As to the third question, the court stated, ". . . neither party may inquire concerning a court-martial member's view of evidence to be presented at trial or the weight which the member would be inclined to attach to it or to any witness who might thereafter appear. . . ."

Finally, the court stated that the [fourth] question asked by defense counsel in effect required the court-martial member to state whether he would consider an element of the offense an aggravating circumstance. . . . Here again, defense counsel sought to probe a court member's mind for imponderables that are unknown until all the evidence is in. . . .

But in *United States* v. *Lynch*,[28] the accused, an Army lieutenant colonel, pleaded guilty to AWOL, larceny of $12,058.57, forgery, and making a false official statement. Before pleading, his civilian defense counsel placed the president of the court under oath and asked him if the accused were found guilty of the offenses charged would the president "feel compelled to vote for his dismissal regardless of the mitigation offered by the defense." After the president replied that he would, the law officer prevented further inquiry along these grounds. Subsequently, the president stated that he resented being put under oath and also that the other members may have been influenced by defense counsel's *voir dire*. The Court held that the accused was prejudiced by the law officer's curtailment of the *voir dire*. The court citing *Parker*,[29] stated that while materiality and relevance must always be considered to keep the examination in bounds, they should be interpreted in a light favorable to the accused. The question put to the president, far from being hypothetical, merely summed up the offenses of which the accused stood charged.[30]

Section III. PARAGRAPH 62*d, h,* MCM, 1951, CHALLENGE PROCEDURE

1. Manner of making challenges for cause. *a. Time.* Challenges should be made before arraignment, but challenges for *cause may be* permitted at any stage and *will* be permitted at any stage, if the challenger has exercised due diligence or if the challenge is based on grounds 1 through 8.[31]

b. New members. Timely opportunity will be given to challenge every new member or new law officer.[32] The Manual, however, does not purport to give the right to challenge a new member peremptorily, if the right has been previously exercised.

c. Order of challenges. Normally, each counsel makes challenges immediately after he has had an opportunity to conduct a *voir dire* examination of the members—trial counsel first, followed by defense.[33] A challenge may be withdrawn by the challenger for any reason.[34]

2. Inquiry into challenge for cause. *a. General.* Both sides are allowed to present evidence and argue.[35] Unlike the Federal rule[36] which allows the judge to conduct the *voir dire* examination of the jurors himself, the Manual gives counsel a right to conduct the examination themselves.[37]

b. Required action when grounds disclosed. The Manual[38] provides that where an undisputed challenge exists on the first eight grounds, the person will be excused forthwith,

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[28] 9 USCMA 523, 26 CMR 303 (1958).
[29] *Supra* note 27.
[30] United States v. Lynch, *supra* note 28.
[31] MCM, 1951, para. 62*d*.
[32] *Ibid.*
[33] MCM, 1951, para. 62*a*. See section V, *infra*, as to peremptory challenges.
[34] MCM, 1951, para. 62*h*(1).
[35] *Id.*, para. 62*h*(2).
[36] Fed. R. Crim. P. 24.
[37] MCM, 1951, para. 62*b*; but see United States v. Parker, 6 USCMA 274, 19 CMR 400 (1955), where Judge Latimer stated the law officer has the discretion to conduct the examination of the members.
[38] MCM, 1951, para. 62*c*, 62*h*(2), Procd. Guide, p. 506.

and if it is manifest that any other challenge will be unanimously sustained, the law officer may excuse the member "subject to objection by any member of the Court." The Code provides, however, that a member will not be excused after arraignment except, *inter alia*, by challenge,[39] that the law officer will *not* rule upon challenges,[40] that the *Court* determines the validity of challenges[41] by a secret written[42] majority vote, with a tie vote disqualifying.[43]

Correct procedure as determined by the Court of Military Appeals. In *United States* v. *Jones*,[44] a majority of the Court of Military Appeals decided that the provisions of the procedural guide of the Manual[45] authorizing the *law officer* to excuse a member forthwith, was equivalent to a challenge sustained without vote and therefore conflicted with Articles 41, 51(a), and 52 of the Code requiring the members in every case to vote before a member could be excused.[46] This holding has imposed several procedural problems. As stated by the dissent in *Jones*, "When it is manifest that the court member must be excused, it should be unnecessary for the court to engage in the 'empty ritual' of taking a formal vote to determine the validity of the challenge."[47] Although the Court in *Jones* recognized that it is "harmless error" for a law officer to excuse a member summarily, it is ethically questionable whether a law officer should be forced to commit deliberate harmless error where a court has erroneously denied a challenge.[48]

3. Contest on challenge. *a. Burden.* The burden is on the challenger to maintain the challenge, but courts should be liberal in sustaining challenges.[49]

b. Rulings during contest. Although the challenged person takes no part in the hearing, unless called upon to testify, the law officer (or president of a special court-martial) continues to rule upon interlocutory questions arising during the contest on the challenge.[50]

c. Instruction. Since the members of the court-martial (except for the president of a special court-martial) may no longer consult the Manual they should be instructed by the law officer (or president of the special court-martial) on the law and procedure for disposing of the challenge.[51]

d. Deliberation and voting by members.

(1) *One challenge at a time.* "The court shall . . . not receive a challenge to more than one person at a time."[52] These provisions apply with the same force where two or more members are subject to challenge on the same ground. In this situation, it is legally correct for the one challenged person to vote on the challenge of another.[53]

(2) *Deliberation and voting.* The vote is conducted in closed session on secret written ballot and is determined by a majority vote, a tie vote disqualifying the challenged person.[54] The challenged person does not participate in the vote.[55] If a bare quorum existed before the challenge, the remaining members may vote, on the challenge of a member.[56] If, however, the sustaining of a challenge reduces the members below a quorum, the court must adjourn.[57]

(1) *First eight grounds.* Because the first

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[39] Art. 29(a).
[40] Art. 51(b).
[41] Art. 41(a).
[42] Art. 51a.
[43] Art. 52(c).
[44] 7 USCMA 293, 22 CMR 78 (1956).
[45] MCM, 1951, sec. 8a, p. 506.
[46] *Jones* recognized, however, that the law officer may originate a challenge and instruct the members on the law relating to challenge.
[47] Moreover, the majority apparently disregarded Article 29a, UCMJ, which, by implication, permits excusal before arraignment, or United States v. Allen, 5 USCMA 628, 18 CMR 252 (1955), where a majority of the court apparently agreed that the convening authority could delegate to an impartial official the right to excuse members for good cause before arraignment.
[48] In practice, however, it appears that law officers generally are not troubled by ethical considerations when violating the strict holding of *Jones* in order to prevent prejudicial error. See, for example, ACM 17411, Cook, 31 CMR 607 (1961), and ACM 17445, Swanson, 25 CMR 882, 885 (1958).
[49] MCM, 1951, para. 62h(2).
[50] *Id.*, para. 62h(2).
[51] See DA Pam 27-9 (1958), para. 16a; United States v. Jones, supra note 44.
[52] UCMJ, Art. 41(a); MCM, 1951, para. 62a.
[53] United States v. Adamiak, 4 USCMA 412, 15 CMR 412 (1954).
[54] UCMJ, Arts. 51(a), 52(c); MCM, 1951, para. 62(h)(8).
[55] MCM, 1951, para. 62h(3), app. 8a, p. 506.
[56] *Id.*, para. 41d(1).
[57] *Id.*, para. 62h(4).

eight grounds are based on either statutory disqualification or ineligibility, requiring the challenged person to be "excused forthwith"—an improper denial of such a challenge, where accused pleads not guilty, will probably result in reversible error, without regard to the compelling evidence of the accused's guilt.[58] In such a case the possibility of prejudice will probably be presumed. If undisputed grounds exist under paragraph 62*f*(1) [lack of qualification as a law officer or member] or paragraph 62*f*(2) [not appointed to the court], the improper denial of the challenge might constitute "jurisdictional" error.[59] If, however, the grounds go to statutory *ineligibility,* as distinguished from statutory *disqualification,* the denial of the challenge will not render the proceedings void for lack of jurisdiction.[60]

(2) *Grounds 9–13.* The grounds set forth in paragraphs 62*f*(9) through 62*f*(13) are facts "indicating that he should not sit as a member or law officer in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality." [61] The ultimate question, therefore, to be decided by the vote on the challenge, is whether the challenged person can try the case fairly; admission of one or more of the facts listed as grounds for challenge under paragraph 62*f*(9) through 62*f*(13), therefore, probably does not require that the challenge be sustained, if the impartiality of the challenged person is otherwise conceded.[62] If the challenge is, as a matter of law, improperly denied *and* if the error is preserved by a proper exercise of the accused's peremptory challenge [see Section V, *infra*] then it is still an undecided question as to whether the Court of Military Appeals will reverse in view of compelling evidence of guilt, or follow the general civilian practice in this regard and apply the "harmless error" rule.[63]

(3) *When accused pleads guilty.* The Court of Military Appeals as yet has not decided the effect of a guilty plea on a prior erroneously denied challenge. [Notwithstanding its decision in *United States* v. *Lynch, supra,* where the Court reversed the findings based on accused's guilty plea after the defense's challenge *and* motion for mistrial had been denied.] Nevertheless, it seems almost certain that the effect of such a plea would be to waive a member's erroneous participation in the findings, but not in the sentence, if the disqualification is based on the first eight grounds of the Manual. This has been the effect accorded the error of nondisclosure of such grounds.[64] If the challenge were based on the other grounds, it is problematical whether the court will look for specific prejudice.

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[58] See United States, v. Renton, 8 USCMA 697, 25 CMR 201 (1958); *cf.*, United States v. Moore, 4 USCMA 675, 16 CMR 249 (1954).

[59] In United States v. Harnish, 12 USCMA 448, 31 CMR 29 (1961), two "members" of the special court-martial were interlopers, since not appointed to the court which tried the accused. Chief Judge Quinn, in a three-sentence opinion held that the Court was improperly constituted and "the charge and its specification are ordered dismissed." Judge Ferguson, concurring, stated that "the proceedings against accused are a nullity" and that the "egregious nature of the error argues against subjecting him again to the harassment of *another trial . . .*" [Emphasis added]. It might appear, therefore, that this ground is jurisdictional. In spite of Judge Ferguson's use of the term "another trial," however, it is apparent that the Court in *Harnish* did not treat the error as "jurisdictional": if the court-martial had truly lacked jurisdiction over the charges, the Court would have had no basis of power on which to order the charge dismissed.

The error of lack of appointment should give rise to automatic reversal and a rehearing, so long as the first trial proceeded under color of law. The essence of the error is that the accused is entitled to a fair trial in accordance with the Code, and he has been deprived of that right by being tried by a court other than the one the convening authority appointed. Compare cases cited *supra* note 16; United States v. Greenwell, 12 USCMA 560, 31 CMR 146 (1961) (member absent without being excused for good cause by convening authority); United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955) (convening authority's purported delegation of power to excuse members); United States v. Roberts, 7 USCMA 322, 22 CMR 112 (1956) (charges referred to trial by person other than convening authority). See also United States v. Goodson, 1 USCMA 298, 3 CMR 82 (1952) (appointed *trial* counsel unqualified—held: no reversible error, the accused not being fundamentally entitled to have the *Government's* interests well represented).

[60] See United States v. Law, 10 USCMA 578, 28 CMR 139 (1959).

[61] MCM, 1951, para. 62*f*(13).

[62] United States v. Richmond, 11 USCMA 142, 28 CMR 366 (1960).

[63] See Busch, *Law and Tactics in Jury Trials* (1949), at 126.

[64] United States v. McBride, 6 USCMA 480, 20 CMR 146 (1955).

Section IV. PARAGRAPHS 62*f*, 63, 64, MCM, 1951, GROUNDS FOR CHALLENGE FOR CAUSE OF THE LAW OFFICER AND MEMBERS

1. Not qualified.[65] There are no Court of Military Appeals decisions concerning disqualification.[66]

2. Not appointed to court.[67] This ground may constitute "jurisdictional" error.[68]

3. Accuser.[69] There are no Court of Military Appeals decisions directly concerning this disqualification.[70]

4. Witness for the prosecution.[71] The person does not become a witness for the prosecution until he testifies, at which time the Manual requires him to be excused.[72] Therefore, his participation prior to the introduction of a prosecution exhibit bearing his signature is not error —provided he had no recollection of signing the document—on the basis of being a technical witness for the prosecution.[73] Where the person actually testifies, however, a different result would probably follow because in that case the likelihood of prejudice to the accused's rights is greater. Paragraph 62*f*(4) of the Manual requires excusal forthwith if it is established that the member *will* testify. Paragraph 63, on the other hand, states that if at any stage the person is *"called"* as a prosecution witness he shall be excused from further participation. Any possible conflict between these two provisions, as to the time the disqualification arises, may be resolved by considering the duty to disclose possible disqualification; if neither the person nor the trial counsel, during the normal challenging procedures, realizes or intends that the person be called as a prosecution witness it cannot be said, until he is actually called, that he "will" become a witness for the prosecution.[74] When he is "called", however, he should be subjected to *voir dire* examination to determine what prejudice, if any, resulted from his prior communications with the members or in his examination witnesses.

5. Investigating Officer.[75] Although the Code does not define "investigating officer," the Manual definition in paragraph 64 is broad enough to cover practically any personal investigation—of any aspect of the offense charged.[76] The decisions of the Court of Military Appeals seem to favor this liberal application of the Manual provision when applied to ineligibility of a law officer or a member. In *United States* v. *Bound*,[77] for instance, an informal investigation by an officer on security watch was held to constitute him an "investigating officer"; in *United States* v. *Dyche*,[78] the Court did not refute the appellate defense counsel's contention that a member was an investigating officer because prior to trial he had made a determination as to whether or not the accused should be released from pretrial confinement.[79]

6. Has acted as counsel.[80] This disqualification arises from actual or presumed[81] participation as counsel for either side during any stage of the proceedings including the pretrial investi-

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[65] MCM, 1951, para. 62*f*(1).

[66] *But see supra* notes 16, 59. It is the Government's duty to appoint only qualified persons to the court, and surely, as between the accused and the Government, the Government is in the best position to ascertain which persons are qualified.

[67] *Id.*, para. 62*f*(2).

[68] See United States v. Padilla, 1 USCMA 608, 5 CMR 31 (1952). In United States v. Harnish, *supra* note 59, the Court voided the special court-martial conviction where two interlopers participated as "members." But see *supra* note 59, and United States v. Stevens, 10 USCMA 417, 420-21, 27 CMR 491, 494-95 (1959) (concurring opinion of Latimer, J., as to disposition of case).

[69] MCM, 1951, para. 62*f*(3).

[70] There are, however, several analogous cases, holding such participation by the accuser automatically reversible error, warranting a rehearing. See United States v. Gordon, 1 USCMA 255, 2 CMR 161 (1952) (convening authority); United States v. Moeller, 8 USCMA 275, 24 CMR 85 (1957) (reporter); United States v. Martinez, 11 USCMA 224, 29 CMR 40 (1960) (interpreter).

[71] *Id.*, para. 62*f*(4), UCMJ, Art. 25(d)(2).

[72] MCM, 1951, para. 62.

[73] United States v. Mansell, 8 USCMA 153, 23 CMR 377 (1957).

[74] See United States v. Moore, 4 USCMA 675, 16 CMR 249 (1954).

[75] MCM, 1951, para. 62*f*(5).

[76] The case of an accomplice, although separate proceedings, is the "same case" as that of the accused. CM 392921, MacDougal, 22 CMR 566 (1956).

[77] 1 USCMA 224, 2 CMR 130 (1952).

[78] 8 USCMA 430, 24 CMR 240 (1957).

[79] But merely forwarding a routine report of crime does not constitute one an "investigating officer." See United States v. Edwards, 4 USCMA 299, 15 CMR 299 (1954).

[80] MCM, 1951, para. 62*f*(6).

[81] CM 847108, Zamarripa, 1 CMR 432 (1952).

gation [82] and the drafting of the charges.[83] The disqualification may be expressly waived or the effect of the erroneous participation on the findings neutralized by a guilty plea.

7. Former member.[84] There are no reported cases dealing with this ineligibility.

8. Enlisted member "assigned" to the same unit as accused.[85] This pertinent provision of the Manual does not seem as broad as that of Article 25(*c*)(1), UCMJ, on which it is based, and which provides that an enlisted member is ineligible to serve on the court if he is a "member" of accused's unit at the time of trial. Pre-Code interpretations of the word "assigned" excluded those on temporary duty to a unit, whereas the word "member" should encompass individuals in that category. This latter interpretation would be more consistent with this provision of the Code, enacted to prevent ill-feeling among enlisted men as a result of one of them sitting as a member at a court-martial. Where a member is "assigned" to the same unit as the accused, the fact that he is only assigned to a unit for administrative purposes and that the unit is extremely large does not make the member any less ineligible.[86]

9. Forwarding charges with personal recommendation.[87] Boards of Review have held that forwarding the case of an *accomplice* with a personal recommendation as to disposition is the *same* case as that of the instant accused and a failure to disclose such ground for challenge prejudiced the accused as to the sentence where he pleads guilty.[88]

10. Opinion as to the guilt or innocence of accused.[89] *a. General.* See also paragraph 62*f*(13) of the Manual for "examples" of "any *other* facts" raising doubt as to the fairness of the proceedings. Some of these examples seem to overlap or be included in the ground of ineligibility set out in paragraph 62*f*(10). This particular ground for challenge is also closely related to the preceding ground, described in paragraph 62*f*(9) of the Manual: if a member or the law officer has recommended a trial, then undoubtedly he has formed *and* expressed at least a tentative opinion as to the guilt of the accused.

b. Opinion formed after the receipt of all evidence. The "opinion" referred to is one which is preconceived and does not apply to that based upon the evidence properly considered in the case. For example, in one case,[90] at the close of the defense's case, the defense's peremptory challenge was properly denied. Thereupon, defense counsel challenged the same member for cause on the ground that he had formed a definite opinion as to the guilt or innocense of the accused. On *voir dire* the member testified that although he had formed an opinion: (1) it was not preconceived, but was based on the evidence received at the trial, and (2) he had not closed his mind to the receipt of any other evidence which might be received. *Opinion:* The challenge was properly denied:

> . . . . It would be ridiculous to expect court members to listen to the evidence when presented uninfluenced by the cross-currents of credibility or incredibility attendant on the various items of proof. The maintenance of such a mental vacuum by each member during the presentation of evidence would constitute a standard contrary to human nature and, further, would be artificial to an extreme. Just what is

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[82] United States v. Hurt, 8 USCMA 224, 24 CMR 34 (1957): Accused was allowed to waive the member's prior participation as his defense counsel at the Article 32 investigation.

[83] United States v. Renton, 8 USCMA 697, 25 CMR 201 (1958). However, the majority of the court has held that such disqualification is not "jurisdictional"—and thus may be expressly waived—since it affects only "eligibility." See United States v. Law, 10 USCMA 578, 28 CMR 139 (1959). Judge Ferguson dissented, and would apparently hold the error to be "jurisdictional," at least in the sense that the accused should not be *permitted* to *waive* the error—even expressly—for reasons of public policy.

[84] UCMJ, Art. 63b. See MCM, 1951, para. 62*f*(13) regarding the law officer's having acted as such both at the original trial and the rehearing.

[85] MCM, 1951, para. 62*f*(8).

[86] CM 398315, Scott, 25 CMR 636 (1958). See also ch. II, *supra*.

[87] MCM, 1951, para. 62*f*(9).

[88] CM 388308, Strawbridge, 21 CMR 482 (1956). See also ACM 8196, Gestner, 14 CMR 822 (1954). In *Strawbridge*, the Board took judicial notice of the record of trial of the accomplice but refused to consider an affidavit of the member wherein he stated that he had not associated the two cases because of the time interval between the trials and because the present accused had pleaded guilty. The Board stated: "We view the meaning of the phrase 'in the case' [in paragraph 62*f*(9), MCM, 1951] in the same light as a similar phrase is regarded in Articles 6(c) and 25(c) of the Code. The phrase 'the same case' has been held to mean the same case or a closely related case involving an accomplice tried seperately upon charges arising out of the same transaction."

[89] MCM, 1951, para. 62*f*(10).

[90] ACM 8175, Graham, 14 CMR 845 (1954).

required of a court member? He must listen and evaluate with an open and impartial mind the evidence presented, the arguments advanced, and he must ultimately render his factual determinations on the issues presented in accord with the rules and laws governing trials by courts-martial, including proper instructions given pursuant to Article 51. . . .

c. Effect of preconceived opinion where evidence of impartiality is received at trial. There are as yet no reported cases dealing with the effect of a denial of a challenge based on grounds 9 through 12, where the grounds are disclosed and admitted, but contrary evidence is presented at the trial tending to show that although the person may previously have been prejudiced, he may have since become impartial; the reported cases deal principally with the effect on nondisclosure of such prior bias.[91] In a case where the member does claim that he has an open mind, despite his pretrial preconception, and where such an assertion is not unreasonable, it is entirely possible that it will not be held error to deny the challenge. In this respect, it is significant that the Court of Military Appeals in such a disputed situation has upheld the denial of a challenge of a law officer based on paragraph 62*f*(13) of the Manual, where he admittedly had acted as trial counsel at a related case but proclaimed his impartiality.[92] Paragraph 62*f*(13), by its express terms merely enumerates "examples" of what facts *may* raise substantial doubt as to the fairness of the proceedings. The "other facts" which may likewise raise such a doubt—which is the ultimate question to be decided on the challenge—are those listed in the preceding grounds for challenge [paragraph 62*f*(9) through 62*f*(12)]. Some of these "other facts", it is true, may be stronger evidence of continuing bias than others; but it may be that none of these "facts" constitute an irrebuttable presumption of partiality. Further, the denial of a challenge based on these last five grounds for challenge, not being based on statutory ineligibility, might not call for the application of the doctrine of "general prejudice."

11. Has acted as convening authority or staff judge advocate.[93] *a. As convening authority.* Although the Manual does not discuss this ground for challenge it is obviously patent error for the convening authority to participate as a member.[94] Although such dual participation is not proscribed by an express provision of the Code, it still violates the intent of Congress to set the convening authority apart in his convening and reviewing duties.

b. As legal officer or staff judge advocate. This ground for challenge appears to be based on the right of an accused to an impartial law officer who will exercise independent discretion in his rulings, uninfluenced by predetermined bias or conception of the law. It is reversible error, therefore, for a law officer to fail to disclose such pretrial activity,[95] although a plea of guilty renders a law officer's participation nonprejudicial.[96] The same result would follow where a member had acted as legal officer.[97]

12. On review, will act as reviewing authority or staff judge advocate.[98] This ground for challenge, since it relates to participation after the trial, should not affect the right of the accused to a fair trial, although it would raise substantial doubt as to the fairness of the post-trial review. Nevertheless, in one case the Court of Military Appeals reversed the findings, where after the trial the law officer acted as staff judge advocate in concurring in the post-trial review of the case.[99] In view of subsequent cases, it is extremely doubtful if such an error would call for more corrective action than a new, post-trial review by an impartial authority or staff judge advocate.

13. Any other facts indicating substantial doubt as to the legality, fairness, and impartiality of the proceeding.[100] *a. General.* The facts listed under this subparagraph of the Manual,

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[91] See for instance, ACM S-11368, Navarro, 10 CMR 628 (1955).
[92] United States v. Richmond, *supra* note 62.
[93] MCM, 1951, para. 62*f*(1).
[94] But mere appointment, without actually sitting, is not prejudicial. ACM 5878, Baker, 7 CMR 788 (1952).
[95] CM 360188, Thorpe, 9 CMR 351 (1953).
[96] CM 401181, Harmon, 27 CMR 670 (1959).
[97] NCM 4, Hartley, 1 CMR 456 (1951) (member "checked over charges" for the convening authority to see that they were properly referred).
[98] MCM, 1951, para. 62*f*(12).
[99] United States v. Crunk, 4 USCMA 290, 15 CMR 290 (1954).
[100] MCM, 1951, para. 62*f*(13).

as well as under paragraph 62*f*(9) through 62*f*(12) as "examples" are merely illustrations of what may constitute doubt as to the fairness of the proceeding. Thus, if the accused challenges a member or the law officer on one of these grounds, and the facts are not disputed, it is not error to overrule the challenge if the evidence shows that the challenged person in fact is unbiased and impartial.[101]

b. Formerly acted as the law officer. Although a board of review has held it to be a denial of "military due process" to deny a challenge to a law officer who had acted as such at the first hearing in spite of that officer's statement that he could fairly perform his duties,[102] the decision in the *Richmond*[103] case cast doubt upon the continued validity of the holding.

c. Will be defense witness. Paragraph 63 of the Manual states that "if a witness called by the defense testifies adversely to the defense, he does not thereby become a witness for the prosecution." his ground for challenge is closely related to the grounds listed in paragraph 62*f*(10) of the Manual, and other grounds listed in paragraph 62*f*(13).

d. Has made statement during investigation. The Manual does not explain this ground for challenge. Nevertheless, any law officer or member who has made a material pretrial statement, based on his personal knowledge, should be subject to successful challenge, because of the danger of his imparting inadmissible evidence to the other members or passing on the credibility of his own statement, or, as law officer, having his ruling improperly influenced. Further, he may very well have an improper preconception of the accused's guilt or innocence. For this last reason, he would be subject to challenge by the prosecution, even though the statement was made "at the request of the defense."

e. Has expressed an opinion as to the mental condition of the accused.

f. Junior in rank or grade to the accused.[104]

g. Direct personal interest in the result of trial. This ground arises from a direct *personal,* as distinguished from *official,* interest in the outcome of the case, that would tend to make the person partial.

In ACM 4374, *Bergin,*[105] the accused was convicted of larceny from a consolidated welfare fund, of which he was the custodian. The defense challenged three members of the court on the grounds that they were *members of the unit fund councils* which received income from the consolidated welfare fund. On *voir dire* the three members asserted they had heard little, if anything, of the case and would try it impartially. The Board held that the overruling of the challenges was prejudicial error.

> . . . . We sustain the contention of defense counsel that any member of any of the councils, responsible for the proper administration of the particular funds, were so closely associated with and had so great an interest in the conservation of its funds that they were rendered incompetent to sit as members of the court-martial. The accused was the custodian of each and every one of the unit funds of the councils of which the challenged members of the court were a part. The unit funds were maintained for the general welfare, recreation and benefit of the squadrons as a whole . . . , and a shortage in the Consolidated Fund reflected a proportionate loss to each individual fund, thus curtailing their activities.

h. Closely related to the accused.

i. Has participated in a closely related case.

(1) *General.* This ground is related to that listed in paragraph 62*f*(10), MCM, 1951, and does not limit the type of "participation" which is disqualifying. Thus prior participation as counsel, law officer, or member may call for sustaining a challenge on this ground.

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[101] United States v. Richmond, *supra,* note 62. Protestations of impartiality, however, are not necessarily conclusive. United States v. Kehtner, 12 USCMA 667, 31 CMR 253 (1962).

[102] CM 376037, Grosel, 17 CMR 894 (1954) (accused has a *right* to a law officer other than the one who originally sat).

[103] United States v. Richmond, *supra* note 62.

[104] See MCM, 1951, para. 4*c*, 41*a*.

[105] 7 CMR 501 (1952). *Bergin* appears to involve only an *official* interest in the result of the trial. The Court of Military Appeals has held that a *convening authority,* who was a chairman of a charity fund drive, was not disqualified from *convening* a court-martial to try an officer for embezzling from this charity fund. United States v. Doyle, 9 USCMA 302, 26 CMR 82 (1958). It may be, therefore, that *Bergin* should be reexamined.

The prior case must, of course, be sufficiently "closely related" to the instant one so as to give rise to a doubt as to the impartiality of the challenged member.[106]

(2) *Effect of participation.* In *United States* v. *Richmond*,[107] the accused, R, was convicted of 41 separate larcenies from the base finance office. It was disclosed that the law officer at R's trial had acted as trial counsel at the trial of C, one of 18 other persons tried for similar larcenies and committed about the same time. Three witnesses who testified at C's trial testified for the prosecution at R's trial, and trial counsel at C's trial had argued against a motion similar to a motion to be presented at R's trial and on which he was required to rule then as law officer. *There was no contention, however, that C was an accomplice of R, or that the testimony in C's case in any way involved the accused.* R's defense counsel challenged the law officer on the grounds that having acted in a closely related case he had acquired knowledge of the facts of the present case; at the same time defense counsel emphasized that he conceded the fairness and integrity of the law officer. After the challenged officer stated that he did not know what facts would be developed and that his prior participation in C's case would in no way impair his impartiality at R's trial, the court members overruled the challenge. The Court of Military Appeals held that the overruling of the challenge was not error:

> . . . . There is no statutory disqualification which prohibited this law officer from serving. On the contrary, it would appear that Article 26 of the Code, . . . expressly authorized his designation, for it only proscribes his appointment if he has acted as counsel in the *same* case. . . . But we must go one step further and ascertain whether paragraph 62*f* (13) of the Manual, supra, disqualified him from serving. . . . Even at the sake of being repetitious, it is worth mentioning again that Congress only went so far as to disqualify a law officer when he had prior participation in the *same* case, and *the Manual rule is limited to those situations where acting in the closely related case would raise substantial doubts as to the legality, fairness, and impartiality of the trial proceedings.* We propose to go no further than the Manual requirements and when a showing to that effect is made, a challenge should be sustained. But when, as here, there is no evidence remotely suggesting that condition to exist, there is, as a matter of law, no disqualification. [Emphasis supplied.]

1. Hostile or friendly to the accused. The bias must be directed for or against the particular individual. Thus, if a person is prejudiced against a certain class of individuals or type of crimes, but it is established that he will try the accused impartially, without regard to this prejudice, it would not be error to allow him to participate in the trial. On the other hand, if there is a doubt that the challenged person will permit himself to be influenced at the trial he should be excused.[108] In addition, court members are subject to challenge where they disclose rigid preconceived notions as to a sentence in the particular case.[109]

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[106] A completely separate trial of the accused for a separate offense prior to the trial is not a "closely related" case. CM 396467, Parrish, 24 CMR 845 (1957), *pet. denied*, 25 CMR 486. But the case of a co-actor is a closely related case. CGMS 20286, Staskus, 20 CMR 556 (1955).

[107] 11 USCMA 142, 28 CMR 366 (1959).

[108] CM 373871, Grittman, 16 CMR 328 (1954). (Error to overrule challenge to member sitting in desertion case of accused Jehovah's Witness where member stated that he could not vote for *anyone* who would not serve in the armed forces; they were . . .)

[109] See ACM 10987, Watkins, 20 CMR 750 (1955); United States v. Lynch, 9 USCMA 523, 26 CMR 303 (1958).

1. General. Each accused, and the trial counsel, is entitled to one peremptory challenge of any member of the court.[110] The law officer is not subject to peremptory challenge.[111]

2. When made. The peremptory challenge must be made before arraignment, although it may be made after arraignment (if not previously exercised) upon the addition of a new member to the court. If the additional member joins the court, after the exercise of a peremptory challenge, but *before* arraignment, then it would seem that every good cause would have to be shown by the government for adding the member, for the practical effect of such action is to deny the accused his right to a peremptory challenge.[112]

a. Order of challenge. The procedural guide of the Manual suggests that challenges be made in the following order: Trial counsel's challenges for cause, trial counsel's peremptory challenge, defense counsel's challenge for cause, defense counsel's peremptory challenge(s).[113] Nevertheless the law officer has some discretion in this area, and, in an appropriate case, may permit the trial counsel to exercise his peremptory challenge after the opportunity to do so had been afforded defense counsel.[114]

b. Before arraignment.

(1) *Waiver.* The peremptory challenge ordinarily is waived if not made before arraignment.[115]

(2) *Addition of new member.* A peremptory challenge ". . . may be used . . . against a new member if not previously utilized in the trial." [116] The convening authority should, if practicable, "excuse from future sessions of the court in a particular case any member who was absent when testimony on the merits was heard, or other important proceedings were had."[117] The challenge proceedings are clearly "important proceedings."[118] Therefore the record of trial should justify the addition of a member, where a quorum exists, before arraignment, but after the exercise of defense's peremptory challenge. Otherwise the accused would be denied an informed choice of the peremptory challenge.[119]

c. After arraignment. The challenge is waived if not made before arraignment,[120] unless a new member is added after arraignment.[121]

3. Forced use of peremptory challenge. If it is error to fail to disclose possible grounds for challenge, then it is certainly error to fail to sustain a proper challenge once disqualifying grounds are disclosed. But the question arises on how to preserve the error for appeal. This depends on the nature of the right to a peremptory challenge. If it is merely to insure an impartial court-martial, then a failure to exercise the peremptory challenge on the single member whose challenge should have been sustained would probably operate as waiver of the effect of the error, assuming that any of the first eight grounds for challenge are not involved.[122]

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[110] MCM, 1951, para. 58c, 62e.

[111] *Id.*, para. 62e.

[112] *Contra*, ACM 7703, Gastellum, 14 CMR 637 (1954).

[113] MCM, 1951, App. 8a, p. 507; see also MCM, 1951, para. 62a: "Challenges by the trial counsel shall ordinarily be . . . decided before those of the accused. . . ."

[114] ACM 9092 Fetch, 17 CMR 836 (1954) (Trial counsel permitted to challenge member who had signed indorsement forwarding charges after defense counsel failed to challenge). See also ACM 16294, Martin, 28 CMR 822 (1959). In ACM S-8175, Graham, 14 CMR 645 (1954), it was held that the law officer did not abuse his discretion by refusing to permit defense counsel to reassert his peremptory challenge at the close of his case where he had previously waived the same.

[115] ACM S-8175, Graham, 14 CMR 645 (1954).

[116] MCM, 1951, para. 62e.

[117] MCM, 1951, para. 87b.

[118] See, for example, CM 373371, Grittman, 16 CMR 328 (1954).

[119] *But see*, ACM 7703, Gastellum, 14 CMR 637 (1954). In Gastellum two new members were added after one peremptory challenge had reduced the court below a quorum. See also ACM 17828, Lee, 31 CMR 748 (1962), where the Board of Review reached the same result as *Gastellum*. See also ACM 11497, Hammell, 23 CMR 827 (1957), *pet. denied*, 23 CMR 421: Where a court is reduced below a quorum by a defense peremptory challenge the defense may not then peremptorily challenge a new member who was added to make a quorum [citing Gastellum]. The propriety of placing the accused in a position where one peremptory challenge will reduce the court below a quorum apears to be at least douhtful.

[120] ACM S-8175, Graham, 14 CMR 645 (1954).

[121] MCM, 1951, para. 62e.

[122] See ACM 17519, Strong, 31 CMR 629 (1961), where a failure peremptorily to challenge a member disqualified on the ground of para. 62f(5) was held not to be a waiver.

On the other hand, if the right to a peremptory challenge is an absolute one, then the accused should not be required to fritter it away on an obviously disqualified member. This latter view accords with the older accepted civilian rule, where the right to a peremptory challenge is given by statute.[128]

[128] Busch, "Law and Tactics in Jury Trials," § 135, (1949 ed.) All three services have held that it constitutes prejudicial error to force the accused to fritter away his peremptory challenge to eliminate a member from the court after an erroneous denial of a challenge for cause. Navy: NCM 53 Morgan, 6 CMR 462 (1952), Army: CM [illegible], 16 CMR 328 (1954); Air Force: ACM 10987, Watkins, 20 CMR 750 (1955). However, there appears to be some evidence that a change in the concept of the nature of the peremptory challenge may be taking place. For example, in ACM 14745, Swanson, 25 CMR 882 (1958), an Air Force Board of Review refused to follow previous holdings, and by so doing, apparently shifted from the view that the peremptory challenge is a distinct right. The Board concluded that their only concern was whether the court-martial finally seated was fairly and impartially constituted. The Court of Military Appeals reversed on other grounds and did not discuss this issue. United States v. Swanson, 9 USCMA 711, 26 CMR 491 (1958). In United States v. Henderson, 11 USCMA 550, 29 CMR 376 (1960), a defense challenge for cause was not sustained, and the defense counsel failed to exercise his peremptory challenge. A majority of the Court of Military Appeals felt that the challenge for cause was denied and "trial defense counsel must have placed the same interpretation upon the member's answers, for no peremptory challenge was exercised. . . ." Judge Ferguson felt that the member was not subject to challenge. Since accused did not remove him by peremptory challenge, that would ordinarily be held to be a waiver, but since this was a capital case, he would not enforce the waiver rule. Ferguson's language would appear to indicate that he, at least, does not consider the peremptory challenge a distinct right. Normally, "[a failure to exercise a peremptory challenge to a] [illegible] member] would completely waive any error arising from his participation."

CHAPTER X

ARRAIGNMENT

References: Arts. 29, 35, UCMJ; para. 11*c*, 28*b*, 37*b*, 41*d*, 61*d*, 65, MCM, 1951.

Section I. INTRODUCTION

After the court has been organized by the convening procedure, and after the challenging procedures have been completed, the accused is formally arraigned.

Section II. PARAGRAPH 65*a*, MCM, 1951, PROCEDURE

1. General.[1] The arraignment consists of: (1) the trial counsel's distribution of copies of the charges to the law officer and members of the court, (2) his reading of the charges,[2] and (3) the trial counsel's calling upon each accused to plead. The plea is not part of the arraignment. The procedure follows that required by Federal procedures[3] with the additional requirement of distributing copies of the charges to the court personnel.

2. Purpose. In civilian procedure the arraignment is the first step by the prosecution after the return of the indictment or filing of the information. Accordingly, its main purpose in civilian procedures is to give the first formal notice to the accused of what he must defend against and also give him a reasonable time to prepare his defense before answering to the charges.

3. Effect of noncompliance. At an early period in the English common law a defendant was accorded few of his present rights; therefore, formal noncompliance with the arraignment procedures was accorded more weight than it now is. Under present civilian law if the record of trial shows that the accused knew the exact nature of the charge to which he pleaded, omission of the express arraignment procedure, in absence of objection, will be held to have been waived. In such a case the arraignment is "implied." [4]

Lack of prejudice, due merely to lack of formal compliance with arraignment procedures, should be even more apparent in military procedure, where the defendant, in extensive and formal pretrial procedures, is advised of the formal charges against him.[5]

Section III. PARAGRAPHS 11*c*, 28*b*, 37*b*, 41*d*, 61*d*, 65*b*, MCM, 1951 EFFECT OF ARRAIGNMENT

1. General. The time of arraignment, "implied" or express, is important in fixing the moment that certain rights and liabilities of the accused become fixed.

2. Permits trial in accused's absence. If the accused voluntarily absents himself without authority, after being present at the arraignment, the trial may proceed in his absence.[6]

[1] See para. 65*a*, appendix 8*a*, page 507, MCM, 1951.

[2] The accused may, and normally does, consent to merely entering the charge sheet in the record of trial. See app. 8*a*, p. 507, MCM, 1951.

[3] F. R. Crim. P. 10.

[4] Garland v. Washington, 232 U.S. 642, discussed at sec. 258, Housel and Walker, "Defending and Prosecuting Federal Criminal Cases" (2d ed., 1946).

[5] CM 347614, Houghtaling, 2 CMR 229 (1951), aff'd, 2 USCMA 230, 8 CMR 30 (defendant not asked to plead). *Accord:* NCM, Williams, 30 CMR 650 (1960). *But see* United States v. Robinson, 13 USCMA 674, 33 CMR 206 (1963).

[6] MCM, 1951, para. 11*c*; ch. VIII, *supra*; United States v. Houghtaling, 2 USCMA 230, 8 CMR 30 (1953).

3. Members not to be changed without good cause. The members of the court may not be added or excused after arraignment without good cause.[7]

4. Peremptory challenge waived.[8]

5. No subsequent arraignment on additional charges. In *United States* v. *Davis,* infra, the Court of Military Appeals construed paragraph 65 of the Manual to hold that once accused has been arraigned on one set of charges, he cannot later at the same trial, be arraigned on additional charges. This accords with military practice before the Code and with existing civilian practice. For instance, in a federal criminal trial when two or more separate indictments or informations are joined against a single accused it is provided that "the procedure shall be the same as if the prosecution were under a single indictment or information." [9] Such a rule is in the interest of an orderly procedure.

Illustrative Case

United States v. *M. L. Davis,* 11 USCMA 407, 29 CMR 223 (1960)

Near the end of accused's lengthy trial on two specifications of indecent acts with a minor female and of which he was eventually acquitted, the prosecution obtained a continuance to permit the accused's arraignment before the same court on an additional charge of the same nature. This last offense was not discovered in time to join it with the original charges. The law officer overruled the defense objection to the additional arraignment and the accused was convicted of this offense.

Opinion: [Judges Ferguson and Quinn] It was prejudicial error to overrule defense's objection. It was error because paragraph 65 of the Manual does not permit separate arraignments of the same accused at the same trial on different charges.[10]

[illegible] paragraph 65*b*, provides:

"*Additional charges.*—After the accused has been arraigned upon certain charges, additional charges, which the accused has had no notice to defend and regarding which the right to challenge has not been accorded him, *cannot be introduced, nor may the accused be required to plead thereto.* However, *if all the usual proceedings prior to arraignment are first had with respect to such additional charges,* including proceedings as to qualifying counsel and excusing and challenging the law officer and members of the court, such charges may be introduced, the accused may be arraigned on them, and the trial may proceed on both sets of charges as the trial of one case." [Emphasis supplied.]

Admittedly, the Manual provision is ambiguous, for its initial sentence seems expressly to forbid the practice which the Government claims is authorized, while its second sentence seems to support that view. We believe, however, that the paragraph, read in its entirety, is intended to prohibit the introduction of new charges following accused's arraignment. At the same time, its second sentence points out that it is permissible for such charges to be brought to the attention of the court-martial at any time up to accused's arraignment, provided the proceedings preliminary to that point are had with respect to the additional allegations. Thus read, the apparent conflict between the Manual's provisions disappears, and an entirely coherent thought is presented. On the other hand, if the Government's position is adopted, the prohibition against introduction of new charges contained in the first sentence of the paragraph becomes meaningless. Certainly, that was not the result intended by the drafters.

We are reinforced in our belief that the quoted Manual provision must be so interpreted by the comments of Colonel Winthrop:

"... [Additional] Charges ... do not require a separate trial, but may and properly should be tried by the same court which tries the original Charges,

[illegible] ch. II, *supra.*

[illegible] *supra.*

[illegible] 19

[illegible] 11 USCMA [illegible] CMR 223, 225.

and at the same time. *They must, however, be brought before the court prior to its being sworn. After the court has been duly sworn to try and determine "the matter now before it," further or "additional" Charges (or specifications) cannot legally be entertained by it at that trial, but must await a separate investigation.*"

[Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, page 156.]

Surely, if the authors of the Manual had intended to provide for a procedure entirely foreign to civil jurisdiction [1] (*) and in conflict with ancient military practice, they would have set it forth in clear and unambiguous terms. That they have not done so convinces us the Government's contention lacks merit. Moreover, we are not certain that the introduction of new charges following arraignment might not conflict with the statutory procedural scheme laid down by Congress in the Code. In Code, supra, Article 36, it expressed its desire that the adjective law of courts-martial, so far as was deemed practicable, be modeled upon the principles applied in United States District Courts. It is distinctly arguable that the various Articles of the Code, appearing in subchapters VI and VII, Chapter 47, Title 10, United States Code, set forth a statutory scheme of procedure totally incompatible with such an abrupt departure from normal civil practice. Our construction of paragraph 65*b*, Manual, supra, however, makes determination of this question unnecessary.

Our decision in nowise affects the Government's right separately to prosecute additional charges which come to light following accused's arraignment upon the original charges. The repeated references in the Manual, supra, to the speedy processing of accusations, the consolidation of charges, and its injunction to try an accused for all known delicts at one hearing quite obviously refer to those offenses which become known prior to the commencement of a particular trial. If other separate crimes are discovered during that trial, it seems clear that the convening authority will breach no duty to the accused by ordering an investigation and separate hearing after completion of the proceedings then in progress. Certainly, we cannot hold a commander responsible for failure to refer additional charges to trial when he had no knowledge of the matter until after the court-martial hearing on the original charges had been convened.

We conclude, therefore, that paragraph 65*b*, Manual, supra, prohibits the introduction of new charges in the proceedings after accused's arraignment, although it permits such action to be taken prior to that event, if other preliminary proceedings are had. [The error was prejudicial because the court members may have been improperly influenced by the improper dual arraignments.] In the instant case, the quoted Manual provision was not so interpreted, and the prosecution was allowed to introduce an Additional Charge of a similar offense near the end of its case. The weakness of its presentation concerning the original delicts was established by the subsequent partial acquittal. We cannot say that the improper combination of charges did not result in unfair consideration of the Additional Charge. Prejudice to the accused is, therefore, apparent, and reversal is required.

Judge Latimer [dissenting] stated that while he does not approve of the multiple arraignment procedure, it is authorized by paragraph 65*b*. Further, even if it were not permitted by the Manual, the resulting error would not have prejudiced this accused because the court members were not influenced improperly by the charges of which he was acquitted.

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* (Court's footnote). "23 CJS, Criminal Law, § 931; State v. Rice, 202 NC 411, 163 SE 112 (1932); State v. Harris, 223 NC 697, 28 SE 2d 232 (1943)."

The accused may not prevent arraignment because he was served with charges within the prohibited peacetime statutory period preceding trial, although failure to comply with the statute[11] is grounds for a mandatory continuance *after* arraignment.[12]

[11] UCMJ, Art. 35.
[12] MCM, 1951, para. 65a. See ch. XII, *infra*.

CHAPTER XI

MOTIONS RAISING DEFENSES AND OBJECTIONS—GENERAL

References: Arts. 39, 40, 48, 44, 46, 51(b), 62(a), UCMJ; para. 54–58, 66–68d, MCM, 1951; para. 21–26, 33–36, DA Pam. 27–9 (1958).

Section I. INTRODUCTION

This chapter discusses the procedural law pertaining to the ruling on objections as to the admissibility of evidence, as well as that relating to the ruling on motions. A detailed discussion of motions to dismiss follows in a subsequent chapter. This chapter is not concerned with motions based on the evidence, *e.g.*: motion for a finding of not guilty; motion to dismiss for reason of insanity at the time of the commission of the offense; res judicata.

Section II. PARAGRAPHS 66, 67, MCM, 1951, GENERAL

1. Kinds of motions. The Manual rule is almost identical to Federal Rule of Criminal Procedure 12.[1] This Federal Rule consolidated all postarraignment and preplea motions and objections, not involving determination of the guilt or innocence of the accused, into two categories: motions to dismiss, and motions to grant appropriate relief.[2]

"A motion to grant appropriate relief is one made to cure a defect of form or substance which impedes the accused in properly preparing for trial or conducting his defense."[3] Such a motion can raise objections going to the form (not substance) of the specification, noncompliance with a substantial requirement of the formal pretrial investigation, misjoinder, etc. Since the motion, if granted, merely requires corrective action and would not establish a binding defense or permanent bar of trial for the offense, it is granted without prejudice to the Government.[4]

Motions to dismiss, however, are those which, if granted, would forever bar trial, *e.g.*, former jeopardy, statute of limitations, pardon.[5] They are generally similar to the old common law plea of "confession and avoidance," not requiring a trial of the general issue. For the purpose of the motion alone, the guilt of the accused, as alleged in the indictment, would be conceded, or "confessed"; the defendant, however, in his motion would set up *new* matter in bar of trial, or "avoidance," which did not therefore dispute the guilt of the accused or deny any essential allegation.

On the other hand, it has been held that a motion to dismiss the count of an indictment for failure to allege an offense is *not* such a plea in bar for the reason that granting it does not prevent subsequent trial on a proper indictment.[6]

2. Time of making motions. *a. General.* The normal time for making motions is immediately after the arraignment. Thus the procedural guide to the Manual suggests that following the arraignment and announcement of when charges were served on the accused the trial

[1] MCM, 1951, para. 67.
[2] Fed. R. Crim. P. 12(a); compare MCM, 1951, para. 66.
[3] MCM, 1951, para. 69a.
[4] See ch. XII, *infra*.
[5] MCM, 1951, para. 68d. See ch. XIII, *infra*.
[6] United States v. Bitz, 282 F. 2d 465 (2d Cir. 1960).

counsel informed the accused: "Before receiving your pleas, I advise you that any motions to dismiss any charge or grant other relief should be made at this time."[7]

b. Before convening.

(1) *To the convening authority.* Any motion or objection may be presented to the convening authority "before trial," without prejudice to the right to renew the motion at the trial.[8] "Before trial" probably means before the court-martial has convened. For instance, where trial counsel refuses to obtain the presence of defense witnesses, the Manual provides that the disagreement will be presented to "the convening authority or to the court, according to whether the question arises before or after the court convenes."[9]

(2) *To the law officer.* Neither the Code nor the Manual expressly forbids or authorizes the law officer to rule on motions or objections before the court-martial convenes.[10] Nevertheless, such action is probably error.[11] Courts-martial are necessarily courts of limited and special jurisdiction and therefore must be convened strictly within the statutory limits. A general court-martial according to the Code, consists "of a law officer and any number of members not less than five."[12] Historically, a court-martial had no authority to pass official judgments until it was convened, this being accomplished by the administration of oaths to the members.[13] The Code provision which still requires the administration of oaths to the members "to perform their duties faithfully,"[14] lends itself to the traditional interpretation that the members cannot proceed upon these duties until they are sworn. Pertinently, the present Manual states "After the oaths have been administered, the convening of the court is complete."[15]

c. After convening. As stated above, motions are made after arraignment.

(1) *Motions for appropriate relief* "may be raised only . . . before a plea is entered . . . but the court for good cause may grant relief from the waiver."[16] It is suggested that the law officer be liberal in granting relief from waiver. The Court of Military Appeals is often reluctant to find waiver, particularly in a "death case," and never when it would result in a manifest miscarriage of justice.

"In general these objections are waived if not asserted prior to the . . . plea."[17]

(2) *Motions to dimiss* normally should be made before the pleas, and must be made "before the conclusion of the hearing." If not made by that time, except in the case of lack of jurisdiction, failure of the charge to state an offense, the defense or objection is waived.[18] Although the right to make a motion to dismiss is generally not waived by a guilty plea,[19] a finding of guilty to a lesser included offense to which accused pleaded guilty prevents the accused from subsequently raising the bar of the statute of limitations.[20]

Illustrative Case

United States v. *Strand*, 6 USCMA 297, 20 CMR 13 (1955)

Before pleading not guilty to one of the specifications the defendant moved

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[7] MCM, 1951, app. 8a, p. 368.
[8] *Id.*, para. 67*a*.
[9] *Id.*, para. 67*d*.
[10] United States v. Mulligan, 3 USCMA 208, 21 CMR 334 (1956), discussed in ch. IV, sec. IV, *supra*.
[11] *Cf.*, United States v. Robinson, 13 USCMA 674, 33 CMR 206 (1963).
[12] UCMJ, Art. 16(1).
[13] Winthrop, *Military Law and Precedents* (2d ed., 1920 Reprint) at 231, 232, 236; see also *id.*, at 161, 162, 210.
[14] UCMJ, Art. 42(a).
[15] MCM, 1951, para. 61*f*; see United States v. Robinson, *supra* note 11.
[16] MCM, 1951, para. 67*b*.
[17] *Id.*, para. 69*a*.
[18] MCM, 1951, para. 67*a*. See also *id.*, paragraphs 67*d* and 122*b*: "The issue of insanity can be raised at any time while a case is before the court."
[19] United States v. Brown, 10 USCMA 483, 28 CMR 49 (1959).
[20] MCM, 1951, para. 68*c*.

to dismiss it on the grounds of multiplicity. The law officer reserved decision on the motion, and the accused was convicted of the offense. Before the court-martial retired to vote on the sentence, the law officer ruled, sustaining the motion.

On appeal the government contended that the word "trial"—as used in Article 51(b), UCMJ, permitting the law officer to change his ruling "at any time during the trial"—means the proceedings up to and including the findings, and not later.

Opinion: "Until the sentence proceedings are complete, the trial is not ended." The law officer may, therefore, make a ruling on an interlocutory matter up to that time.

Note. Paragraph 21*b*, DA Pam 27–9 (1956) cites *Strand, supra,* for authority that a motion to dismiss "may be raised at any time before the announcement of the sentence." *Quaere:* (1) Does *Strand* define the time when the law officer may *rule,* as distinguished from the time the motion must be *presented?* (2) Are the sentence proceedings "complete" with the "announcement of the sentence"? For this second question see *United States* v. *Robinson,* 4 USCMA 12, 15 12 (1954).

3. Form and content of motion. The substance, and not the form of the motion, controls. If the accused is not represented by counsel the court *shall* call his attention to apparently available defenses and objections.[21]

Section III. PARAGRAPHS 57*g*(2), 67*e*, MCM, 1951, HEARING ON MOTIONS OR OBJECTIONS

1. General. Since the legal principles governing hearings on motions also apply to hearings on objections to the admissibility of evidence, both hearings are discussed in this section.

2. Right to present contentions. "Before passing on a contested motion, the court will give each side an opportunity to introduce pertinent evidence and to make an argument."[22] "While . . . an arbitrary refusal to entertain an argument on an interlocutory question may constitute error . . . the right to present argument should not be abused, and the court may . . . limit or refuse to hear argument when it is trivial, merely repetitious, or made for the purpose of delay."[23]

Illustrative Case

United States v. *Brown,* 10 USCMA 482, 28 CMR 48 (1959)

HOMER FERGUSON, Judge:

The accused was convicted by a general court-martial of wrongful possession of heroin, ... This Court granted review of two issues:

1. Whether the law officer erred in not permitting defense counsel to state the grounds of his objection to Exhibit 1, and in overruling the defense objection to the search without inquiring into the legality thereof.

2. Whether the search and seizure was legal.

The pertinent facts will be noted where necessary to a discussion of the issues. Concerning the first issue, the following appears in the record:

"Q Who was searching the accused?

"A Sergeant First Class Templeton.

* * * * *

"Q Did Sergeant Templeton give you anything at that time?

"IC: I object.

"LO: Overruled.

"IC: May I state the grounds?

"LO: Overruled. Continue.

"Q Did Sergeant Templeton give you anything when you were standing next to the accused?

"A He did. He gave two small bottles. One was empty. The other was full, after I looked at it.

"IC: I move that the answer be stricken, on the grounds that this was an illegal search.

"LO: Overruled."

[21] MCM, 1951, para. 67*b*.
[22] *Id.*, para. 67*e*.
[23] *Id.*, para. 58*g*.

. . . . To aid the judge or law officer in his task, there is imposed upon counsel the duty of objecting to evidence considered to be inadmissible. "The function of the objection is, first, to signify that there is an issue of law, and, secondly, to give notice of the terms of the issue." Wigmore, Evidence, 3d ed, § 18. The specific grounds for the objection must be stated, and ordinarily new bases may not be raised for the first time on appeal. Boston and A. R. Co. v. O'Reilly, 158 US 334, 15 S Ct 830, 39 L ed 1006. See generally Wigmore, supra, § 18. The basis for rule has been stated thusly:

* * * * *

These well-established concepts are designed to aid in the orderly administration of justice. In the instant case, however, we do not have a situation where defense counsel failed to object, nor was the failure to specify the grounds for his protest attributable to him. It was the law officer who not only arbitrarily overruled the objection but, upon request, refused to permit the defense counsel to state his grounds. *Such arbitrary action usually results in an uninformed ruling and generally deprives appellate authorities of a proper record upon which to assess the correctness of the law officer's action. Either result may prove fatal to the validity of any ensuing conviction.* [Emphasis supplied.]

* * * * *

While the law officer's ruling was uninformed the evidence subsequently received sufficiently reflects the circumstances of the search to permit an informed appellate judgment thereon. *Thus, while we deem his arbitrariness prejudicial,*[24] [emphasis supplied] we also pass to the second granted issue which squarely presents the question of the legality of the search. [The search was held illegal.]

In his dissent Judge Latimer stated that the majority opinions detracted from judicial powers of a law officer:

> I believe all members of the Court are generally interested in strengthening the role of the law officer and making him in the image of a Federal trial judge. Yet, opinions such as this eat away that possibility. A trial judge in a civilian court is not a mere figurehead who must bend with the will of the advocates. He is the master of the court and is entitled to require that cases be tried properly and expeditiously. He need not listen to every harangue proposed by counsel and, if he considers an objection premature and inappropriate, he need not have the jury confused and the record cluttered by a lot of immaterial argument. The same authority ought to inhere to a law officer in the military courts. If the judge or law officer is satisfied that there is no merit to the objection upon any legal ground, he is not required to allow counsel to expound on the objection. If he errs and there is any valid basis for excluding the evidence, he is subject to reversal providing the accused was prejudiced. . . .

3. **Right to out-of-court hearing.** *a. General.* Paragraph 57*g*(2) of the Manual states that "except with respect to hearing arguments on" proposed additional instructions (73*c*(2)) "it is discretionary with the law officer whether the accused shall be allowed an out-of-court hearing on an interlocutory question. Electing to adopt the applicable Federal law in *United States* v. *Carrignan,* 342 U.S. 36 (1951), the Court of Military Appeals has substantially overruled this provision and given the accused an absolute right to an out-of-court hearing to present his grounds for objecting to the admissibility of a confession.[24] This right is apparently based on the accused's desire to keep evidence material to the issue of voluntariness, but of possible disadvantage to him, away from the court members.[25]

The same rationale should apply to hearings on motions, especially to those in bar of trial where the accused may not wish, for example, to have the court members hear that he

[24] United States v. Cates, 9 USCMA 480, 26 CMR 260 (1958).
[25] United States v. Cates, *supra* note 24, citing United States v. Dicarlo, 8 USCMA 853, 24 CMR 163 (1957).

has once before been convicted for the "same" offense.

b. Effect of denial of out-of-court hearing. It is prejudicial error for the law officer to deny a defense request for an out-of-court hearing, provided the record of trial, by evidence or an offer of proof, shows an issue was raised, or would have been raised. This is so even though the law officer's ruling admitting the evidence, or denying the motion, is supported by the record of trial. Of course, if the law officer arbitrarily refuses to allow the defense to state its grounds for the out-of-court hearing that in itself may constitute prejudice.[26]

Illustrative Case

United States v. *Young*, 10 USCMA 249, 27 CMR 323 (1959)

As soon as the prosecution called for its witness, an FBI agent, the defense obtained an out-of-court hearing to contest the admissibility of the anticipated testimony of this witness concerning a pretrial statement of the accused. During the ensuing hearing the accused was allowed to begin to testify as to a lack of proper warning of his rights under Article 31, but he was then cut off by the law officer who did not believe he could rule on the admissibility of the pretrial statement. The proceeding terminated and the prosecution's pertinent evidence, as well as accused's complete testimony, on the issue of admissibility was again received, this time in open court.

Opinion: The failure to accord accused his right to an out-of-court hearing was prejudicial error.

> In United States v. Cates, . . ., we held that it is error to deny the accused's request for a preliminary out-of-court hearing to determine the admissibility of a pretrial statement made by him. . . . The question then is whether an issue of admissibility is presented by the record of trial. If there is none, the accused was not harmed by the failure to hold the preliminary hearing. In our opinion, there is an issue of admissibility.
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> * * * * *
>
> 2 It would seem that the law officer here completely disregarded his duty to make the initial determination of admissibility in favor of submitting the issue directly to the court-martial. However, the accused does not challenge the law officer's ruling from that standpoint, and we put the matter aside in our consideration of the case.

Judge Latimer [dissenting]: The error, if any, was not prejudicial; "[T]he testimony adduced on the interlocutory question was neither inflammatory, or incriminating."

4. Recording requirements. If the out-of-court hearing includes the presentation of preliminary evidence it will be fully recorded, transcribed, and appended to the record.[27] Offers of proof need not be recorded, unless the law officer refuses to hear the preliminary defense evidence in support thereof.[28]

Otherwise there is no legal requirement that out-of-court hearings be recorded,[29] although the Court of Military Appeals has stated: "We believe that during the trial of a case *the better practice is to record all matters which in any way affect the proceedings.*"[30]

Note. In *Lampkins*, the out-of-court hearing was concerned with the law officer's instructions. The Manual provides that, although the law officer may decide otherwise, "argument upon a proposed instruction . . . as a general rule . . . will not be recorded."[31]

5. Burden of proof. *a. General.* Generally the party making an objection or motion raising an interlocutory question has the burden of establishing his contentions by a "preponderance of the evidence."[32]

b. Exceptions.

(1) *Objection to illegally seized evidence.* If an issue is raised as to whether evidence was obtained as a result of an illegal search, the government must

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[26] United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959). *But see* United States v. Evans, 13 USCMA 598, 33 CMR 130 (1963), and United States v. Lock, 13 USCMA 611, 33 CMR 143 (1963).

[27] MCM, 1951, para. 57*g*(2).

[28] *Id.*, para. 57*g*(2), 154*c*.

[29] United States v. Ransom, 4 USCMA 195, 15 CMR 195 (1954).

[30] United States v. Lampkins, 4 USCMA 81, 15 CMR 81 (1954). [Emphasis supplied.]

[31] MCM, 1951, para. 73*c*(2).

[32] MCM, 1951, para. 57*g*(1), 67*c*.

establish that the search was legal, by "clear and positive testimony."[33]

(2) *Confessions and admissions.* For the purpose of the law officer's initial ruling on admissibility, the Government must establish that the confession (or admission, if its admissibility is contested) was voluntary and obtained in compliance with Article 31, UCMJ.[34] See paragraph 6*d*, section IV, below.

(3) *Mental capacity to stand trial.* The Government must establish, beyond reasonable doubt, when the issue is raised, that the accused is not entitled to a continuance because of lack of mental capacity to cooperate in his defense at the time of trial. This requirement applies to the initial ruling of the law officer, as well as to court members if a member objects to the law officer's ruling.[35]

(4) *Motion for finding of not guilty.* The Government need produce only "substantial evidence"[36] of the principal (or lesser included) offense. But the law officer should not consider the defense evidence and must accept the credible prosecution evidence. This same standard applies to each court member when the members vote following an objection by a member to the law officer's ruling. A motion to dismiss for mental irresponsibility at the time of the offense is not, like a motion for a finding of not guilty, a "demurrer to the evidence." When the latter motion is made, *all* the evidence (not only the prosecution's) must be considered.[37]

(5) *Tolling of statute of limitations.*[38] When the defense has made a motion to dismiss a specification which on its face appears to be without the statute of limitations, the prosecution must prove "by a preponderance of the evidence" that the statute was tolled by the accused's absence, from the jurisdiction, or some other circumstance which under Article 43 would toll the running of the statute.[39]

Section IV. PARAGRAPHS 57, 67, MCM, 1951, RULINGS ON OBJECTIONS AND MOTIONS

1. General. "The law officer of a general court-martial . . . shall rule upon interlocutory questions. Any such ruling . . . upon any interlocutory question other than a motion for a finding of not guilty, or the question of the accused's sanity, shall be final . . .; but the law officer may change any such ruling at any time during the trial."[40] The Code does not define "interlocutory question," but the Manual states, parenthetically, that interlocutory questions are "all questions other than the findings and sentence."[41]

2. Objections to the admissibility of evidence. *a. General.* The question of admissibility of evidence is interlocutory in nature, and unless otherwise provided by law, its determination rests with the law officer.[42]

b. Confessions and admissions. See paragraph 6*d*, below.

c. Overlapping questions of fact. In rare cases, usually those requiring the determination of competency of witnesses, the ruling of the law officer also bears directly on the guilt or innocence of the accused. Since this latter question is one relating to "the findings and

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[33] United States v. Berry, 6 USCMA 609, 20 CMR 325 (1956).

[34] United States v. Odehweller, 13 USCMA 71, 32 CMR 71 (1962), modifying the requirement of MCM, 1951, para. 140*a* stating that the confession need be established as voluntary "by an affirmative showing". See also United States v. Goard, 13 USCMA 588, 33 CMR 120 (1963).

[35] United States v. Williams, 5 USCMA 197, 17 CMR 197 (1954). *Quaere:* Should this standard apply to a defense request for continuance to obtain additional evidence on the issue of mental incapacity or responsibility? See paragraph 5*a*, above.

[36] MCM, 1951, para. 70*a*.

[37] United States v. Williams, *supra*, note 35. On a motion for a finding of not guilty, however, only the prosecution evidence need be considered. See para. 31*d*, DA Pam. 27-9, "The Law Officer" (1958); for the same procedure on a federal motion for judgment of acquittal, see United States v. Wilson, 178 F. Supp. 881 (D.C. 1959).

[38] See ch. XIII, *infra*.

[39] MCM, 1951, para. 68*c*.

[40] Art. 51(b), UCMJ.

[41] MCM, 1951, para. 57*b*.

[42] United States v. Berry, 6 USCMA 609, 20 CMR 25 (1956), citing UCMJ, Art. 51(b).

sentence," and therefore noninterlocutory, the problem arises as to how the law officer may rule on a question of admissibility of evidence without also usurping the functions of the court members who alone have the right to decide the guilt or innocence of the accused.

In such a case the law officer should rule finally on the admissibility of the evidence, using the Manual standard of "preponderance of the evidence."

Note. In some civilian jurisdictions the "prima facie" test is used: The judge accepts as true the preliminary prosecution evidence in opposition to the objection, and does not consider the preliminary defense evidence in support of the objection.[43]

Illustrative Case

United States v. *Richardson*, 1 USCMA 558, 4 CMR 150 (1952)

Accused, R, in addition to an AWOL charge, was charged in one specification with taking indecent liberties with a minor female, C, on 9 July 1951 in Arkansas; another specification alleged the same type offense from 10—16 July 1951 in Alabama. Before pleading accused made a "motion to dismiss" these latter two charges on the grounds the C was his wife at the times of the alleged commission of both offenses. [This, of course, would be a complete defense, as it is not a crime for a man to take "indecent" liberties with his own wife.] At the ensuing out-of-court hearing both R and C testified that on 9 July they had been intimate at an Arkansas hotel, and that the next day they had proceeded to accused's home in Alabama, where they lived for a few days under circumstances that would justify finding the existence of a common law marriage in Alabama. The law officer denied the motion, and in the ensuing trial the accused, who did not take the stand in open court, failed to object to the competency of C's testimony on the basis of the husband-wife privilege. The law officer instructed the court that the defense of common law marriage was raised only as to the second offense in Alabama, as Arkansas did not recognize common law marriages, although it did recognize such marriages if valid in other states. Accused was convicted of only the AWOL and the Arkansas offense.

Opinion: This conviction for the Arkansas offense is disapproved.

The law officer should not have ruled on the "motion to dismiss" which set up matter which should be raised on a plea of not guilty; but the law officer should have ruled on the competency of C to testify as to *both* offenses, because even if a subsequent common law marriage in Alabama was no defense to the Arkansas offense, C's spousal relationship at the time of trial could, on proper objection, prevent her from testifying concerning the Arkansas offense:

> . . . . A determination of the relationship for this purpose is an interlocutory question and one which should be ruled on by the law officer. He could not possibly rule on the question of whether accused was entitled to claim privilege until he had determined the status existing between the accused and the witness. Perhaps the best procedure would have dictated that he await the time the question was raised by defense counsel. However, it sometimes expedites the trial of cases to adopt a procedure which permits all preliminary or interlocutory questions based on out-of-court testimony to be determined before the trial on the merits commences. We see nothing erroneous with a law officer hearing evidence outside the presence of members of the court prior to trial for the purpose of being prepared to rule on anticipated questions of law. . . .

Accused did not waive objection to the competency of C's testimony because it was obvious that the law officer would have overruled the objection, having previously denied the "motion to dismiss" based on the same grounds. By acquitting the accused of the Alabama offense, the court members found the existence of a common law marriage at the time of trial and hence the testimony of C concerning the Arkansas offense should not have been considered by the members:

[43] See cases cited in *Selected Writings on Evidence and Trial*, Association of American Law Schools (1957 ed.) at 149; 1 Morgan, *Basic Problems on Evidence* (1954 ed.) at 43, 44; McCormick, *Evidence* (1954 ed.) § 53; Morgan, *Functions of Judge and Jury in Preliminary Questions of Fact*, 43 Harvard Law Review 164, 175; opinion of Judge Learned Hand in United States v. Dennis, 183 F 2d 201 (2d Cir., 1950), 230, 231.

Had the law officer found a common law marriage, he undoubtedly would not have permitted Clarene to testify. The court-martial and the board of review found a marriage existed prior to the time of trial so unless there was a waiver . . ., the wife's evidence should not be considered."

Note. It appears here that the Court reached the right result with the wrong reasoning—that the court members' ruling on the admissibility of evidence was binding on the law officer. If an objection *had* been made, the *accused* would have had to establish it by a *"preponderance of the evidence."* If overruled, the *government* still would have to convince each member of the same question, *beyond reasonable doubt;* and the initial overruling of the objection by the law officer would not relieve the prosecution of this more onerous burden. In other words, the members' finding would not be necessarily inconsistent with the law officer's ruling, had an objection been made and overruled. Further, the law officer's ruling on admissibility of evidence is "final," and therefore cannot be overruled by the members.

But here the law officer made no ruling. Lack of objection to C's testimony should be immaterial because the Court refused to apply waiver. This being so, an objection can be implied, as well as a concomitant duty, to rule, which was not complied with. Thus the accused was deprived of a substantial right—the right to have the law officer rule on the admissibility of damaging evidence—to his obvious prejudice. See paragraph 5c, below. Under this rationale, a rehearing would be authorized, but impractical because under the doctrines of res judicata and "law of the case" the law officer at the second trial would be bound by both the first verdict and by the appellate decision to exclude the wife's testimony.

3. Questions of procedure. *a. General.* Since procedural questions are "interlocutory" in nature,[44] the law officer rules on them.

b. Exceptions. The Court of Military Appeals has indicated that the members of the court-martial have the unqualified right to call for additional evidence.[45] Other examples of procedural questions to be decided by the court members instead of the law officer are such issues as which is the lightest combination of punishments in a sentence,[46] or whether to take a revote on the findings.[47] If the members disagree as to whether these interlocutory measures should be employed, the disagreement should be resolved by a majority vote, a tie vote being in favor of the accused.[48]

4. Motions. *a. General.* The law officer rules finally on motions for appropriate relief, because they raise purely interlocutory questions which do not raise any "defenses or objections" in permanent bar of trial.[49] Likewise he rules finally on motions in bar, not raising fact issues.

b. Motions in bar raising pure questions of law.

(1) *Common law.* At early common law such a motion was raised by the prosecution's demurrer to defendant's confession and avoidance to the indictment. For instance, the defendant would, on a special plea in bar of *autrefois* convict, confess to the indictment, but at the same time set up as matter in bar of trial (or "avoidance") the record of trial of his previous conviction for the same offense. If the prosecution then believed that, as a matter of law the old record of trial and indictment showed a different offense, he would "demur" (admit the truth of the matter in avoidance) and ask the judge to decide the legal question based on undisputed facts, or evidence. Since no issue of fact was raised by these pleadings, the judge could decide the issue finally. Originally the law was so severe that having lost on the legal issue, the accused was not allowed to "plead over" and deny his guilt, because he had "confessed" it on his plea in bar, and conviction and judgment could follow without jury trial. As criminal procedure became more enlightened, however, the common law judges could

[44] MCM, 1951, para. 57*c*.
[45] United States v. Selley, 7 USCMA 603, 23 CMR 67 (1957).
[46] ACM 11617, Zempel, 21 CMR 752 (1956); *pet. denied*, 21 CMR 840.
[47] United States v. Nash, 5 USCMA 550, 18 CMR 174 (1955).
[48] UCMJ, Art. 52(c). *Quaere:* May the vote be oral?
[49] United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954). See para. 4*b*, section V, *infra*.

allow the defendant to plead over and contest the facts of the indictment.[50]

(2) *Federal law.* Federal Rule of Criminal Procedure 12(*b*) continues the pre-existing federal practice of having the judge rule finally on motions in bar of trial, where no fact issue is presented.[51]

(3) *Military law.* As in federal practice and English common law, the law officer may rule finally on pure legal issues raised in bar of trial; thus he need not resubmit the issue to the court members.

Illustrative Case

United States v. *McNeill*, 2 USCMA 383, 9 CMR 13 (1953)

Before the plea to a charge of desertion the law officer denied accused's motion to dismiss for lack of jurisdiction. The motion was based on undisputed evidence that, although he was drafted into the service without objection, accused was exempt from the draft. The law officer later refused to submit this issue to the court on its final deliberations.

Opinion: The law officer, as here, may rule finally on pure questions of law raised in bar of trial:

> In questioning the sufficiency of the instructions of the law officer, appellant contends that the question of the jurisdiction of the court should have been submitted to the court of determination. In United States v. Ornelas, 6 CMR 96, [illegible], we held that if there was a factual dispute concerning jurisdiction which would have an effect on the ultimate guilt or innocence of the accused, it should be presented to the court-martial for determination. In the instant case there was no such question. The issue here raised was predicated on testimony which was undisputed and, therefore, involved only a question of law. When that is the posture of the case, the decision rests solely with the law officer.[52]

c. Motions in bar raising issues of fact.

(1) *Common law.* See paragraph 4*b*(1) above. If the prosecution, instead of demurring, traversed (denied) the facts of avoidance, an issue of fact was raised. In such case the jury would decide the question by a special verdict, because at common law "there was no trial by the record" in criminal cases.[53] If the jury decided the issue adversely to the accused, he was then allowed to plead not guilty to the general issue.[54]

(2) *Federal law.* The Federal practice, prior to the enactment of the Federal Rules of Criminal Procedure, substantially adopted that of pre-Constitution common law; fact issues raised on special pleas were submitted to the jury.[55] The applicable Federal Rules continued the substance of pre-existing practice, although abolishing purely technical requirements of pleading.[56]

Federal Rule of Criminal Procedure 12*b*(4) [henceforth referred to as "Rule 12*b*(4)"] provides:

> (4) *Hearing on motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. *An issue of fact shall be tried by a jury if a jury trial is required under the constitution* or an act of Congress. All other issues of fact shall be determined by the court with or with-

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[50] 1 Chitty, *Criminal Law* (1841 ed.) at 434, 435.

[51] Peters v. United States, 87 Fed. 984 (C.C. Wash., 1898), affirmed 94 Fed. 127 (9th Cir., 1899), cert. denied, 176 U.S. 684 (1900).

[52] Accord, United States v. Gallagher, 7 USCMA 506, 22 CMR 296 (1957), jurisdiction at time of trial; United States v. Fretwell, 11 USCMA 377, 29 CMR 193 (1960), former nonjudicial punishment for same offense.

[53] Archbold, *Criminal Procedure*, at 54, 1, Chitty, *Criminal Law* (1841 ed.) at 434, 435; see Abbott, *Criminal Trial Practice* (4th ed., 1939), sections 718-719.

[54] 1 Chitty, *op. cit. supra* note 53, at 460.

[55] United States v. Thompson, 155 U.S. 271, 273 (1894) [plea of former jeopardy disposed of by special verdict, before proceeding to trial of general issue]; United States v. Kissel, 218 U.S. 601 (1910) [date of commission of offense as raising defense of statute of limitations submitted properly to jury along with the general issue].

[56] *Notes of Advisory Committee* on Rule 12, Federal Rules of Criminal Procedure.

out a jury or on affidavits or in such manner as the court may direct. [Emphasis supplied.]

"The phrases, 'trial by jury' and 'right of trial by jury,' as used in the Federal Constitution, have been interpreted to mean a trial by jury as understood at common law before the adoption of the Constitution." [57] It would follow, therefore, that even under Rule 12*b*(4) fact issues raised by "motions to dismiss"—the old "special pleas in bar"—would have to be submitted to the jury for decision. In this respect it is significant that the preliminary draft of Rule 12*b*(4) would have entitled the accused to a jury trial only "if the issue is one which heretofore might have been raised at the trial under a plea of not guilty." [58] The requirement of a jury trial for these fact issues formerly raised by special pleas in bar has been recognized even today under Rule 12*b*(4).[59] By statute, however, the Federal judge may rule finally on any motion to dismiss for lack of speedy trial.[60]

(3) *Military law.* Prior to the 1949 Manual, the military practice followed the Federal practice. Contested issues of fact raised by a plea in bar had to be decided by the court before preceding to the trial of the general issue.[61] The rulings of the law member on these special pleas were subject to objection by the court, thereby providing accused a "jury" verdict.[62]

The 1949 Manual contained substantially the same wording as its predecessor, but the "special pleas" were relabelled "motions to dismiss" in accordance with the Federal Rules of Criminal Procedure, adopted a few years before the 1949 Articles. Although the law member, as does the law officer under the present Code, then had the power to rule finally on "interlocutory questions," apparently the drafters of the 1949 Manual did not consider the possible conflict of this new power with the historic procedure of providing the accused special verdicts on fact issues raised by special pleas in bar.

Congress intended that the 1949 Manual provisions, which followed "exactly" the Federal rules on motion procedure, be followed under the Code.[63] Accordingly, paragraph 67 of the 1951 Manual incorporated, verbatim, the pertinent provisions of the 1949 Manual. It added, in subparagraph 67*e*, however, the following provision:

> If the motion raises a contested issue of fact which should properly be considered by the court in connection with its determination the accused's guilt or innocence, the introduction of evidence thereon may be deferred until evidence on the general issue is received. For example, if a specification alleges that an offense was committed at a time which is within the period permitted by the statute of limitations and the accused makes a motion to dismiss on the ground that trial is barred by Article 48, asserting that the offense was committed at an earlier time than that alleged, the introduction of evidence pertinent to the motion may be deferred and the matter considered by the court in its deliberation on the issue of guilt or innocence. . . .

Although a plea in bar has no logical connection with the "guilt or inno-

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[57] Busch, *Law and Tactics in Jury Trials* (1949 ed.) § 23; see also Sparf v. United States, 156 U.S. 551 (1895).

[58] Note the pertinent Manual wording allowing final ruling on a motion to dismiss: "Any defense or objection which is capable of determination without trial of the issue raised by a plea of not guilty." MCM, 1951, par. 67a.

[59] United States v. Watkins, 120 F. Supp. 154 (1954); United States v. Haromic, 125 F. Supp. 128 (1954).

[60] Fed. R. Crim. P. 48.

[61] Winthrop, *Military Law and Precedents* (1920 ed.), at 253, 254, 258, 267, 269.

[62] MCM, 1928, at 40, 80, 81.

[63] *Hearings Before the House Committee on Armed Services* on H.R. 2498, 81st Cong., 1st Sess., at 1055; Report, *id.*, at 24; Senate Report on H.R. 4080, *id.* at 22.

cence" of the accused, and is a merely technical, but complete defense, nevertheless, considering the federal procedure and the genesis of the Manual provisions, it would seem that the military accused is entitled to have the court members pass on the issue if the evidence is conflicting. This view is indicated in dictum of the Court of Military Appeals in *Ornelas*.[64]

Illustrative Case

United States v. *Ornelas*, 2 USCMA 96, 6 CMR 96 (1952)

During the trial the law officer denied the accused's motion to dismiss for lack of jurisdiction and later refused to present the issue to the court members. Accused, who was charged with desertion, testified that he was never inducted, disputing the prosecution's evidence of a morning report's recital that he absented himself shortly after induction.

Opinion: Rehearing authorized.

> Where the determination of jurisdiction involves no contested issue of fact, so that the question becomes one of law alone, it would be quite sound, and entirely consistent with civilian practice, to leave the matter to the sole determination of the law officer. But where there are disputed facts to be resolved, it would seem unusual indeed that the law officer should resolve them, and we do not believe this to be the intention of Article 51(*b*) and paragraph 67*e*, supra. In a latter portion of this paragraph it is said that "If the motion raises a contested issue of fact which should properly be considered by the court in connection with its determination of the accused's guilt or innocence, the introduction of evidence thereon may be deferred until evidence on the general issue is received." The underlying tenor of this statement suggests that there *may* be issues of fact involved in a defense or objection which should be dealt with by members of the court. But difficulty arises in determining what are the issues of fact "which should properly be considered by the court." A conceivable inference is that some issues of fact are "properly" for the court and some are not, but no basis for the taking of distinction is expressly given. Some assistance may be gleaned from an example given in paragraph 67*e*, supra, which states in substance that, if an accused defends on the ground that prosecution is barred by the statute of limitations, the court may decide, in the course of its determination of the guilt or innocence of the accused, the question of when the offense was in fact committed. This seems to be indistinguishable in essence from the sort of factual issue involved here—namely, whether the accused had in truth taken the oath of induction. All of this appears, on its face at least, to conflict with the preceding portion of paragraph 67*e*, to the effect that action on motions raising defenses and objections is "an interlocutory matter"—and with the Code, Article 51(*b*), supra, which makes the ruling of the law officer on "interlocutory questions" final. Accepting for the moment the notion that an adoption of the usual civilian practice would require submission of such a factual issue to the court, it is evident that an obstacle to the derivation of the same rule from the Code and Manual is the sentence in the latter's paragraph 67*e* to the effect that "A decision

[64] United States v. Ornelas, 2 USCMA 96, 6 CMR 96 (1952).

on such a motion is an interlocutory matter." *It does not seem likely that the draftsmen of the Manual thereby intended that the law officer be entrusted with final decision of issues of fact raised in connection with "Defenses and Objections."* [Emphasis supplied.] This would be wholly inconsistent with their subsequent reference in the same paragraph to the necessity for decision by the court of some factual issues. It is to be noted that the sentence quoted does not provide that *questions* raised by such defenses and objections *are* "interlocutory," but rather that a *decision* thereon is an interlocutory matter. In our opinion, the draftsmen were quite clearly saying only that such decision is interlocutory in a *procedural* sense and *not* that it is interlocutory in a substantive sense—which would bring it within the exclusive purview of the law officer. We think they meant to observe that the decision is interlocutory in that it does not bear on the ultimate merits of the case.

There is nothing in the legislative history of the Uniform Code of Military Justice which assists in dealing with this problem. However, the Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 82, discloses that paragraph 67 of the Manual was patterned on Rule 12(b), Federal Rules of Criminal Procedure. This rule states clearly that issues of fact arising in connection with defenses and objections "shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress." This suggests forcibly that the Manual draftsmen did not intend to vest in law officers final authority to decide issues of fact arising in connection with a defense or objection raised by an accused.

We conclude that where an accused raises a defense or objection which should properly be considered by the court in its determination of *guilt or innocence*, and which resolves itself into a question of fact, that issue must be presented to and decided by the court pursuant to appropriate instructions. But where the issue is purely interlocutory or raises solely a question of law, it is within the sole cognizance of the law officer. It follows that the law officer in this case erred in making his decision on the issue of jurisdiction final. The accused was entitled to have the issue submitted to the court itself and decided by them under appropriate instructions. *We should add that it matters not, on our opinion, whether the issue is submitted at the time the motion is made or at the conclusion of the case* when the court is required to deliberate on the evidence. [Emphasis supplied.]

Note. In *Ornelas* the decision on the one issue would decide *two* legal questions: 1. The guilt or innocence of the accused—for if he was never inducted he could not commit the offense; 2. Whether the court had jurisdiction to try him, for he was a civilian unless he had been inducted. The Court had only to dispose of the first question, and therefore the remainder of the opinion, dealing with motions raising defenses or objections is dictum. Nevertheless, in *United States* v. *Berry*,[65] the Court stated:

> Apparently the law officer misunderstood our decision in . . . Ornelas and . . . Richardson. In both those cases we were concerned with disputed questions of fact regarding a matter *which would bar* or be a complete de-

fense to prosecution. A matter of that kind should "properly be considered by the court in connection with its determination of the accused's guilt or innocence."

It seems possible, therefore, that the Court probably will not distinguish between a plea in bar raised by a motion to dismiss—and having no logical relation to accused's guilt or innocence—and a pure defense to the issue of guilt or innocence raised by a plea to the general issue. In both cases the Court might very well require the issue to go to the members, on a "reasonable doubt" standard.

In such case, how the issue is to be submitted is problematical. In *Ornelas* the Court opined it made no difference whether "the issue is submitted at the time the motion is made or at the conclusion of the case. . . ."

It would be a rare instance where the evidence in support of a motion to dismiss was not entwined with that of a general issue. In such an exceptional case the issue might be heard first in accordance with the old procedure; otherwise it would be submitted along with general issue, with appropriate instructions.

DA Pam 27–9 (1958), "The Law Officer" lends itself to a contrary interpretation, implying that the law officer rules finally on all fact issues raised by motions to dismiss, which do not have a logical relation to the guilt or innocence of the accused. Paragraph 34 provides: "If a defense or objection is raised . . . which involves the determination of a question of fact affecting the ultimate question of guilt or innocence, the issue must be submitted on the merits." [66]

[66] See also DA Pam 27–9, (1958), para. 28.

[67] *Quaere:* Could defense counsel have presented his assignment of error by putting the accused on the stand in an out-of-court hearing?

[68] UCMJ, Art. 51(b); *cf.* United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959).

[69] United States v. Sessions, 10 USCMA 383, 27 CMR 457 (1959).

[70] United States v. Brown, *supra* note 68.

5. **Deferring ruling.** *a. General.* The law officer has a duty to rule on interlocutory questions at the time they are raised, although he need not give advance, advisory rulings on hypothetical questions. "Deferring" rulings on motions, when that term is used in the Manual or elsewhere, for all practical aspects means either making a "provisional" ruling or refusing to rule because *only* the court members should pass on the issue.

Illustrative Case

United States v. *Harris*, 10 USCMA 69, 27 CMR 143 (1958)

After the prosecution started to establish the voluntariness of accused's pretrial statement the defense counsel obtained an out-of-court hearing where the law officer, in response to defense's questions, advised that if accused took the stand on the issue of voluntariness he would allow the latter to be impeached by being asked if he had once lied under oath. As a result the accused did not testify in either the open or out-of-court proceedings. The Court of Military Appeals granted review on the correctness of the law officer's "ruling."

Opinion: No issue was presented for the Court to decide since there was no actual ruling by the law officer:

> It is essential to properly raise the issue. Here, there was no ruling by the law officer. As noted earlier, his "ruling" was simply an indication of what he expected to do if the question were presented to him and it is obvious that, the accused not having been called as a witness, at no time was there an actual issue as to the extent to which he could be cross-examined. The question did not arise and there is nothing for this Court to consider. . . .[67]

b. Procedure. A party has a right to a ruling on an objection to the admissibility of evidence at the time it is made.[68] The correctness of his ruling is determined by the evidence before the law officer at the time of his ruling.[69] Since to render an "informed" ruling the law officer must have the benefit of preliminary evidence or offers of proof on the issue,[70] it would appear that he could not summarily "defer" a ruling (sustain or overrule an objection, "subject to

being connected up") without some legal basis for this decision—at the minimum, an offer of proof.

Where presenting the grounds for the objection would prejudice the accused, if made in open court, he is entitled to an out-of-court hearing.[71] In such a case the fact that the same evidence presented in the out-of-court hearing must again be presented in open court does not justify the law officer's refusal to rule in the out-of-court hearing.[72] This duty to rule initially on the purely interlocutory question of admissibility of evidence presents a practical procedural problem in the rare case where the law officer's decision overlaps, or affects, the determination of the accused's guilt or innocence.[73] In *Richardson*,[73] the law officer's determination of the prosecutrix's competency as a witness would affirm or negate the accused's sole defense, even though the members must pass on this latter issue if the preliminary question of competency were decided adversely to the accused. In such a case if the law officer initially ruled against the accused, the entire preliminary evidence would have to be resubmitted to the court members. To enable the law officer to make an informed ruling, and at the same time avoid the possibility of the cumbrous proceeding of two identical litigations, perhaps the best procedure would be for the law officer, in an out-of-court hearing, to limit both parties to detailed offers of proof. This would obviate time-consuming testimony, and at the same time provide the law officer with information on which to base his decisions. This procedure would not suffice, however, if it interfered with the accused's right of cross-examination.

Illustrative Case

United States v. Young, 10 USCMA 249, 27 CMR 323 (1959)

The law officer interrupted accused's testimony, in an out-of-court hearing on the issue of voluntariness of a confession, stating that he, the law officer, could not rule on the issue at that time because only the court members could do so after hearing the pertinent evidence.

Opinion: "It would seem that the law officer here completely disregarded his duty to make the initial determination of admissibility in favor of submitting the issue directly to the court-martial." [74]

c. "Provisional" [75] ruling final, unless changed.

Illustrative Case

United States v. Porter, 10 USCMA 427, 27 CMR 501 (1959)

When the defense objected to certain testimony of a prosecution witness and moved to strike it the law officer ruled that the evidence was admissible "subject to . . . being connected to the accused;" but he then agreed with defense counsel that his ruling meant that the evidence was not then admissible and later stated that he would make his ruling when both sides had rested. At no time did he rule on the motions to strike. Nor did he instruct the court members to desregard that portion of trial counsel's final argument wherein he commented on the "evidence" which was the subject of defense's objections.

Opinion: Trial counsel's argument constituted prejudicial error because the law officer had excluded the evidence even though he did not rule on the motions to strike.

d. Rulings on motions.[76] In general, the law officer should not defer his ruling if he has the power to make a final ruling, and when he does so, he should state his reasons therefor. Where the facts are not yet sufficiently developed for an informed ruling, and the accused could not be harmed by the presentation of further evidence, the law officer may properly defer ruling.

Illustrative Case

United States v. Strand, 6 USCMA 297, 20 CMR 13 (1955)

At the beginning of the trial the law officer deferred ruling on defense's motion to dismiss as multiplicious one of two specifications. The

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[71] United States v. Ostrosky, 6 USCMA 480, 20 CMR 260 (1958); see sec. III, para. 8, *supra*.

[72] United States v. Young, 10 USCMA 249, 27 CMR 323 (1959).

[73] See United States v. Richardson, 1 USCMA 568, 4 CMR 150 (1952), discussed in sec. IV, para. 20, *infra*.

[74] See para. 6d, *infra*, for the procedure in ruling on voluntariness in out-of-court and subsequent joint court hearings.

[75] For a description of provisional rulings, see DA Pam 27-9 (1958), para. 58.

[76] See DA Pam 27-9 (1958), para. 54.

law officer deferred ruling on the motion until after the findings of guilty of both specifications, at which time he granted the motion.

Opinion: The law officer's action was proper.

. . . . The power to change a ruling clearly includes the power to reserve decision. If the law officer has any doubt about a question requiring a ruling, good sense and sound practice require careful consideration of the question, rather than an "off the cuff" decision. Civilian courts recognize the practice of reserving decision on a motion raising a question of law until after the verdict of the jury. . . . There is no compelling reason requiring a different practice in the military, particularly when the procedure is consistent with the logical construction of Article 51(*b*). . . .

The occasions when a law officer will be called upon to change a ruling or reserve decision until after the findings are few in number. However, the law officer is the best judge of what action he should take. In our opinion, the law officer in this case acted wisely, . . . [Emphasis supplied.]

Note. Deferring ruling on a motion does not relieve the law officer of the ultimate responsibility of making the ruling, through the device of letting the members make a finding on the issue and following this finding in his own ruling. Thus the suggested procedure in DA Pam 27–9, at paragraph 26*b* appears improper. Assuming, as does the pamphlet, that the law officer may rule on the defense of the Statute of Limitations, then the law officer should make his independent ruling before the verdict, and not, as suggested therein, after their finding.

6. Effect of rulings. *a. General.* The law officer's rulings, if not reversed by him during the hearing, are final.

b. Res judicata. The final ruling of the law officer is binding on the Government if the same issue of fact or law is raised at a subsequent trial of the accused for a different offense.

c. Law of the case.

(1) *General.* Since the law officer's ruling on purely interlocutory questions is final, the members, as well as appellate authorities are bound by his ruling, even if erroneous, in considering the legal sufficiency of the record of trial. But if accused is convicted or sentenced because of nonadherence to the law officer's erroneous ruling or instruction, appellate authorities may order a rehearing if it is otherwise justified. The doctrine of res judicata would not bar such a rehearing because it is the same trial.[77] On rehearing of a case, the law officer is bound by the appellate decision on a question of law which is resubmitted at the second trial.[78]

(2) *Ruling on evidence.*

Illustrative Case

United States v. *DeLeon*, 5 USCMA 747, 19 CMR 43 (1955)

The law officer, erroneously, excluded prosecution testimony based on an intercepted telephone call from the accused, but permitted the introduction of evidence obtained as a result of the eavesdropping. This latter evidence was sufficient to sustain the conviction of two charges; however, the board of review concluded that it was "tainted," because of the prior exclusionary ruling of the law officer.

Opinion: Board of review reversed.

If the accused is acquitted, the Government, of course, cannot appeal from rulings by the law officer which erroneously exclude material evidence against him. But, if convicted, the accused is entitled to appellate review of erroneous rulings which may have prejudiced his defense. However, the accused's right is not exclusive. To support the conviction, the Government may also properly challenge erroneous rulings by the law officer. It may do so not for the purpose of obtaining consideration by the appellate tribunal of the excluded evidence, but for the purpose of showing that other evidence which has

[77] See United States v. DeLeon, 5 USCMA 747, 19 CMR 43 (1955).
[78] CM 398866, Wallace, 27 CMR 607 (1958).

been admitted is not illegally tainted. . . .

(3) *Instructions.*

Illustrative Case

CM 392883, *Anders*, 23 CMR 448 (1957)

Accused's conviction for perjury was based solely on circumstantial evidence, although the law officer, erroneously, had instructed the members that they could not convict on such evidence.

Opinion: Rehearing ordered. The members were bound to follow the incorrect instruction of the law officer. If they had done so they would have acquitted the accused.

d. Confessions and admissions. As stated above (paragraph 3, section III) the accused has a right to an out-of-court hearing on the issue of voluntariness of an admission or confession. At this time the prosecution must establish voluntariness beyond reasonable doubt.[79] If the law officer admits the evidence at the out-of-court hearing, he should advise the accused of his right to raise the issue again in open court.[80] In this respect the Manual provides:[81]

> When as a result of a hearing held out of the presence of the members of the court, the law officer rules that the proffered evidence is admissible, such evidence will be offered in open court. . . . If preliminary evidence adduced at such hearing goes to the weight of the evidence admitted . . . both sides will be given an opportunity to present for the consideration of the members of the court any . . . evidence affecting the weight to be given to the evidence so admitted.

If the issue of voluntariness is not raised in open court, the law officer's ruling on the admissibility of the confession is final.[82]

On the other hand, when the question is raised in open court, the law officer must again rule (if the preliminary evidence is different), and advise the court members that his ruling admitting the statement still requires each member to make his independent determination both as to whether: (1) the confession is voluntary, and (2) it is credible, before he can consider it as evidence.[83]

The standard of proof applied by the *law officer* in making his initial ruling is as yet not clear. The Manual requires the government to establish the voluntariness of the confession or contested admission by an "affirmative showing".[84] Nevertheless, on this purely interlocutory question on the admissibility of evidence, it has been established that as far as each *member* is concerned, the government must prove the confession's admissibility, "beyond a reasonable doubt." [85] This has been the actual practise in courts-martial for several years.[86]

Section V. PARAGRAPH 67*f*, MCM, 1951, ACTION BY CONVENING AUTHORITY ON RULINGS OF LAW OFFICER

1. General. "If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action." [87] The provision was intended to adopt the practise then authorized by paragraph 64*f*, MCM, 1949, which in turn substantially repeated the provisions of paragraph 64*a*, MCM, 1928. The present Manual provisions are almost identical to those of the preceding Manuals. They appear much broader than the Code provision and provide additionally that when the record of

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[79] United States v. Odenweller, *supra* note 84.

[80] *Cf.*, United States v. Cooper, 2 USCMA 388, 8 CMR 188 (1953).

[81] MCM, 1951, para. 57*g*(2).

[82] United States v. Dicarlo, 8 USCMA 353, 24 CMR 163 (1957).

[83] United States v. Powell, 8 USCMA 381, 24 CMR 191 (1957); United States v. McQuaid, 9 USCMA 568, 26 CMR 348 (1958); United States v. Rice, 11 USCMA 524, 29 CMR 340 (1960).

[84] MCM, 1951, para. 140*a*. See also *id.*, app. 8*a*, at 518: ". . . ordinarily the prosecution must show that it [the confession] was voluntary."

[85] United States v. Odenweller, 13 USCMA 71, 32 CMR 71 (1962).

[86] DA Pam 27-9, "The Law Officer" (1958), at 171.

[87] UCMJ, Art. 62(*a*).

trial is returned for the court's consideration, "the court will accede to the views of the convening authority" when the motion was decided on a "question . . . solely . . . of law" but on "issues of fact" "the court will exercise its sound discretion in reconsidering the motion."[88]

2. Questions of law. The legislative history of Article 62(*a*) indicates that the covening authority's power to direct reconsideration of the granting of a motion to dismiss was to be exercised only when the prior ruling decided a question of law, with no disputed testimony, *e. g.*: "which motion does not go to the merits of the case and does not amount to an acquittal. . . ."[89] This was also the attitude of the Army boards of review.[90] Thus being authorized by Congress, the power to direct reversal of a purely legal decision apparently does not contravene the spirit of Article 37, prohibiting unlawful command influence.[91] It has also been stated that Article 62(*a*), and the corresponding provisions of paragraph 67*f* of the Manual, do not conflict with that part of Article 51(*b*) relating to the finality of the law officer's ruling on interlocutory questions.[92]

3. Questions of fact. Historically, questions of fact raising a bar of trial were asserted by special pleas in bar.[93] The military accused, as the civilian defendant in a federal criminal proceeding, was entitled to present evidence in support of his special plea and to receive a verdict—or ruling thereon—before being required to plead to the general issue. Failure to accord the accused this right was prejudicial error, even though he was offered the opportunity to present his evidence on the special issue before the court-martial deliberated on his guilt or innocence.[94]

Prior to the 1920 enactment of Article of War 40(*a*) the convening authority could direct the court-martial to reconsider an acquittal.[95] After Congress forbade the practice, the convening authority, however, could still request the court-martial to reconsider its sustaining of a plea in bar. If the court's ruling were based on a disputed issue it was not bound to accede to the convening authority's desires.[96] This provision of the 1928 Manual, however, was tacitly held invalid by a decision of an Army board of review[97] where it was held that such a decision was *"tantamount to a finding of not guilty,"* and the convening authority thus had no power to return the record of trial for the court-martial's reconsideration of the ruling, as he would have when merely a question of law was involved.

Therefore the present Manual provision might conflict with Article 62(*a*), which authorizes the convening authority to direct reconsiderations only where "the ruling does not amount to a finding of not guilty." Significantly, there have been no cases testing this part of paragraph 67*f*. The only authority for the right to direct reconsideration of such a factual issue is found in Winthrop's pre-Code treatise, and even he acknowledged its shaky premise, preferring to base it on the historical concept that a court-martial was a "mere instrumentality for the maintenance of discipline", which could not, without being insubordinate, disregard the convening authority's power to overrule its action on special pleas; but Winthrop also noted that "[T]he Secretary of the Navy declined to approve the exercise of a similar authority by a convening officer, on the ground of want of precedent and because he considered the power to be a 'dangerous' one."[98]

4. Purely interlocutory questions. *a. General.* Motions or objections raising questions which, if decided in favor of the accused, do not result in termination of the proceedings, or if they

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[88] MCM, 1951, para. 67*f*.

[89] See *Hearings Before Subcommittee of the Committee on Armed Services, House of Representatives*, 81st Cong., 1st Sess., H.R. 2498, at 1179, 1180.

[90] CM 332514, Mattingly, 81 BR 139 (1948).

[91] ACM S-18043, Taylor, 28 CMR 752 (1959). See also United States *ex rel* Froehlick v, Forrestel, 137 F. Supp. 580 (N.D. Ill. 1956) (law officer overruled by the convening authority after granting motion to dismiss based on purely legal question of the running of the statute of limitations).

[92] ACM, Taylor, *supra* note 91.

[93] See sec. IV, *supra*.

[94] CM 288142, Radovich, 55 BR 89 (1945).

[95] Digest of Opinions of The Judge Advocate General of the Army, 1912, p. 557.

[96] MCM, 1928, para. 64*a*.

[97] CM 332514, Mattingly, 81 BR 139 (1948).

[98] Winthrop, Military Law and Precedents (1920 ed.), Note 59, at 273.

do—do not bar another trial on the same charge (i. e., declaration of mistrial)—can properly be called "interlocutory questions." The convening authority cannot direct reconsideration of the court's decisions on these matters because of the Code's statement that the "ruling made by the law officer . . . upon any interlocutory question . . . shall be final." [99] Thus the law officer's rulings on motions for appropriate relief and on evidentiary matters are not subject to review independent of the complete record of trial. If the law officer's ruling requires affirmative action by convening authority or trial counsel, and the latter declines to comply, the law officer's enforcement powers are essentially negative, probably being limited to the declaration of a mistrial, or the eventual granting of a motion to dismiss for lack of speedy trial.

b. Motions for appropriate relief.[100]

(1) *Continuance.*

Illustrative Case

United States v. *Knudson*, 4 USCMA 587, 16 CMR 161 (1954)

The law officer, over protest on direction of the convening authority, reversed his prior ruling granting a defense application for an indefinite continuance until such time as the Secretary of the Navy acted on accused's pretrial request that charges be dropped because of a former acquittal in a civilian trial for the same act.

Opinion: [Judge Quinn.] Paragraph 67*f*, MCM, 1951, does not authorize piecemeal appeals by the government from a ruling on such an interlocutory question as the decision on an application for a continuance. That procedure is alien to federal criminal practice and violates Article 51(*b*), as well as Article 40 which gives the "court" (meaning the law officer) the final decision in such a matter. [*Judge Brosman,* concurring in the result]: General prejudice resulted from unlawful command influence which was not authorized by paragraph 67*f*. In extraordinary circumstances a civilian judge might issue a writ of mandamus to correct a trial judge's clear abuse of discretion on ruling on a continuance. The equivalent procedure might be used by the convening authority, although in the military system there is the unique danger of unlawful command influence. Here no such extraordinary circumstances existed such as to negative the possibility of this danger.

[*Judge Latimer,* dissenting.] The convening authority's action was proper.

> One might entertain the view that the convening authority should be stripped of the power he has historically possessed, but that is a matter of policy which has been determined by Congress and the President. Certainly, in the face of the foregoing provision, [paragraph 67*f*] this Court is in no position to deprive him of his authority by judicial legislation.

(2) *Motion to amend specification.*

Illustrative Case

ACM 10994, *Robinson,* 20 CMR 816 (1955)

Immediately after the law officer had granted the defense's request to have trial counsel make a vague specification more specific, the trial counsel obtained a recess. An hour later the court reconvened and after the trial counsel transmitted the convening authority's direction that the trial continue on the unamended charge, the law officer reversed himself.

Opinion: The law officer's ruling on the defense request was final and not

[99] UCMJ, Art. 51(*b*).
[100] See ch. XII, *infra.*

subject to review even though under certain circumstances, where only the convening authority may take action to comply with the law officer's ruling, the law officer may grant a continuance for this purpose.

Note. Paragraph 69*b*(3), MCM, 1951, provides: "Whenever the trial counsel is not prepared to propose an appropriate amendment to a defective specification . . . the court may continue the case in order to permit the trial counsel to refer the matter to the convening authority."

CHAPTER XII

MOTIONS FOR APPROPRIATE RELIEF

References: Articles 35, 40, 62, UCMJ; paragraphs 58, 69, MCM, 1951.

Section I. PARAGRAPH 69*a*, MCM, 1951, INTRODUCTION

Section II of the preceding chapter discusses motions for appropriate relief generally, including when they must be made to avoid waiver. This chapter will discuss particular motions for appropriate relief.

Section II. PARAGRAPH 69*b*, MCM, 1951, DEFECTS IN THE CHARGES AND SPECIFICATIONS

1. General. See paragraphs 69*a*, *b*, MCM, 1951.

2. Vagueness. *a. General.*

"If a specification, although alleging an offense . . . is defective in some matters of form as, for example, that it is . . . indefinite, or that it . . . is laid under the wrong Article, or does not contain sufficient allegations as to time or place, the objection should be raised by a motion for appropriate relief."[1]

b. Time and place. Since time and place are generally immaterial allegations, designed merely to enable accused to prepare his defense, the prosecution should be allowed a reasonable latitude in pleading these items. Thus, "on or about" is generally sufficient to allege a date, and it is proper to allege merely the general vicinity as the situs of the alleged crime. Where, as with an embezzlement-type charge, the accused is the only person who might know exactly when the crime was committed, the prosecution is allowed a wider latitude because "it could obviously have not knowledge of facts known only to the accused."[2]

Indefinite pleading becomes of more concern to the accused, however, in the following situations: (1) where two or more separate crimes were committed against the same victim, one shortly after the other, and only one is alleged; and (2) where the statute of limitations is in issue.[3]

The Government can avoid the first problem, initially, by alleging both crimes, even if believed to be multiplicious because they constitute one transaction. If this is done, and there is doubt as to whether the offenses are separate or not, a defense motion to elect should not be sustained,[4] although the law officer does have the power to grant such a motion.[5] Where the Government has not so properly pleaded, the defense may require it to elect the offense which it intends to prove, by amending the specification to show distinctly the particular allegation. Further, even if the defendant has not requested or obtained this relief, before the case is submitted to the court-martial for its findings, the law officer must require the prosecution to elect which offense the court-martial will consider.[6]

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[1] MCM, 1951, para. 69*b*(1).

[2] CM 398688, Aronson, 26 CMR 658 (1958) (reversed on other grounds); *cf.* United States v. Mehns, 12 USCMA 290, 30 CMR 290 (1961).

[3] See ch. XIII, *infra*, for discussion of statute of limitations.

[4] MCM, 1951, para. 26*b*, 69*e*. But there should be separate specifications, see United States v. Paulk, *infra* note 11.

[5] United States v. Strand, 6 USCMA 297, 20 CMR 13 (1955).

[6] CM 401106, Murphy, 28 CMR 421 (1959), *pet denied*, 28 CMR 414.

c. Effect of failure to object. Generally, the failure to make a motion at the trial to make the specification more definite precludes assignment of such error on appeal.[7] In such a case, however, as where the accused pleaded guilty to a specification that alleged a broad period of time for its commission, it is doubtful that he could be tried subsequently for any other similar offenses included within that period.[8] To so apply waiver to vague charges on a guilty plea, accused must have been represented by competent counsel; otherwise a rehearing would be authorized.[9]

3. Duplicity. A specification that alleges more than one separate offense is duplicitous.[10] Therefore a motion to sever such a specification into separate allegations should be granted. In fact, this may be done before trial even over the objections of the accused.[11] Since separate punishment for each offense would be authorized if the specification is broken into separate allegations, there seems to be no reason why this should not be the case if the accused fails to request this relief, provided the court is properly instructed on the elements of the different offenses in the single specification.

4. Multiplicity. When two or more specifications are based on the "same act," "same transaction," violate the same "societal norm" or one is a lesser included offense of the other, they are "multiplicious," and do not authorize separate punishment on conviction.[12] The test for multiplicious pleading varies according to the attitude of the Court of Military Appeals and the evidence introduced; therefore decided cases should be consulted in each situation. In any event multiplicious pleading, in a contested case, ordinarily can affect only the sentence.[13] Consequently, the effect of such error can be cured when the law officer discharges his duty in instructing the members as to the maximum authorized sentence.

The Manual chapter on motions does not provide for a motion to dismiss for multiplicity. It does state: "A motion to elect—that is, a motion that the prosecution be required to elect upon which of two or more . . . specifications it will proceed—will not be granted." [14] Although the Manual does provide that "One transaction . . . should not be made the basis for an unreasonable multiplication of charges," it adds: "There are times, however, when sufficient doubt as to the facts or law exist to warrant making one transaction the basis for charging two or more offenses. See 74*b*(4). . . ." [15] The reference to subparagraph 74*b*(4) indicates that this is more of a guide for the accuser than a positive rule of procedure, for subparagraph 74*b*(4) provides: "The accused may be found guilty of two or more offenses arising out of the same act or transaction, without regard to whether the offenses are separate. . . . [H]owever, see 76*a*(8)." Subparagraph 76*a*(8) merely limits the authorized punishment.

Despite these authorities, however, the Court of Military Appeals has held it not improper for a law officer to sustain a motion to dismiss a specification, after he had heard the evidence, because it was multiplicious.[16] Nevertheless, the Court added that "the important consideration is the effect of the [multiplicious] specification on the sentence." [17] It would seem therefore, that the better procedure would be to deny such a defense request for relief, made before the plea and at a time when the law officer has no evidence to assist his determination as to whether the offenses alleged are actually based on "the same transaction." If the evidence subsequently introduced at trial proves the motion to have been well taken, the effect of his previous error in denying the motion can be rendered nonprejudicial by limiting instructions on the sentence.

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[7] MCM, 1951, para. 67*b*. But denial of a timely motion may result in reversal, where the government was able to make the specification more definite. United States v. Williams, 12 USCMA 683, 31 CMR 269 (1962).

[8] United States v. Karl, 8 USCMA 427, 12 CMR 183 (1953). United States v. Maynazarian, 12 USCMA 484, 31 CMR 70 (1961).

[9] United States v. Autrey, 12 USCMA 252, 30 CMR 252 (1961).

[10] MCM, 1951, para. 28*b*.

[11] CM 366209, Taylor, 13 CMR 201 (1953); *pet. denied*, 14 CMR 228. Failure to grant such a motion is prejudicial when the accused may be misled in his defense. United States v. Faulk 13 USCMA 456, 32 CMR 456 (1963). Accused was charged with one theft from five victims "between 30 November 1959 and 28 February 1962". The evidence indicated at least three separate thefts.

[12] See United States v. McClary, 10 USCMA 147, 27 CMR 221 (1959).

[13] United States v. Dandaneau, 5 USCMA 462, 18 CMR 86 (1955).

[14] MCM, 1951, para. 69*e*.

[15] MCM, 1951, para. 26*b*.

[16] United States v. Strand, 6 USCMA 297, 20 CMR 13 (1955).

[17] *Ibid.*

Multiplicious pleading may have more importance when accused pleads guilty pursuant to a pretrial agreement with the convening authority. His plea may have been induced by an erroneous belief as to the maximum punishment authorized, or he may have agreed to higher ceiling on the punishment as a result of this belief.[18] In such a case the law officer should examine carefully the pretrial agreement to ascertain if there is a misstatement as to the maximum authorized punishment. Should the law officer discover such an error, he should allow the accused a continuance to call this to the convening authority's attention and appropriate amendment of the agreement. Before doing this he would need an offer of proof by the trial counsel, as it is difficult to resolve a question of multiplicity without hearing the evidence on the merits.

The effect of dismissal of a multiplicious specification is as yet undetermined. If it were truly a lesser included offense, then under the law of former jeopardy a subsequent trial would be barred by the trial on the principal offense.[19] On the other hand, if the specification alleged a separate offense—but part of "the same transaction" (e.g., a simultaneous offense against multiple victims),[20] dismissal of the specification might not bar trial if the conviction of the other specification was dismissed on review. In such case the accused has not been punished at all despite the fact that one specification had been dismissed to prevent multiple punishment. Absent former jeopardy therefore, there would appear to be no cogent reason against a subsequent trial on the dismissed charge.[21]

5. **Unsworn charges.** *a. General.* An accused may not be "tried" on unsworn charges over his objection.[22] A failure to raise the objections, however, waives the error.[23] The waiver probably occurs when accused pleads, if the other pretrial procedures have been properly accomplished.

b. Change of identity of original sworn charge.

(1) *Before arraignment.* The Manual requires that if charges are so altered over the accuser's signature so as to involve "the inclusion of any . . . offense or matter not fairly included in the charges as preferred" they should be resworn.[24] This defect could be waived, provided the mandatory pretrial investigation and advice were accomplished. But if such alteration were made *after* the pretrial investigation it is doubtful that that error could be waived by accused's failure to make a motion for appropriate relief.[25]

Illustrative Case

ACM 6055, *Olivieri*, 10 CMR 644 (1953)

The original sworn charge alleged an act in violation of a 5th Air Force Regulation. Before trial the charge was amended, without being resworn, to allege the same act as a violation of a Far East Command Circular. Before the plea the law officer denied defense counsel's objection to being tried on unsworn charges.

Opinion: Conviction of the amended charge set aside. The amendment constituted a substantial change in the nature of the offense as originally charged, within the meaning of subparagraphs 33*d* and 33*e*(2) of the Manual, "contrary to the express prohibition contained in paragraph 29*e* of the Manual," and over the objection of the accused. It follows that the

[18] Cf., United States v. Wills, 9 USCMA 623, 26 CMR 403 (1958). See also the policy of The Judge Advocate General of the Army against unreasonable multiplication of charges. JAGJ 1962/8304, 2 April 1962.

[19] See ch. XIII, *infra*.

[20] See MCM, 1951, para. 200*a*(7).

[21] See, however, United States v. Sabella, 272 F. 2d 206 (2d Cir. 1959); former jeopardy bars trial for selling illegally imported narcotics, where accused's previous conviction for selling the same narcotics without a written order was set aside on habeas corpus review. *But see*, United States v. Oakes, 12 USCMA 406, 30 CMR 406 (1961); a holding in one case that two offenses are multiplicious does not necessarily mean that one is the lesser included of the other; see also the separate opinion of Judge Quinn in United States v. Bryant, 12 USCMA 198, 30 CMR 198 (1961) to the effect that separate punishments at separate trials for offenses committed at the same time might violate the rule that all offenses should be tried at the same time.

[22] MCM, 1951, para. 29*e*.

[23] United States v. May, 1 USCMA 474, 4 CMR 80 (1952).

[24] MCM, 1951, para. 33*d*.

[25] See MCM, 1951, para. 33*e*(2), requiring a new pretrial investigation in such a case.

accused's substantial rights were materially prejudiced.

Query: In *Olivieri*, if the FEC Circular had been discussed at the pretrial investigation, would have accused waived the error of amendment by failing to object (1) prior to the plea? (2) prior to the findings? Would the rationale of *Olivieri* apply in the case of a special court-martial?

(2) *After arraignment.* A change in the identity of a specification after the receipt of evidence is tantamount to the withdrawal of the original charge and the substitution of another one.[26] The situation arises on a material variance of the proof with the original charge. Where such variance occurs and the convening authority, or trial counsel, withdraws the charge, at another trial for the same charge, the accused may make a valid motion to dismiss for former jeopardy.[27] The substitution of a different charge, after the arraignment and plea, as well as a pretrial investigation and advice. But in *United States* v. *Davis*[28] it was held that there can be only one arraignment at each trial, and it is prohibited to prefer additional charges after arraignment. The opinion in *Davis* indicates that such a procedure could not be waived.

Illustrative Case

ACM S–2490, *Little*, 5 CMR 382 (1952)

The accused was arraigned before a special court-martial on a charge of assaulting the victim "near Perkins." After the evidence showed that on the ride back from "Perkins" to "Mather Air Force Base" the accused committed another assault on the same victim the court, at the prosecution's request and over accused's objection, allowed the specification to be amended to allege an assault at "Mather Air Force Base." The accused was convicted of this specification.

Opinion: The conviction of the amended specification is set aside. The amended specification charged a different offense.

> We have found no clear statement of the law that specifically authorizes a motion to amend a specification to conform it to the proof. But we think such a motion is just as proper in courts-martial trials as it generally is in their civilian counterparts. In a proper case there can be no question but that the court may grant a motion to amend a "defective" specification, where the motion is made before the taking of testimony (see MCM, 1951, par 69, pp 104–5), usually after arraignment and before the plea (see MCM, 1951, App 8a, p 508). Under such circumstances this procedure is specifically authorized by the Manual for Courts-Martial, 1951, paragraph 69b, pages 105–6. Likewise, in a proper case there is no question but that the court, at the time of making its findings, may make amendments to a specification by "exceptions and substitutions" (MCM, 1951, par 74b, pp 115–16). Though no clear or specific provision is made for it in the Manual (see MCM, 1951, par 69, pp. 104–6), no good reason appears why the court on motion, after the introduction of the evidence has begun and prior to the findings and in lieu of exceptions and substitutions or otherwise, should not entertain a motion to amend a specification to conform it to the proof and, in a proper case, where there is no resultant prejudice to the accused, to grant such motion. Proper and permis-

[26] But a mere change of form is permitted, even at the request of the prosecution. United States v. Wilson, 2 USCMA 248, 8 CMR 48 (1953); *cf.* United States v. Johnson, 12 USCMA 710, 31 CMR 296 (1962).

[27] MCM, 1951, para. 56, 68d; Art. 44, UCMJ.

[28] 11 USCMA 407, 29 CMR 223 (1960).

sible exceptions and substitutions in substance accomplish the same result as do proper amendments to conform a specification to the proof. Consequently, the court should be able to do, in this regard, before the findings, at least what it can do in a proper case afterwards. . . .

But this does not mean that the motion in this case should have been granted. The next question that presents itself is, when, in general, may such a motion be granted. Among other rights of an accused, is his right after arraignment to be tried *only* for the offense charged . . ., and to be apprised of that specific offense at the time of the arraignment and not at some later time. . . . As a corollary to these principles, a court may not by exceptions and substitutions ". . . change the nature or identity of any offense charged . . ." (MCM, 1951, para. 74b(2), pp 115–6; . . . .

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It follows that an amendment to conform a specification to the proof is not permissible where the evidence to which the specification is to be conformed shows a new and different offense from the one charged.

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This error was prejudicial to the substantial rights of the accused. As a result of the amendment, the accused was found guilty of an offense not charged. As a consequence he was denied a fundamental right of Military due process in that he was not "informed of the charges against him" as required by Article 30b of the Uniform Code of Military Justice, embodying, in substance, the provisions of the Sixth Amendment of the Federal Constitution that "in all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation. . . ."

The offer of the president of the court to permit the defense to make a motion to continue the case in order to prepare "a defense" does not alter the result. First, the defense was ready and willing to proceed on the offense charged. It could not be required to do more. The accused could not be compelled by a mere continuance, based on an unauthorized amendment, charging a new offense, to submit to trial for such new offense, to which there was no accuser . . ., no reference to trial . . ., no arraignment . . . and no opportunity to prepare for trial.

Note. Compare CM *Murphy, supra* note 6: The allegation was not as specific as in *Little* and therefore allowed proof of two separate offenses. Since the defense had not objected until near the end of the trial, the prosecution was not required to "elect" until that time.

Section III. PARAGRAPH 69*c*, MCM, 1951, DEFECTS ARISING OUT OF PRETRIAL INVESTIGATION

1. General. Paragraph 69*c* of the Manual provides:

Such motion alleging defects arising out of the pretrial investigation should be sustained only if the accused shows that the defect in the conduct of the investigation has in fact prevented him from properly preparing for trial or has otherwise injuriously affected his substantial rights.

2. Procedure. The purpose of this motion could be (1) to enable the accused to better prepare his defense by obtaining information denied him as a result of the defective pretrial

investigation; (2) to require a redetermination by the convening authority of the type of court-martial to hear the case where the original information in the Article 32 investigation was materially incomplete or misleading or based on unreliable information;[29] (3) to require complete pretrial disposition of a charge when the identity of the charge was changed over the original signature of the accuser, or after the pretrial investigation or advice.[30]

The first defect (assuming it would not influence the choice of forum) could be remedied by a continuance of the trial where it appears that defense counsel may obtain the desired information. In such a case a new pretrial investigation, corrected pretrial advice and reference to trial should not be necessary. In the second case, however, compliance with these procedures would be necessary, depending on how material were the errors in the original pretrial proceedings. Naturally, the more serious is the nature of the offense, the less material become the effect of these errors insofar as it influences the disposition of the charges.

The Manual sets out these two alternative methods of relief—continuance at trial or continuance for compliance with required pretrial procedures—but does not state the circumstances dictating the choice of remedy.[31] The pertinent provision does state that "the motion should be sustained only if the accused shows that the defect . . . has in fact prevented him from properly preparing for trial or has otherwise injuriously affected his substantial rights."[32] Thus the burden is on the accused to show cause for the requested relief.[33]

Even if the motion is initially improperly denied, it has been held that subsequent events at the trial can cure the effect of the error—at least where it did not effect the disposition of the charges. Thus at a trial for rape where it appeared that accused had not been permitted to make a statement at the pretrial investigation and at the trial requested relief from this error, it was held that the effect of the law officer's denial of relief, if improper was neutralized by the fact that accused subsequently testified.[34]

3. **Waiver.** Generally a failure to raise the issue at the trial constitutes waiver.[35] This general rule assumes the absence of cumulative error and the absence of a death sentence.[36]

Section IV. PARAGRAPH 69*d*, MCM, 1951, MOTION TO SEVER TRIALS

1. **General.** This section is concerned with the severance of two or more *accused* joined at one trial, rather than with the severance of two or more *charges* against a single accused into separate trials.[37]

Before an accused is entitled to a severance in a joint trial, he must show, specifically, that he would suffer substantial prejudice in his defense. Likewise, in a common trial (as distinguished from a joint trial) the accused must demonstrate the exact reasons he is entitled to a separate trial, although his burden is not quite as heavy in this respect as it is with a joint accused.

2. **Joint trials.** "A joint offense is one committed by two or more persons acting together in pursuance of a common intent."[38] The possibility that one accused may be unfairly harmed by being tried with his fellow conspirator must be weighed against the public's right to a single expedient, nonwasteful trial where the evidence against the plural accused is the same and closely related. The balance weighs more heavily toward the public interest when the accused are jointly charged. Under such conditions a separate trial is a privilege, not a right: "A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the

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[29] See United States v. Samuels, 10 USCMA 206, 27 CMR 280 (1959).

[30] See section II, *supra*.

[31] MCM, 1951, para. 69*c*.

[32] *Ibid.*

[33] CM 377832, Batchelor, 19 CMR 452 (1955), aff'd, 7 USCMA 354, 22 CMR 144 (1956); but see United States v. Samuels, *supra* note 29.

[34] ACM 8408, Everett, 16 CMR 676 (1954), *pet. denied*, 16 CMR 292.

[35] United States v. McCormick, 3 USCMA 361, 12 CMR 117 (1953); accord, United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955).

[36] See United States v. Parker, 6 USCMA 75, 19 CMR 201 (1955).

[37] See ch. XI, *supra*.

[38] MCM, 1951, para. 26*d*.

goats." [39] The Manual requires that good cause be *shown* for a severance of trials. Thus a mere statement by the defense counsel that "he might wish to call one accused as a witness in the other's case" is insufficient "Showing" of good cause when the defense counsel declines to state his definite intention to do so.[40]

3. Common trials. A common trial is one where two or more accused are tried together on evidence which tends to prove the offenses of all accused but which does not, as in a joint trial, tend to show joint or concerted action.[41] Because it is less apparent than in a joint trial that the accused voluntarily associated themselves to commit the crimes, the accused are in a slightly better position to complain of the danger of being unfairly convicted on the basis of "guilt by association." Thus the Manual provides: "In a common trial a motion to sever will be liberally considered. It should be granted on the motion of an accused . . . in a common trial with other accused against whom offenses are charged which are unrelated to those charged against the mover (331)." [42] Nevertheless, as in a joint trial, the movant must specify the reason for relief.

Illustrative Case

United States v. *Fears*, 11 USCMA 584, 29 CMR 400 (1960)

F and J were arraigned at a common trial by general court-martial on charges of using dope at the same place and time, each separate charge being supported by substantially the same evidence. Their single counsel moved to sever trials on the grounds that J would testify on behalf of F, but he did not specify what the testimony would be or how J would be hampered by testifying at a common trial. The law officer denied the motion. F denied the prosecution eyewitness testimony that narcotics were discovered in his possession and further testified, being corroborated in this latter respect by a friend's testimony, that he was at the scene of the crime through entirely innocent circumstances. The defense counsel vigorously contested the admission in evidence of J's confession, although J did not testify on the merits.

Opinion: The law officer's ruling denying the motion was not improper. Since the charges were based on the same evidence it was proper for them to be referred to a common trial. *Cf.*, *United States* v. *Bodenheimer*, 2 USCMA 130, 7 CMR 6 (1953). In *United States* v. *Evans*, 4 USCMA 541, 4 CMR 133 (1952), a joint trial, it was held that merely stating the ultimate grounds for a severance did not constitute the specific *showing* of the good cause required by paragraph 69b of the Manual. Although the instant case was a common trial, calling for more liberal consideration of a motion to sever than in a joint trial, still there must be some showing of why accused would be prejudiced by the common trial. This burden was not sustained by the defense counsel:

> Even though the burden of so doing was specifically brought to his attention, defense counsel declined to offer anything beyond a bare statement in support of the motion. His assertion that Jones would testify is no more than a representation that he would become a witness but it does not furnish the law officer with the nature of the testimony, or its competency, relevancy, or materiality to the issues. Furthermore, no fact or circumstances was suggested as to why the accused Jones would feel free to testify in a separate proceeding but hampered in a common trial. And although the law officer's ruling obviously left the door open for the motion to be reasserted later, if other matters came to light, the defense presented nothing more and did not renew the motion. Certainly, then, we have been presented with no facts which would justify a holding that the law officer abused his discretion in refusing to grant relief. . . . We might add, parenthetically, that not only was the law officer's ruling within proper limits, but in our review of the record we have found no prejudice to accused by reason of his common trial, nor has any reasonable possibility thereof been pointed out by the defense.

[39] United States v. Fradkin, 81 F.2d, 55, 58.
[40] United States v. Evans, 1 USCMA 541, 4 CMR 133 (1952).
[41] MCM, 1951, para. 33d.
[42] MCM, 1951, para. 69d.

4. Procedure. *a. Motion denied.* The burden is on the accused to establish good cause for a severance, although the law officer has considerable discretion on ruling on the motion.[43] Even if the law officer is correct in denying the motion, if there is a reasonable possibility that a single defense counsel cannot represent the multiple accused equally—he must ascertain on the record of trial that the coaccused recognize this possibility but still wish joint representation.[44] Although neither the Manual nor the Code require the *appointment* of separate defense counsel, they do require that separate individual defense counsel be provided upon request.[45] This is also consonant with the Manual provision that "[I] n joint or common trials, each of the accused must in general be accorded every right and privilege which he would have if tried separately." [46]

b. Motion granted.

If the motion is granted, the court will first decide which accused it will proceed to try and, in the case of joint charges, direct an appropriate amendment of the charges and specifications. For instance, if after severance the court proceeds with the trial of B in a case in which A and B have been jointly charged with an offense, the specification should be amended to allege, in effect, either that B committed the offense or that B committed the offense in conjunction with A. The amendment should be formally made as a part of the proceedings, no actual alteration being made in the charge sheet itself. For an example see the procedural guide, appendix 8*a*. When, as a result of action on a motion to sever, trial of one or more accused is deferred, the trial counsel will report the facts at once to the convening authority so that he may take appropriate action to try the deferred accused or to make other disposition of the charges as to such accused.[47]

Note. A special situation arises when accused X and Y are tried together on Charges A and B, and it appears proper to try the accused together on Charge A, but improper to try them together on Charge B. In such a case the prosecutor—who in general decides in what order cases should be tried[48]—should be given the choice to either: (1) sever the accused's trials, or (2) withdraw Charge B and try the accused jointly on Charge A.[49]

c. Waiver. Absent a manifest miscarriage of justice, a failure to object at the trial to the misjoinder of accused constitutes waiver of the error.[50]

d. Request for enlisted court members. The accused must make his request for enlisted members *before the court convenes.*[51] If accused was aware of this right before the court convened and failed to assert it at the proper time, he should not then be allowed to claim it merely in order to obtain a severance of trials, once his motion to sever has been denied.

Section V. PARAGRAPH 58, MCM, 1951, CONTINUANCES

1. General. "A court-martial may, for reasonable cause, grant a continuance to any party for such time and as often as may appear to be just."[52] A continuance is a broad remedy used to secure time to prepare for trial and more often than not as an ancilliary remedy to another form of relief.[53] Although generally such relief is requested before, or at the beginning of a trial, accused is entitled to it at any time during the trial when he can show "reasonable cause."

2. Postponement of trial. The president, after consultation with the law officer and trial counsel sets the exact date of trial.[54] Before the court is assembled defense counsel may secure an extension of the trial date by requesting relief of the convening authority. If this is refused he

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[43] United States v. Fears, 11 USCMA 584, 29 CMR 400 (1960).
[44] See ch. VII, *supra*.
[45] UCMJ, Art. 27, 38*b*; MCM, 1951, para. 53*c*.
[46] MCM, 1951, para. 53*c*.
[47] MCM, 1951, para. 69*d*.
[48] MCM, 1951, para. 44*d*.
[49] See United States v. Bodenheimer, 2 USCMA 130, 7 CMR 6 (1953).
[50] *Ibid; accord,* United States v. Williams, 10 USCMA 28, 27 CMR 102 (1958), United States v. Alvarez, 10 USCMA 24, 27 CMR 98 (1958).
[51] UCMJ, Art. 25(c)(1), MCM, 1951, para. 36*c*(2)(a).
[52] UCMJ, Art. 40.
[53] See, *e.g.*, sections II and III, *supra*, where a continuance is necessary in order to take corrective action.
[54] MCM, 1951, para. 40*b*(1)(a).

may, after so informing trial counsel, advise the law officer of his intention to request such relief when the court is assembled. The latter officer may advise the president of his prospective ruling on the matter, in order that the court not be needlessly assembled, but it would appear better procedure not to do so for two reasons: (1) the law officer is not obliged to give hypothetical rulings, especially before the court is convened; (2) the exact date of assembling the court is generally an administrative matter, and the convening authority has, by denying defense's prior application, clearly directed to his subordinate (the president) the exact date for assembling the court.

3. Grounds for continuance. *a. Mandatory.* "In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days after the service of charges . . . or before a special court-martial within a period of three days after the service of charges upon him."[55] The date of service of charges and date of trial are excluded from this period, although holidays and Sundays are not.[56] As a working rule, however, when the time period falls within the time period prescribed by statute, it is desirable to exclude Sundays and holidays if the period is less than seven days.[57]

Note. In *Nichols* a trial in the United States during the Korean war was a trial in "time of peace" within the meaning of Article 35, UCMJ; the Court, in the same situation, later held that such a trial was "in time of war" so as to toll that Statute of Limitations.[58]

b. Grounds.

(1) *General.* See paragraph 58*c*, MCM, 1951.

(2) *To obtain presence of witness.* An accused has the right to the personal attendance at the trial of a material and necessary defense witness within reach of process. This right is derived from Article 46, UCMJ, giving opposing counsel—and the court-martial—equal opportunity to obtain witnesses.[59] It cannot be defeated by forcing the accused to accept, in the place of the live testimony of the witness, a stipulation of his testimony.[60]

Note. Paragraph 58*f*, MCM, 1951, provides: "An application based on the absence of a witness may be denied when the opposite party is willing to stipulate that the absent witness would testify as stated in the application unless it clearly appears that such denial would be prejudicial." In view of *United States* v. *Thornton*,[61] such a denial would be per se prejudicial where the witness' testimony would be both material and necessary. Where, however, the testimony would be cumulative or otherwise unimportant—even though material—it would appear proper to deny the request for the witness or his deposition upon the offer of the opposite party to stipulate.[62]

(3) *Accused's mental incapacity to stand trial.* See chapter XVI, *infra*.

c. Application. The Code requires the "court-martial" to rule on an application for a continuance.[63] Nevertheless, the Manual provides:[64]

> Application should be made to the court *if in* session, otherwise to the convening authority, but application to the court for an *extended delay*, if based on reasonable cause, may be referred by the court to the convening authority. [Emphasis supplied.]

The Court of Military Appeals has stated this provision of the Manual "presents a serious conflict between the Code and the Manual" and "appears to substitute the discretion of the convening authority for the judgment of the court."[65] If "in session" is taken to mean at a time before the court-martial convenes, then that portion of the cited provision is unobjectionable and follows the other Manual provision authorizing the convening authority to rule on pretrial motions for appropriate relief.[66] On the other hand, that portion allowing reference to the convening authority of a request for an

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[55] UCMJ, Art. 35.
[56] United States v. Nichols, 2 USCMA 27, 6 CMR 27 (1952).
[57] United States v. Nichols, *supra* note 56, citing Fed. R. Crim. P. 45(a).
[58] UCMJ, Art. 43(a) (b); United States v. Ayers, 4 USCMA 220, 15 CMR 220 (1954); see ch. XIII, *infra*.
[59] United States v. Thornton, 8 USCMA 446, 24 CMR 256 (1957).
[60] *Ibid.*
[61] *Supra* note 59.
[62] WC NCM 6000871, Cunningham, 30 CMR 698 (1960), reversed 12 USCMA 402, 30 CMR 402 (1961) because the accuser acted as investigating officer. Cf. United States v. Harvey, 8 USCMA 538, 25 CMR 42 (1957).
[63] UCMJ, Art. 40.
[64] MCM, 1951, para. 58*g*.
[65] United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954).
[66] MCM, 1951, para. 67, 115, 121.

"extended delay" does not appear justified by Article 40 or 51. See, in this respect, chapter XVI, infra, wherein is discussed the Manual provision purporting to allow the convening authority to direct the court-martial to reconsider their decision granting an extended continuance because of accused's mental incapacity to stand trial.

d. Evidence required. See paragraph 58*f*, MCM, 1951. The defendant must show reasonable cause for the continuance although ordinarily the grounds as stated may be accepted as true. "Due diligence" is one of the prerequisites.[67]

Also, failure to state the materiality of a requested witness' testimony is insufficient showing of "reasonable cause," for a continuance.[68]

The law officer is allowed considerable discretion in his ruling, but the Court of Military Appeals has encouraged him to be liberal in granting defense requests for continuance. Thus in *United States* v. *Nichols*,[69] it was stated:

> . . . . We believe that law officers should weigh carefully the merits of a motion to continue and if it appears reasonable that it is not made on frivolous grounds or solely for delay, the request should ordinarily be granted. However, the burden still remains on the moving party to justify the motion. Counsel for accused has the responsibility to make a full and fair disclosure of the necessity for, and the nature, extent and availability of, the desired evidence. If he fails to do so, the law officer cannot be condemned.

e. Ruling. Since a request for a continuance is an interlocutory question not affecting the ultimate merits of the case, the law officer rules finally on all such requests, except those based on the mental capacity of the accused to stand trial.

Illustrative Case

United States v. *Knudson*, 4 USCMA 587, 16 CMR 161 (1954)

The accused naval officer had been previously *acquitted* by a state court of a charge of sodomy based on the same acts for which he was subsequently arraigned at a court-martial. The law officer granted a defense motion to continue the trial until such time as the Secretary of the Navy took action on the accused's letter requesting the Secretary terminate the court-martial in accordance with his published policy prohibiting courts-martial for an act if an accused had been previously *convicted* by a state court for the same act. Five days later the court reconvened and were presented with the convening authority's written directive that: (1) characterized the law officer's ruling as an "abuse of discretion" and (2) ordered the trial to proceed, unless the court-martial found some proper ground for a continuance. Over accused's objection of illegal interference, the law officer reversed his prior ruling, although demurring that this prior ruling had not been an abuse of discretion.

Opinion: Conviction reversed.

> Responsibility for the proper conduct of a general court-martial trial rests upon the law officer. With certain exceptions, his rulings on interlocutory questions are final and constitute the rulings of the court. Article 51, Uniform Code of Military Justice, 50 USC § 626. In the application of these principles, we have held that the determination of whether a request for a continuance should or should not be granted rests within the sound discretion of the law officer. United States v. Nichols, 2 USCMA 27, 6 CMR 27; United States v. Plummer, 1 USCMA 373, 3 CMR 107; see also: United States v. Sizemore, 2 USCMA 572, 10 CMR 70. The standard used in the exercise of the discretion is "reasonable cause." Article 40, Uniform Code of Military Justice, 50 USC § 615. Manual for Courts-Martial, United States, 1951, paragraph 58, page 82. A review of its exercise may be had only upon a clear showing that the discretion was abused. United States v. Plummer, *supra*.

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[67] *Quaere:* If the counsel admits lack of diligence in securing a vital defense witness, should his application for a continuance be denied?

[68] United States v. Harvey, *supra* note 62, MCM, 1951, para. 44*f*(2), 58*f*, and 115*a*.

[69] 2 USCMA 27, 6 CMR 27 (1952).

A claim of abuse of discretion is usually reviewed on appeal as part of the entire case. In fact, we know of no authority in Federal judicial practice which permits an intermediate appeal for the sole purpose of reviewing that claim. Under Federal law, the right to appeal an interlocutory determination in a civil case does not include an appeal from a ruling on a continuance. 28 USC, Section 1292. In a criminal case an appeal lies only from the final decision. 28 USC, Section 1291. Rule 37, Federal Rules of Criminal Procedure. Copp v. United States, 168 F2d 190 (CA 1st Cir 1948); United States v. Domroe, 129 F2d 675 (CA 2nd Cir 1942). Moreover, the Government may appeal only if the final decision is adverse to it. See: 18 USC, Section 3731.

We have repeatedly held that Federal practice applies to courts-martial procedures if not incompatible with military law or with the special requirements of the military establishment. United States v. Fisher, 4 USCMA 152, 15 CMR 152. Therefore, unless military law of necessity required an intermediate review of the law officer's discretion in the grant or denial of a motion for continuance, the convening authority's action here was illegal.

The Government argues that the convening authority is authorized to control the grant of a continuance by the provisions of paragraph 58 of the Manual for Courts-martial, United States, 1951. The pertinent parts of the paragraph read as follows:

* * * * *

e. Application and action thereon. — Application should be made to the court if in session, otherwise to the convening authority, but an application to the court for an extended delay, if based on reasonable cause, may be referred by the court to the convening authority.

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At the outset, we are faced with a possible conflict between paragraph 58e of the Manual, and Article 40, Uniform Code of Military Justice, *supra*. The latter empowers the law officer, not the convening authority, to act on an application for a continuance. Therefore, it may be that even when the court is not actually in session, an application for a continuance should be made to the court and not to the convening authority. However, we need not now decide whether this provision in the Manual may properly be reconciled with the Code requirement. Here, the application was made while the court was in session, and, under both the Code and the Manual, the law officer was the proper person to rule on it. He granted the application. Under well-settled principles, his ruling was not subject to review until the trial had been completed; and then only if the ruling was prejudicial to the accused. See Manual, paragraph 58*d*, page 83.

Justification for the convening authority's action is also sought in that part of paragraph 58*e*, which provides that if the application is for "an extended delay . . . [it] may be referred by the court to the convening authority." This too presents a serious conflict between the Code and the Manual. In effect, the Manual provision appears to substitute the discretion of the convening authority for the judgment of the court. Again, however, we need not attempt to reconcile the two provisions.

The accused's application was not, in fact, referred to the convening authority for decision. Consequently, unless the Manual provision is to be construed as mandatory, the convening authority had no power or right to make any decision on the matter of a continuance. The language of the paragraph is plainly permissive and we find nothing in it which requires a forced construction. . . .

Having no power to review the law officer's grant of a continuance, the convening authority should not inject himself into the proceedings. . . .

The Code and the Manual give the convening authority certain rights of review in carefully limited instances, when the court-martial has acted so as to terminate finally the proceedings against the accused without, however, making any finding on his

guilt or innocence. Thus, if a specification is dismissed on the ground that . . ., the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action. Article 62(*a*), Uniform Code of Military Justice, 50 USC § 649; Manual for Courts-Martial, United States, 1951. . . . See also, Manual, *supra*, paragraph 122*b*, page 203. However, these rights do not give the convening authority the power to review interlocutory rulings made by the court while the case is in progress, and this is particularly true when the Code expressly regulates the procedure, as it does in this case.

The record clearly shows that the law officer yielded to the pressure of the convening authority. "It is the personal view of the law officer," he said "that it was not an abuse of discretion to grant the continuance when the continuance was granted." Nevertheless, he ordered the trial to proceed. In so doing, he abdicated his powers to the convening authority. Manifestly, this was error. United States v. Self, 3 USCMA 568, 13 CMR 124.

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. . . This interference resulted in prejudice to the accused by depriving him of the opportunity of having the Secretary of the Navy consider his request for the termination of further proceedings against him, which we regard as a substantial right.

The decision of the board of review is reversed and a rehearing is ordered.

BROSMAN, Judge (concurring in the result):

I fully agree with the result reached by Chief Judge Quinn in this case. However, I prefer to bottom my vote for reversal on the notion that general prejudice enters the picture when a convening authority interferes—as he did here—with the law officer's ruling on a continuance.

Note. Chief Judge Quinn, who authored the principal opinion in *Knudson*, actually must have reversed for "general prejudice," for he made no comment as to the sufficiency of the evidence on the merits of the case. In this respect, Judge Brosman's recognition of the need to apply the doctrine of "general prejudice" is supported by sound principles of judicial administration. *Knudson* does illustrate the intention of the court to protect the law officer from unlawful command interference with his function—whether or not the law officer makes correct decisions, and in *Knudson* the correctness of the law officer's decision is at least arguable. In the area of continuances the Court will allow the law officer considerable discretion in deciding whether or not to grant the motion. In *United States v. Rogan*,[70] the law officer denied the accused army officer's 46 day old request for a continuance pending Secretarial action on his offer to resign in lieu of trial. The Court, noting that the accused did not say when the request would be acted on, upheld the conviction. The Court, citing *Knudson*, stated that the law officer, in the interest of justice, could have granted a reasonable continuance but then added: "The question, however, is not what the law officer could have done, but whether he abused his discretion in what he did."

f. Effect of ruling.

(1) *Motion granted.* The ruling is final and nonappealable. See however, chapter XVI, *infra*, regarding the right of the convening authority to request reconsideration of the grant of a continuance because of accused's asserted mental incapacity to stand trial.

(2) *Motion denied.* As an interlocutory decision, the denial of a motion is not separately appealable. However, if on appeal it is held to have been improperly denied the Manual provides that: "A rehearing should be ordered only if the prejudice to the rights of the accused can be cured thereby."[71]

Query: A continuance for the purpose of obtaining an identified alibi witness is improperly denied. A rehearing is ordered, but before the second trial the witness is accidently killed. Must accused's motion to dismiss be sustained?

[70] 8 USCMA 739, 25 CMR 243 (1958).

[71] MCM, 1951, para. 58*d*. *Quaere*, A continuance for the purpose of obtaining an identified alibi witness is improperly denied. A rehearing is ordered, but before the second trial the witness is accidentally killed. Must accused's motion to dismiss be sustained?

Section VI. CHANGE IN PLACE OF TRIAL

1. General. Though not specifically authorized by the Manual or the Code, the existence of a remedy equivalent to the civilian "change of venue" has been recognized at military law. Such relief could be directed toward: (1) securing a forum whose members would be free from the influences of public hostility directed toward the accused, (2) securing a place of trial where witnesses whose personal attendance could not be otherwise secured because of non-amenability to process—could appear at the trial, or (3) avoiding the effect of unlawful command influence.

2. Public hostility. *a. General.*

There is no specific provision for a motion for change of venue in military law. However, in United States v. Gravitt, 5 USCMA 249, 17 CMR 249, it was settled that 'if . . . [the accused] can demonstrate that the court would be adversely influenced by a general atmosphere of hostility or partiality against him, existing at the place of trial, he would be entitled to be tried in some other place.' A like motion may be made in the Federal district courts under Rule 21a of the Federal Rules of Criminal Procedure, which states:

> "The court upon motion of the defendant shall transfer the proceedings as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division."

In the spirit of Article 36(a), Uniform Code of Military Justice, 10 USC § 836, we too consider the motion as one addressed to the sound discretion of the trial court. See 4 Barron and Holtzoff, Federal Practice and Procedure (Rules Edition, 1950), § 2092. . . .[72]

Note. Such a motion is obviously a form of a "challenge to the array" of the court members, submitted on the premise that no impartial court can be appointed within the command or within the geographical area. As in civilian procedure, the instances when it should be granted are few; nevertheless, the reasons supporting such a motion—when they are established—would seem to be more compelling than in the civilian court. The military community is a more close-knit one; its officers have a duty to be constantly aware of morale and attitudes within the command.[73]

b. Burden of proof. As with other motions for appropriate relief, the movant must establish grounds for the requested relief.[74] He must produce testimony and exhibits as the subject matter of his motion is not generally subject to judicial notice.[75] The following factors can demonstrate the need for a new place of trial, or at least the need for new members who may not be affected by the general atmosphere of hostility: (1) the intensity of and timing of the adverse publicity with relation to the time of trial;[76] (2) the assurance that such hostility will not prevail another place or operate against members from outside the command or geographical area;[77] (3) the members' answers on voir dire.[78] This subjective factor, however, should not in itself be determinative, but should be considered objectively along with other factors, (4) the assurance that a continuance will not serve the purpose. Practically, a continuance might be the only alternative where the hostility is so intense and widespread that it would be difficult to secure an impartial court anywhere.[79] Thus in the case of widespread, intense, pretrial publicity one federal court granted an eleven month continuance of trial to allow the attendant atmosphere of hostility to abate.[80] Such relief, of course, should be weighed against the public's right to secure a just conviction, for an undue delay in trial may make any subsequent prosecution impossible. Further a continuance would not be a reasonable alternative where during such a period the accused remained in pretrial confinement for the reason that he is entitled to a *speedy*, fair trial. This overriding requirement of a

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[72] United States v. Carter, 9 USCMA 108, 25 CMR 370 (1958).
[73] See United States v. Hedges, 11 USCMA 642, 29 CMR 458 (1960).
[74] United States v. Carter, *supra* note 72.
[75] 18 Fed. B. J. 56 (1958).
[76] See United States v. Hurt, 9 USCMA 735, 27 CMR 8 (1958).
[77] *Cf.*, United States v. Carter, *supra* note 72.
[78] *Ibid.*
[79] See United States v. Carter, *supra* note 72.
[80] Delaney v. United States, 199 F. 2d 107 (1st Cir. 1952).

speedy trial becomes of less importance when the accused is not confined.

c. Ruling. The law officer rules finally on such a motion.

d. Effect of ruling.

(1) *Motion denied.* The ruling is an interlocutory decision, and may not be appealed, except with the entire record of trial. Even then, absent an abuse of discretion, the ruling will not be disturbed. In examining the law officer's ruling, the Court of Military Appeals has examined the subsequent conduct of the court personnel and spectators to determine the correctness of the decision.[81]

(2) *Motion granted.* It is doubtful that a law officer personally could give the relief requested as this, by statute, would require the discretionary, personal action of a qualified convening authority only.[82] Where only a change in the place of the trial is requested—with no change in court membership—the law officer, for the guidance of the convening authority, should indicate the reasons for refusing to proceed with the trial at that location unless the requested action were taken. If the court personnel were then removed to another site the ensuing trial would be a mere continuation of the proceedings, the "motion for a change in venue" having been granted.[83] On the other hand, if *both* the court membership *and* the place of trial were the subject of the motion, granting it would amount to a "mistrial," inasmuch as subsequent proceedings would be before a different court-martial.[84]

3. To secure witnesses.

Illustrative case

CM 394067, *Cox*, 23 CMR 535 (1957)

The accused pleaded not guilty to, but was convicted by a general court-martial, sitting in the Territory of Hawaii, of the offense of desertion from 21 December 1946 until on or about 1 August 1956, in violation of Article of War 58. . . .

. . . The accused assigned several errors, only two of which are now urged by appellate defense counsel. The first of these is that the law officer erred in denying the accused's request for a change of venue from the Territory of Hawaii to the Republic of the Philippines. . . .

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The request for a change of venue made by the trial defense counsel was not without salient reasons. First, it was pointed out that the accused's wife's live testimony, had she been present as a witness, might have been more effective than her deposition in presenting to the court such matters as the accused's state of mind during his prolonged absence, and his alleged intention to surrender. Secondly, the defense counsel indicated that further investigation of other possible witnesses for the defense living in the Philippines was hampered if not precluded by the existing distance factor. In this connection, we note, for example, that at least one of such matters ripe for investigation was the accused's statement that his civilian status was clarified in 1947 by contact with the American Embassy in the Philippines—a matter which would lend itself to easy verification were defense counsel present there to pursue it. Finally, the practicability of removal was shown by the defense in that all the necessary components for a general court-martial existed in the Philippines—save the team of trial and defense counsel. On these facts we find that the defense counsel possessed, and what is more important, *demonstrably argued* good legal cause for moving for a change of venue. Though we are cognizant of the fact that those military cases extant on the

[81] United States v. Carter, *supra* note 72a. United States v. Hunt, *supra* note 76. In Federal courts many judges will not grant the specific relief, relying on instruction to counsel to similar effect, *e.g.*, United States v. Pisano, 193 F.2d 355, 360 (2d Cir. 1951), cert. denied, 343 U.S. 907 (1952). This problem is discussed in Ronald Goldfarb and Jonathan Goldfarb, "Free Press—Fair Trial," 36 N.Y.U.L.R. 810, 818 (1961).

[82] But see United States v. Gravitt, 5 USCMA 216, 17 CMR 216 (1954).

[83] ACM 14066, Long, 24 CMR 847 (1957).

[84] *Ibid.*

subject to change of venue are concerned largely with the assertable ground of hostility in the environment of the trial forum (e. g. United States v. Gravitt, supra; United States v. Vigneault, supra), we find that an additional requisite of a fair trial is that the rights of full and complete pretrial investigation and the discovery of favorable witnesses be accorded an accused. Change of venue may be sought for such purpose. . . . We must therefore conclude that the law officer abused his discretion in denying the accused's timely motion for removal of the case to the Republic of the Philippines. We recognize, of course, that as a practical matter the discretion of the law officer on this issue was considerably limited, if not foreclosed, by the prior denial [by the convening authority] of the defense counsel's written request for change of venue (Def. Ex. A.).

Note. The board of review in *Cox* concluded that "practically" the law officer's discretion was "limited, if not foreclosed" by the prior refusal of the convening authority to grant a change in the place of trial. Such a pretrial determination, though authorized, is not binding on the law officer in any degree.[85] The law officer should not abdicate his function of making independent decisions on such interlocutory questions.[86] "Practically," therefore, he could well have advised the convening authority of the necessity for reconsidering his pretrial decision.

4. Unlawful command influence. There are no reported military cases which discuss in detail how to cure unlawful command influence at the beginning of the trial, where the members have been influenced. Appellate judicial and administrative action has not shed too much light on the matter. In this postrial area the convening authority has received command direction to withdraw his illegal instruction as a prerequisite to convening a rehearing on the tainted case; occasionally, a rehearing has been authorized only before a different convening authority.[87] The ultimate appellate disposition of such cases apparently has been tailored to fit the situation of each case, and the nature of the unlawful influence.

These same principles might be applied by the law officer before the trial begins, but after arraignment. If the unlawful influence were local and not too serious he might advise of the necessity of an immediate retraction as a condition to preceding with the trial. If it were not so mild, then in the exercise of his discretion he might also advise as to the necessity of: (1) convening the court in another command, or (2) selecting members from outside the command.

This latter procedure is essentially that prescribed by the Manual when the convening authority is the accuser in fact. In such case he must "refer the charges to a superior competent authority . . . or designate another competent convening authority to exercise jurisdiction." [88]

[85] MCM, 1951, para. 67a.

[86] United States v. Knudson.

[87] See United States v. Hedges, 11 USCMA 642, 29 CMR 458 (1960); CM 404508, Lee, 15 Sep 1960.

[88] MCM, 1951, para. 5a(3).

CHAPTER XIII

MOTIONS TO DISMISS

References: Articles 10, 18, 15, 33, 43, 44, UCMJ; paragraphs 67*g*, 68, MCM, 1951.

Section I. INTRODUCTION

The general procedural principles relating to all types of motions to dismiss were discussed in chapter XI, *supra*, This chapter will discuss the substantive and procedural law pertaining to each particular motion to dismiss.

Section II. PARAGRAPH 68*b*, MCM, 1951, LACK OF JURISDICTION OVER PERSON OR OFFENSE

1. Failure to allege offense.[1] The motion to dismiss on this ground can be raised at any time, even on appeal for the first time,[2] and it is not waived by a plea of guilty.[3] If the motion is initially granted at the trial, the convening authority may direct the court to overrule its action, as its ruling decided purely a question of law.[4] If it is eventually decided that the specification fails to allege an offense the accused can later be tried on a proper charge for the stated reason that the first proceedings were a nullity.[5] An absolute application of this rule would preclude an accused—who was acquitted on a fatally defective specification—from claiming former jeopardy at another trial. If the accused was acquitted on the merits, however, this result would flatly contradict the Constitutional protection against double jeopardy.[6] Even if this were not the case, since the court-martial at least had jurisdiction over the person, it would be "a court of competent jurisdiction", and the doctrine of res judicata would prevent subsequent trial on a properly drawn charge.[7]

2. Lack of jurisdiction over the person. *a. General.* In time of peace civilians are not subject to trial by courts-martial. Substantively the question of "jurisdiction" over the serviceman can arise in any one of the following ways. The accused (1) denies that he was in the service when he allegedly committed the offense, (2) contends that the offense occurred during a prior enlistment, (3) argues that he has been finally discharged from the service, or (4) asserts that the court-martial is improperly convened or constituted. The first basis of attack on the jurisdiction of the court actually goes to the merits of the case, because most of the punitive articles of the Code define the offense as being committed by "any person subject to the Code." [8] The second and third bases relate truly to the jurisdiction over the person

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[1] See ch. XII, *supra*, for a discussion of proper pleading and the essential elements to be alleged.

[2] MCM, 1951, para. 68*b*.

[3] United States v. Fount, 3 USCMA 565, 13 CMR 121 (1953).

[4] UCMJ, Article 62(a); MCM, 1951, paragraph 67*f*.

[5] MCM, 1951, para. 68*b*; see also *id.*, para. 68*c*: "A person has not been tried in the sense of Article 44 if the proceedings were void for any reason, such as lack of jurisdiction to try the person or offense."

[6] U. S. Const., 5th Amend.; United States v. Ball, 163 U.S. 662 (1896). See United States v. Autrey, 12 USCMA 252, 30 CMR 252 (1961); the Court of Military Appeals reversed a special court-martial *conviction* of a specification to which accused had pleaded guilty. It authorized a *rehearing*—not a new trial—for the stated reason that the charges failed to state an offense, since the allegation of property alleged stolen was too vague to protect the accused from being tried again for the same charge.

[7] See MCM, 1951, para. 71*b*; ch. XVI, *infra*.

[8] *Cf.*, United States v. Ornelas, 2 USCMA 96, 6 CMR 96 (1952), ch. XI, *supra*.

at the time of trial and the question raised can be logically separated from that of the accused's guilt or innocence.

b. Evidence required. Jurisdiction over the accused at the time of trial must be proved by evidence in the record of trial and such jurisdiction may not be conferred on the court-martial by the consent of the parties. The evidentiary requirement may be satisfied by a stipulation of facts, however, and such a stipulation does not amount to an "agreement" to bestow jurisdiction where none otherwise existed.[9]

c. Burden of proof. Where no factual question exists, and the decision is based solely on a question of law, the defendant apparently has the burden of persuasion.[10] If the evidence is in conflict it has been stated that in resolving the disputed factual question,[11] the defendant has the burden of proof, by a "preponderance of the evidence," although the dictum in *Ornelas* indicates that any such factual question raised by any motion in bar of trial should be sent to the members for decision on a "reasonable doubt" standards, even if it has no logical connection with the accused's guilt or innocence.[12]

d. Effect of ruling.[13] If the motion is denied it is not separately appealable. If, on appellate review, it is finally decided that the court-martial has no jurisdiction over the person of the accused, then the proceedings would be void.[14]

Quaere: Serviceman A is acquitted of a charge of larceny, committed on an army post possessing exclusive federal jurisdiction, on the basis that he thought the property taken was his own. On review the Staff Judge Advocate correctly determined that the offense was committed in a prior enlistment and concluded that the court-martial had no jurisdiction.[15] May the accused then legally be tried for larceny, over his objection, in a federal district court?

e. Waiver. A question of jurisdiction over the person may be raised for the first time on appeal.[16]

Section III. PARAGRAPH 68c, MCM, 1951; STATUTE OF LIMITATIONS

1. General. See Article 43, UCMJ, and paragraph 68*c*, MCM, 1951, with respect to the limitation on time within which charges may be filed against an accused. The Code divides the military offenses into three general classes: (a) No limitation exists for desertion or AWOL committed in time of war, for aiding the enemy, or for mutiny or murder;[17] (b) a 3-year limitation exists for peacetime desertion and for relatively serious offenses (those prescribed by Articles 119 through 132, UCMJ)[18] (c) a 2-year limitation for any other offense. This 2-year limitation applies also to imposition of nonjudicial punishment.[19]

2. "Time of War." *a. Commencement.* In determining when the statute applicable to desertion or AWOL is suspended "in time of war," the Court of Military Appeals has applied the "yardstick of practicality" in determining that the suspension begins on actual commencement of hostilities, even without a formal congressional declaration of hostilities.[20] This is because the intent of the statutory suspension is to provide a deterrent for reluctant war-bound recruits, as well as for combat deserters, and to compensate for the difficulties of apprehending absentees during emergency war time conditions. Applying this reasoning, the Court found that an AWOL committed in the United States by a Korean-bound soldier during the Korean War was committed in "time of war," so as to render inapplicable the three year statute of limitations.[21]

[9] United States v. Garcia, 5 USCMA 88, 17 CMR 88 (1954).
[10] MCM, 1951, para. 57*g* (1), 67*e*; ch. XI, *supra*.
[11] DA Pam 27-9 (1958), para. 23.
[12] United States v. Ornelas, *supra* note 8. See United States v. Berry, 6 USCMA 609, 20 CMR 325 (1956).
[13] See ch. XI, sec. V, *supra*, as to the convening authority's power to direct reconsideration of the law officer's ruling granting the motion.
[14] *Supra*, note 5.
[15] MCM, 1951, para. 11*a*.
[16] *Id.*, para. 68*b*.
[17] UCMJ, Art. 43(a).
[18] *Id.*, Art. 43(b).
[19] *Id.*, Art. 43(c).
[20] United States v. Ayers, 4 USCMA 220, 15 CMR 220 (1954). [Judge Quinn dissenting.]
[21] *Ibid.*