlisted persons.[27]

*d. Denial of request for enlisted members.* When an accused's request for enlisted members is denied, the convening authority must append to the record a written explanation why such members could not be obtained.[28] The only grounds of excuse are "physical conditions or military exigencies."[29] The decision on availability, however, is the convening authority's and so long as his judgment appears reasonably related to the contingencies noted in Article 25(c)(1) it could not be successfully challenged.

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[17] However, the selection of a court predominantly composed of persons whose duties appear to give them a natural bias in favor of the prosecution has been held an abuse of discretion and reversible error. See United States v. Hedges, 11 USCMA 642, 29 CMR 458 (1960).

[18] ACM 8501–R, Cook, 18 CMR 715 (1955).

[19] See United States v. Murphy, 224 Fed. 554 (N.D. N.Y. 1915); Patrick v. Commonwealth, 115 Va. 998, 78 S.E. 626 (1913).

[20] See MCM para. 4*f*, 86*c*.

[21] See UCMJ, Art. 25(a), (b).

[22] See UCMJ, Art. 25(c).

[23] See CM 868955, Andrass, 11 CMR 299 (1953).

[24] Compare CM 868294, Moses, 11 CMR 281 (1953), in which it was held reversible error for trial counsel to excuse seven of the 81 members appointed and not call or notify eleven others.

[25] See UCMJ, Art. 25(c); MCM para. 86*c*(2)(a).

[26] *Ibid.* It is the duty of defense counsel to advise accused of this right before trial, and if accused wishes to exercise his right, defense counsel will prepare the written request, have it signed by accused, and forward it without delay through the trial counsel to the convening authority, or to the court if trial is imminent, MCM para. 48*e*. If accused does not wish to exercise his right, the record of trial should show he was advised, or otherwise aware of it. See United States v. Parker, 6 USCMA 75, 19 CMR 201 (1955); MCM App. 8, at 504.

[27] See MCM para. 61*g*. *But see* WC NCM 58–01534, Rendon, 27 CMR 844 (1958) holding that failure to meet the one-third ratio until the time of arraignment was not jurisdictional error, nor was it prejudicial, absent timely objection. Apparently MCM para. 61*g* was not called to the board's attention in *Rendon*.

[28] See UCMJ, Art. 25(c)(1).

[29] *Ibid.*

Arbitrariness is checked by the requirement that he explain his decision in writing.[30]

**2. Form and content of appointing order.** *a. General.* The Code does not specify the form and content of the order creating the court, but the Manual implies that for appellate purposes some writing is needed to *confirm* the appointment of the court and the qualifications of its personnel.[31] Thus, there is no mandatory requirement that the order essential to the creation of the court-martial be in writing. An oral order, though not preferable, would suffice. But if a person participated as a member of a court to which he had not been appointed by *any* order, oral or written, his participation cannot be validated by the subsequent attempted "ratification" of the convening authority.[32]

*b. Oral order.* In one case,[33] prior to departing his command on temporary duty, the convening authority (1) verbally selected the members of the general court-martial to try the accused, and (2) verbally directed his staff judge advocate to refer the case for trial by "general court-martial". During his absence, written letter orders were published confirming these oral orders. It was held that the court-martial had jurisdiction and that the verbal appointing order was legally competent, the subsequent letter order being merely a formalization thereof.

*c. Preferable form of order.*

(1) *General.* The Manual contains model "forms for appointing orders."[34] These are elaborated in regulations by the Army[35] and the Navy.[36] The Manual forms, as amplified by regulation, are preferable since they insure that appellate agencies will be furnished all the necessary information concerning qualifications of members, counsel and the law officer of the appointed court-martial. These forms, however, are not mandatory. In one Navy case,[37] the letter of appointment had been properly addressed to the president of the court, but the body of the order did not actually list him as a court member. This was held not to be error, since the convening authority clearly intended the addressee to be president, and as such a court member.

(2) *Ambiguous orders.* Ambiguous orders will be interpreted to effectuate the apparent intent of the convening authority.[38] Appointing orders may, of course, be so ambiguous that they betray no apparent intent, in which case they would be defective. This can easily be avoided by taking due care in the preparation of orders, and avoiding unnecessary amendments by publishing a completely new order to reflect changes in personnel.

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[30] See CGCMS 20629, Rivera, 24 CMR 519 (1957) (no abuse of discretion when accused's ship on 31 day patrol and convening authority stated no enlisted personnel available from other patrols). *But see House Hearings* at 1150–51 (statement of Felix Larkin, quoting commentary that accompanied the proposed 25(c)(1) to the effect that the unavailability exception was to avoid long delays and great expense of transporting witnesses in connection with offenses committed on ships at sea or on isolated units ashore such as remote weather stations):

> Now we intended that that be a part of the legislative history, as instructions to the commanders and the people that write the manual that it would only be in the most exceptional type of case that they would proceed and it would only be after the commander writes a statement of the conditions he has faced which made it impossible for him to obtain enlisted men and this statement is to go with the record.
>
> So it will not just be arbitrary or capricious convenience of his which he could adopt in order to avoid using enlisted men in the event he was the type of commander who wasn't sympathetic with this provision.

[31] See MCM para. 86*b*; *cf.* AR 310–10 para. 57(a) (21 Sep. 61) ("Oral appointing orders will be confirmed by written orders as soon as practicable".)

[32] See *infra* notes 37–41.

[33] CM 369622, Petro, 16 CMR 802 (1954).

[34] See MCM app. 4.

[35] See AR 310–10 para. 57–59 (21 Sep. 61).

[36] See JAG MANUAL sec. 0105 (eff. 1 Nov 61).

[37] United States v. Beard, 2 USCMA 344, 8 CMR 144 (1953). The Navy Supplement to the Manual then in effect required the convening authority to address the letter of appointment to the president of the court, and the convening authority must therefore have intended the addressee to act as president "It should not be—and is not—an unyielding condition precedent to the lawful convention of a court-martial that the appropriate form be followed parrotlike in minute detail. . . ." 2 USCMA 344, 346, 8 CMR 144, 146.

[38] In United States v. Padilla, 1 USCMA 608, 5 CMR 31 (1952), it was unclear whether two appointing orders were separate and independent, or whether the second was an amendment of the first. The convening authority apparently attempted to add two more members to the second court but because of the ambiguity of the appointing orders it was unclear to which court he had effectively added them. The Court of Military Appeals concluded he intended to add them to the second court, which actually tried the accused, since without them that court would not have had a quorum. The Court noted that when faced with an ambiguous order it would [illegible] the circumstances of the [illegible] avoid reading an absurd result [illegible] there are alternative interpretations [illegible]

*d. Retroactive effect.* Since, in legal theory, the court-martial does not exist until all essential personnel have been appointed to it, action taken by a purported court-martial—absent initial appointment of any essential personnel—is invalid, and cannot be retroactively validated.[39] For these purposes "essential" personnel include the court members,[40] the law officer,[41] qualified appointed defense counsel, [42] and, in the Army's opinion, the trial counsel.[43]

**3. Power to refer cases to trial.** The convening authority must *personally* decide *whether* to refer charges for trial, and the *grade* of court-martial to which the charges should be referred.[44] It may well be that he also must select the *particular court* that will try the accused, assuming he has appointed several courts of that grade. The Code and the Regulation[45] are both silent on this last question. The Manual, however, states that the charges are *ordinarily* referred to a court-martial for trial by indorsement on the charge sheet.[46] The charge sheet form indicates that the reference is to a *particular* court by order of the convening authority.[47] Pre-Code decisions held that when charges were properly referred to court *A* but then tried by court *B*, and the result approved by the convening authority, the error, if any, was harmless, and was cured by the convening authority's *ratification.*[48] The Court of Military Appeals has approved the result reached in these cases.[49] The Court has, however, rested its approval not on the doctrine of ratification, but on the theory that: formal written referral of charges for trial is not necessary; oral referral will suffice; and, absent any showing to the contrary, the charges will be *presumed* to have been *orally* referred by the convening authority to the particular court that tried the accused.[50] Thus, although no case has yet so held, it appears that the convening authority must personally refer the case to a *particular* court-martial.[51]

**4. Effect of trial by improperly constituted court-martial.** Technically, a court that has not been properly constituted, or to which charges have never been properly referred has no power to adjudicate the dispute. It is said that a trial under such circumstances is a "nullity." [52] Probably, however, this is not *entirely* so.

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[39] This includes the case where essential personnel actually participate without having been appointed.

[40] See United States v. Harnish, 12 USCMA 448, 31 CMR 29 (1961) (two "interlopers"—nonappointed persons—participated as court members; automatically reversible error even though court had quorum without them and in view of egregiousness of error, rehearing would be harassment—charges *dismissed.*); ACM #S-7588, Cameron, 18 CMR 788 (1953).

In NCM 61 01166, Heddon (15 Aug. 1961) (unpublished), no error was found even though the case had inadvertently been referred to the court for trial before the court had been appointed. By the time of trial, however, the court had been fully and properly appointed. Thus no *action* was taken before proper appointment.

[41] See CM 302975, Machlin, 59 BR 348 (1946), cited with approval in *Harnish, supra* note 40, and ACM 8038, Wolfrey, 15 CMR 768 (1954).

[42] See MCM, para. 61*f*, emphatically stating that failure to appoint qualified defense counsel is jurisdictional error. *Quaere*, however, whether an *acquittal* secured by counsel who lacked qualification or appointment would be held a nullity for purposes of double jeopardy? See discussion, *infra*, para. 4; *cf.* United States v. Kraskouskas, 9 USCMA 607, 26 CMR 387 (1958), in which the law officer of the GCM excused qualified appointed defense counsel at accused's request, and permitted accused to be defended by selected military counsel (see UCMJ, Art. 38(b)) who was *not a lawyer.* The court-martial acquitted accused of two offenses while convicting him of two others. The Court of Military Appeals held that a nonlawyer is not qualified to act as selected military counsel, but merely reversed and remanded for a rehearing limited to the two offenses of which accused was convicted—indicating that it found general prejudice but no jurisdictional error.

[43] See Dig. Op. JAG 1912–1940, sec. 368(1). This view appears to be shared by the Air Force, see ACM 14913, Genesee, 26 CMR 845, 849–50 (1958) (dictum); *cf.* ACM S-7588, Cameron, 18 CMR 788 (1953) (approving opinion of Air Force JAG). *But see*, WC NCM 6200722, Erickson (24 Aug. 62) (unpublished); NCM 5501032, Galyon, 19 CMR 541 (1955), in which Navy boards of review held the convening authority's ratification of the prior participation of nonappointed trial counsel was harmless error.

[44] See MCM para. 33*f*, 35*a*; AR 310–10, para. 56 (21 Sep. 61). The convening authority's failure to make these decisions personally is *automatically* reversible error. See United States v. Roberts, 7 USCMA 322, 22 CMR 112 (1956). In United States v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955), the Court of Military Appeals had refused to commit itself on whether the error was automatically reversible. Its discussion, however, had indicated no practically conceivable situation in which the error would not be prejudicial.

[45] AR 310–10, para. 56 (21 Sep. 61).

[46] MCM para. 33*f*.

[47] See MCM app. 8 at 467.

[48] See, *e.g.*, United States v. Wilson (ACM 1947), 2 CMR (AF) 262 (1949); United States v. Casey, 8 BR 159 (1932); L & LB 10–11; *cf.* United States v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955).

[49] See United States v. Griffin, 13 USCMA 213, 32 CMR 213 (1962); United States v. Emerson, 1 USCMA 43, 1 CMR 48 (1951).

[50] *Ibid.*

[51] This seems consistent with the intent of Congress, which allowed the commanding officer to retain his power to appoint and convene courts-martial for reasons of administrative convenience. The pattern of the Code provision in this area (see UCMJ Arts. 25–27, 37) is to require the responsibility for the decisions in an identifiable individual, require him to act impartially, and forbid him to attempt to use his administrative power to unlawfully influence the outcome of the case. *Accord*, United States v. Harnish, 12 USCMA 448, 31 CMR 29 (1961) (two unappointed persons sat as court members); NCM 26, Schmidt, 1 CMR 498 (1951) (court without quorum); United States v. Roberts, 7 USCMA 322, 22 CMR 112 (1956) (charges not properly referred). This was clearly the traditional military view. See Dig. Ops. JAG 1912–1940 §§ 365(1) at 169–70, 365(7)–(9), 368(1), 408(7).

While the Court has spoken of a trial before an improperly constituted court, or a trial on improperly referred charges, as a "nullity" and "void," it has usually ordered such cases remanded for a rehearing.[58] In theory, a finding by the Court of Military Appeals that the court-martial proceedings were without jurisdiction should preclude the Court from taking further judicial action thereon. In addition, it is hard to see how the Court can order the rehearing of charges that have never been validly referred for trial.

By ordering a "rehearing" even when there has been a "jurisdictional" defect in the first trial, the Court necessarily accords *some* validity to the first trial. This is because a "rehearing" imports the protections of Article 63(b), providing that an accused may not be retried for any charge on which he was acquitted at the first trial, nor if twice convicted on the same charge can the punishment be more severe than that first imposed. It follows from this that a court-martial—instituted under color of law—which purports to try charges against an accused who is subject to military jurisdiction, and reaches findings and sentence, has at least a limited *de facto* jurisdiction. This *de facto* jurisdiction consists of the power to (1) acquit, or (2) set the maximum sentence the accused may receive for a conviction of the charge in question.

## Section III. CHANGES IN MEMBERS OF COURTS-MARTIAL

*References:* UCMJ, Art. 29; MCM, para. 37.

1. **General.** Section II of this chapter dealt with the proper establishment of the court-martial and the referral of charges to it for trial. This section will examine what changes in the membership of the court-martial are thereafter permissible. According to the statutory materials, *arraignment* is a pivotal point in determining the validity of such changes. Before arraignment the convening authority may add to or excuse members from the court at his discretion.[54] After arraignment, however, only the convening authority may add or excuse members and then only for good cause.[55]

The problem of "unlawful command influence" is a unifying thread running through this area, since the convening authority's discretion is limited by the rule that he may not unfairly attempt to influence the court-martial.[56] Such undue influence inheres in any attempt by the convening authority to *select* the court members in such a way as to produce a result prejudicial to the accused.[57] Any changes in the membership of the court initially selected by the convening authority are subject to the same rule. Since arraignment follows the challenging procedures, at which the court members will often have given some indication of their inclinations, any excusal or addition of members thereafter should be *prima facie* open to suspicion. For the same reason, withdrawal of the charges from the court to which they were referred is equally suspect,[58] and cases

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[53] See cases cited *supra* n. 52; United States v. Stevens, 10 USCMA 417, 27 USCMA 417, 27 CMR 491 (1959); *cf.* United States v. LaGrange, 1 USCMA 342, 3 CMR 76 (1952). The *Harnish* case is clearly in line with this principle although a rehearing was not in fact ordered. In that case Judge Ferguson noted that "the proceedings against accused was a nullity. The egregious nature of the error argues against subjecting him again to the harassment of another trial. I, therefore, join in dismissing the Charge and its specifications". 12 USCMA at 443, 31 CMR at 30. Judge Ferguson thereby implied that the Court of Military Appeals could direct further proceedings. In view of Code Art. 67(e) the only further proceedings the court can direct is a "rehearing" and this, of course, is subject to the acquittal and sentence-limitation protections of Art. 63(b). Further, Judge Ferguson's remarks indicate that the harassment inherent in further proceedings may be viewed as based on *actualities* rather than the technical legal distinctions associated with the traditional doctrine of double jeopardy. There can be no question but that the Court in *Harnish* intended that the accused not be tried again on the charge in question.

[54] See MCM, para. 37, 41*c*, 41*d*(4).

[55] See UCMJ, Art. 29(a). Although this article literally applies only to the excusal of members, the Court of Military Appeals has held that the same rule applies to the addition of members as well. See United States v. Whitley, 5 USCMA 786, 19 CMR 82 (1955) (relying on MCM para. 37*b* and UCMJ, Art. 37).

[56] See UCMJ, Art. 37.

[57] The appearance of improper manipulation of the system is not indicated merely by the selection of a court only for the trial of a particular accused. See United States v. Kemp, 13 USCMA 89, 32 CMR 89 (1962). Appearances may indicate, however, that the convening authority has improperly attempted to produce an outcome unfavorable for the accused. His discretion in selecting the panel is not absolute. It may be reviewed, and if found to have been abused, as in the situation described above, the result is reversible error. See United States v. Hedges, 11 USCMA 642, 29 CMR 458 (1960).

[58] See generally, Kales, *Limitations on Power of the Convening Authority to Withdraw Charges*, Mil. L. Rev., April, 1961 (DA Pam 27-100-12, 1 Apr. 61) at 275.

dealing with this problem will be mentioned herein since they are closely related to the primary topic of this section.

**2. Before arraignment.** *a. Absence of members.*

(1) *Unexplained.* The convening authority has discretion to excuse members before arraignment.[59] The unexplained, but unchallenged, absence of a member at the time the court convenes is presumed to have been authorized.[60] This presumption of validity, however, may be rebutted by a showing that the member was improperly excused.[61]

(2) *Who may excuse.* There is a question whether the convening authority may delegate his power to excuse members before arraignment. In the leading case on this question,[62] the Court of Military Appeals was divided in opinion. Judge Quinn thought that the convening authority could not delegate this power because "the power to excuse . . . is an integral part of the power to select". Judge Brosman conceded that the power was delegable but only to an impartial official (such as the staff judge advocate or president of the court) who could then exercise it only *for good cause.* Judge Latimer, dissenting, concluded that having personally selected the court, the convening authority could delegate to an impartial official the power to excuse members before arraignment *for any reason.* In view of this decision, Judge Brosman's opinion would seem to be the law, although the replacement of two of the participating judges makes the present status of the law uncertain. The power to excuse may not, of course, be delegated to a partial or presumably biased official such as the trial counsel.[63]

(3) *Member AWOL.* The absence of a member before arraignment without any color of authority is not chargeable to the convening authority, is not reversible error, and does not prevent the court from proceeding with the trial if a quorum is present.[64]

(4) *Appointed Defense Counsel.* The excusal of appointed defense counsel is an exception to the convening authority's relatively broad discretion to excuse personnel before arraignment. Probably, appointed defense counsel may not be excused except for good cause.[65] This seems reasonable, in view of his duty to familiarize himself with the case and normally represent the accused at pretrial proceedings.[66]

*b. Addition of members.* Before arraignment the convening authority has discretion to add new members to the court.[67] Since, however, he must personally select the members of the court, the power to add members may not be delegated.[68] Although this discretion may be abused,[69] it is very broad. Thus, the convening authority's unexplained addition of members prior to the *convening* of the court, at least,[70] will probably be presumed valid, absent some showing of impropriety.[71]

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[59] See *supra*, note 54.

[60] See CM 363955 Andress, 11 CMR 299 (1953).

[61] See United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955); CM 369909 Perry, 14 CMR 434 (1954); *cf.* United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960) (improper withdrawal of charges).

[62] United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955).

[63] See CM 368294 Moses, 11 CMR 281 (1953); CM 369909 Perry, 14 CMR 434 (1954). The appearance of evil is too great under these circumstances, and the trial counsel should certainly only be allowed one peremptory challenge.

[64] See MCM para. 41*d*(3) providing that "the unauthorized absence of a member . . . from a session of court may be a military offense but his absence prior to the arraignment . . . will not prevent the court from proceeding with the trial if a quorum is present." To forestall any possibility of prejudice, however, it may be advisable in *this* situation to appoint an additional member if accused so requests considering the numerical aspects of balloting. *Cf.* United States v. Grow, 3 USCMA 77, 11 CMR 77 (1953).

[65] See United States v. Tellier, 13 USCMA 328, 32 CMR 328 (1962). In *Tellier*, the Court cited as analogous the *Grow*, *Whitley*, *Boysen*, and *Greenwell* cases, discussed infra notes 72, 73, 75, and accompanying text.

[66] Certainly the substantial pretrial involvement of defense counsel in the case for the defense is implicitly recognized in the rule that the mere appointment of a lawyer as defense counsel is *prima facie* evidence that he has "acted for the defense." See MCM, para. 6*a*.

[67] See MCM para. 37*a*.

[68] See UCMJ, Art. 25(d)(2); *cf.* United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955).

[69] See *supra* note 57.

[70] Whether the pivotal point should be the time the court is convened or the time of arraignment is discussed *infra* notes 87–88 and accompanying text.

[71] *Cf.* CM 363955, Andress, 11 CMR 299 (1953) (excusal of members); United States v. Lord, 18 USCMA 78, 32 CMR 78 (1962) (withdrawal of charges).

**3. After arraignment.** *a. Absence of personnel.* After arraignment, court members may only be excused (1) for physical disability, or (2) as a result of challenge, or (8) by order of the convening authority for good cause shown.[72] The same rules apply to the Law Officer[73] and appointed defense counsel.[74]

*b. Effect of improper absence.* The improper excusal of a member prevents the court from properly proceeding with the trial even if a quorum is present.[75] When this situation occurs, it would seem to call for a reasonable continuance to obtain the absent member—or, if this were not feasible, the granting of a motion to dismiss for lack of speedy trial.[76] Granting a mistrial over the accused's objection would be proper only in exceptional circumstances.[77] If the trial is allowed to proceed to a conclusion over the accused's objection, the *unexplained absence* of a member will result in automatic reversible error.[78] Although there are no cases directly in point, it would seem that the above rules relating to improper excusal of a member apply equally to the situation where a member is AWOL after arraignment.[79]

*c. "Good cause."* In all the situations that require the convening authority to show good cause for his actions, he must set forth clearly for the record the specific reasons for his decision, and such reasons must constitute good cause.[80]

The Code does not specify what constitutes good cause for excusing a member. The Manual indicates that "military exigencies or emergency leave, among others, may constitute good cause," and that the decision "rests within the discretion of the convening authority." [81] The convening authority's discretion is somewhat limited, however. His discretion will be sharply scrutinized on review, and his reasons must be clearly set forth on the record.[82]

It would appear that emergency leave is good cause,[83] but ordinary leave is not.[84] Relief of a member on the orders of a superior authority may be good cause under certain circumstances.[85] In general, some sort of critical

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[72] See UCMJ, Art. 29(a); United States v. Grow, 3 USCMA 77, 11 CMR 77 (1953); *cf.* United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960) (charges improperly withdrawn from court). Likewise, no member may be *added*, after arraignment without good cause shown. See United States v. Whitley, 5 USCMA 786, 19 CMR 82 (1955).

[73] See United States v. Boysen, 11 USCMA 331, 29 CMR 147 (1960).

[74] See United States v. Tellier, 13 USCMA 323, 32 CMR 323 (1962) (by implication).

[75] *Cf.* United States v. Greenwell, 12 USCMA 560, 31 CMR 146 (1961). It is not clear whether the accused can waive this defect by failing to object. See United States v. Grow, 3 USCMA 77, 11 CMR 77 (1953). The Grow case indicates that even when a member has been *properly* excused, if the accused thereby incurs any numerical disadvantage in the balloting, and makes timely objection, he may be entitled to appropriate relief in the form of appointment of an additional member. When the excusal was *improper*, however, it could not be cured by appointment of an additional member.

[76] This would be appropriate when the member was improperly excused and the convening authority indicated his intent to persist in the impropriety.

[77] See generally Kates, *Former Jeopardy—A Comparison of the Military and Civilian Right*, Mil. L. Rev., January 1962 (DA Pam 27-100-16, 1 Jan 62) 51, 57-62. To permit the convening authority to induce a mistrial by improperly excusing essential court personnel would effectively defeat the intent of Congress. See UCMJ, Art. 44(c); MCM, para. 68b, 68d; United States v. Stringer, 5 USCMA 422, 17 CMR 422 (1954).

[78] See United States v. Greenwell, 12 USCMA 560, 31 CMR 146 (1961) (General prejudice found. Government must show clearly on the record [existing facts] for the relief of the member).

[79] This would follow for several reasons. Art. 29(a) provides that after arraignment, no member shall be "absent or excused . . . except for physical disability or by order of the convening authority for good cause." The Manual recognizes that the trial may proceed when a member is AWOL *prior* to arraignment, but not after. See MCM, para. 41d(3), (4). The practical effect of holding otherwise would probably nullify the position taken in the *Greenwell* case, *supra* note 78, since the thrust of that case, and the Code, is to compel the convening authority to justify the absence of any member after arraignment. An unauthorized absence cannot be justified, and, as cogently stated by the Chief Judge in United States v. Allen, 5 USCMA 626, 641, 18 CMR 250, 265 (1955), the accused has a "right to be tried by a court composed of members appointed by the convening authority not lawfully absent or excused. . . . He is entitled to be tried in accordance with the requirements of the uniform Code. He was deprived of that right. He is, therefore, entitled to a rehearing."

[80] See United States v. Greenwell, 12 USCMA 560, 31 CMR 146 (1961) (no cause shown); *cf.* United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960) (leniency of prior judgments of particular court not good cause for withdrawing charges from it).

[81] See MCM, para. 37b.

[82] See, *e.g.*, United States v. Boysen, 11 USCMA 331, 29 CMR 147 (1960); United States v. Grow, 3 USCMA 77, 11 CMR 77 (1953).

[83] See CM 404771, Patterson, 30 CMR 478 (1960). The alternate holding in *Patterson* that unauthorized absence is not reversible error absent a showing of specific prejudice seems misplaced since the accused in *Patterson* joined the prosecution in requesting excusal of the member. Further, it is erroneous. See United States v. Greenwell, 12 USCMA 560, 31 CMR 146 (1961).

[84] See ACM 12923, Bosheare, 25 CMR 737 (1956).

[85] In United States v. Grow, 3 USCMA 77, 11 CMR 77 (1953), relief of a member at the request of the Deputy Chief of Staff of the Army on the ground of military exigency was held to be good cause. The Court noted that this particular reason was the strongest argument in support of Art. 29(a) and that the relief was proper since (1) this basis was accepted by the defense at the trial as dispositive of the issue, and (2) no evidence was introduced by either party indicating that the convening authority's action was tainted by any abuse of discretion. It may be seen that these facts were somewhat unusual. Since *Grow*, however, the court has held that "good cause" must represent some military exigency or emergency, and the normal conditions of military life do not furnish such grounds. United States v. Boysen, 11 USCMA 331, 29 CMR 147 (1960). In *Boysen*, orders transferring the law officer to a different command were held not to be good cause in and of themselves.

situation must be shown, as distinguished from the usual and the ordinary.[86]

*d. Arraignment as the pivotal point.* In discussing the excusal, absence, and addition of members, arraignment has been treated as the key point in time. This is supported by the Code and Manual provisions discussed. However, in one related case, the Court of Military Appeals required the convening authority to show good cause for withdrawing charges after the *convening* of the court but *before arraignment.*[87] One major reason why changes in membership after arraignment present a special potential for abuse is that by then the members will often have indicated their inclinations with regard to the case. This results from the *voir dire,* which precedes arraignment. In view of this fact it would seem that the reasons supporting a requirement of justification for change *after arraignment* apply with equal force to the time after the *convening of the court.* In addition, if the appearance of evil is to be avoided, it seems illogical to allow the prosecution only one peremptory challenge, but at the sime time permit the convening authority unlimited discretion to excuse members. Likewise, it seems unfair to allow the convening authority full discretion to add members after the accused has exercised his sole peremptory challenge.[88]

*e. Procedure on addition of new member.*

(1) *General.* Whenever a court-martial is reduced below a *quorum,* the trial shall not proceed until sufficient new members have been added.[89] The Code and Manual prescribe the procedure that must be followed when a new member is added. Undoubtedly, the same rules would apply when a new member is added for reasons other than lack of a quorum.[90]

(2) *Verbatim record of trial.*[91] When the trial is before a general court-martial, or a special court-martial with verbatim record of trial, the new member must first be sworn. Then opportunity must be given to challenge him for cause, or peremptorily, if the right to one peremptory challenge was not not previously exercised. Finally, the substance of all prior proceedings shall be made known to the new member, and the recorded testimony of each witness read to him in the presence of the accused, counsel, law officer and members of the court.

(3) *Summarized record of trial.*[92] If the trial is before a special court-martial with summarized record of trial, the new member is first sworn, and subject to challenge, as above. Then, however, the trial must proceed anew, as if no evidence had been presented.

**4. Manner of effecting changes in court-martial personnel.** *a. Permanent changes.* Like the initial appointing orders,[93] permanent excusals from or additions to the court should be confirmed in writing. When, prior to arraignment, the convening authority desires to change the composition of the court it is better practise to promulgate a complete new order appointing a new court, rather than risk inadvertent error through the use of several amending orders.[94]

*b. Temporary changes.* It is said that authority for temporary absences from a particular case or series of cases need not be confirmed by written orders.[95] However, according to the developing case law, when "good cause" is required for the convening authority's action the record must clearly show that (1) the convening authority, (2) added or excused the member, (3) for good cause. In view of these stringent requirements it may well be both wisest and most convenient for the convening authority to confirm his actions by written orders, notwithstanding the Manual's permissive wording.

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[86] See United States v. Boysen, *supra* note 85.
[87] See United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960).
[88] *But see* ACM 7703, Gastellum, 14 CMR 637 (1954).
[89] See UCMJ, Art. 29(b), (c).
[90] See *supra* note 78.
[91] See UCMJ, Art. 29(b); MCM para. 41*e*, 62*d*, *e*.
[92] See UCMJ, Art. 29(c); MCM para. 41*f*.
[93] See *supra* section II, para. 2, Form and content of appointing order.
[94] See MCM, para. 37*c*(1), app. 4. Compare United States v. Padilla, 1 USCMA 603, 5 CMR 31 (1952).
[95] See MCM para. 37*c*(2).

# CHAPTER III

# UNLAWFUL COMMAND INFLUENCE

*References:* Art. 37, UCMJ; para. 38, MCM.

**1. General.** Under the Code, the court-martial is an independent court of law. It is not a disciplinary board. Although the commanding officer retains general power over, and responsibility for, discipline within his command, the court-martial is no longer *his instrument* for achieving this discipline.[1] The commanding officer has a wide variety of nonjudicial disciplinary measures at his disposal, but when he determines that none of these measures is adequate to deal with an apparent offender, he may decide that the situation calls for trial by court-martial.[2] Once this decision is made, the commanding officer cannot unlawfully influence the proceedings to the accused's detriment. The question of guilt or innocence is for the independent judgment of the court-martial. Although the sentence may *affect* discipline in the command, the degree to which the sentence imposed should be deterrent—rather than rehabilitative—is *equally* for the independent judgment of the court. The Code provides:

> No authority convening a . . . court-martial, nor any other commanding officer shall censure, reprimand or admonish such court . . . with respect to . . . any . . . exercise of its . . . functions. . . . No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the actions of a court-martial . . . in reaching the findings or sentence in any case. . . .[3]

Congress allowed the commanding officer to retain the power to appoint and convene courts, refer cases for trial and review court-martial decisions, primarily for administrative convenience.[4] At the same time, Congress sharply restricted the commanding officer's authority to influence the outcome of a trial to the detriment of an accused. The *normally* primary machinery for the enforcement of Article 37 was to be Article 98 which provides:

> Any person subject to this code who . . .
>
> (2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.[5]

In practise, however, enforcement of Article 37 has not taken this course. There is no reported case of conviction under Article 98(2). Instead, enforcement has been effected *judicially*, by finding reversible error in any court-martial proceedings that have been *affected* by unlawful command influence. Thus, the issue of unlawful influence is not normally posed as an independent inquiry whether someone has committed a wrong by *"attempting"* to exercise such influence. Rather, the issue arises collaterally, when an accused asserts that the proceedings in his case have been prejudicially *affected* by unlawful command influence. What command influence is "unlawful" has also been developed judicially. Since almost every case in this area has been decided on its particular facts, it seems most worthwhile here to merely set forth some general principles and guidelines in the area.

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[1] See UCMJ, Art. 37; *House Hearings* 1019–21; H.R. Rep. No. 491, 7–8; *Senate Hearings* at 87–88, 800–01.

[2] See MCM, para. 129.

[3] UCMJ, Art. 37.

[4] See *supra* ch. II, section II, para. 1a.

[5] See H.R. Rep. No. 491 at 7–8.

[6] There were many who advised Congress that this provision would not work—that it was practically unenforceable. See, *e.g.*, *House Hearings* 715–20; *Senate Hearings* 172–174.

**2. Persons subject to unlawful influence.** *a. Court members.*

(1) *General.* No commanding officer may censure, reprimand or admonish the court members with regard to their functions, and no person may attempt to influence them by unauthorized means.[7] If there is a substantial risk that the members were so influenced, to the accused's prejudice, it is reversible error.[8] The Code appears to authorize only two limited instances of what might amount to "lawful" command influence: the convening authority's power to choose the appropriate grade of court-martial to hear the case,[9] and his power to return the record of trial to the court for reconsideration of the dismissal, upon motion, of any specification—when such dismissal does not amount to a finding of not guilty.[10] In addition to these provisions of the Code, however, it is obvious that the commanding officer must maintain good order and discipline in his command, and therefore must take normal general measures for the *prevention* of misconduct.[11] Also, it is proper for him to insure that the members of his command, eligible for court duty, have some general and impartial understanding of the operation of court-martial procedures and their duties as court members.[12] There is often a fine line between the proper and improper exercise of these functions by the commanding officer, however. In most cases, both the lawfulness and the probable impact on court-martial proceedings of any alleged command influence will be judged on the basis of a combination of factors. Principal among these are: (1) the nature of the act or statement;[13] (2) its proximity to the trial;[14] (3) the rank and position of the person acting or making the statement;[15] (4) its specificity with respect to the particular proceedings;[16] and (5) the extent to which it is addressed to personnel connected with the proceedings, concerning their functions with regard thereto.[17]

(2) *When influence unlawful.* Using the above factors, it is fairly easy to identify a case of gross or blatant unlawfulness.[18] Some confusion has been encountered in two particular types of situation, however. The first concerns the "policy" statements concerning good order and discipline that may be disseminated throughout the command by the convening authority or the commanding officers of superior commands. So long as such communi-

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[7] See UCMJ, Art. 37.

[8] The requisite quantum of risk that must be shown is discussed *infra* n's 36–41 and accompanying text.

[9] Compare MCM para. 33*h*. That the convening authority chose to refer the case to a general rather than a special court, however, may not be called to the members' attention, for their consideration on the sentence. See United States v. Carpenter, 11 USCMA 418, 29 CMR 234 (1960); United States v. Lackey, 8 USCMA 718, 25 CMR 222 (1958); *cf.* MCM, para. 44*f*: "nor will [trial counsel] bring to the attention of the court any intimation of the views of the convening authority, or those of the staff judge advocate or legal officer, with respect to the guilt or innocence of the accused, appropriate sentence, or any other matter exclusively within the discretion of the court. See Article 37."

[10] See UCMJ, Art. 62. *But see* ch. XI, sec. V, Action By Convening Authority On Rulings of the Law Officer.

[11] See United States v. Carter, 9 USCMA 108, 25 CMR 370 (1958).

[12] See MCM para. 38; United States v. Navarre, 5 USCMA 32, 17 CMR 32 (1954); CM 404577, Padilla, 30 CMR 481 (1960). Pretrial "orientation" lectures to court members, however, have been ordered discontinued in the Army.

[13] See, *e.g.*, United States v. Kitchens, 12 USCMA 589, 31 CMR 175 (1961); United States v. Zagar, 5 USCMA 410, 18 CMR 34 (1955); United States v. Littrice, 3 USCMA 487, 13 CMR 43 (1953).

[14] See United States v. Wood, 13 USCMA 217, 32 CMR 217 (1962). Compare United States v. Littrice, 3 USCMA 487, 13 CMR 43 (1953), *with* United States v. Isbell, 3 USCMA 782, 14 CMR 200 (1954).

[15] See United States v. Rinehart, 8 USCMA 402, 24 CMR 213 (1957); United States v. Estrada, 7 USCMA 635, 23 CMR 99 (1957).

[16] See, *e.g.*, United States v. Olson, 11 USCMA 286, 29 CMR 102 (1960); United States v. McCann, 8 USCMA 675, 25 CMR 179 (1958); United States v. Ferguson, 5 USCMA 68, 17 CMR 68 (1954).

[17] See, *e.g.*, United States v. Kitchens, 12 USCM9 589, 31 CMR 175 (1961); United States v. Hawthorne, 7 USCMA 293, 22 CMR 83 (1956).

[18] See United States v. Hunter, 3 USCMA 497, 13 CMR 53 (1953); CM 400008, Olivas, 26 CMR 686 (1958). In *Olivas*, the convening authority called meetings of most of the officers who served on courts-martial, for a "refresher course" in military justice. He stated to the officers that he had felt such a course necessary because he was "horrified" at some recent GCM results—that in half the cases he had experienced considerable difficulty controlling his temper, because the court members had "fallen flat on their faces":

". . . in the first place, a case is referred to a general court-martial for one very important reason, that is that if the man is found guilty, the proper sentence should include a severe—a fairly severe sentence . . . don't just slap him on the wrist. I am not trying to put any influence on you. All I am trying to get through your head is, if the man is found guilty, give him punishment to suit the crime, and get that through your heads." 26 CMR 686, 688.

cations confine themselves to the administration of personnel and the *prevention* of misconduct they are permissible and proper.[19] To the extent they intimidate or suggest any "proper" disposition of offenders by courts-martial, however, they are improper and unlawful command influence, when brought to the attention of court members.[20]

The other delicate problem area concerns pretrial "orientation" lectures that have often been given to the court members by the convening authority or staff judge advocate, discussing frequently encountered legal problems and their duties as court members.[21] No matter how well-intentioned such discussions really are, or in what general terms they are phrased, this is a dangerous practise. The proximity of the trial, and the fact that the remarks are addressed to the court members as such, gives almost any conceivable general statement the *appearance* of a specific reference—capable of being interpreted as a command desire for specific results in particular cases. For this reason, the practise of giving pretrial "orientation" lectures has now been ordered to cease, in the Army.[22] The extent to which it remains permissible in the other services has been judicially narrowed. On the Court of Military Appeals, Judge Ferguson is convinced that *no* such pretrial instruction is consistent with the Code.[23] Although the Court has not yet gone that far, it recently indicated that—

> . . . pretrial lectures or conferences should be carefully limited to general orientation on the operation of court-martial procedures and the responsibilities of court members. They should not suggest, directly or indirectly, that the findings or sentence in a particular case may be based on matters outside the record of proceedings before the court-martial.[24]

For all practical purposes, this position would seem to invalidate most of the Manual provisions dealing with points on which the members may be instructed at such a lecture.[25] As matters now stand, the delivery of a pretrial lecture to a court is simply inviting trouble:

> Needed instruction in this field may be provided without legal impediment and without raising an issue of command influence as often as may be considered necessary by courses which cover any desired aspect of military law, including, for example, such related subjects as the logical evaluation of evidence or the theory of penology. But when similar instruction is given by a convening authority of his staff judge advocate to a group selected for court duty, everything and anything that is said is subject to professional scrutiny and certain criticism. There are few more sensitive or delicate areas in our legal system, and properly so.

Even when such instruction is couched in entirely innocuous language, so incontrovertibly harmless as to be almost pointless, the mere circumstance that instruction was given to a newly appointed court is enough to create distrust of the motive behind it in some of the more suspicious minds to be found among professional advocates, and a fear that

[19] See United States v. Hurt, 9 USCMA 785, 27 CMR 8 (1958); United States v. Carter, 9 USCMA 108, 25 CMR 370 (1958).

[20] See, *e.g.*, United States v. Leggio, 12 USCMA 8, 30 CMR 8 (1960); United States v. Olson, 11 USCMA 286, 29 CMR 102 (1960); United States v. Estrada, 7 USCMA 685, 23 CMR 99 (1957).

[21] See MCM, para. 38; United States v. Navarre, 5 USCMA 32, 17 CMR 32 (1954); United States v. Littrice, 3 USCMA 487, 13 CMR 43 (1953).

[22] See JAGJ 1962/5215 (6 Feb 62). The Navy has adopted a similar policy. See JAG Notice 5817 (13 Feb 62) (SECNAV NOTICE 5215).

[23] See United States v. Dalmine, 12 USCMA 850, 854, 30 CMR 850, 854 (1961) (dissenting opinion).

[24] See United States v. Davis, 12 USCMA 576, 581, 31 CMR 162, 167 (1961) (dictum).

[25] See MCM para. 38.

improper subliminal indoctrination of the audience may have been indirectly accomplished.[26]

(3) *Impact of unlawful command influence.* As has been noted, the question of unlawful influence has not yet arisen as part of a prosecution against anyone who exercised such influence. Rather, unlawful influence is posed collaterally as a question of prejudicial error in proceedings affected thereby. In several ways, this procedural posture shapes the issue somewhat differently than it is cast by the literal provisions of Article 37. Thus, the cases hold that the accused must not only show that there was error (unlawful influence) but also that it was *prejudicial, i.e.,* that it apparently affected the outcome of the trial.[27] This is primarily a question of fact. In testing for such prejudice, the appellate courts will look to the five basic factors noted above,[28] assess the apparent meaning of the influencing statement,[29] and compare the apparent tendency of the statement with the result the court-martial actually reached.[30] In addition, the procedural posture of the issue renders certain aspects of Article 37 irrelevant to the inquiry. Since the important question is whether the court members were unlawfully influenced in their actions, it is not necessary to establish anyone's legal responsibility for the influence.[31] Nor is it essential to show any actual *"attempt"* to exercise unlawful influence. The occurrence of prejudicial influence is reversible error, even though it was unintended.[32] Conversely, no matter how blatant and noxious an "attempt" was made, if it was apparently ineffectual there is error, but it is not prejudicial.[33]

The invalidation of trials on the grounds of unlawful command influence is not, however, simply a capricious and unpredictable snare for the commanding officer. Although the real motive or intent of an allegedly unlawful act or statement by the commander is not in itself relevant, it inevitably has an indirect effect. Obviously, if the statement could only have been made with an improper motive, its apparent meaning will be very clear and the courts would have little difficulty in finding it unlawful.[34] On the other hand, to the extent that the statement had a legitimate motive and purpose, any appearance of unlawful tendency or meaning will naturally be diluted.[35] Thus, a commanding officer who exercises restraint and circumspection when commenting upon the future or past courtroom behavior of any personnel, and who attempts in good faith to adhere to the spirit of the Code will in the nature of things have few problems with unlawful command influence. His surest protection, in this area, is a firm conviction that the *trial* by court-martial is an *independent proceeding*—not a tool for the enforcement of his disciplinary policies. Doubtless, this admonition is unnecessary to most commanding officers. In this area, however, public and Congressional confidence in the integrity of the Army is at stake, and an igno-

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[26] See CM 404577, Padilla, 30 CMR 481, 486 (1960) (concurring opinion by Crook, Judge Advocate).

[27] See United States v. Wood, 13 USCMA 217, 32 CMR 217 (1962); United States v. Davis, 12 USCMA 576, 31 CMR 162 (1961).

[28] *Supra* notes 13-17 and accompanying text.

[29] See United States v. Coffield, 10 USCMA 77, 27 CMR 151 (1958).

[30] See United States v. Kitchens, 12 USCMA 589, 31 CMR 175 (1961).

[31] Exposure of the court members to an unlawfully influencing command statement will produce error no matter who is responsible for bringing it to their attention. See United States v. Leggio, 12 USCMA 8, 30 CMR 8 (1960) (trial counsel); United States v. Littrice, 8 USCMA 487, 18 CMR 43 (1958) (convening authority); United States v. Zagar, 5 USCMA 410, 18 CMR 34 (1955) (staff judge advocate); United States v. Walinch, 8 USCMA 8, 23 CMR 227 (1957) (President of court asked for directive, and Law Officer approved request).

[32] See United States v. Coffield, 10 USCMA 77, 27 CMR 151 (1958); ACM 17919, Thompson, 32 CMR (1962) (after findings, court members recessed in room where SJA's "Progress Chart" was posted, containing information as to conviction and length of sentences of two co-accused previously tried).

[33] *Cf.* United States v. Kitchens, 12 USCMA 589, 31 CMR 175 (1961) (assistant SJA tried to force defense counsel to desist from asserting defense of unlawful command influence; no prejudice found, since defense counsel did *not* desist).

[34] Compare CM 400008, Olivas, 26 CMR 686 (1958).

[35] Compare United States v. Hurt, 9 USCMA 735, 27 CMR 8 (1958); CM 404577, Padilla, 30 CMR 481 (1960).

rant or careless misstep by one commander can destroy what hundreds of wise measures and fair trials have built.

(4) *Requisite strength of showing of prejudice.* The question—what likelihood of prejudice must be shown to warrant reversal?—has not yet been clearly answered. Probably something more than simply a "fair risk" of prejudice must be shown by the accused. This has remained unclear because the Court's test of what *is* error has not dovetailed with its analysis of what does *not* amount to error: In cases that have been reversed because of prejudicial command influence, the nominal test has been whether a "fair risk" of prejudice was shown.[36] In cases that the Court has upheld, however, this terminology has not been used. Rather, on such occasions the Court's language has often indicated that it was convinced there was *no* prejudice, despite the showing of what would seem to have been at least a "fair risk."[37] The net effect of such decisions is that the accused must probably show a substantial risk of prejudice to warrant reversal. Although this confusion may be partly semantic, it seems to have arisen from a difference of opinion among the members of the Court. Judge Ferguson has often written the majority opinion in cases reversing on the grounds of unlawful influence,[38] and has dissented when the Court has affirmed.[39] *He* clearly holds that a "fair risk" of prejudicial influence is enough to warrant reversal.[40] It seems probable, however, that a majority of the Court has concurred in reversal only when something more than this has actually been shown.[41]

*b. Other personnel.*

(1) *General.* As to personnel other than court members, the Code provides:

> No (convening authority) . . . or other commanding officer, shall censure, reprimand, or admonish . . . any . . . law officer, or counsel . . . with respect to any . . . exercise of . . . his functions in the conduct of the proceeding.[42]

Many of the rules discussed above with respect to court members also apply to unlawful command influence of other personnel connected with the proceedings. Some disparity in their circumstances and in the applicable rules, however, renders separate discussion convenient. It may be generally noted that, as distinguished from court members, the functions and duties of other personnel are more explicitly regulated by specific Code provisions. It is deemed that the accused has a more or less substantial right to have them perform their duties as required by the Code. This has enabled the Court, on occasion,

[36] See United States v. Kentner, 12 USCMA 667, 31 CMR 253 (1962); United States v. Coffield, 10 USCMA 77, 27 CMR 151 (1958); *cf.* United States v. Martinez, 11 USCMA 224, 29 CMR 40 (1960).

[37] See United States v. Wood, 13 USCMA 217, 32 CMR 217 (1962); United States v. Davis, 12 USCMA 576, 31 CMR 172 (1961).

[38] See, *e.g.*, United States v. Olson, 11 USCMA 286, 29 CMR 102 (1960); United States v. Coffield, 10 USCMA 77, 27 CMR 151 (1958); United States v. Rinehart, 8 USCMA 402, 24 CMR 218 (1957).

[39] See United States v. Davis, 12 USCMA 576, 31 CMR 172 (1961); United States v. Danzine, 12 USCMA 850, 30 CMR 850 (1961). In his dissents, Judge Ferguson has referred to prior reversals as based on the showing of a "fair risk" of prejudicial influence. This characterization may generate some confusion, since it frequently appears to be wrong, in light of the facts and language of such cases. For instance, in United States v. Olson, 11 USCMA 286, 29 CMR 102 (1960), Judge Ferguson, writing for the majority, had stated that "the *probability* of improper influences . . . *is established beyond cavil by this record.*" But, dissenting in United States v. Wood, 13 USCMA 217 at 229, 32 CMR 217 at 229 (1962) Judge Ferguson complained that "what was left only to *a fair risk*" in the Olson case is here made express: "In *this* case . . . the record before us *establishes beyond cavil* that [certain members were unlawfully influenced]." (Emphasis added.) Moreover, in *Olson*, Judge Ferguson characterized United States v. Schultz, 8 USCMA 129, 23 CMR 353 (1957), and United States v. Walinch, 8 USCMA 3, 23 CMR 227 (1957) as "fair risk" cases, although they appear to have involved a somewhat greater probability of prejudice. In United States v. Rivera, 12 USCMA 507, 511, 31 CMR 93, 97 (1961), Judge Ferguson, dissenting, appears to similarly mischaracterize an entire line of analogous precedents. Such disparity between facts, opinion, and subsequent characterization lends a somewhat surrealistic quality to the law on this point.

[40] See United States v. Rivera, *supra* note 39.

[41] See, *e.g.*, United States v. Kitchens, 2 USCMA 589, 31 CMR 175 (1961) (court could not say "with any degree of assurance" that result would have been the same had court-martial not been exposed to improper statement); United States v. Estrada, 7 USCMA 685, 23 CMR 99 (1957) (SECNAV's instruction "bound to exert some influence" over court members).

[42] See UCMJ Art. 37.

to bypass the collateral questions concerning the existence and effect of unlawful command influence, and focus instead on the broader question whether the accused was afforded his more explicit *rights* under the Code. This point will be amplified below with respect to the particular personnel involved.

(2) *The law officer.* Congress intended that the law officer assume the approximate role of a civilian judge.[43] He is obviously in as sensitive a position as the court members with regard to his functions at the trial, and any command efforts to influence the integrity and independence of his decisions will be regarded with severe distrust.[44] The same rules apply to him as to the court members.[45]

Certain mechanical factors have served to minimize the incidence of command influence concerning the law officer, and promise to reduce the possibility of this problem to the vanishing point. First, Congress required that the law officer be a lawyer qualified to perform the duties of that office.[46] Secondly, a separate Judge Advocate General's Corps was established in the Army, to insulate advocate from the normal chain of command.[47] An enlightened policy by The Judge Advocate General of the Army has resulted in further administrative measures to effectuate this purpose. Thus, with the establishment of the Army's Law Officer Program, the function of law officer was wholly assigned to particular qualified judge advocates, normally for a 3 year tour of duty.[48] They were formed into a specialized Division within JAGO, known as the Field Judiciary, under direct command of The Judge Advocate General. The law officer is not assigned to the command of any convening authority, and his work is not supervised by any convening authority or staff judge advocate. He is assigned to a convenient duty station within a "judicial circuit" and serves where needed within that circuit. His duty station must furnish his logistical support. His availability is managed by himself and the senior judicial officer in the circuit—"Circuit Judicial Officer."[49] This separate organization and specialization of function increases the expertise and independence of the Army law officer and relieves him from any obligation inconsistent with his judicial functions.

The Judge Advocate General of the Army has promulgated a measure that nurtures this development still further. It provides that all judge advocates in the Corps who perform trial or appellate judicial, or appellate counsel, functions are organized into a separate Class II Activity—"The United States Army Judiciary"—which is largely self-supervised and is administratively removed from the direct control of The Judge Advocate General.[50] This should serve to insu-

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[43] See United States v. Keith, 1 USCMA 493, 4 CMR 85 (1952); *House Hearings* 1152–54. The Court has enthusiastically furthered this policy. See Miller, *Who Made the Law Officer a 'Federal Judge?'*, MIL. L. REV. (DA Pam 27–100–4, Apr 59) at 39; Snyder, *Evolution of the Military "Judge,"* 14 S.C.L. Q. 381 (1962).

[44] See United States v. Boysen, 11 USCMA 331, 29 CMR 147 (1960); CM 398680, Godwin, 25 CMR 600 (1958).

[45] Moreover, the law officer is responsible for the proper conduct of the proceedings. See UCMJ Art. 51. Indications that he has been subjected to command influence may therefore be tested not only on the grounds of influence *per se*, but also by questioning whether he fully exercised his responsibilities for the proper conduct of the trial. See United States v. Kennedy, 8 USCMA 251, 24 CMR 61 (1957); United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954).

[46] See UCMJ, Art. 26.

[47] See *House Hearings*, 624–27. The separate Corps was established for the Army by the Elston Act, as embodied by amendment in the Selective Service Act of 1948, sections 246–49, Stat. 604, 648, 80th Cong., 2d Sess. (1948). The value of such a separate Corps was disputed by the Navy and Air Force, however, and Congress decided not to require it for those services, for the time being. See *House Hearings* 1289–1302; H.R. Rep. No. 491 at 8–9.

[48] See letter, Adjutant General of the Army to commanders exercising general court-martial jurisdiction, AGAO–CC 210.31 (27 Dec 58) JAG, Hq DA, TAGO, 29 October 1958; subject: Law Officer Program.

[49] See letter, *supra* note 48; "Standing Operating Procedure," Memorandum of Field Judiciary Division, Office of The Judge Advocate General (1 Jan 59); Meagher & Mummey, *Judges in Uniform, an Independent Judiciary for the Army*, 44 J. Am. Jud. Soc'y 46 (1960); Wiener, *The Army's Field Judiciary System: A Notable Advance*, 46 ABAJ 1178 (1960).

[50] See "The U.S. Army Judiciary," JAGO Mem. No. 10–4 (27 Nov 62).

late such personnel from any appearance of influence attributable to possibly inconsistent duties that The Judge Advocate General is required to perform. Thus the problem of command influence with respect to law officers should now be a thing of the past.

(3) *The defense counsel.* The defense counsel is also in as sensitive a position as the court members, and the same rules apply to him with regard to unlawful command influence.[51] The defense counsel, however, has been mechanically insulated from command influence only to the extent that, to serve as appointed defense counsel in a general court-martial, he must be a lawyer, certified by The Judge Advocate General as qualified to perform such duties; and in such case he is generally a member of The Judge Advocate General's Corps,[52] thus somewhat removed from the normal chain of command. As a lawyer, he must adhere to the Canons of Legal Ethics in regard to the faithful and zealous representation of an accused.[53]

To insure against any appearance of command influence in this area, the Court has tended to drift from the question whether the defense counsel may have been improperly influenced into a broader question concerning counsel's adequate representation of the accused.[54] Adequate representation does not mean the "best possible," but, as developed by the court, it means a great deal more than the purely perfunctory representation often held sufficient in civilian jurisdictions.[55] The Court is sensitive on this issue and has inclined to make a fairly thorough inquiry into the adequacy of representation. Regardless whether such inquiry is a desirable way to supervise the working judge advocate,[56] it will be made, and it tends to minimize any search for unlawful command influence. If the accused was inadequately represented, it does not matter *why*.

(4) *Witnesses.* Intimidating, tampering with, or influencing the testimony of a witness is naturally condemned.[57] If it appears that unlawful command influence was exercised over a witness, the result is reversible error.[58] The circumstance of a witness, however, presents a somewhat different question as to what command action is *unlawful*. Thus, it is not unlawful to offer immunity from prosecution to one co-accused in exchange for his testimony in the trial of his partner.[59] Nor is it unlawful to negotiate a "deal" with the accused himself (at his request) in exchange for his plea of guilty.[60] These administrative measures have their counterpart in civilian practise. There are some ramifications, however. Any person who offers

[51] See United States v. Kitchens, 12 USCMA 589, 31 CMR 175 (1961); CM 389592, Dobr, 21 CMR 45 (1956) CM 359489, Plant, 8 CMR 384 (1953). Unexplained relief of appointed defense counsel at any time may well amount to general prejudice. See United States v. Tellier, 13 USCMA 328, 32 CMR 328 (1962).

[52] See UCMJ, Art. 27. Conflict of interests arising from his prior or subsequent exercise of other functions is also forbidden by Art. 27.

[53] This was a major reason why the Court concluded that, although not specifically provided, Congress intended that military counsel *selected* by the accused (see UCMJ Art. 38(b)) must also be a qualified lawyer. See United States v. Kraskouskas, 9 USCMA 607, 26 CMR 387 (1958). Compare United States v. Powell, 13 USCMA 364, 32 CMR 364 (1962). For the functions and obligations of defense counsel, see generally *infra*, chs. VI, VII, secs. II, IV–VII.

[54] See United States v. Tellier, 13 USCMA 328, 32 CMR 328 (1962). The accused has a right to be represented by counsel in his defense. See UCMJ, Art. 38(b). To render this provision effectual, it has been construed to require *adequate* representation. See United States v. McMahan, 6 USCMA 709, 21 CMR 31 (1956).

[55] Compare United States v. Horne, 9 USCMA 601, 26 CMR 381 (1958), with United States v. Hill, 310 F. 2d 601 (4th Cir. 1962), and Snead v. Smythe, 278 F. 2d 838 (4th Cir. 1959), *cert. denied*, 358 U.S. 850 (1958); Edwards v. United States, 256 F. 2d 707 (D.C. Cir), *cert. denied*, 358 U.S. 847 (1958); United States v. Parrino, 212 F. 2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954). See generally, Pollock, Equal Justice in Practice, 45 MINN. L. REV. 787 (1961); David, *Institutional or Private Counsel: A Judge's View of the Public Defender System*, 45 MINN. L. REV. 753. But compare Turner v. Maryland, 303 F. 2d 507 (4th Cir. 1962).

[56] See United States v. Allen, 8 USCMA 504, 510, 25 CMR 8, 14 (1957) (Latimer, J., dissenting); Horton, *Professional Ethics and the Military Defense Counsel*, 5 MIL. L. REV. 67, 100–104 (DA Pam 27-100-5, Jul 59).

[57] See UCMJ, Art. 134; 18 USC secs. 1503–05 (1958); United States v. Long, 2 USCMA 60, 6 CMR 60 (1952).

[58] See United States v. Kennedy, 8 USCMA 251, 24 CMR 61 (1957); CM 401924, Estes, 28 CMR 501 (1959), Command influence over *witnesses* is not proscribed by UCMJ, Art. 37, but the natural attributes of the command structure increase the likelihood of prejudicial effect when improper influence is exerted over a subordinate.

[59] See MCM para. 148e, 150b.

[60] See United States v. Watkins, 11 USCMA 611, 29 CMR 29 427 (1960); ch. XIV, sec. III, *infra*.

a witness immunity is thereafter barred from performing any reviewing function in regard to the proceedings, which the Code requires to be performed impartially.[61] With respect to negotiated guilty pleas, the appellate reviewing agencies are scrupulous to examine such pleas for any element of inconsistency, improvidence, or involuntariness.[62] Thus although certain forms of command action are permissible in relation to witnesses, they are consonant with civilian practise, and the integrity of military judicial proceedings is extensively protected through related procedural requirements.

(5) *Trial counsel.* The Code forbids the convening authority to censure, reprimand, or admonish *"counsel."*[63] Nevertheless, to properly assess what constitutes unlawful influence over the *trial* counsel, and how the accused may be prejudiced thereby, one must keep firmly in mind that trial counsel's fundamental duty is to prosecute a case fairly but vigorously.[64]

In cases requiring trial counsel to be a lawyer, it has been noted that a lawyer is bound by the Canons of Ethics not to use unconscionable tactics.[65] This, of course, could be frustrated if some nonlawyer were actually conducting the prosecution from behind the scenes.[66] In such cases, however, the use of unconscionable tactics would itself be prejudicial error.[67] It might be that the difficulty of detecting when this had happened would be so great that signs of interference by nonlawyer personnel would warrant some finding or general prejudice.[68] There do not appear to be any cases in point, however.

In contrast to the problem of influence by nonlawyers is the question how much influence may lawfully be brought to bear on the trial counsel by a staff judge advocate or other superior judge advocate officer, affecting the conduct of the prosecution. Such influence has not yet been squarely held reversible error.[69] The staff judge advocate, in his official administrative capacity, has some responsibility to supervise the work of subordinate judge advocates—to insure that cases in his command are being effectively prosecuted and defended. True, it has been said that briefs given to trial counsel for his "guidance" must not be so detailed and compulsory as to reduce him to a mere automaton.[70] Over Judge Ferguson's dissent, however, a majority of the Court has upheld extremely detailed "suggestions," so long as they are formally labeled as "sugges-

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[61] See United States v. White, 10 USCMA 63, 27 CMR 137 (1958) (convening authority); United States v. Albright, 9 USCMA 628, 26 CMR 408 (1958) (staff judge advocate review). He is not barred from referring the case for trial, since it is said that such a task does not require him to pass on the probable truth of the testimony, but only on whether a trial seems warranted. See United States v. Moffett, 10 USCMA 169, 27 CMR 243 (1959). *Quaere* whether this distinction is sound.

[62] See UCMJ, Art. 45(a); United States v. Watkins, *supra* note 60; United States v. Welker, 8 USCMA 647, 25 CMR 151 (1958); United States v. Allen, 8 USCMA 504, 25 CMR 8 (1958); ch. XIV, sec. III, *infra*; Melhorn, *Negotiated Pleas in Naval Courts-Martial*, 17 JAG Journal 103 (Sep 62).

[63] See UCMJ, Art. 37.

[64] See United States v. Doctor, 7 USCMA 126, 21 CMR 252 (1958); United States v. Olson, 7 USCMA 242, 22 CMR 32 (1956).

[65] *Ibid.*

[66] See United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954) (dictum).

[67] Compare NCM 62 00886, Kuchler (17 Oct 62) (unpublished), in which nonlawyer trial counsel in special court argued on sentence that accused deserved the maximum for having wasted the court's time by pleading not guilty. Such obvious and overt unconscionable tactics undoubtedly deny the accused a fair trial, no matter who is at fault.

[68] Unconscionable tactics may be covert, *e.g.*, when a prosecutor offers a witness whose testimony he has reason to believe is perjured; or when he does not call to the judge's attention a legal precedent he knows to be contrary to the law as he argues it to be.

[69] In United States v. Kennedy, 8 USCMA 251, 24 CMR 61 (1957), when the chief prosecution witness was hostile and noncommittal, trial counsel at first joined with defense counsel in a motion to dismiss the charges for lack of sufficient evidence. The staff judge advocate ordered trial counsel to move for a continuance (to allow enough time for himself and others to illegally threaten and coerce the witness into testifying). Although the Court denominated this order "unlawful," there were so many other aspects of unlawful command influence in the case that it remains to be seen whether even the above, standing alone, would warrant reversal.

[70] See United States v. Haimson, 5 USCMA 208, 17 CMR 208 (1954). The issue of command influence in this context is related to, but separate from, the question how far a staff judge advocate or convening authority may take part in the prosecution without *disqualifying himself* from subsequently reviewing the case. See UCMJ, Art. 6(c); United States v. Coulter, 8 USCMA 657, 14 CMR 75 (1954). The former, if found, invalidates the findings or sentence or both, while the latter only invalidates the review.

tions."[71] It is difficult to conceive of any concrete prejudicial error to the accused by reason of a flawless and persuasive presentation of the evidence against him. Surely he has no right to be ineptly prosecuted. This may have led the Court to find that superior judge advocate officers are authorized to exert substantial command influence in regard to trial counsel.[72]

(6) *The convening authority.* As an *object* of unlawful command influence, the convening authority remains a legal enigma. The Code forbids any attempt to influence by unauthorized means, the conduct of any convening or reviewing authority in the exercise of his "judicial acts."[73] The major "judicial acts" are the decision of a subordinate commander as to disposition of charges, the appointment and convening of the court, reference of the charges to trial, and review of the record of trial.[74] What constitutes "unauthorized" influence has, as in other areas discussed above, been developed judicially. The case law may be fairly summarized as follows: command influence over the convening authority *is lawful unless it amounts to control.* So long as the convening authority is not deprived or relevant and material information,[75] and is not misadvised concerning his legal duties,[76] he may be subjected to general policy declarations by his superiors which are so influential that they persuade—but not force—him to act to the prejudice of a particular accused.[77] Error occurs only when there appears a fair risk that the convening authority believed he was forbidden to exercise his judgment on the matter.[78]

On the question of what constitutes command influence, there is thus a drastic line of demarcation between the convening authority and the personnel of the court. The very same policy directives (concerning elimination from the service of certain types of offenders) have invariably generated prejudicial error when brought to the attention of court members, but not when they have obviously *influenced* the convening authority in *his* actions.[79]

This clear distinction has in part developed because of a difference of opinion among the judges on the Court of Military Appeals. Judge Latimer was generally of the opinion that command influence was only unlawful (as to *any* personnel connected with the court-martial proceedings) if there appeared a fair risk that the person subjected to the influence thought he could not exercise his own judgment on the matter.[80] Judge Ferguson, however, has continuously maintained that reversible error occurs when any person connected with the proceedings was prejudicially influenced by matters extraneous to the justice of the particular case.[81] Chief Judge Quinn resolved this difference by siding with Judge Latimer in cases

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[71] See United States v. Mallicote, 13 USCMA 19, 32 CMR 374 (1962).

[72] Compare United States v. Haimson, *supra* note 70.

[73] UCMJ, Art. 37.

[74] See United States v. Hawthorne, 7 USCMA 293, 22 CMR 83 (1956); United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960); United States v. Roberts, 7 USCMA 322, 22 CMR 112 (1956); United States v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1955).

[75] See, *e.g.*, United States v. Foti, 12 USCMA 303, 30 CMR 303 (1961); United States v. Greenwalt, *supra* note 74.

[76] See, *e.g.*, United States v. Plummer, 7 USCMA 630, 23 CMR 94 (1957); United States v. Massey, 5 USCMA 514, 18 CMR 138 (1955).

[77] See United States v. Rivera, 12 USCMA 507, 31 CMR 93 (1961); United States v. Betts, 12 USCMA 214, 30 CMR 214 (1961).

[78] See United States v. Hawthorne, 7 USCMA 293, 22 CMR 83 (1956); United States v. Doherty, 5 USCMA 287, 17 CMR 287 (1954).

[79] *Compare* United States v. Walinch, 8 USCMA 8, 23 CMR 227 (1957) (error to bring to court's attention a SECNAVINST calling for elimination of homosexuals), *with* United States v. Rivera and United States v. Betts, *supra* note 77 (no error when convening authority considered same directive). The same results have been generated by a similar directive on thieves. Compare United States v. Estrada, 7 USCMA 685, 23 CMR 99 (1957) (error to bring to court's attention), and United States v. Fowle, 7 USCMA 349, 22 CMR 139 (1956) (same), with United States v. Webster, 9 USCMA 615, 26 CMR 395 (1958) (no error for convening authority to consider).

[80] See United States v. Betts, *supra* note 77 (convening authority); United States v. Estrada, *supra* note 79 (court members).

[81] See United States v. Rivera, 12 USCMA 507, 509, 31 CMR 93, 95 (1961) (dissenting).

involving the convening authority, himself, and with Judge Ferguson in most other cases.[82] This distinction promises to continue.[83]

Regardless how it came about, the distinction seems justified. The convening authority is the focal point of the basic antithesis between discipline and justice in military law. It is arguable that the Code stakes out for the convening authority a greater sphere of independence than the Court of Military Appeals is enforcing.[84] However, such an interpretation of the Code would seem unrealistic and unenforceable. The primary function of the Army is to fight wars, not to conduct trials. The commanding officer is necessarily charged with the maintenance of good order and discipline in his command. This is true of all commanding officers, including those superior to the convening authority in question. They must form, and encourage the execution of, general disciplinary policies within their command. It would be unfeasible to rule that, charged with the enforcement of those policies at all other times, the convening authority could not consider them when exercising his responsibilities for the reference of cases to trial and the review of courts-martial proceedings.

The Court of Military Appeals, in response to the major thrust of Congressional concern at the time of enactment of the Code, has been zealous to insure that accused persons in the military receive as fair and impartial a *trial* as they would in civilian life. With respect to pretrial and posttrial matters, however, the military accused enjoys somewhat greater procedural protections than he would in civilian jurisdictions. This may be an additional explanation why the Court has not been as sensitive to "influence" problems in relation to the convening authority. After all, in addition to the justice of the particular case, the needs and circumstances of the community are considered by *civilian* prosecutors in deciding whether to prosecute, and by *civilian* judges in imposing sentence.

Many cases have involved the convening authority's review of the appropriateness of the sentence. It should be remembered that, under the Code, the sentence is imposed by the court-martial. The accused has no inherent right to have his sentence reduced. All the cases hold is that on the basis of disciplinary policies that he considers desirable to effectuate, the convening authority may decide *not to reduce* a sentence that a fair and impartial court thought appropriate. Reversible error will be found, however, if the policy is compulsory, or if the convening authority was led to believe that he could not exercise his judgment on the matter. If he has not exercised his judgment, then of course he has not "reviewed" the record as required by the Code, and a new convening authority review is necessary.[85]

(7) *Conclusion.* Obviously the needs and circumstances of the community have a legitimate role in the administra-

[82] See, *e.g.*, United States v. Betts, *supra* note 77, and United States v. Estrada, *supra* note 79. In United States v. Plummer, 7 USCMA 630, 23 CMR 94 (1957) Chief Judge Quinn wrote the majority opinion, and although he pointedly condemned the improper *influence* exerted over the convening authority, the closing passage of this opinion indicated that reversal was warranted because the convening authority might have thought himself *bound* by the influencing statement.

[83] Although Judge Kilday has now replaced Judge Latimer, the distinction remains. *Compare* United States v. Rivera, *supra* note 81 (convening authority), *with* United States v. Kitchens, 12 USCMA 589, 31 CMR 175 (1961) (court members).

[84] On its face, Art. 37 treats the convening authority the same as the court members. Also, Art. 64 seems to contemplate that no part of the sentence is valid except what the convening authority, in his discretion, determines should be approved. Judge Ferguson interprets this to mean that the convening authority's discretion should be completely untrammeled, and that he should be as insulated from policy considerations (when reviewing) as the court members. See United States v. Webster, 9 USCMA 615, 617, 26 CMR 395, 397 (1958) (dissenting opinion).

[85] See United States v. Wise, 6 USCMA 472, 20 CMR 188 (1955) (convening authority announced policy that he would not consider retention in service of any accused sentenced to a punitive discharge).

tion of any system of criminal law. Compared with the civilian community, however, the military has a tradition of obedience, a greater *sense* of community needs and goals, and the necessity for coordinated effort to accomplish a mission. All pose an inherently greater danger in the military that an accused may be convicted and severely punished as a deterrent example, with less regard to the justice of his particular case. Conceding the general validity of policy and disciplinary considerations in the military, the Court has struck a sound compromise by excluding such matters from the courtroom, but allowing them fairly free play outside. The courtroom phase of the court-martial proceeding determines the findings and sentence—whether the accused is guilty and how much *he* deserves to be punished, under the facts and circumstances of his particular case.

The convening authority's function is not to try or sentence the accused. He is empowered to exercise a lenient discretion by *not* referring to trial the charges against an apparent offender, or by reducing or vacating the sentence or findings that an independent court-martial thought just and appropriate under the evidence and the circumstances of the particular case. The convicted accused is prejudiced not by the convening authority's failure to exercise such leniency but by his failure to *consider* it. This is why command *control* over such decisions is unlawful, but command influence is not. The Court's implicit distinction seems both just and workable.

**3. Practical problems.** *a. How issue of command influence raised.* Unlawful command influence is such a threat to the fundamental integrity of the proceedings that it probably cannot be waived. The issue may be raised for the first time on appeal.[86] If the defense counsel has knowledge, before or at the trial, of the facts on which the allegation of influence is based, he customarily will utilize *voir dire* to determine whether and to what extent the members have been unlawfully influenced.[87] This procedure has its pitfalls, however, since only some of the members may have previously been exposed to the alleged influencing statement.[88] If this is the case, then even though the accused's challenge to those members is upheld, he will, by the normal process of *voir dire* and challenge, have contaminated the rest of the members. Again, if the influencing statement is patently unlawful, the member's disclaimer that they were affected by it may be given little weight on appeal,[89] rendering the challenging process somewhat irrelevant. In such cases, *voir dire* and open court challenge do not meet the need for relief, and an out-of-court conference with the law officer to secure appropriate relief may be in order.[90]

*b. How effect of unlawful influence cured.* If the statements constituting the alleged unlawful influence are known before the trial, error may be *avoided* by a *complete retraction.* A partial retraction or explanation is dangerous since it may simply aggravate the situation.[91] If only some members have been influenced, error may also be avoided by challenging them from the court, provided the rest of the members are not contaminated in the process.[92] The surest way to avoid such wholesale contamination is for the law officer to excuse the affected members at the request of defense counsel.[93] If the trial proceeds to a conclusion

[86] See United States v. Hardy, 12 USCMA 513, 31 CMR 99 (1961); United States v. Ferguson, 5 USCMA 68, 17 CMR 68 (1954).
[87] See United States v. Olson, 11 USCMA 286, 29 CMR 102 (1960).
[88] Compare United States v. Wood, 13 USCMA 217, 32 CMR 217 (1962).
[89] See United States v. Kitchens, 12 USCMA 589, 31 CMR 175 (1961); United States v. Zagar, 5 USCMA 410, 18 CMR 34 (1955).
[90] Compare United States v. Talbott, 12 USCMA 446, 31 CMR 32 (1961) (*voir dire* on matters—not concerning command influence—that could contaminate other members of the court). In *Talbott*, the alternative of an out-of-court conference with the law officer was suggested, on the hypothesis that the latter could declare a mistrial if the matter were too prejudicial to be disclosed in open court. A third course of action—not proceeding with the trial until the member was removed by the law officer or convening authority—was not mentioned. *Cf.* Art. 29, UCMJ; United States v. Jones, 7 USCMA 283, 22 CMR 73 (1956).
[91] See United States v. Kitchens, 12 USCMA 589, 31 CMR 175 (1961).
[92] *Cf.* United States v. Richard, 7 USCMA 46, 21 CMR 172 (1956).
[93] See United States v. Jones, 7 USCMA 283, 22 CMR 73 (1956).

and the impact of unlawful influence is not discovered or correctly assessed until that time, several steps may be taken by the reviewing agencies to cure the error. Generally, only so much of the findings and sentence as are judged to have been affected by the unlawful influence will be disturbed; if the findings have been affected, a complete rehearing is probably required.[94] More frequently, it is the sentence that has been influenced. This may be cured by a rehearing on the sentence, or by reassessment and elimination of so much of the sentence as is deemed attributable to the unlawful influence.[95]

[94] See United States v. Olson, 11 USCMA 286, 29 CMR 102 (1960) (effect of command influence concerning one offense deemed so pervasive as to require reversal of findings on *all* offenses of which accused convicted).

[95] See United States v. Kitchens, *supra* note 91.

# CHAPTER IV

# THE LAW OFFICER

*References:* Arts. 26, 39, 51, UCMJ; para. 4*e*, 39, 57, 58, MCM, 1951; Canons of Judicial Ethics, American Bar Association, Canons 2–11, 3–15, 17, 18, 21, 24, 29, 32–86.

## Section I. INTRODUCTION

**1. Historical background.** *a. Articles of War.* From 1920 to 1949, under the Articles of War, the convening authority of a general court-martial was required to appoint, as a voting member of the court, a law member who, if available, was a member of The Judge Advocate General's Department. If such an officer was not available then a "specially qualified" officer from another branch was to be appointed. The law member voted with the other members.[1] His rulings on interlocutory questions (other than challenges) except for those pertaining to the admissibility of evidence, were not final and were subject to objection by other members of the Court.[2]

*b. Articles of War, 1949.* From 1949 to 1951, the law member was required to be a legally qualified officer; further, the law member's ruling became final on all interlocutory questions (other than challenges) except those raising an issue of insanity or on a motion for a finding of not guilty.[3] Nevertheless he still continued to sit and vote as a member of the court on the findings and sentence.[4]

*c. Uniform Code of Military Justice.* Under the Uniform Code of Military Justice, the law member was redesignated the law officer, and for the first time was separated from the members of the court. No longer could he vote with the court or consult with them in closed session (except for assisting the members in putting the findings in proper form). Additionally he was required to instruct on the elements of the offense charged.[5]

*d. Legislative intent.* Congress intended to make the law officer as nearly like a civilian judge *"as possible under the circumstances."*[6] Some of these "circumstances" detract from the "civilian judge" concept: The law officer, for example, may not (a) dispose of challenges (b) direct a judgment of acquittal or (c) adjudge a sentence; also unlike a civilian judge, he may closet himself with the "jury" to put the "verdict in proper form". Nevertheless the "civilian judge" analogy was apparently adopted by paragraph 39*b* of the Manual, wherein the law officer is made responsible for the fair and orderly conduct of the trial.

**2. Aim of the Court of Military Appeals.** The Court of Military Appeals has announced its aim "to assimilate the status of the law officer, whenever possible, to that of a civilian judge of the Federal system."[7] In carrying out this aim the Court has frequently applied Federal practise to courts-martial. For instance, it has conferred on the law officer the power to declare a mistrial, to defer ruling on a motion until after verdict, and to challenge a member of the court. On the other hand, the court occasionally has strayed from its announced intent and curtailed the powers of the law officer. For

[1] Article of War 8.
[2] MCM, 1928, para. 88, 40, 51.
[3] AW 8, 81, Articles of War 1949.
[4] MCM, 1949, para. 40.
[5] UCMJ, Arts. 26, 39, 51.
[6] Hearing before the House Armed Services Committee on H.R. 2498, 81st Congress, 1st Session, page 607. United States v. Renton, 3 USCMA 697, 25 CMR 201 (1958).
[7] United States v. Blesak, 3 USCMA 714, 14 CMR 132 (1954).

example, it has denied him the authority to excuse a member after arraignment who is subject to challenge for cause; it has allowed the members the right to call for evidence during the trial, subject only to the law officer's ruling on admissibility. In any case, however, the Court has been quick to uphold the law officer in the exercise of his proper functions and to strike down even the appearance of an unlawful influence on that officer. Likewise, the Court has unhesitatingly condemned the appearance of unethical conduct on the part of the law officer, using as its standard, the Canons of Judicial Ethics, and requiring the law officer to conduct himself with *judicial* discretion, impartiality and independence. The image of the law officer as a "federal judge" has been emphasized by the Army in its establishment of an independent judiciary.[8]

## Section II. PARAGRAPHS 4*e*, 39, MCM, 1951, QUALIFICATIONS OF THE LAW OFFICER

**1. Statutory competence.** *a. Legal requirements.* The UCMJ requires the law officer at any trial to be an officer who is a member of the bar of a Federal court, or highest court of a state, and who is certified as qualified to perform his duties by The Judge Advocate General of his service. The Code provides he shall be appointed by the general court-martial convening authority,[9] and the Manual gives the convening authority the discretion to select the particular law officer.[10] Nevertheless the Army has initiated a policy whereby career law officers, assigned to Department of the Army, are regularly attached to the convening authority's command for appointment as law officers; other officers who have been previously certified are ordinarily not to be appointed as law officers.[11]

*b. Military requirements.* The law officer must be an officer on active duty.[12] There is no expression of policy in the Manual, as there is in the case of a member, that he be of the same armed force as the accused.[13]

**2. Effect of statutory incompetence.** If the appointed law officer does not possess the qualifications specified in Article 26(*a*), the proceedings would be void, according to the Manual, as these requirements are jurisdictional.[14] On the other hand, the instances of dual participation, also enumerated in Article 26(*a*), (*e. g.*, accuser, witness for the prosecution, etc.) pertain to *eligibility*, as distinguished from statutory *qualifications*, (appointment, active duty status, certificates). As such, provided the officer possesses the requisite qualifications, his ineligibility under the statue does not affect the jurisdiction of the court-martial. Thus defense counsel may expressly waive the law officer's ineligibility, although, in view of the statute and Manual provisions,[15] an ineligible officer should not be appointed to the court; if he were, he should excuse himself from participation in the trial. If the defense counsel does not expressly waive the ineligibility, a rehearing, as distinguished from a new trial, may be ordered to remedy the defect.

*Illustrative Cases*

*United States* v. *Law*, 10 USCMA 573, 28 CMR 139 (1959)

Prior to arraignment, followed by a plea of guilty the law officer disclosed that he had helped draft the charges in the case and also had presided as law officer on two companion cases. The defense counsel expressly waived his right to challenge the law officer.

*Opinion:* Assuming the activity of the law officer in preparing the charges constituted him a counsel for the government, the ineligibility was waived.

However, as a majority of the Court pointed out in United States v. Mortensen, 8 USCMA 288, 24 CMR 48, there is a difference between a lack of statutory qualification as distinguished from eligibility set out in Article 26(a). And it is clear that

[8] See *supra*, ch. III, note 48 and accompanying text.
[9] UCMJ, Art. 26(a).
[10] MCM, 1951, para. 4*f*, 37*c*.
[11] *Supra*, note 8.
[12] MCM, 1951, para. 4*e*.
[13] MCM, 1951, para. 4*g*(1).
[14] MCM, 1951, para. 4*e*.
[15] MCM, 1951, para. 62*f*.

the prior participation by a law officer in any activity listed in the relevant portion of that subarticle does not raise such a bar to his acting at trial that it cannot be waived, for in United States v. Beer, 6 USCMA 180, 19 CMR 306, we held the right to question a court member's eligibility to participate could be cast aside by 'an intelligent and conscious waiver. . . .' Certainly there is no difference between the pertinent language of Article 25 and 26 of the Code, supra, and thus there is no question but that a low officer's ineligibility, like that of a court member, may be similarly waived. . . .

Accordingly, the board of review erred in holding that there was no properly constituted court martial. . . .

*United States* v. *Renton*, 8 USCMA 697, 25 CMR 201 (1958).

Prior to accused's plea of not guilty to two of the charges, the court denied defense's challenge of the law officer, based on the latter's admission that he had assisted in drafting the charges. During the trial the law officer made several rulings favorable to the accused and there was no showing of actual prejudice to the rights of the accused.

*Opinion:* His participation constituted reversible error. The law officer should have disqualified himself:

> We look with complete disapproval upon the conduct of a law officer who actively assists the prosecution prior to trial and then subsequently attempts to sit in the case as a disinterested arbiter.

## Section III. ETHICAL CONCEPTS

**1. General.** Many of the principles contained in the Canons of Judicial Ethics may be found in the Manual. For instance, Canon 15, condemning unwarranted interference with the trial, is incorporated almost verbatim into the Manual. In assimilating the status of the law officer to that of a judge, the Court of Military Appeals has often applied the Canons of Judicial Ethics. Particularly it has stressed the application of Canon 4 in emphasizing that not only evil, but the appearance of evil must be avoided. It can be said, therefore, that the law officer is required to comply, as far as the military situation permits, with ethical principles embodied in (1) the Canons, (2) Manual, and (3) the Code.

**2. Applicable Canons.** *a. General.* Either by express provision of the Manual or Code or by case law, the Canons of Judicial Ethics, American Bar Association, have been applied to courts-martial as closely as the military situation will allow. Of particular importance are Canon 4 (Avoidance of the Appearance of Impropriety), Canon 14 (Independence), Canon 15 (Interference in the Conduct of Trial), Canon 17 (Prohibition of ex parte communication with counsel for one side) and Canon 33 (Social Relations During Trial). The establishment of a separate corps of Army trial judges has strengthened the independence of the Army judiciary. The Court of Military Appeals has made it clear that except where peculiar military requirements make it necessary to depart from the accepted ethical standards of a judge, that no deviation therefrom will be tolerated.

*b. Regulating conduct of trial.*

(1) *General.* Canon 15 is repeated almost verbatim (with the word "law officer" substituted for "judge") in the provisions of paragraph 39*b*(2) of the Manual:

> The law officer may properly intervene in a trial of a case to prevent unnecessary waste of time or to clear up some obscurity. However, he should bear in mind that his undue interference or participation in the examination of witnesses, or a severe attitude on his part towards witnesses, may tend to prevent the proper presentation of the case. . . .[16]

[16] MCM, 1951, para. 39*b*(2).

(2) *Questioning witnesses.* Thus while the law officer in his proper control of the proceedings, may question a witness to clear up an ambiguity and develop material testimony which is apparently within the knowledge of the witness, in doing so he must be careful to avoid creating an appearance of partisanship which could improperly influence the members of the court. Any appearance of bias against the accused on the part of the law officer—whether or not intended—is particularly fraught with the possibility of prejudice because the law officer is by his very nature, supposed to be "above the fray". His contrary attitude, therefore, could have an unfair impact on the members of the court. In deciding whether the law officer properly was questioning a witness merely to clear up an apparent ambiguity in the testimony—or whether he, improperly, was seeking to perfect the government's case—the Court of Military Appeals has applied no particular test, resolving the issue on some of the following factors,[17] none of which by itself is necessarily governing: (1) the number of questions (2) their phrasing, (3) their purpose. Merely asking a single question that would normally be asked by a prosecutor is not by itself sufficient to raise the spectre of injudicious bias.[18] Likewise, it is not improper to ask several questions of a prosecution witness whose prior testimony is ambiguous; the fact that the subsequent answers are damaging to the accused does not show improper motive.[19] On the other hand, a law officer's accusatory questioning of an accused—who has been examined previously in a most thorough and competent manner by the prosecutor—creates an impression of prejudicial judicial bias towards the accused.[20]

(3) *Controlling questions by court members.* After examination by counsel and the law officer, the members of the court-martial may, if necessary, question the witness.[21] The law officer has a duty, however, to assure that the trial proceeds in an orderly manner with a record free from redundancies and repetitious questions. Therefore he properly may preclude such questions, as he may other questions calling for inadmissible replies.[22] Particularly must he control a member's questions that indicate a desire to perfect the prosecution's case, rather than to clear up an ambiguity or to seek as yet unelicited information.[23] The members, as is the law officer,[24] are forbidden from overtly siding with prosecution. The stated reason for this prohibition is that such slanted interrogation indicates a propensity to convict the accused before "... all of the available material—evidentiary and instructional—has been presented for his consideration".[25] A defense challenge is not the only remedy for such bias, because this procedure might prejudice the accused's case. Rather, there is an independent duty of the law officer to intervene.[26] Therefore where necessary, the law officer has the authority to require a member's question to be submitted in writing to him for approval.[27]

We cannot leave this matter without expressing surprise at the continued existence of behav-

[17] United States v. Flagg, 11 USCMA 686, 29 CMR 452, (1960): Reversed for improper questioning by members and law officer.

[18] United States v. Lindsay, 12 USCMA 285, 30 CMR 285 (1961).

[19] United States v. Weaver, 9 USCMA 18, 25 CMR 275 (1958). Accord, United States v. Bishop, 11 USCMA 117, 28 CMR 341 (1960). *Quaere:* The law officer, before trial, has read the complete pretrial investigation; is his motive in questioning the witnesses' "ambiguous" testimony more open to suspicion? See United States v. Fry, 7 USCMA 682, 23 CMR 146 (1957); United States v. Hodges, 14 USCMA 23, 33 CMR 235, 10 May 1963.

[20] United States v. Lowe, 11 USCMA 515, 29 CMR 33 (1960).

[21] MCM, 1951, para. 54*a*; see also sec. II, ch. XV, *infra*.

[22] *Cf.*, United States v. Jackson, 3 USCMA 646, 14 CMR 64 (1954).

[23] United States v. Smith, 6 USCMA 521, CMR 237 (1955); United States v. Blankenship, 7 USCMA 328, 22 CMR 118 (1956).

[24] United States v. Lowe, *supra* note 19.

[25] United States v. Smith, 6 USCMA 521, 20 CMR 237 (1955).

[26] *Ibid.*

[27] See United States v. Marshall, 12 USCMA 177, 30 CMR 177 (1961).

ior of this nature on the part of court members. To be sure, the military fact finders have the right and, indeed, the duty to ask questions which clarify matters presented in evidence and tend to furnish further information relevant to the charges on which the accused has been arraigned. We have continually recognized this privilege. United States v. Blankenship, supra; United States v. Smith, 6 USCMA 521, 20 CMR 237; United States v. Flagg, supra. At the same time, and in the same causes, we have pointed out the necessity for maintenance of an impartial attitude throughout the trial and have not hesitated to reverse when members abused their right in an effort to assist the Government.

It seems that, after the establishment of so many precedents in this area, action would have been taken to eliminate this senseless tendency on the part of court members to ally themselves with the prosecution. In his concurring opinion in United States v. Blankenship, supra, Judge Latimer drew attention to the submission of written questions to the law officer as a means of combatting this evil. We realize that this procedure may not prove workable in special courts-martial, but we are certain that equally effective means may be devised whereby these lesser tribunals can be reminded of the proper limitations upon their role.

(4) *Assisting the prosecution.* Naturally the law officer may not compromise his required impartiality by consistently and actively assisting in the prosecution of the case. But an appearance of partiality is not created by a few isolated questions designed to expedite the proceedings, rather than to convict the accused. Canon 15, itself, as well as the Manual, authorizes the judge or law officer to "intervene in a trial of a case to prevent unnecessary waste of time." [28] Thus a law officer does not abdicate his position by twice assisting the prosecution in establishing the predicate for admission of this evidence. Such isolated and occasional assistance to counsel who are uncertain of the correct procedure does not make the law officer a partisan advocate.[29]

(5) *Censuring counsel.* The law officer, as a civilian judge,[30] has the ethical responsibility of criticizing and correcting the unprofessional conduct of counsel. It has been held improper for the president of a general court-martial to upbraid the law officer and counsel for the latters' bickering during the trial, their professional decorum being "the responsibility of the law officer." [31]

*c. Relationship with parties.*

(1) *General*: "A judge's official conduct should be free from impropriety and the *appearance* of impropriety . . . his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach." [32]

The "appearance" of judicial impropriety must be condemned in the case where actual proof is lacking, for the judicial system gains its respect and consequent effectiveness from the support of "outsiders" who have no knowledge of the personal qualities of the particular judge.

[28] *Supra* note 15.
[29] United States v. Payne, 12 USCMA 456, 31 CMR 42 (1961).
[30] ABA Canons of Judicial Ethics, Canon 11.
[31] CM 899282, Cannon, 26 CMR 603 (1958); *see* United States v. Scoles, 14 USCMA 14, 33 CMR 226 (1963). Although the Manual at paragraph 40b(1) permits the president of the court-martial to prescribe the uniform to be worn by the participants, the law officer may overrule him when the type uniform the president orders interferes with the dignity or impartial conduct of the trial. United States v. Scoles, *supra*.
[32] ABA Canons of Judicial Ethics, Canon 4 (emphasis supplied).

(2) *Ex parte communications:* "A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him. . , . Ordinarily all communications from counsel to the judge intended . . . to influence action should be made known to opposing counsel." [33]

*Illustrative Case*

CM 391199, *Brown*, 22 CMR 471 (1956)

The court denied the defense's challenge of the law officer who disclosed that before trial the trial counsel, without the defense counsel being present, had conferred with him concerning (1) the possibility of a continuance and (2) the law officer's view on a question of impeachment. The law officer refused to give counsel his views and denied that the trial counsel had tried to influence him.

*Opinion:* The conviction was reversed without regard to whether the accused had been prejudiced by the impoper conduct of the law officer and the trial counsel:

> Paragraph 5, Department of the Army Pamphlet No. 27–9, August 1954, "Military Justice Handbook" provides that the staff judge advocate or counsel may pinpoint the legal questions involved to give the law officer an opportunity to conduct his own research, but *the merits of the case will not be mentioned.* It is apparent from a reading of the cited paragraph, that whenever "counsel" is mentioned therein, it refers to *both* counsel, and not solely to the advocate for one side only. The Board recognizes that this pamphlet is advisory only, but the procedure suggested therein should be and is most persuasive to those actively participating in the conduct of trials by court-martial. . . . "A lawyer should not communicate and argue privately with the Judge as to the merits of a pending cause . . ." (Canon 8 of Professional Ethics of the American Bar Association). . . .
>
> In regard to the conduct of a trial (distinguishable from these pretrial maneuvers), the Court of Military Appeals said:
>
> > In addition to the specific prohibitions, and other regulations, set forth in the Manual for Courts-Martial and in the Uniform Code, there exist certain basic principles which underlie the conduct of trial by court-martial—or any other sort of tribunal. Not the least of these is that the court's action and deliberations must not only be untainted, but must also avoid the very appearance of impurity. . . . (United States v. Walters (No. 3734, 4 USCMA 617, 16 CMR 191).
>
> These "basic principles" underlying the conduct of trials must be similarly applicable to the conduct of pretrial procedures, especially when the prosecuting attorney and the trial judge are involved, in the absence of the accused or his counsel. "When such an unhappy appearance is present, proper judicial administration often requires reversive action." (United States v. Walters, supra.) . . .
>
> (3) *Social Relations:* "It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; . . . he should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the *suspicion* that his social or business relations or friendships constitute an element in influencing his judicial conduct." [34]
>
> Again, the appearance of evil is stressed, as distinguished from the actual existence of im-

[33] *Id.*, Canon 17. See also ABA Canons of Professional Ethics, Canon 3. *Cf.*, authorized pretrial practice in the presence of all parties, once the court-martial is convened. Chapter XI, infra. See also para. 5, DA Pam 27–9, "The Law Officer". (1958), which encourages counsel before trial to pinpoint for the law officer legal issues (as distinguished from the merits of the case) in order to provide an opportunity for expeditious pretrial legal research. The same provision states, however, that opposing counsel should be afforded an opportunity to be present at an oral conference, or, if the issues are presented in writing, that a copy thereof should be provided to opposing counsel. *Quaere:* Should a law officer respect the attempted confidence of defense counsel who approaches him and says, "I would like to advise you of certain surprise, complicated legal issues I am going to raise at trial, but first I must request that you promise not to divulge them to the prosecution".

[34] ABA Canons of Judicial Ethics, Canon 33 (emphasis supplied).

propriety. This ethical caution as to social relations applies to the law officer's contacts with both counsel and members. Such communications, if challenged, result in a presumption of prejudice that must be rebutted.[85] It is particularly a dangerous area in the military where old friendships and sometimes limited living conditions tend to throw together, more frequently than in the civilian sphere, all parties to the criminal trial. Yet the military judge must live with this restriction on his social activities, remembering that his actions must be weighed not by his military associates who have no doubt as to his integrity, but instead by the accused and civilians who are not so well acquainted with his reputation.

*Illustrative Cases*

*United States* v. *Waltens*, 4 USCMA 617 16 CMR 191 (1954)

It is error for the law officer during recesses to fraternize with members, discuss the case with them, ask defense counsel in their presence to give his view on pertinent German laws, and, during trial, to be unduly harsh to defense counsel:

> In addition to the specific prohibitions, and other regulations, set forth in the Manual for Courts-Martial and in the Uniform Code, there exists certain basic principles which underlie the conduct of trials by court-martial—or any other sort of tribunal. *Not the least of these is that the court's actions and deliberations must not only be untainted, but must also avoid the very appearance of impurity. . . . When such an unhappy appearance is present, proper judicial administration often requires reversive action.*
>
> We need not—and do not—question the motives of the law officer who functioned at the trial of the case before us. The point is that he sadly neglected appearances. The Uniform Code purports to set the law officer apart from court members—much as a judge is set apart from the jury. Admittedly, this segregation is difficult to maintain at times in the military milieu, since law officer, court members, and trial personnel may be thrown together—occasionally but necessarily—in the performance of essential military duties quite unrelated to the trial of the case. This Court—one may be sure—is fully aware of these necessities. *Cf.* United States v. Adamiak, 4 USCMA 412, 15 CMR 412. *Yet we do not feel required to sanction close camaraderie between trial personnel and members of the court when nothing in their military duties demands the development of such a relationship during trial.* Although there be no express rule in the Manual—or elsewhere in the traditional sources of military law—dealing with conduct during a recess, a law officer must exercise sound discretion in the avoidance of behavior at such times inconsistent with the proper and dignified operation of courts-martial, or with general confidence in their integrity. Accordingly, we consider that, in the instant case, the law officer's behavior during the two recesses constituted error. [Emphasis supplied.]

CM 392662, *Medlock*, 22 CMR 501 (1956)

During a noon recess the law officer lunched with counsel for both sides and a member of the court. There was a great amount of jesting, and when trial counsel asked defense counsel why he did not recall accused as a witness, the law officer replied, "I don't think I could stand another hour of it." Prior to the lunch recess the law officer had conducted a noticeably partisan cross-examination of the accused.

*Opinion:* Such conduct of the law officer necessitated reversal.

> Having lunch with a court member during the trial of a case under the circumstances as here shown creates enough appearance of evil in and of itself, and should have been avoided if ordinary common sense and discretion had been used, but thus to use the accused and his counsel as a noontime subject of jest at such lunch-

[85] CM 392662, *Medlock*, 22 CMR 501 (1956) which was reversed for the appearance of impropriety. The record showed that during a lunch recess attended by the law officer, counsel for both sides and a member of the court, there was a great amount of jesting. When trial counsel asked defense counsel why he did not recall accused as a witness the law officer interjected, "I don't think I could stand another hour of it" (referring to the accused's unpleasant body odor).

eon exceeds the bounds of propriety to the extent that the only way in which we can show our condemnation of such unjudicious conduct, is to vacate this proceeding and order a rehearing untainted by such misconduct.

*d. Independence:* "A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism."[36]

Because of the command structure of the services, the law officer originally was more vulnerable than his civilian counterpart to attempts to influence or compromise the independence of his decisions. The establishment in the Navy, Marine Corps, and Army, of a corps of law officers independent of convening authority has removed this possibility of a threat to judicial independence in the services.[37] Even before these services acted, the Court of Military Appeals was sensitive to any appearance of a command attempt to interfere with the law officer's performance of duty;[38] the Court also has interpreted the Manual[39] to preclude the relief of a law officer during trial for any reason other than "emergency or exigency."[40]

## Section IV. PARAGRAPH 39*b*, MCM, 1951, DUTIES OF THE LAW OFFICER

The many and varied duties of the law officer are assimilated to those of the Federal judge.[41] They are set forth generally in paragraph 39*b* of the Manual;[42] they are not discussed in this chapter, but are set forth in the particular chapter dealing with an isolated procedural aspect of the trial, as for example those chapters discussing rulings on motions.[43]

[36] ABA Canons of Judicial Ethics, Canon 14.
[37] See *supra* ch. III, note 48 and accompanying text.
[38] *E.g.*, United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954).
[39] Para. 39*e*. This provision authorizes relief for "good reason."
[40] United States v. Boysen, 11 USCMA 881, 29 CMR 147 (1960). See also discussion in chapter III, para. 2*b* (2), *supra*.
[41] United States v. Biesak, *supra* note 7.
[42] DA Pam 27-9, "The Law Officer" (1958), contains a detailed discussion of these duties as understood in 1958.
[43] *E.g.*, chapters XI-XIII, *infra*.

# CHAPTER V

# MEMBERS OF COURTS-MARTIAL

*References:* Art. 25, UCMJ; Para. 4*a*–4*d*, 40, 41, MCM, 1951.

## Section I. PARAGRAPH 40, MCM, 1951, PRESIDENT OF COURT-MARTIAL

**1. General.** The senior member present at the trial is the president of any court-martial.[1] "The president of a general court-martial, with a few listed exceptions in paragraph 40*b*(1), is assigned a position similar to that of the foreman of the jury."[2] The president of a special court-martial operates in a dual status in that, in addition to his duties as a voting member of the court, he also makes initial rulings on interlocutory questions and instructs the court.[3] His final instructions to the other members on the elements of the offense and (following conviction) on the authorized sentence, are not, like other interlocutory questions, subject to the objection of other members of the court.[4] Although the president of a special court-martial (as distinguished from a general court-martial) does have the right to consult the Manual in open court, no other member may do so. During the deliberations of a special court-martial, however, use of the Manual is forbidden.[5]

**2. Duties.** *a. Pretrial.* The president sets the time, place, and uniform for trial after consulting with the trial counsel, and law officer when appropriate.[6] Although the Manual provides that pretrial objections will be referred to the convening authority,[7] it also states that the president of the court may obviate ruling on a party's pretrial request for a continuance, by postponing the convening of the court after obtaining the advice of the law officer.[8]

*b. Trial.*

(1) *General.* The president, subject to the rulings of the law officer which effect the legality of the proceedings, is responsible for conducting the proceedings in a dignified, military manner.[9] The professional decorum of counsel, however, is not the responsibility of the president of a general court-martial.

*Illustrative Case*

CM 399282, *Cannon*, 26 CMR 593 (1958)

It was prejudicial error for the president of the court to call a conference during the trial, in absence of the accused, in which he upbraided the law officer and counsel for both sides:

> Undoubtedly counsel . . . were guilty of unprofessional behavior but their professional decorum was the responsibility of the law officer. Certainly the actions of the court president, in calling such a conference without the accused, constituted such a departure from his responsibility as an

[1] MCM, 1951, para. 40*a*.
[2] Legal and Legislative Basis, Manual for Courts Martial, 1951, p. 69.
[3] MCM, 1951, para. 40*b*(2).
[4] United States v. Bridges, 12 USCMA 96, 30 CMR 96 (1961).
[5] United States v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957).
[6] MCM, 1951, para. 40*b*(1)(a).
[7] MCM, 1951, para. 67*a*.
[8] MCM, 1951, para. 58*b*.
[9] MCM, 1951, para. 40*b*(1)(b).

impartial trier of fact as to render the proceedings invalid by reason of unfairness, intimidation of counsel and the wrongful application of command influence.

(2) *Relations with other members.* Since each member has an equal voice in all questions submitted to a vote, it is forbidden for the president of a court-martial to exercise his superiority of rank to influence the independent judgment of other members.[10] Thus where the *voir dire* examination of the president of a general court-martial revealed, among other things, that he had erroneous ideas as to the applicable law, that he instructed each new court on its functions, and that he rendered fitness reports on some new members of the court, it was held prejudicial error for the court to deny the accused's challenge for cause.[11]

(3) *Administration of oaths.* The president administers the oath to counsel.[12] Article 42, UCMJ, requiring counsel to be sworn, applies only to the trial proceedings proper; hence counsel need not be sworn to take a pretrial deposition.[13] The oath is administered at the beginning of the trial.[14]

(4) *Continuance.* The law officer rules finally on a motion for a continuance.[15] Paragraph 40*b*(1)(*d*) of the Manual also allows for law officer to decide finally, when counsel has so requested, that the proceedings continue or be suspended, despite the desire of the president to the contrary. But the same subparagraph does not make it entirely clear whether the law officer may override the president's suspension of the proceedings when counsel have not objected thereto. It states "whether a matter of recess or adjournment has become an interlocutory question will be finally determined by the law officer (57*d*)." Paragraph 57*d* provides that the law officer will rule finally on such interlocutory questions; yet the Court of Military Appeals, in dictum, has stated, in a case where counsel did not object to the president's announcement of an adjournment, that it was error for the law officer to override this "prerogative of the president" by declaring a recess for the purpose of changing the president's mind as to the need for an adjournment.[16]

(5) *Spokesman for other members.* The president presides over closed sessions, speaks for the court in announcing result of any vote and in conferring with the law officer on any question of law and procedure.[17] Because he is the spokesman of the court, unless his remarks indicate otherwise, they are imputed to all members of the court.

*Illustrative Case*

*United States* v. *Smith*, 6 USCMA 521, 20 CMR 237 (1955)

The accused was recalled to the witness stand twice and questioned vigorously by the president who stated that the *court* was convinced of his guilt and intimated that the accused was lying.

*Opinion:*

The language used by the president is particularly open to challenge in that he purported to represent the court-martial, not in the impartial role of a jury foreman, but virtually as an assistant prosecutor. We are, therefore, sure that the members of the court-martial deserted their customary and proper role and joined the ranks of partisan advocates.

[10] MCM, 1951, para. 41*b*, 74*d*.
[11] United States v. Dean, 5 USCMA 44, 17 CMR 44 (1954).
[12] MCM, 1951, para. 40*b*(1)(*c*).
[13] United States v. Parrish, 7 USCMA 337, 22 CMR 127 (1956).
[14] MCM, 1951, para. 61*h*, 112*c*. For the effect of failure to administer the oath to counsel, see ch. VIII, *infra*. "Preliminary Organization of the Court."
[15] MCM, 1951, para. 58.
[16] United States v. Solak, 10 USCMA 440, 28 CMR 6 (1959).
[17] MCM, para. 40*b*(1)(*e*, *f*).

## Section II. PARAGRAPHS 4*a–d*, MCM, 1951, QUALIFICATION OF MEMBERS

**1. General.**[18] Article 25, UCMJ, specifies which persons possess the statutory qualifications (as distinguished from eligibility) to sit as members on the trial of a particular accused. All members must be on active duty. Any commissioned officer is qualified to sit as a member of any court-martial;[19] a warrant officer is likewise qualified, except for the trial of an officer.[20] An enlisted man may sit as a member only when an enlisted accused has, prior to the convening of the court, made a written request that the members of the court include enlisted persons. It has been held, however, that a discharged prisoner serving a military sentence, is not an "enlisted man" to be entitled to have enlisted members on his court-martial.[21]

**2. Civilians.** No civilian accused is entitled to have civilians or enlisted men as members of the court, for the reason that there is no such authorization in the Code.[22]

**3. Legal officer.** Neither the Manual nor the Code prohibits a legal officer of the services from sitting as a member of the Court; in fact, the Manual encourages the appointment of such a member on a special court-martial where complicated issues of law are anticipated.[23] Nevertheless it has been stated that in order to discourage the practise of creating professional jurymen, the participation of a legal officer member will be closely scrutinized to insure that, by virtue of his legal background, he has not improperly usurped the functions of other members of the court.[24]

**4. Grounds of ineligibility.** *a. General.* The Code disqualifies a member who has acted as accuser, witness for the prosecution, investigating officer, or counsel for either side in the same case.[25] The Manual makes a member ineligible to sit on a court-martial if he is in a status of arrest, confinement or suspension from rank.[26]

*b. Service regulations.* "The availability of certain persons for detail may be restricted by departmental regulations."[27] Some restrictions imposed by Army regulations are as follows:

(1) *Chaplains.* Chaplains are not available for appointment as a member, investigating officer, law officer, or counsel.[28]

(2) *Medical and Dental Corps Officers.* "Except when regulations specifically stipulate to the contrary, such officers will not be detailed as members of courts-martial. . . ."[29]

(3) *Officers of Veterinary Corps, Nurse Corps, Medical Specialist Corps.* Although the regulations pertinent to the utilization of these officers encourage their assignment to duties most compatible with their specialties, there is no express prohibition as in the case of Chaplains, physicians, and dentists, against their appointment as members of courts-martial.

(4) *Women's Army Corps.* No restriction exists against the appointment of WAC members of courts; when the accused is a WAC, the membership of the court should include WAC personnel, if available.[30]

**5. Members from other armed forces.** The Code provides that one armed force may exercise court-martial jurisdiction over an accused of another armed force, subject to the regulations prescribed by the President.[31] These regulations discourage the exercise of such jurisdiction except when necessary to prevent harm to the services.[32] Even then, only the com-

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[18] For the procedure in selecting, adding, or excusing members see ch. II, *supra*, and subparagraphs 41*c*, *d*(1)(3)(4), 41*e*, *f*, MCM, 1951.

[19] MCM, 1951, para. 4*a*; Art. 25(*a*), UCMJ.

[20] MCM, 1951, para. 4*a*; Art. 25(*b*), UCMJ.

[21] ACM 18035, Ragan, 32 CMR 913 (1962).

[22] ACM 7031, Covert, 16 CMR 465 (1954), rev'd, on other grounds, 6 USCMA 48, 19 CMR 174 (1955), then dismissed by grant of writ of habeas corpus for lack of jurisdiction.

[23] MCM, 1951, para. 4*d*.

[24] United States v. Sears and Lenzinger, 6 USCMA 661, 20 CMR 377 (1956).

[25] UCMJ, Art. 24.

[26] MCM, 1951, para. 4*a*.

[27] MCM, 1951, para. 4*a*.

[28] AR 165-15, 7 Nov 60.

[29] AR 40-1, 4 Nov 60, subpara. 19*b*, 15.

[30] AR 600-110, 8 Jul 58, para. 16.

[31] UCMJ, Art. 17(*a*).

[32] MCM, 1951, para. 13.