Quaere: Should the same result follow in the case of a soldier who went AWOL, during the Korean War, from his regular assignment as hotel clerk at the United States Army Rest Center at Nice, France, on the French Riviera?

b. Termination. Applying the same "yardstick of practicality" the Court found that the Korean War ended on 27 July 1953, the date of the Armistice marking the actual end of hostilities.[22] The Court decided that the 3-year statute of limitations began to run after that date, despite the lack of a formal congressional declaration of the cessation of hostilities.[23]

3. Duration of limitation. *a. Commencement.*

(1) *Noncontinuing offenses.* The applicable statutory period begins to run, in the case of a noncontinuing offense, on the date of the commission of the offense.[24] Since AWOL and desertion (even though the intent to desert is formed after the initial unauthorized absence) are noncontinuing offenses, the initial date of AWOL, as alleged, marks the date the statute begins to run. When this date is material because of the defense of the statute of limitations, the court-martial may not commit a major variance by finding that the offense occurred at a later date, not barred by the statute.[25]

(2) *Continuing offenses.* The statute cannot bar trial for any part of the offense within the statute.[26] Where the crime consists of a course of conduct consisting of several, or many separate but related offenses, it is more in the nature of a continuing offense, but the statute applies separately to each act. Thus where an accused is charged with dishonorably failing to pay a debt from "about 1 July 1955 to 18 May 1957", the fact that the initial dishonorable disclaimer occurred on 10 May 1955, more than 2 years before the receipt of charges on 14 June 1957, will not bar trial. Each subsequent refusal to pay the same debt, at a time within the statute, will support the charge.[27] Although the crime of conspiracy is not technically a continuing offense, it is not "committed"—within the meaning of the statute of limitations—until the last overt act is committed by any conspirator. This is so, even if such an act is committed without the knowledge of the accused, provided the latter has not by that time withdrawn from the conspiracy.[28]

b. Termination.

(1) *General.* According to the Code the statute ceases to run upon "the receipt of sworn charges . . . by an officer exercising summary court-martial jurisdiction over the command *which includes the accused.* See 33b. . . ."[29] In the Army to insure that in AWOL or desertion cases the statute of limitations will not bar eventual trial, commanders are authorized to forward charges to the Department of the Army when the accused has been "dropped from the rolls" as a deserter. In such a case the accused's records are transmitted with the charge sheet noting the timely receipt of sworn charges.[30] When the procedure is followed, it is, of course, impossible to allege the termination date of the unauthorized absence, because the accused is still AWOL when the charges are forwarded. Nevertheless, despite the omission in the specification of this

---

[22] See United States v. Shell, 7 USCMA 640, 23 CMR 110 (1957).

[23] *Ibid.* In United States v. Swain, 10 USCMA 37, 27 CMR 111 (1958), the Court cited *Shell* to mark the time at which began the 3-year period preceding the beginning of the running of the statute of limitations for wartime frauds against the Government.

[24] UCMJ, Art. 43(b), (c); MCM, 1951, para. 68b; but see *infra* note 48 and accompanying text for the exception in the cases of offenses listed in Art. 43(f), UCMJ.

[25] MCM, 1951, para. 68c.

[26] *Ibid.*

[27] United States v. Atkinson, 10 USCMA 80, 27 CMR 154 (1958).

[28] United States v. Rhodes, 11 USCMA 755, 29 CMR 571 (1960).

[29] MCM, 1951, para. 68c. (Emphasis supplied.) MCM, 1951 para. 33b, also states that the statute ceases to run upon receipt of charges by an officer exercising summary court-martial jurisdiction over "a member of his command"; one Judge of the Court of Military Appeals believes in the validity of the additional requirement of the Manual. United States v. Johnson, 10 USCMA 630, 28 CMR 196 (1959). [Judge Quinn and Ferguson concurring in the result.]

[30] AR 630-10, 14 July 1958, para. 38(2).

terminal date, the statute of limitations will be tolled for the reason that it is an immaterial part of the allegation. The offense being a noncontinuing one, is "committed" at the inception of the AWOL.[31] This is so, even if the authorized punishment for the offense as originally alleged is increased by the addition of the allegation that the desertion was "terminated by apprehension"—such words merely stating aggravating matter, rather than changing the identity of the offense as originally alleged.[32]

(2) *Effect of amendment after charges received.* If the identity of the offense is changed, after receipt of the original sworn charges by the officer exercising summary court-martial jurisdiction over the accused, the new charge must be sworn to.[33] Being sworn anew, it must be received anew by this officer,[34] and the statute would not be tolled until this latter date, if in the meantime the statutory period had run, trial would be barred on the accused's motion. An amendment of the date of the commission of the offense, however, generally does not change the "identity" of the offense, because such an allegation is usually immaterial. Thus, the sworn charges can be amended, over the accuser's original signature, to allege an earlier date of commission, provided that trial on the amended charge would not have been barred as of the date of the receipt of the original sworn charge.

Illustrative Case

United States v. *Brown,* 4 USCMA 688, 16 CMR 257 (1954)

On 22 January 1953, the officer exercising summary court-martial jurisdiction over the accused received sworn charges alleging the attempted commission, on 13 June 1951, of indecent acts. (The applicable statute of limitations for a violation of Article 80 is 2 years.) On 18 March 1953, the sworn charges were amended, over the original signature of the accuser, to allege the date of commission as 1 March 1951. The law officer denied defense counsel's plea of the statute of limitations.

Opinion: The motion was properly denied because the amendment in the date of the commission of the offense did not affect its identity:

> . . ., the amended specification did not allege the offense to have been committed at a date which would have been barred by the statute of limitations. When the original sworn charges were received by the "officer exercising summary court-martial jurisdiction," the plea of the statute would not have been available to the accused with respect to the offense as it was alleged in the amended specification. On the whole, there can be no question that the accused was not misled or prejudiced in his defense on the merits.

(3) *Effect of drafting new charges.* The defense of the statute of limitations is applicable to the charge sheet on which the accused is *arraigned.* Thus if charges were filed timely, but a new charge sheet is sworn to after the statute of limitations has run, the accused may successfully plead the statute if he is arraigned on the new charge sheet.[35] In such a case the introduction into evidence of the original charge sheet will not change the

---

[31] United States v. Spann, 10 USCMA 410, 27 CMR 484 (1959).

[32] *Ibid.* (dictum). The maximum punishment for peacetime desertion terminated by apprehension, is increased from two to three years, MCM, 1951, para. 127*c*, Section A ("Table of Maximum Punishments").

[33] See ch. XII, *supra.*

[34] The statute of limitations is tolled upon receipt of "sworn" charges. UCMJ, Art. 43.

[35] United States v. Rodgers, 8 USCMA 226, 24 CMR 36 (1957). [Judge Latimer dissenting].

result—the motion in bar should still be sustained.[36] The sustaining of the motion, however, should not bar another trial on the old charge sheet, since the granting of the motion was based on the allegations of the new charge sheet. At the second trial, because a new legal question is presented, the principle of res judicata should not apply.[37] To avoid the problem of recharging the accused, the Government should use the old charge sheet, whenever trial on the new charge sheet would be barred by the statute of limitations.[38]

4. **Tolling.** *a. General.* See Article 43, UCMJ, for the periods during which the running of the statutory period is suspended—or "tolled." Except for these instances the period continues to run; there is no "fugitive from justice" exception such as exists generally in the majority of civilian statutes of limitations.[39] If the military accused may avoid detection and apprehension, for the statutory period, then generally he may avail himself of the protection of the statute.

b. Absence from territory. "Periods in which the accused was absent from territory in which the United States has the authority to apprehend him . . . shall be excluded in computing the period of limitation. . . ."[40] In view of treaties which give the United States authority, abroad, to apprehend military offenders against their own laws,[41] it would seem that in foreign countries—parties to such treaties—the statute of limitations would not toll. Such an extension of the commonly accepted definition of the term "territory" does not seem unwarranted in view of the express words of the statute.[42]

c. In the custody of civil authorities. "Periods in which the accused was . . . in the custody of civil authorities shall be excluded in computing the period of limitation. . . ."[43] The statute recommences to run, however, when the accused is released from civilian custody, even though accused does not return to military control.[44]

d. Secretarial certification.

> For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation . . . is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.[45]

The foregoing provision of the Code appears to foreclose any inquiry into the basis of the certification. Nor, from the wording of the statute does it seem that any formal charges need be preferred. In this connection the Manual provides that *charges* in "security" cases in wartime will be forwarded to the officer exercising general court-martial jurisdiction. That officer may make the decision to try the case then, or he may forward it to his Secretary.[46] This provision of the Manual, however, appears more concerned with the requirement of a speedy trial,[47] rather than with the running of the statute of limitations, since that is stopped by the initial receipt of charges.

e. Wartime frauds. For any type of wartime fraud, or attempted fraud, against the United States, including contracts and subcontracts, "the running of any statute of limitations shall be suspended until 3 years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress." [48]

---

[36] United States v. French, 9 USCMA 57, 25 CMR 319 (1958).

[37] See the discussion of res judicata in ch. XVI, *infra*; but see United States v. Hooten, 12 USCMA 339, 30 CMR 339 (1961).

[38] United States v. Spann, *supra* note 31.

[39] United States v. Bushin, 7 USCMA 661, 23 CMR 125 (1957).

[40] UCMJ, Art. 43(d).

[41] See, *e.g.*, Article VII, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, signed at London on June 19, 1951, 4 UST 1792; TIAS 2846; 199 UNTS 67. [Henceforth referred to as "NATO-SOFA."]

[42] See United States v. Wilmot, 11 USCMA 698, 29 CMR 514 (1960). Accused was convicted of a specification founded on the Narcotics Drug Import and Export Act. The accused brought drugs into a United States air base in Japan. The Act proscribed bringing a narcotic drug "into the United States or any territory under its control or jurisdiction." The Court held that the airbase was such a "territory." See also ACM S-18423, Hutchetson, 29 CMR 770 (1960), concerning the right to apprehend military personnel under the terms of NATO-SOFA.

[43] UCMJ, Art. 43(d).

[44] United States v. Bushin, 7 USCMA 661, 23 CMR 125 (1957); *cf.*, United States v. Shell, 7 USCMA 646, 23 CMR 110 (1957).

[45] UCMJ, Art. 43(e).

[46] MCM, 1951, para. 33*f*.

[47] See sec. V, *infra*.

[48] UCMJ, Art. 43(f).

Illustrative Case

United States v. *Swain*, 10 USCMA 37, 27 CMR 111 (1958)

Sworn charges of filing false claims for travel expenses on 16 April 1953 (during the Korean War) were first received on 11 December 1956. In support of his motion to dismiss defense counsel pointed out that the Korean War ended 27 July 1953 and that therefore the 3 year statute of limitations barred trial. The defense contended that Article 43(f) meant merely that prosecution must be initiated within 3 years from the end of the war.[49] On the other hand, the Government argued that, under the statute, the period of limitation does not even begin to run until 3 years after the end of hostilities.[50]

Opinion: The statute did not begin to run until 3 years after the end of the Korean War, and trial was not barred. The United States Supreme Court decision in *Klinger*[51] and *Grainger*[52] are in conflict, but *Grainger* is the more recent decision, and directly interprets the statute. There is therefore no need to go behind the literal reading of the statute.

5. Procedure in contested cases. *a. General.* Whether it arises as a question of law, or one of fact requiring the weighing of evidence, the Manual implies that (except for one instance) the law officer rules finally on a motion to dismiss for the running of the statute of limitations, apply a different standard of proof depending on what facet of the state is in issue.[53] The exception concerns the ruling on the motion to dismiss which raises a disputed issue as to when the offense was committed, such a date then presumably becoming material and therefore part of the general issue.[54] The Manual, ambiguously, states in this respect:[55]

> It is not imperative that the accused, in order to avail himself of this defense, do so by means of a motion to dismiss. The limitation may equally be taken advantage of under a plea of not guilty by establishing the defense by evidence during the trial. See 67*e* for an example of a case in which it is appropriate to raise this defense under a plea of not guilty.

The pertinent portion of subparagraph 67*e* provides:

> If . . . the accused makes a motion to dismiss on the ground that trial is barred by Article 43, 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.

The Manual provisions were cited in the dictum of *United States* v. *Ornelas*[56] as but one example of an issue of fact raised by a motion in bar of trial. According to the *Ornelas* dictum *all* such issues *must*[57] be submitted to the court members for determination (presumably on a "reasonable doubt" standard) regardless of their logical connection with the accused's guilt or innocence. This dictum accords with the practice in federal[58] and state[59] courts. Even disregarding *Ornelas* it is difficult to rationalize why the Manual allows a disputed "date of commission" to be submitted to the court members, yet does not authorize the same to be done when the tolling of the statute is in issue. Neither issue seems to bear more directly on the accused's guilt or innocence. Nevertheless, the pamphlet "The Law Officer" implies that, except when the date of the commission of the offense is in issue, the law officer will rule finally on all issues raised by a motion on bar based on the statute of limitations.[60]

b. Tolling.

If it appears from the charges that the statute has run against an offense (or in

[49] Citing United States v. Klinger, 345 U.S. 979 (1953).
[50] Citing United States v. Grainger, 346 U.S. 235 (1953).
[51] United States v. Klinger, *supra* note 49.
[52] United States v. Grainger, *supra* note 50.
[53] MCM, 1951, para. 68*c*.
[54] United States v. Kissel, 218 U.S. 601 (1910), cited in § IV, ch. XI, *supra*.
[55] MCM, 1951, para. 68*c*.
[56] 2 USCMA 96, 6 CMR 96 (1952) discussed in § IV, ch. XI, *supra*.
[57] Note that the Manual provides the issue "may" be submitted. MCM, 1951, para. 67*e*. But see United States v. Berry, 6 USCMA 609, 20 CMR 325 (1956).
[58] United States v. Kissel, *supra* note 54; United States v. Franklin, 188 F 2d 182 (3d Cir. 1951); see United States v. Dierker, 164 F. Supp. 304 (W. D. Pa. 1958); United States v. Haromic, 125 F. Supp. 128 (E.D. Pa. 1954).
[59] Connecticut v. Weber, 108 A. 348 (1918); see also cases cited in Busch, Law Tactics and Jury Trials (Stud. ed.) at 208.
[60] DA Pam 27-9 (1958), para. 24, p. 205.

the case of a continuing offense) a part of the offense charged, the Court will . . . advise him [the accused] of his right to assert the statute. . . . The burden is not on the defense to show that . . . absence from the territory in which the United States has authority to apprehend him . . . . prevents the accused from claiming exemption under Article 43.

. . . . [T]he motion should be sustained unless the prosecution shows by a preponderance of evidence that the statute does not apply because of periods . . . excluded. . . . [Under the provisions of Article 43(d)].[61]

c. Date of commission of the offense. When there is an issue as to whether the offense occurred at an earlier date than alleged (and the earlier date would bar trial) it has been suggested that the law officer defer ruling on the motion and submit it to the members on the findings—presumably requiring the prosecution to establish, beyond a reasonable doubt, that the offense was not committed at a date earlier than that barred by the statue.[62] In a federal decision an alternative procedure was suggested: The prosecution should amend the indictment (by a bill of particulars) to allege the offense was committed on a specific date not barred by the statute.[63] In either procedure the court-martial members would decide the issue. When the question is purely one of law, as is usually the case, the law officer may rule finally on the motion.[64]

6. Procedure on guilty pleas. When an accused pleads guilty to a lesser included offense, punishment for which would be barred by the statute of limitations, he must waive his right to assert the statute before his plea may be accepted.[65] Then when accused is found guilty pursuant to this plea, he may not at that time withdraw it.[66] However, an accused may plead not guilty to the principal charge (the trial of which is *not* barred by the statute) but at the trial concede his guilt of the lesser included offense (the trial of which *would* be barred by the statute). In such a case it has been stated to be a procedure prejudicial to the accused for the law officer to advise the members that if they find the accused guilty of the lesser included offense they may not punish him for it; the expressed reason for this conclusion is that such an instruction might tend to coerce a finding of guilty of the principal offense.[67]

Note. Such a rationale unfairly puts the Government in an untenable position. The defense, "magnanimously," concedes guilt of AWOL (trial for which is barred by a 2-year statute of limitation) at the same time contesting the "intent to desert" alleged in the principal offense of desertion (trial for which is not barred by a 3-year statute of limitations). It is possible that out of misplaced sympathy, due to accused's frank concession of guilt of the lesser offense, the members of the court could acquit the accused of desertion and find him guilty of AWOL only. They could then be disillusioned to discover that the practical effect of their verdict was an acquittal, since accused can then assert the 2-year statute "in bar of punishment."[68] Since he had not formally pleaded guilty, he would not have waived the right to assert such a motion.

When such tactics have been adopted it should be proper for the law officer, out of hearing of the members, to caution defense counsel and accused that their actions constitute a guilty plea to the lesser offense, every bit as much as if it had been formally entered—at least as far as waiver to the bar of the statute of limitations is concerned. Then if accused is convicted of the lesser included offense, he should not be allowed to plead the statute "in bar of punishment."

---

[61] MCM, 1951, para. 68*c*.
[62] DA Pam 27-9 (1958), para. 26*b*.
[63] United States v. Haramic, *supra* note 58.
[64] See ch. XI, *supra*.
[65] MCM, 1951, para. 68*c*. In any case where it appears the statute has run the law officer must advise the accused of his right to assert it.
[66] MCM, 1951, para. 74*h*. The benefit of the statute may be waived, and in that sense it is not "jurisdictional." United States v. Troxell, 12 USCMA 6, 30 CMR 6 (1960).
[67] CM 362921, Sitterly, 10 CMR 528 (1953).
[68] MCM, 1951, para. 74*b*. In such a case the motion would be decided as would a motion to dismiss. NCM 59-01668, Brand, 28 CMR 668 (1959).

1. General. The predecessor to The Uniform Code, the Articles of War, contained provisions incorporating the old common law concept of former jeopardy.[69] Under them an accused could plead the equivalent of the old special pleas of *autre fois acquit* and *autre fois convict*, in order to be protected from successive trials for the same offense. This required, however, a completed trial.[70] Article of War 40 therefore did not prevent the convening authority from withdrawing the charges before verdict and referring them to another court-martial, at which the plea of former jeopardy—under the Article, at least—was unavailable to the accused. This shortcoming was brought to the attention of the drafters of the Code through the military case of *Wade* v. *Hunter*,[71] decided by the Supreme Court while the Uniform Code was being considered. In *Wade*, it was assumed, but not decided, that the Fifth Amendment protection applied to the military; that even under the Fifth Amendment, for urgent tactical reasons of combat, a trial could be terminated before verdict without jeopardy attaching, provided the case was not withdrawn in bad faith or to save a possible acquittal. In *Wade* the majority opinion pointed out that even in Federal courts, mistrials may be declared "where the end of public justice would otherwise be defeated,"[72] and that in such cases jeopardy does not attach. The opinion did not, however, indicate that a convening authority would have all the mistrial powers of a Federal judge, but only that for urgent military necessity he could terminate the trial.

The Congress intended that the convening authority have such power;[73] at the same time the drafters of the Code added what was intended to be a protection against the abuse of unwarranted withdrawal of charges by either the prosecutor (who under the Manual may so act only by direction of the convening authority) or the convening authority:[74]

> A proceeding which, subsequent to the introduction of evidence but prior to a finding is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused shall be a trial in the sense of this article.

The wording pertaining to "failure of available evidence . . . without any fault of the accused" is identical to the stricter prohibition against retrial as set forth in *Cornero* v. *United States*,[75] an appellate decision considered by the drafters of the Code, but seemingly rejected in Wade v. Hunter.[76] Subsequent decisions of the Court of Military Appeals, however, have apparently approved termination of the trial *by the law officer*,[77] under the broader test of "manifest necessity in the interest of justice," as adopted in *Wade*, for judges.

Another statutory change relating to former jeopardy was that imposed by the limitation on authority to order rehearings.[78] This was necessary because of the then existing Federal law relating to former jeopardy. Under that concept, once convicted, an accused could not be retried unless he appealed his conviction, thereby "waiving" his right to assert a former conviction at a rehearing.[79] But the drafters of the Code feared that the Code's automatic appeal provision in cases going to the boards of review would preclude the application of such "waiver" theory and place the military accused

[69] Hearings on S. 857, Before the Sub-Committee of the Senate Committee on Armed Services, 81st Cong., 1st Sess., at 321–325 (1949).

[70] AW 40, MCM, 1949.

[71] 336 U.S. 684 (1949).

[72] *Ibid.*, citing United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[73] *Supra* note 69.

[74] UCMJ, Art. 44(c).

[75] 48 F. 2d 69 (9th Cir. 1931).

[76] *Supra* note 71. *But see* Downum v. United States, 372 U.S. 734 (1963) (reaffirming the Cornero rule as one instance of lack of manifest necessity for terminating trial in interests of justice).

[77] In the earlier and leading case, United States v. Stringer, 5 USCMA 122, 17 CMR 122 (1954) Judge Brosman stated that only the convening authority had such power. Judge Quinn believed that only the law officer had such "mistrial powers" while Judge Latimer would allow either officer to so act. Apparently all the present judges now agree that the law officer has this power. Significantly, since *Stringer*, there are no reported cases where the convening authority has declared a mistrial. *Cf.*, United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958).

[78] UCMJ, Art. 63.

[79] United States v. Ball, 163 U.S. 662 (1896).

in a less advantageous position than his civilian counterpart who might be content with his first conviction.[80] Congress intended that the military accused have all the protections of the Fifth Amendment against former jeopardy, whether or not the Amendment applied, of its own force, to the military.[81] Therefore, to compensate[82] for the fact that the military accused really could not "waive" the protection against a second trial when he did not appeal his first conviction, Congress gave the military accused three safeguards not then enjoyed by the civilian: (1) it forbade rehearings unless a "prima facie" case had been made at the first trial;[83] (there is no apparent limitation in Federal courts; once a civilian accused appeals a conviction on a charge for which he should have been acquitted, he can be retired regardless of the state of the evidence, provided such rehearing if "just".[84]) (2) It prohibited a rehearing of an offense for which he was acquitted at the first trial;[85] (3) it prohibited a sentence in excess of that adjudged at the original trial.[86]

2. Time jeopardy attaches. *a. General.* "No person shall without his consent, be *tried* a second time for the same offense."[87] Thus jeopardy attaches when there has been a "trial".

b. Before plea. "A proceeding which subsequent to the introduction of evidence, but prior to a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused shall be a *trial* in the sense of this article."[88] Under this provision, except where "manifest necessity" justifies the declaration of a mistrial by the law officer, jeopardy attaches only upon receipt of evidence on the merits.[89] Thus jeopardy does not attach when preliminary evidence on preplea motions is received,[90] although once the court is convened the accused may be entitled to a rehearing if the Government does not show "good cause" for withdrawing the case from that particular court-martial and referring to another for completed trial.[91]

c. After plea, before verdict. When the trial is terminated before verdict, after receipt of evidence on the merits the basic questions are: *"Was the case terminated for 'manifest necessity in the interest of justice' or was it withdrawn to save an acquittal?"* If the answer to the first of these questions is "yes," then the answer to the second must be "no," and vice versa. For instance, if a mistrial were declared obviously for the purpose of saving a "weak" case, then the case was not withdrawn for "manifest necessity in the interest of justice."[92] At the second trial, therefore, the accused could successfully plead former jeopardy citing Article 44(c), UCMJ, to the effect that he has already been "tried," since the former proceeding was terminated "for failure of available evidence ... without any fault of the accused."

This Code provision was designed to protect the accused from a second trial following the unwarranted withdrawal of charges.[93] Although not clearly set out in the legislative hearings on the enactment of the Code, there

---

[80] *Supra* note 69.

[81] *Ibid.* See separate opinions in United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958), cited by Judge Quinn in 35 St. John's L. Rev. 225, 282.

[82] S. Rep. No. 486, 31st Cong., 1st Sess. (1949), at 19.

[83] *Ibid.*; UCMJ, Art. 63(a), requires "sufficient evidence in the record to support the findings" as a prerequisite to a rehearing.

[84] Bryan v. United States, 338 U.S. 552 (1950), discussed by Mayers and Yarbrough in *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, at 18 (1960).

[85] UCMJ, Art. 63(b). At the time of the enactment of the Code, a civilian who appealed his conviction of a lesser included offense in a federal court on rehearing could be convicted of the principle offense of which he had been acquitted originally, Trono v. United States, 199 U.S. 521 (1905), on the theory that he had "waived" the right to object to retrial on the offense of which he had been acquitted. See United States v. Ball, *supra*, note 79. *Trono* was in effect overruled by Green v. United States, 355 U.S. 184 (1957).

[86] UCMJ, Art. 63(b). It is worth noting, however, that in a recent decision, the California Supreme Court (Traynor, J., writing for the majority) held that such a sentence-limitation is implicit in the concept of double jeopardy, even when the accused has appealed from his first conviction. People v. Henderson, 29 Cal. 2d 297, 386 P 2d 677, 35 Cal. Rep. 77 (1963). The decision is novel, but well reasoned. It is based on *Green*, *supra* note 84, and a similar California precedent, and seems an accurate prediction of the direction in which the United States Supreme Court is moving.

[87] UCMJ, Art. 44. (Emphasis supplied).

[88] UCMJ, Art. 44(c). (Emphasis added).

[89] United States v. Wells, 9 USCMA 509, 26 CMR 289 (1958).

[90] *Ibid. Quaere:* Has jeopardy attached when a disputed fact question is raised by receipt of preliminary evidence on a preplea motion in bar of trial?

[91] United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960), discussed in Mil. L. Rev., April, 1961 (DA Pam 27-100-12, 1 April 61) pp. 275-280.

[92] ACM 8951, Flegel, 17 CMR 710 (1954).

[93] *Ibid.*, citing: Hearings on H.R. 4080 Before a Subcommittee of the House Committee on Armed Services, 81st Cong. 1st Sess. (1949) at 802, 1047; Hearings on S.R. 857 Before a Subcommittee of the Senate Committee on Armed Services, *id.*, at 170, 186, 823; S. Rep. No. 486, *id.*

is some indication that Congress intended that former jeopardy apply when the convening authority withdrew the charges, except in the case of an urgent combat situation[94] such as was the basis for the decision in *Wade* v. *Hunter*.[95] The drafters of the Manual nevertheless construed Article 44(c) to allow retrial of a case withdrawn by the convening authority not only for such "urgent and unforeseen military necessity"[96] but also when "inadmissible information, highly prejudicial to either the Government or the accused, has been brought to the attention of the court, and it appears to the convening authority that the members of the court cannot be reasonably expected to remain uninfluenced thereby."[97] This wording apparently adapts the rationale of that part of the *Wade* opinion referring to the mistrial powers of a civilian judge. *Wade*, however, was not decided on this basis, but on reasons of "urgent military necessity."

The Court of Military Appeals has never in a square holding decided if the convening authority has or has not this *additional* withdrawal power. In *United States* v. *Stringer*[98] a divided Court found that both the law officer and the convening authority had "mistrial" powers. If Judge Ferguson agrees that only the law officer may declare mistrials[99] (*Cf.*, withdrawal of charges by the convening authority for "urgent and unforeseen military necessity") then that will be the law in view of Judge Quinn's previous announcement to the same effect.

d. After verdict, before sentence. A literal interpretation of Article 44 (c), UCMJ, would seem to make the plea of former jeopardy unavailable if the charges were withdrawn after findings, but before sentence:

> A proceeding which . . . *prior* to a finding . . . is . . . terminated . . . shall be a trial in the sense of this Article. [Emphasis added.]

Such an interpretation, as Judge Latimer observed in *United States* v. *Ivory*,[100] could not prejudice the accused, because, "Pretermitting the safeguards cloaking sentences. . . . If an accused is initially found guilty, he can never be convicted of a degree of an offense greater than that returned by the original court-martial."[101]

This makes sense if the criteria for ordering a second trial is the same as ordering a rehearing—a test not always applied when a mistrial is declared before finding.[102] If the rehearing safeguards were applied, then a legally insufficient record could not be saved by declaring a mistrial after finding. Further, and even assuming a legally sufficient record of trial, if the record indicated the case was withdrawn because of the lenient disposition of the members, perhaps a plea of former jeopardy should be considered on the second trial on the theory that even an "automatic appeal" should not be taken where a very light sentence was assured.[103]

3. Mistrials. *a. General.* When error has been committed at the trial, which is manifestly prejudicial to the accused—or the government—and it cannot be cured by cautionary instructions, challenges, or other trial procedures, a mistrial may be declared as a last resort.[104] Where the prejudice is readily apparent this may be done even over the objection of the accused,[105] who should not be able to exercise

---

[94] See legislative history cited in *supra* note 93.

[95] 336 U.S. 684 (1949).

[96] MCM, 1951, para. 56b.

[97] *Ibid.*

[98] 6 USCMA 122, 17 CMR 122 (1954). Judges Latimer and Quinn found such power in the law officer from Art. 51, giving the law officer the power and the duty to rule finally on interlocutory questions and also from the inherent power of a judge. Judge Brosman, on the other hand, maintained that Article 44 made no mention of withdrawal of charges by the law officer. This objection has little force, since Article 44 expressly mentions proceedings "dismissed or terminated by the convening authority *or on motion of the* prosecution . . ." (emphasis added).

[99] An indication that Judge Ferguson will side with Judge Quinn in allowing only the law officer to declare a mistrial is found in United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960) wherein he expressed doubt as to the validity of the former jeopardy provisions of para. 56b, MCM, 1951.

[100] 9 USCMA 516, 26 CMR 296 (1958). Judge Quinn affirmed on the basis of estoppel and Judge Ferguson on the basis of a material variance.

[101] 9 USCMA 516, 520, 26 CMR 296, 300.

[102] See NCM 56-03467, Reese, 24 CMR 467 (1957), 495, 496.

[103] Absent a defense request for mistrial after conviction, or an appeal, at civilian law a defendant could successfully plead *autre fois convict* at a second trial. See United States v. Sabella, 272 F. 2d 206 (2d Cir. 1960); *cf.*, United States v. Ball, *supra* note 79. *But see* Crawford v. United States, 285 F 2d 661 (D.C. Cir. 1960).

[104] See United States v. Shamlian, 9 USCMA 28, 25 CMR 290, (1958).

[105] See United States v. Schilling, 7 USCMA 482, 22 CMR 272 (1957); nor is expressed consent required in federal criminal procedure. United States v. Gori, 282 F. 2d 43 (2d Cir. 1960), affirmed 366 U.S. 917 (1961).

a veto power over the proceedings and thus obtain two bites at the apple in the form of a rehearing in case he is convicted.

The law officer possesses great discretion in determining when the extraordinary relief of a mistrial is necessary. On a second trial, when the mistrial is attacked collaterally by a motion to dismiss for former jeopardy in which it is asserted that there was no need to declare a mistrial, the law officer's former ruling will not be disturbed absent a showing of an abuse of discretion.[106] The law officer has as a basis for his decision the actual viewing of the events of the trial. The convening authority has no such intimate connection with the trial and therefore, according to Chief Judge Quinn, should not have the same powers to declare a mistrial for events occurring in the courtroom.[107]

b. Denial of Motion for Mistrial. The Court of Military Appeals has been most generous in upholding the law officer's decision to deny a motion for a mistrial, finding that the law officer in most cases can cure the effect of the error by (1) striking objectionable evidence,[108] (2) cautionary instructions,[109] and (3) by removing an objectionable member in an appropriate case.[110] Where, however, inadmissible and incriminating evidence of a particularly damaging nature has been received (such as confessions or admissions of an accused), the law officer will usually err if he fails to grant a mistrial.[111]

(1) *No abuse to deny.*

Illustrative Cases

United States v. *Shamlian,*
9 USCMA 28, 25 CMR 290 (1958)

For being drunk on guard duty accused was sentenced to a bad conduct discharge, six months confinement and partial forfeitures. Prior to pleading, the defense in open court made a motion to dismiss on the grounds that the pretrial advice did not inform the convening authority that the accuser had recommended special court-martial. Trial counsel, before he was stopped by the law officer, implied that the decision to try the case by a general court-martial had been influenced by ". . . the man's previous convictions and . . . his attitude toward the service. . . ." The law officer denied the defense motion for a mistrial, but instructed the court to disregard trial counsel's remarks. He repeated this admonition three times, the last being in his final instructions to the court members. *Opinion,* [Judge Ferguson dissenting]. The law officer did not abuse his discretion. Although it was error for the trial counsel to mention the accused's previous conviction and attitude towards the service, the nature and seriousness of the offenses were not disclosed at that time and the court members can be presumed to have followed the law officer's repeated instructions to disregard the trial counsel's objectional remarks.

Recently, in United States v. Patrick, 8 USCMA 212, 24 CMR 22, this Court had occasion to reemphasize the role of the law officer when action upon a motion for mistrial. We there said:

It is now well established that the law officer has the same discretion as a civilian trial judge to declare a mistrial. United States v. Stringer, 5 USCMA 122, 17 CMR 122; United States v. Richard, 7 USCMA 46, 21 CMR 172. But the remedy is a drastic one. Dolan v. United States, 218 F 2d 454 (CA 8th Cir) (1955). Ordinarily an error in admitting evidence can be cured by

---

[106] That fact that alternative courses of action are available—declaring a mistrial or giving curative instructions—does not require that the law officer choose the best one, but only that he have some reason for his particular course of action. United States v. Johnpier, 12 USCMA 90, 30 CMR 90 (1961).

[107] United States v. Stringer, *supra* note 98.

[108] United States v. Shamlian, *supra* note 104.

[109] *Ibid.*

[110] United States v. Batchelor, 7 USCMA 384, 22 CMR 144 (1956).

[111] The doctrine of "general prejudice" is applied in the case of confessions or admissions. United States v. Grant 10 USCMA 585, 28 CMR 151 (1959). But curative instructions are nonprejudicial where the law officer first admitted the confession, and then finally and *erroneously* excluded it. United States v. Justice, 13 USCMA 31, 22 CMR 31 (1962).

striking it and instructing the court members to disregard it. Only in the extraordinary situation, where the improperly admitted testimony is inflammatory or highly prejudicial to the extent that its impact cannot be erased reasonably from minds of an ordinary person, is there occasion for the law officer to grant a motion for a mistrial. An appellate court is detached from the courtroom drama and therefore, the law officer's ruling on such a motion will not be disturbed on review unless there was a clear abuse of discretion on his part."

United States v. *Batchelor*, 7 USCMA 354, 22 CMR 144 (1956)

The accused was convicted of such charges as communicating with the enemy and misconduct as a prisoner of war. During the challenging procedure a court member stated that he was hostile to the accused and had formed an opinion that he was a traitor. The member was removed from the court, but the law officer denied the defense motion for a mistrial.

Opinion: The law officer did not abuse his discretion.

It is true enough that a motion for a mistrial is an appropriate remedy whenever it becomes apparent that some incident has occurred during the course of a trial which affects the right of an accused to have a fair trial by the members then sitting. United States v. Smith, 6 USCMA 521, 20 CMR 237. And there may be instances where a disqualified member expresses an opinion which is so prejudicial to an accused that relief of the member from the panel will not serve to cure the prejudice, even though appropriate instructions are given by the law officer. United States v. Richard, 7 USCMA 46, 21 CMR 172. However, the effect, if any, caused by remarks such as the one made by Lieutenant Schowalter may normally be cured by the procedure adopted by the law officer here, and the general rule is the appropriate one in this case.

* * * * *

Comparison of this case with United States v. Richard, supra, easily demonstrates why this law officer did not err in denying the motion for mistrial. In that case, the disqualified court-martial member did more than merely express his opinion. He asserted that the accused had been tried for another serious offense, which was related to the one then before the court-martial, and attempted to buttress his opinion as to the offense for which the accused was then on trial by referring to certain inadmissible evidentiary items. Under those circumstances, we held prejudicial and inadmissible evidence tending to create hostility toward the accused was called to the attention of the court, and that the law officer had no choice but to declare a mistrial, for we believed that no reasonable person could fail to be influenced by the comments of the disqualified member. Here, however, the situation is quite different. No evidence had been introduced, and Lieutenant Schowalter expressed his opinion, and nothing more.

(2) *Abuse to deny:* Where it appears improbable that the members can remain uninfluenced by the error, the law officer, on his own motion, or on that of the defense, must declare a mistrial. Certain errors, such as the introduction of an inadmissible con-

fession, create a presumption of incurable prejudice leaving the law officer no discretion in the matter.[112] Here it would seem immaterial that the defense counsel opposed the declaration of a mistrial, if as a matter of law, the conviction would have to be reversed. It would be a useless, one-sided procedure to proceed with a trial that at the very worst for the accused would result in a rehearing with an alternative, outside chance for an acquittal.[113] Of course, if the prosecution deliberately introduced error in the expectation of obtaining a mistrial and having a better prepared case at the second trial, former jeopardy might lie.[114] Here the mistrial would be granted not for "manifest necessity" in the interest of justice, "but rather to save an acquittal."[115]

Illustrative Case

United States v. *Grant*,
10 USCMA 585, 28 CMR 151 (1959)

During his trial for larceny and making a false official statement the accused testified on cross examination that he had not confessed to Colonel F. This officer was then called as prosecution witness and on direct examination (1) testified, without a predicate being laid under Article 31, that the accused confessed to him, and (2) volunteered that accused had committed "rubber check" offenses and was a "psychopathic liar." The law officer denied the motion for a mistrial, but struck all the witness' testimony and twice admonished the court members to disregard it.

Opinion: Reversed and rehearing authorized. [Latimer, J., dissenting]

A motion for mistrial is addressed to the law officer's sound discretion, and we have repeatedly indicated that we will reverse only where his ruling constitutes an abuse of that discretion. United States v. Patrick, 8 USCMA 212, 24 CMR 22; United States v. Shamlian, 9 USCMA 28, 25 CMR 290. Thus, in United States v. Patrick, supra, we found that the law officer's granting of a motion to strike inadmissible testimony and instruction to the court to disregard it in their deliberations was sufficient to overcome any prejudice inherent in a witness' testimony that the accused was engaged in the sale of leave papers. And in the *Shamlian* case, supra, we reached a similar conclusion concerning the effect of the trial counsel's remarks about the accused's previous convictions and attitude toward the service. On the other hand, in United States v. Richard, 7 USCMA 46, 21 CMR 172, we found that declarations by a court member during the challenge procedure concerning the accused's prior history of misconduct and the results of certain polygraph tests required the law officer to declare a mistrial. The instant case is more closely related to the last mentioned situation.

The court members were confronted with the testimony of a witness who was not only a senior Army officer but also the Commanding Officer of the garrison forces at the post at which the court met and to which its members were assigned as personnel of lodger units. Not only was he permitted to testify concerning accused's confession of guilt to him without the necessary predicate of a warning being shown, but he also "improperly depicted the accused as 'a despicable character' unworthy of belief by the court-martial". . . .

[112] *Ibid.*

[113] *Supra* note 105.

[114] Dissenting opinion in United States v. Gori, *supra* note 105. This would most certainly be true if the defendant objected to the declaration of a mistrial under such circumstances.

[115] See par. 2c, *supra*.

It is difficult to see how the members could erase from their minds the damning effect of Colonel Flemming's vituperative declarations and accord to the accused the fair trial to which he is entitled.

* * * * *

The Government argues, however, that any prejudice inherent in the denial of the motion was overcome by the compelling nature of the evidence of accused's guilt. Assuming *arguendo* that the proof of guilt is compelling, the short answer to the government's contention is that the accused is entitled to a fair hearing. . . . And we have unhesitatingly rejected the idea that compelling evidence has any curative effect when a confession has been introduced without showing compliance with Code, supra, Article 31. . . .

Note. In *Grant* for the first time the Court expressly applied the doctrine of "general prejudice" to confessions or admissions improperly received. Before this decision the Court had purported to find an abuse of discretion in denying the mistrial because of the specific prejudice caused by the improperly admitted evidence.[116]

c. Grant of Motion.

(1) *General.* As has been seen, the law officer has a wide degree of discretion in deciding whether or not a mistrial should be declared. On borderline cases he might well, therefore, consider the practical, as well as the legal consequences of his granting such a motion. Some important factors to be considered are the nature of the error complained of, the stage of the trial, and the party making the motion.

(2) *Time.* If the occasion for declaring a mistrial arises before jeopardy attaches—such as when a highly inflammatory remark is made by a member during challenging procedures[117]—no improper motive could be attributed to the law officer's granting a mistrial. The discretion to declare a mistrial during the period between plea and verdict however, will be examined more closely when the issue is raised on a second trial, and it is argued that the mistrial was declared to save a weak case. Practically, in doubtful cases, the law officer would do well to reserve ruling until *after finding*. If the accused is acquitted the case is of course finally terminated. On the other hand if he is convicted, the law officer could grant the motion without his decision later being attacked collaterally on the ground that the trial was terminated to save the Government's case.[118]

If the error occurs after verdict and could effect only the sentence, then perhaps the law officer could declare a mistrial as to the sentence only.[119] Such a limited decision has not as yet been defined by judicial opinion and in most cases would seem to be an impractical procedure for the reason that little saving in time would be effected; the convening authority could immediately order a "split rehearing"[120] on the sentence, in which case the accused would be afforded the benefit of a sentence limitation which he would not have if the trial were terminated before sentence.

(3) *Party making motion:*

(*a*) *Accused:* If the accused makes the motion for mistrial and it is incorrectly denied, a rehearing may be ordered in event of conviction. If it is improperly granted, he should be estopped from pleading former

[116] United States v. Harris, 8 USCMA 190, 24 CMR 9 (1957); United States v. Ditrizio, 8 USCMA 334, 24 CMR 144 (1957).

[117] United States v. Richard, 7 USCMA 46, 21 CMR 172 (1956).

[118] See para. 2d, *supra*, and United States v. Ivory, *supra* note 101. Doubtless this would not hold true if the evidence in the record at the first trial was not legally sufficient to support the conviction.

[119] United States v. Lynch, 9 USCMA 628, 26 CMR 408 (1958), is not authority to the contrary. In that case a motion for mistrial was improperly denied during the challenging procedures and the accused pleaded guilty. A complete rehearing was ordered because the members of the court were so prejudiced as to become "incapable of receiving a plea of either guilty or not guilty."

[120] United States v. Miller, 10 USCMA 296, 27 CMR 370 (1959).

jeopardy at a subsequent trial for the same offense.[121]

A different situation might arise, however, where the error calling for a mistrial was generated by the Government to save a weak case. If the error hopelessly prejudiced the accused's cause, through no fault of his own, he is faced with an unjustified dilemma of the Government's creation: to save a sure conviction he must ask for a mistrial and be estopped from claiming former jeopardy at a subsequent trial where the government will put on a better case. Under these circumstances the fact that the accused was the party who moved for the mistrial should not raise estoppel.[122]

(*b*) *Prosecution:* The fact that the Government asked for the mistrial over the objection of the accused, should be a factor in determining—objectively—the motive of the law officer in declaring the mistrial. It would usually be a factor indicating that the mistrial was declared to "save an acquittal."[123] On the other hand, if error occurred which was not induced by the prosecution, the defendant should not be allowed to insist on proceeding with a trial that eventually would be reversed. In that situation particularly, the law officer should insure that the record reflects with great detail the defense's reasons for resisting the declaration of a mistrial.

4. **Same offense.** *a. General.* Assuming a completed "trial," resulting in a conviction approved on review, the accused cannot over his objection be tried a second time "for the same offense."[124] The definition of the term "same offense" requires solving the perplexing problem of whether a single act or transaction violating two or more different statutes can result in the commission of two or more separate crimes, the trial of one of which will not bar trial for the other.

b. Multiple trials, Multiple punishment. As yet, neither the constitutional nor statutory doctrine of former jeopardy have been applied to determining the maximum punishment at a single trial on conviction for two or more offenses arising out of the same transaction.[125] As a matter of fact, in dictum, the Court of Military Appeals has stated that merely because in the same trial two offenses might be limited by one punishment does not necessarily mean that they are not "separate offenses", at least for some purposes.[126] The basis of deciding maximum punishment at the same trial involves the determination of legislative intent as to appropriate *punishment*, apparently unfettered by any Constitutional limitation of former jeopardy, provided the total punishment is not too harsh.[127] Nevertheless, the United States Supreme Court has given such offenses the same *effect* (as far as the total punishment is concerned) whether they are joined in one trial or convictions are obtained in consecutive trials. As Justice Black pointed out in his dissent in *Gore* v. *United States*,[128] what difference does it make if an accused receives three consecutive sentences of five years each at separate trials (which he believes is forbidden) or a single sentence of fifteen years

---

[121] *Cf.*, concurring opinion of Judge Quinn in United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958).

[122] See Gori v. United States, 364 U.S. 917 (1961).

[123] See *supra* note 92.

[124] UCMJ, Art. 44(a).

[125] The problem of the maximum punishment at a single trial is discussed later in the portion of the text dealing with sentencing procedures. See also MCM, 1951, para. 76*a*(8).

[126] See United States v. Oakes, 12 USCMA 406, 30 CMR 406 (1961). It should be noted, however, that the holding in *Oakes* was that the accused could not be found guilty of larceny under a specification alleging wrongful sale of government property. It may well be, therefore, that the dictum in *Oakes* is limited to questions of prejudicial lack of due notice in allegations, and that the same analysis would not be relevant to a government attempt to try the two offenses at separate, successive trials. In fact, recent civilian cases have asserted that if two offenses could not be separately punished at the same trial, they certainly could not be *tried* separately, because of the additional element of harassment involved in multiple prosecutions. See the opinions in the following civilian cases: United States v. Sabella, 272 F. 2d 206 (2d Cir. 1959); Gore v. United States, 357 U.S. 386 (1958); (a 5-4 decision overruling Blockburger, *infra* note 127, Justices Black and Douglas dissenting on the issue of former jeopardy.

[127] Blockburger v. United States, 284 U.S. 299 (1932); distinguished in United States v. Sabella, *supra* note 126, 11 and

[128] *Supra* note 126. Accused received three consecutive sentences at the same trial for three narcotic offenses proved by the same act although three violations of separate statutes were proved. The majority opinion held that former jeopardy did not apply because Congress could decide the relative gravity of a particular act.

at one trial? But if an earlier decision were followed, the doctrine of former jeopardy would have allowed *Gore* to be convicted in separate trials.

In *Gavieres* v. *United States*[129] decided in 1911, the accused was first convicted of being disorderly in a public place and then of insulting a public officer in the execution of his office. The Court, conceding that the same evidence proved the different statutory elements, nevertheless held that to be the "same offense"—within the proscription of former jeopardy—not only must the fact be the same, but also the law. This decision which stresses rather formalistically the allegations rather than the proof in support thereof, was handed down at a time when the complexity and scope of purely statutory offenses was trifling when compared to that of the vast matrix of today. Significantly, in recent times a *Gavieres* situation has not been reaffirmed by the court. It has been rejected by at least one federal circuit court.[130] It is fair to apply the *Gavieres* requirement of sameness in both fact and law when the consequences of the act or transaction are different—such as when there are multiple victims or distinct consequences.[131] But when the act produces substantially only one result, then it would seem that not only should the punishment be limited as for a single offense, but even more so that future trial should be barred, even though at a second trial different statutory words are alleged.[132] Former jeopardy is aimed at unwarranted harassment of the accused—to prohibit the prosecution from wearing "the accused out by a multitude of cases with accumulated trials." [133] Successive trials entail liabilities and expenses not usually involved at a single trial of several offenses. For that reason it seems not unlikely that in the future civilian appellate courts will be more prone to find the "same offense" (and thus former jeopardy) at a second trial, than they would if the offenses were joined at the same trial.

To summarize, the strict "same evidence" test of *Gavieres* was adopted in *Blockburger*, on the question of multiple punishment at a single trial. It has been assumed for many years that the test enunciated in *Gavieres* and *Blockburger* was settled law, despite persistent and growing scholarly criticism of the rule on the grounds that it was unduly harsh, and senselessly formalistic. In 1958, however, *Blockburger* was reaffirmed, in *Gore*, by a bare majority, the fifth member of which was Mr. Justice Frankfurter. Although it is always hazardous to speculate on future results based on the composition of the Court, it seems quite likely that the strict *Gavieres-Blockburger* test will not remain the federal rule for multiplicity of punishment when the Supreme Court is next faced with the question. Moreover, although a federal *Gavieres*-type situation has not been before the Supreme Court recently, the dissents and majority dicta in cases such as *Hoag*, *Abbate*, and *Gore* have uniformly indicated that the strict *Gavieres* "same evidence" test is not the proper Constitutional test for jeopardy at separate trials. Exactly what the Court will hold the proper test to be is not yet clear. If the test resembles *Gavieres* at all, the indications are that it will emphasize the evidence actually introduced, rather than that which is theoretically required (or not required) to prove the two offenses, and that it

---

[129] 220 U.S. 338 (1911).

[130] United States v. Sabella, *supra* note 126. The decision did not mention *Gavieres*, but expressly refused to apply the rationale of the *Gore* decision to multiple trials. See also the dissent of Justices Douglas and Black in Hoag v. New Jersey, 356 U.S. 464 (1958), 478, note 8: "But it [*Gavieres*], like other cases arising under the law of the Philippine Islands . . . has not been deemed an authoritative construction of the Constitutional provision. See Green v. United States, 355 U.S. 184 (1957), 194–198." In *Hoag* even the majority opinion admitted: "But even if it was constitutionally permissible for New Jersey to *punish* the petitioner for each of the four robberies as separate offenses, it does not necessarily follow that the State was free to *prosecute* him for each robbery at a different time." 356 U.S. 464 (1958), 466. In Harlow v. United States, 301 F. 2d 361 (5th Cir. 1962) the court, in upholding the accused's right not to be tried consecutively for two technically different offenses based on the same act, followed *Grafton* and did not mention *Gavieres*. The accused had first been convicted by a High Commissioner's court in Germany of conspiracy to receive bribes. Over his objection he was subsequently tried in a federal district court for a violation of 18 USC § 871. The Court of Appeals, in dismissing the conviction, held that the offenses, though not the "same in name" were the same in fact and that the evidence required to prove the first offense necessarily would prove the second.

[131] Ciucci v. Illinois, 356 U.S. 571 (1958): Accused hurled his family to death in one fire and was tried consecutively for the murder of his wife and one child, a second child, and a third child. Although each conviction was supported by the same evidence, the State did not obtain the death penalty until the last trial. In a 5–4 decision, this was held not to violate the 14th Amendment "due process," although at the time of the decision, the 5th Amendment former jeopardy protection was Palko v. Connecticut, 302 U.S. 319 (1937). It might be now. See Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Hoag v. New Jersey, 356 U.S. 464 (1958), where the Court upheld, in a 5-4 decision, consecutive trials where the victims of the robbery were different.

[132] *Contra*, United States v. Gavieres, *supra*, note 129.

[133] Hoag v. New Jersey, 356 U.S. 464 (1958), 467.

will in addition require that whatever differences in proof are actually involved be "significant" differences. What differences might be found "significant" for these purposes is still another unanswered question. Perhaps this judgment will be based on such factors as the singleness of the criminal act or intent, whether it affected more than one victim or societal interest, and the relative ease with which both crimes could have been prosecuted at the first trial. Probably none of these considerations would be determinative, in and of itself.

At the present time, the military test for the "same offense" for jeopardy purposes is a matter of guess-work. The Manual rule is based upon the strict *Gavieres-Blockburger* "same evidence" test, which the draftsmen assumed to be the authoritative Constitutional interpretation, for both jeopardy (separate trials) and multiplicity of punishment (at a single trial).

The Court of Military Appeals has not decided a case on this question for jeopardy purposes. It has, however, decided many cases on the question for purposes of multiplicity of punishment at a single trial, and in this contest it has *not* followed the strict "same evidence" test promulgated in the Manual. Rather, it has taken a liberal approach, very similar to that suggested above. The Supreme Court has consistently indicated, in the past ten years, that whatever test is adopted for purposes of multiplicity, a broader test is warranted for jeopardy purposes at separate trials, because the latter involves the additional element of harassment of the accused by multiple prosecutions. If this reasoning alone is followed by the Court of Military Appeals, it would be logical for the Court to extend to the jeopardy situation at least as liberal a rule as it has developed for purposes of multiple punishment at a single trial. There may be another factor in the military situation, however, which could affect the logic of this extension.

The Court of Military Appeals has not yet been presented with the *Gavieres*-type situation where the accused is tried consecutively for violation of separate statutes, all based on the same act and proved by the same evidence, and involving only one victim or substantial consequence. When it does, the Court will have an additional fact to consider: the Manual "injunction" that *all* known offenses be joined at a single trial.[134] Even if the Court will not choose a more liberal view of the former jeopardy protections, yet it is not inconceivable that it might use its administrative powers[135] to dismiss the second charge. In doing so it might find support, in an appropriate case, in the Constitution and Code guarantees of a speedy trial.[136] Under this latter rationale it could be held that the accused was prejudiced by not having his second charge tried at the first trial.

c. Same sovereign. To be the "same offense" within the protection of former jeopardy, the offense must violate the law of only one sovereign.[137] Thus where a single act violates a State and Federal statute the accused may be convicted first by the State, then by the Federal Government,[138] and vice versa.[139] Because Federal civilian courts and courts-martial each derive their sovereignty from the United States, a trial by one of these two tribunals bars subsequent trial in the other for the same offense. In this respect the Manual provides:[140]

> The same acts constituting a crime against the United States cannot, after acquittal or conviction of the accused in a civil or military court deriving its authority from the United States, be made the basis of a second trial of the accused for

---

[134] "Subject to jurisdictional limitations, charges against an accused . . . should be tried at a single trial." MCM, 1951, para. 30*f*, 33*h*. Although these words appear directory rather than mandatory, they have been held to be an "injunction." See United States v. Davis, 11 USCMA 407, 409, 29 CMR 223, 225 (1960). The Federal rule concerning joinder of related offenses is permissive only. Fed. R. Crim. P. 7. By 1956, 15 states had enacted legislation making it mandatory to join known offenses in enumerated circumstances, on pain of bar of second trail. This accords with the view of the American Law Institute. See Model Penal Code, Section 308 (2) (1956).

[135] Compare the Court's action prohibiting the use of Manuals at trial. United States v. Kinehart, 8 USCMA 402, 24 CMR 212 (1957).

[136] United States v. Hounshell, 7 USCMA 3, 21 CMR 129 (1956); U.S. Const; VIth Amend; UCMJ, Arts. 10, 33.

[137] MCM, 1951, para. 68*d*.

[138] Abbate v. United States, 359 U.S. 187 (1959). After this decision the then U.S. Attorney General issued a policy directive prohibiting a second trial by Federal authority unless in each instance authority was obtained from the Attorney General. See also AR 22-12 (24 Apr 58) prohibiting the Federal courts-martial jurisdiction, as well as Article 15 punishment, after civilian trial without first securing the permission of the officer exercising general court-martial jurisdiction.

[139] Bartkus v. Illinois, 359 U.S. 121 (1959).

[140] MCM, 1951, para. 68*d*. [Emphasis added.] This wording follows that in Grafton v. United States, 206 U.S. 333 (1907).

that crime in the same or another such court without his consent.

The cited words seem to conflict with the decision in *Gavieres* v. *United States*,[141] decided four years after *Grafton* v. *United States*,[142] where the same act was the basis of multiple prosecutions in courts deriving their jurisdiction from the United States. Indeed, the *Gavieres*, argument was anticipated, but rejected in *Grafton*. Later, in *Gavieres*, the Court, with questionable logic, strained to distinguish its decision in *Grafton*.

In *Grafton* the court-martial had acquitted the accused of the noncapital offense of homicide, and he was then, over his protest, convicted by a federal territorial court for the offense of "assassination," based, of course, on the same act of killing. On appeal the Government urged that two different crimes were involved: "One against military law and discipline, the other against civil law,"[143] the Court refused to accept this proposition and observed that the civilian court could have assumed jurisdiction first. Since the "same acts" were the foundation of each charge, it found former jeopardy. It is submitted that *Grafton*, as adopted in the Manual, is the appropriate interpretation of the law unless the same act produces distinct consequences, as, for example, a felony murder of a mailman. There, not only is homicide committed, but federal mail is interfered with and the deliveryman killed.

d. Foreign agreements. Under certain treaties with the foreign governments of the countries wherein our troops are stationed, a single act may constitute a violation of the law of both the United States and of the foreign country. The two countries then agree who shall first try the military accused. Thereafter, the country which did not first try him may not try the accused, in the same territory, for the same offense, although he may be tried subsequently for an offense against discipline even if it arises from the same act.[144] A Canadian contempt-of-court commitment for refusing to testify at a coroner's inquest was held not to be a "trial" within the sense of the applicable treaty so as to bar a subsequent court-martial in Canada for service-discrediting conduct in refusing to testify.[145]

Section V. ARTICLES 10, 33, 98, UCMJ, DENIAL OF SPEEDY TRIAL

1. General.[146]

The United States Constitution guarantees to all persons prosecuted under Federal law 'the right to a speedy and public trial.' United States Constitution, Amendment VI. Article 10 of the Uniform Code, . . . reiterates that guarantee. In pertinent part it provides:

> ". . . When any person subject to this code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

To give emphasis to the importance of the right, Congress provided that when a person is held for trial by general court-martial "the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If the same is not practicable, he shall report in writing to such officer the reasons for delay." Article 33, Uniform Code of Military Justice, ... It further provided that any person re-

---

[141] 220 U.S. 338 (1911).

[142] 206 U.S. 333 (1907).

[143] *Ibid.* This argument was apparently based on an earlier decision of a lower court, *In re* Stubbs, 133 Fed. 1012 (D.C. Wash. 1905). There a soldier, acquitted by a State jury of a murder charge, was subsequently convicted by a court-martial of the same homicide, it being alleged as "conduct to the prejudice of good order and discipline." The court found that this additional element made it a different offense.

[144] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, Aug. 23, 1953, Art. VII, para. 8 [1951] 4 U.S.T. & O.I.A. 1792, T.I.A.S No. 2846, 199 U.N.T.S. 67.

[145] United States v. Sinigar, 6 USCMA 330, 20 CMR 46 (1955). Chief Judge Quinn dissented; Accused's conviction was set aside, however, because of insufficient proof.

[146] United States v. Hounshell, 7 USCMA 3, 7, 21 CMR 129, 132 (1956).

sponsible for an unnecessary delay in the disposition of a case violates the Uniform Code. Article 98, Uniform Code of Military Justice, ... Unquestionably therefore the right to a speedy trial is a substantial right. And, if it is denied to the accused, the trial judge can redress the wrong by dismissing the charges. Petition of Provoo, 17 FRD 183, affirmed 350 US 857. . . .

Because no right to bail exists in the military, the length of the permissible delay in trial is substantially less than in Federal civilian courts.[147] As in civilian courts, the right to a speedy trial fills in the gap left by the statute of limitations, which by itself gives no guarantee to a timely trial once charges are preferred.[148]

2. Computation of delay. Presumably, if Article 10 and 33, UCMJ, were the sole and complete source of the right, then only those periods spent in pretrial arrest or confinement would be totaled in determining when the delay in trial has violated the Codal right to a speedy trial; it has been indicated, however, that the time should be computed from the beginning of confinement, or the formal presentment of the charges, whichever first occurs.[149] This presupposes, of course, that the accused has suffered no other harm than being restrained an unwarranted length of time. If the defense of his case was prejudiced by an undue delay in trial, whether or not he was confined during the period, then "military due process" would require dismissal of the charges on the basis that the accused had been deprived of "military due process," rather than on the basis of a violation of Articles 10 and 33.[150]

Excluded from computation of the pretrial delay in disposing of charges are comparatively short periods between stages of processing the charges, where such periods of delay are not due to the negligence or design of the prosecution. Article 10 of the Code provides that when the accused is placed in pretrial restraint that "immediate steps" shall be taken to inform him of the specific charge against him "and to try him or to dismiss the charges and release him." If the Government is diligent in a timely accomplishment of each of these steps, "the fact that there is some reasonable delay in between the steps is immaterial. Thus, where the accused was apprehended on 7 December 1958, the pretrial investigation was conducted on 13 February 1959, and the allied papers forwarded to the convening authority on 26 February 1959 explained a reason for the delay in investigation, accused was not entitled to dismissal of the charges for denial of speedy trial.[151]

> . . . Unquestionably, pretrial confinement is burdensome. However, the defense does not dispute the validity of the confinement; and the period of confinement is not, in our opinion, so extended as to indicate in any way that the confinement is part of an oppressive design on the part of the Government against the accused. Also, in our opinion, *the period is not so long and so free of statutory requirements for the performance of essential preliminary proceedings* as to establish, as a matter of law, that there was a lack of reasonable diligence in prosecution. We conclude, therefore, there is ample evidence to support the law officer's ruling denying the defense motion to dismiss because of the purported deprivation of a speedy trial. Thus, the board of review erred, as a matter of law, in holding that the law officer abused his discretion in his ruling.
>
> Before concluding our opinion, it is appropriate to reiterate what we said in United States v. Wilson, 10 USCMA 398, 403, 27 CMR 472; when the issue of a

---

[147] *Ibid.* See United States v. Brown, 10 USCMA 498, 28 CMR 64 (1959). The shortest period of delay justifying dismissal of the charges in reported civilian Federal case in recent years was 8½ years. Taylor v. United States, 238 F 2d 259 (D.C. Cir., 1956).

[148] See Hoopengarner v. United States, 270 F. 2d 485 (6th Cir. 1959).

[149] See United States v. Williams, 12 USCMA 81, 30 CMR 81 (1961): "In other words control itself [by the military] is not the initiation of a criminal prosecution. We pointed out in United States v. Callahan, 10 USCMA 156, 27 CMR 230, the confinement might be an appropriate beginning of the period for which the Government is accountable in a challenge to the reasonableness of the prosecution. For present purposes, we may assume that confinement, or the formal presentment of the charges, whichever first occurs, determines the beginning of the period."

[150] Despite the contrary provisions of para. 67*a*, of the Manual which provides: "Such objections as that . . . owing to the long delay in bringing him to trial he is unable to obtain witnesses to defend himself . . . are not proper subjects for motions prior to plea." The Court of Military Appeals has held that Article 10 "reiterated" the speedy trial guarantee of the VIth Amendment. United States v. Hounshell, *supra* note 146.

[151] United States v. Davis, 11 USCMA 410, 29 CMR 226 (1960).

speedy trial is raised by way of a motion to dismiss, *"the facts necessary to a proper disposition of the question should be incorporated in the record."* The allied papers in this case show much more clearly than the evidence presented to the law officer, the actual course of events. *All the details should have been presented on the motion to dismiss."*[152]

3. Delay for joinder of new charges. Since the Manual requires a joinder of all known charges at a single trial, a delay in processing a charge in order to investigate also newly discovered offenses is not only justified, but required. If the accused were tried consecutively on known charges he might well complain that he had been prejudiced by a failure to join them all at a single trial.

Illustrative Case

United States v. Batson,
12 USCMA 48, 30 CMR 48 (1960)

While in desertion the accused had engaged in a bad check spree, and the investigating officer was directed to investigate not only the charge of desertion but also eight complaints of larceny by check. This ancillary investigation disclosed a total of 48 possible bad check complaints and continued for about a month when defense counsel requested a speedy trial on the larceny by check charges (which were still being investigated) and on the desertion charge. The convening authority denied the request. The investigating officer had not by that time completed his voluminous inquiry and did not do so until about two and one-half months later when he completed investigation of twenty-one additional charges alleging resisting apprehension and larcenies by check. At the trial, before pleading guilty[153] pursuant to a pretrial agreement with the convening authority, the accused moved to dismiss the original charge of desertion. The law officer denied the motion.

Opinion: The law officer ruled correctly. The delay was necessary to enable the investigating officer to make a thorough investigation. The bad check complaints were material to the element of intent in the original desertion charge. In addition, even if those offenses were not formally charged at first, they were known to the military and proceedings against the accused in separate trials would be contrary to military law and of doubtful benefit to the accused.

. . . . Over a long span of years, the military has followed an authoritative enactment which requires that all known offenses be tried together in a single trial. It is a rule of procedure which the President can prescribe, and paragraph 30*f* of the Manual for Courts-Martial, United States, 1951, states the principle in the following language:

> "Subject to jurisdictional limitations, charges against an accused, if tried at all, should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment."

With that rule in mind, absent some substantial prejudice to the defense of an accused—and no one contends that this accused was handicapped in defending on the merits—it would be reasonable for the investigating officer to wrap up all known offenses in one pretrial package. Moreover, it is interesting to note that the accused in his immediate request for trial or dismissal did not limit his demand to one charge. On the contrary, he included both the desertion and the larceny offenses. Finally the separation of the crimes for trial would not have aided the accused insofar as confinement was concerned. Assuming *arguendo* that the Government had proceeded on the desertion charge, regardless of the outcome, the other offenses would have been pending against the accused and he would have remained in confinement awaiting their disposition.

Accordingly, we hold the law officer did not err in refusing the defense motion for relief based upon the contention accused had been denied his right to a speedy trial.

---

[152] 11 USCMA 410, 414, 29 CMR 226, 230. (Emphasis supplied).

[153] By pleading guilty an accused does not waive the prior error of an improper denial of his motion to dismiss for denial of speedy trial. United States v. Brown, 10 USCMA 498, 28 CMR 64 (1959). [Judges Ferguson and Latimer; Judge Quinn dissenting on this point.]

The certified question, therefore, is answered in the negative.[154]

4. Procedure. Until recently, it seemed clear that, absent any manifest miscarriage of justice the motion to dismiss for lack of a speedy trial is waived if not raised at the trial.[155] In one case, it was even held (alternatively) that as a prerequisite to raising the issue at the trial, the accused must have made some *pretrial* request to anyone in authority—for a speedy trial.[156] The status of both of these rules, however, was substantially impaired by the recent case of *United States* v. *Schlack*.[157] In Schlack, the accused was confined for 96 days without charges being preferred against him. During this period, however, he apparently made no demand for trial, and at the trial he pleaded guilty and made no motion based on denial of speedy trial. This issue was raised for the first time by appellate defense counsel before the Board of Review, which held that the apparent violation of *both* Articles 10 and 33 together with the lack of any government explanation for the delay, in the record of trial, amounted to a denial of *due process*, which was not waived, and which warranted dismissal of the charges. The Court reversed, holding that although the Board was correct on the waiver question, it was improper to dismiss the charges since the government had never had a hearing on the issue. The Court therefore concluded that the case should be returned (for a rehearing? Quaere) to a level at which witnesses could be heard and testimony taken to fully protect the interests of the government, and the accused. In view of the *Schalck* case, it would be wise for trial counsel—in any case involving pretrial confinement and an appreciable delay in trial—to merely establish for the record, as a matter of course, the reasons for the delay. This could be done at an out-of-court hearing. Then, if the defense is asked, and does not wish to contest the issue, the objection would no doubt be waived. In any event, the underlying facts would be set out in the record, rendering the issue susceptible of decision by an appellate court without any further proceedings for that purpose.

If the motion is properly raised at the trial the burden is on the Government to justify on the record of trial any delay in excess of the requirements of Article 10 (stating that "immediate steps" will be taken to try accused) and Article 33 (forwarding completed investigation within eight days of initial pretrial restraint).[158] Although the prosecution has this burden, the trial counsel need not establish that all the delay was necessary, but only that most of the delay was not intentional or due to oppressive design or negligence on the part of the Government.[159] As it raises an interlocutory question (having no logical connection with the guilt or innocence of the accused, nor based on any pre-Constitutional law) the law officer rules finally on the motion in the exercise of his discretion.

5. Finality of ruling. Absent an abuse of discretion, the denial of a motion to dismiss for lack of speedy trial should not be disturbed on review.[160] If the motion is granted, and involves only undisputed facts giving rise to a question of pure law, the convening authority—according to the Manual[161]—has authority to overrule the law officer. Such a procedure seems to conflict with the Code.[162]

---

[154] 12 USCMA 48, 58, 30 CMR 48, 58.

[155] United States v. Hounshell, *supra* note 146.

[156] United States v. Wilson, 10 USCMA 398, 27 CMR 472 (1959); United States v. Lustman, 258 F2d 415 (2d Cir. 1958). *But see* United States v. Wilson, 10 USCMA 387, 27 CMR 411 (1959): "In the military, application of the rule of waiver, where the accused is confined, has little to recommend it."

[157] 14 USCMA 371, 34 CMR 151 (1964).

[158] United States v. Brown, 10 USCMA 408, 28 CMR 64 (1959).

[159] United States v. Davis, *supra* note 151.

[160] See United States v. Brown, *supra* note 158.

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

[162] See discussion in section V, ch. XI, *supra*. In the Federal circuits there is a split of authority on whether the Government may appeal the grant of a motion to dismiss for lack of speedy trial under the statutory provisions authorizing appeal to the United States Supreme Court from a ruling granting a motion to dismiss in bar of further trial (18 USC § 3731). Since the motion is granted under Fed. R. Crim. P. 48(b), the Ninth Circuit holds the ruling is nonappealable. United States v. Apex Distributing Company, 270 F. 2d 747 (9th Cir. 1959); United States v. Heath, 260 F. 2d 623 (9th Cir. 1958). The Court of Appeals for the District of Columbia takes a contrary view. United States v. Williams, 163 F. 2d 695 (D.C. Cir. 1947). *Cf.*, Mann v. United States, 304 F. 2d 3940 (D.C. Cir. 1962).

1. General. Pardon is an Executive power to be exercised personally by the President of the United States. It should not be confused with his *remission* power which may wipe out the punishment but not—as may a pardon—the offense itself.[163] Special pardons (to named individuals) have been rarely issued;[164] general pardons (amnesty to a specified group of persons) in the past were not so rarely exercised,[165] but even a declaration of amnesty must be made personally by the President.[166] Finally, pardon is not to be confused with "constructive pardon" (or condonation), which can be exercised by specified commanders.[167]

2. Nondelegable Presidential Power.

Illustrative Case

United States v. *Batchelor*, 7 USCMA 354, 22 CMR 144 (1956)

The accused was convicted of charges of misconduct while a Korean prisoner of war. On the last day for the exchange of prisoners an American major of the United Nations Explainer Group announced to the group of American POWs, including the accused, who were still in enemy custody, that they would not be harmed and had nothing to fear by allowing themselves to be repatriated to the United States. On appeal it was contended that the major had been an authorized agent of the President and that his announcement amounted to an offer of general amnesty or pardon which was accepted by the accused when the latter returned to United States control.

Opinion: Under Article 2, Section 2, of the United States Constitution, the general pardon power is nondelegable and may be exercised only by the President of the United States. Thus, the major's announcement did not amount to an offer of amnesty.

Note. The Court made no comment on whether the plea was waived by failure to raise it at the trial. Such comment was probably unnecessary in view of the fact that a pardon wipes out the crime, retrospectively; thus the issue may be raised at any stage of the proceeding, including the appellate level, for the first time. In this respect the Manual may be in error when it states that "A pardon . . . exempts the individual . . . from punishment. . . ." [168]

3. Promise not to prosecute. Although certain commanders may "condone" desertion,[169] only the President may pardon. Therefore, a promise not to prosecute an offense is not binding under normal circumstances.

Illustrative Case

United States v. *Werthman*, 5 USCMA 440, 18 CMR 64 (1955)

The accused's squadron commander agreed not to prefer charges for larceny after accused had confessed. The new squadron commander, however, preferred charges which resulted in accused's conviction by general court-martial. The law officer denied the defense motion to dismiss, on grounds of military due process.

Opinion. The law officer did not err. Dismissal of charges prior to trial does not bar subsequent trial (citing paragraph 56 of the Manual) and here charges were not even preferred. Only the President can grant an express pardon. While there might be a valid legal theory of constructive pardon it could be used only by an officer exercising general court-martial jurisdiction, and then only to condone desertion. There was no breach of faith by the original squadron commander. He kept his word and could not bind his successor. Nor was there an ethical lapse by the Government. The original promise not to prosecute was gratuitous, without consideration, and was merely an act of compassion.

Note. Dismissing a charge pursuant to an executed pretrial agreement to plead guilty to other offenses would probably create an equitable, if not a legal bar, to subsequent trial for that charge.

4. Procedure. "A pardon may be interposed in bar of trial by a motion to dismiss." [170]

---

[163] Winthrop, *Military Law and Precedents* (2d Ed., 1920) at 467.
[164] *Id.*, at 269.
[165] *Ibid.*
[166] United States v. Batchelor, 7 USCMA 354, 22 CMR 144 (1956).
[167] Winthrop, *op. cit. supra* note 163, at 269.
[168] MCM, 1951, para. 68*e*.
[169] Section VII, *infra*.
[170] MCM, 1951, para. 68*e*.

Section VII. PARAGRAPH 68*f*, MCM, 1951, CONSTRUCTIVE CONDONATION OF DESERTION

1. General. Unconditional restoration of a deserter to duty by (a) an officer exercising general court-martial jurisdiction, (b) with knowledge of the offense, operates henceforth as a bar to trial.[171]

2. AWOL not condoned.

Illustrative Case

United States v. *Minor*, 1 USCMA 497, 4 CMR 89 (1952)[172]

Accused was convicted for a war-time AWOL in Korea from 18 January 1951 to 4 March 1951. After he was found guilty he testified that on return from his AWOL he served with his original unit until the date of trial, but offered no evidence to show that the division commander (exercising general court-martial jurisdiction) knew of the restoration to duty. The defense made no motion to dismiss at the trial; on appeal, appellate defense counsel urged the charge be dismissed.

Opinion. Conviction affirmed. Historically constructive condonation could be raised only in bar of a charge of desertion, and it is doubtful that the Court could create a defense to the lesser included offense of AWOL as legislation would be necessary. In any event, the issue was not raised as there was no showing that the officer having general court-martial jurisdiction over the accused had knowledge of accused's restoration to duty. Finally, defense counsel's failure to raise the issue at the trial precludes it from being raised on appeal.[173]

Note. Since Congress did not create the defense of condonation to desertion the fear of judicial legislation should not preclude the condonation of AWOL—a logical result since it is a lesser included offense of desertion.

3. Procedure. The motion must be asserted at the trial or it is waived.[174] The law officer decides the motion.[175] The prosecution may rely on the lack of the required entry in the accused's service record to be made when desertion is condoned.[176]

Section VIII. PARAGRAPH 67*a*, MCM, 1951, PROMISED IMMUNITY [177]

In the military the accused is occasionally given a "grant," [178] or "promise" [179] of immunity from prosecution to testify at the trial of an accomplice or common wrongdoer. This practice has been sanctioned by the Manual which states that such a promise of immunity can later be set up as a "defense" [180] if the witness is subsequently tried in spite of the previous guarantee of immunity.

The Code does not mention such a defense, nor is a similar practice permissible in federal civilian courts in absence of statutory authorization; [181] when no such authority exists, the accused's remedy is to obtain a continuance and judicial recommendation to the President for pardon.[182] Even when statutory authority exists, to be valid the statute must accord the same sweeping immunity as covered by the Constitutional right against self-incrimination.[183]

Even with the doubtful assumption that the Manual authority to grant immunity has a firm statutory, legal basis, still it does not seem to

---

[171] *Id.*, para. 68*f*.

[172] *Accord*, United States v. Walker, 10 USCMA 501, 4 CMR 93 (1952).

[173] Citing Winthrop, *op. cit. supra* note 162, at 270, and MCM, 1951, 67*a*. Note: Constructive condonation does not wipe out the crime but only excuses it. Thus it could not be raised the first time on appeal; *accord*, United States v. Walker, *supra* note 171, and United States v. Perkins, 1 USCMA 502, 4 CMR 94 (1952).

[174] United States v. Perkins, *supra*, note 173.

[175] An Army board of review has stated that where the facts in support of the motion are disputed, the issue should be submitted to the members. See CM 359019, Linerode, 11 CMR 262 (1952), citing United States v. Ornelas, *supra* note 8. The board's rationale was that any disputed issue of fact raised on a motion in bar of trial should be submitted to the members, regardless of its logical connection with the guilt or innocence of the accused.

[176] See AR 640-201, 20 Sep 61.

[177] For an excellent and more complete discussion of this ground as the subject of a bar of trial see Grimm, "Grants or Promises of Immunity under Military Law" a thesis submitted to The Judge Advocate General's School, U.S. Army (1957).

[178] MCM, 1951, para. 56*c*, 150*b*.

[179] MCM, 1951, para. 67*a*, 148*e*.

[180] MCM, 1951, para. 56*c*, 67*a*.

[181] United States v. Ford (Whiskey Cases), 99 U.S. 594 (1878).

[182] *Ibid.*

[183] Counselman v. Hitchcock, 142 U.S. 547 (1892).

give the necessary scope of protection afforded by Article 31 where the accused has an absolute right not to testify as to *any* matter which will incriminate him. For instance, the Manual states that a witness may be forced to answer an incriminating question.[184]

> if, because a grant of immunity . . . he can successfully object to being tried for the same offense as to which the privilege is asserted.

and further provides[185]

> The fact that an accomplice testifies for the prosecution does not make him afterwards immune to trial *except to the extent* that immunity may have been promised him by an authority competent to order his trial by general court-martial.

Thus, according to these provisions, the grant of immunity need not be complete, and an accused validly may be forced to waive his right to the Article 31 protection on the basis of a limited promise of immunity. That is, if he is promised immunity for offense A, he can be forced to testify as to that offense even though such testimony might contribute later to the proof against him of a distinctly different offense B. In such a case, according to the Manual, he could not validly plead "promise immunity," since the "promise" ran only to offense A.[186] In such a case perhaps accused's alternative remedy would be to move to exclude all his testimony at the first trial on the grounds that the promise of immunity should be as broad as the Article 31 guarantee. Since, however, even this remedy would not exclude leads or other information obtained through the testimony, and thus would not give the witness protection equivalent to Article 31, it remains highly questionable whether a witness could be compelled to testify (on pain of contempt) on the basis of a limited promise of immunity.

It thus behooves both the Government and the accused to scrutinize carefully the offer of immunity to insure that each party understands completely the effect of the contract. Regardless of the legality of the Manual provisions, the promise or grant of immunity, if sufficiently broad, obviously has great practical advantages to the accused because the persons charged with the administration of military justice will respect its terms out of at least ethical reasons. Where, however, Federal authorities are interested in the prosecution,[187] out of fairness to the accused the limitations of the promise of immunity should be realized. It is doubtful that a federal judge would be legally bound by the military commander's promise nor is it certain that a United States attorney would be bound to respect its terms.

Finally it must be remembered that although a convening authority is not disqualified from referring a case to trial as a result of securing immunity for a witness,[188] he is disqualified from reviewing the record of trial.[189]

Section IX. PARAGRAPH 68*g*, MCM, 1951, FORMER PUNISHMENT

1. General. Article 15 of the Code authorizes commanding officers to impose fairly substantial punishment on members of their command for "minor offenses" without resort to trial by court-martial.[190] Such punishment is called nonjudicial punishment, and the procedure for imposing it is summary. Since such punishment is not a trial or judicial proceeding, an individual who has been punished under Article 15 is not

[184] MCM, 1951, para. 150*b*.

[185] MCM, 1951, para. 148*a*.

[186] In ACM 10767, Guttenplan, 20 CMR 764 (1955), accused was granted immunity from prosecution as to certain listed offenses in return for his testimony as a witness. Part of this testimony admitted some prior false statements in relation to the listed offenses. Accused was then later tried for offenses committed after the grant of immunity. His motion to dismiss was denied. After the defense emphasized the accused's good character the prosecution was allowed to rebut this with the accused's testimony as a witness at the other trial, wherein accused admitted to making false statements. *Opinion:* The grant did not cover the latter offenses and accused's testimony was admissible to show his knowledge of the extent of the grant.

[187] See AR 22-160, 7 Oct 55, concerning concurrent investigation of crimes over which the Department of Justice and agencies of the Department of Defense have a mutual interest.

[188] United States v. Moffett, 10 USCMA 169, 27 CMR 243 (1959).

[189] United States v. White, 10 USCMA 68, 27 CMR 137 (1958).

[190] UCMJ, Art. 15, 10 USC § 815, *as amended*, 76 Stat. 447, 87th Cong., 2d Sess. (1962). This amendment completely revised and expanded Art. 15 and hereinafter all references to Art. 15, *as amended*, unless otherwise specified. In implementation of the "new" Art. 15 and the powers therein delegated to the President and Secretaries concerned, the Manual provisions relating to Art. 15 were completely rewritten by Exec. O. 11081, Jan. 29, 1963 (eff. 1 Feb 63), and the Army published AR 22-15 (1 Feb 63). All references to the Manual hereinafter are to the Manual *as so amended*, unless otherwise specified.

technically protected from subsequent trial for the same offense by the former jeopardy provisions of Article 44.[191]

By negative implication, however, Article 15(f) of the Code provides that the imposition and enforcement of Article 15 nonjudicial punishment *for a minor offense* may be interposed in bar or trial for the same offense.[192] The Manual explicitly so provides.[193] The language of the Code and Manual further implies that such punishment may be pleaded in bar of trial for *any other minor* offense arising out of the same act or omission.[194] The Manual also states that the imposition of nonjudicial punishment bars subsequent nonjudicial punishment for the same offense.[195]

In addition to Article 15, Article 13 of the Code provides that persons held in pretrial confinement may be "subjected to minor punishment . . . for infractions of discipline." [196] It has been held that an accused subjected to disciplinary punishment for a minor offense under this Article, may plead such punishment in bar of trial for the same offense—Congress' intent in this regard being construed in *pari materia* with Article 15.[197]

2. Definition of "Minor Offense." The Code does not define the term "minor offense." The former Manual provisions defined "minor offense" in the following terms.

> Whether an offense may be considered "minor" depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking the term includes misconduct *not involving moral turpitude* or any greater degree of criminality than is involved in the average offense tried by summary court-martial. An offense for which the punitive article authorizes the *death penalty* or for which confinement for *one year or more* is authorized *is not a minor offense.* Offenses such as larceny, forgery, maiming, and the like involve moral turpitude and are *not to be treated as minor.* Escape from confinement, willful disobedience of a noncommissioned officer or petty officer, and protracted absence without leave are offenses which are more serious than the average offense tried by summary courts-martial and *should not ordinarily be treated as minor.*[198]

Within the past year, however, Congress greatly expanded the powers of the commanding officer to impose nonjudicial punishment

---

[191] See United States v. Fretwell, 11 USCMA 877, 29 CMR 193 (1960); ACM 6516, Yray, 10 CMR 618 (1953).

[192] UCMJ, Art. 15(f): "The imposition and enforcement of disciplinary punishment under this article for any act or omission is *not a bar* to trial by court-martial for a *serious* crime or offense growing out of the same act or omission." (Emphasis added.) MCM, 1951, para. 128*b* repeats the same language. The Code and Manual also provide that if Art. 15 punishment has been improperly enforced for a *serious* offense, at a trial for such offense the accused may show the nonjudicial punishment he has already incurred therefor, and that will be taken into account in mitigation of the sentence, should he be found guilty. *Ibid.*

[193] MCM, 1951, para. 68*g*: "Non-judicial punishment previously imposed under Article 15 for a minor offense may be interposed in bar of trial for the same offense." *Note* that here the Manual speaks only of punishment "imposed," whereas Art. 15(f), and para. 128*b*, of the Manual, quoted *supra* note 191, speak of "imposition *and enforcement*." There may be a question, therefore, whether imposition of nonjudicial punishment without any enforcement thereof, may be pleaded in bar of trial. Cases decided under prior law held that enforcement of the punishment *in part* would suffice to bar trial, ACM 6516, Yray, 10 CMR 618 (1953), and that once punishment had been enforced an attempt to "withdraw" it by setting it aside would be ineffective to remove the bar to trial, because the punishment had nevertheless been "inflicted," NCM 58-01699, Mahoney, 27 CMR 898 (1958) (letter of reprimand). These cases are still good law. Whether imposition of nonjudicial punishment without *any* enforcement would bar trial appears to be a moot question, for all practical purposes, since most such punishment includes an admonition or reprimand, and under the Regulations those punishments are normally enforced (executed) instantaneously when the punishment is imposed. See AR 22-15, para. 10.

[194] See *supra* note 191. On this point, it is true that para. 68*g* of the Manual seems to provide otherwise, but the example there given shows clearly that the draftsmen only intended to permit trial for a *serious* offense, following nonjudicial punishment for *another minor* offense arising from the same act or omission.

[195] MCM, 1951, para. 128*d*. See also AR 22-15, para. 8*e*: "Several minor offenses arising out of substantially the same transaction will not be made the basis of separate actions under Article 15." Although the regulation literally applies only to successive Art. 15 proceedings for minor offenses, it might well apply to estop Army convening authorities from initiating *prosecution* for a minor offense, following nonjudicial punishment, for another minor offense arising from substantially the same transaction. This would be a somewhat broader protection for the accused than the "same act or omission" test implied in the Code and Manual, discussed *supra*. The Regulation might be interpreted to have this effect because if an accused has been punished for an offense under Art. 15, it would be strange to find him protected against further Art. 15 punishment for a closely related minor offense, but subject to trial therefor. Such a rule would protect him against a lesser danger while subjecting him to a greater.

[196] UCMJ, Art. 13.

[197] United States v. Williams, 10 USCMA 615, 28 CMR 181 (1959) (disciplinary segregation on a reduced diet); but trial would not be barred by purely administrative segregation that was not imposed as punishment. Ibid. Under Article 15, *as amended*, however, (for purposes of subsequent trial of an offense previously punished) the concept of a "minor offense" under Article 15 is properly broader than that of a "disciplinary infraction" under Article 13. The reasons for this are amplified in the text, infra, para. 2, *a*, and specifically discussed in note 213, *infra*.

[198] MCM, 1951, para. 128*b*, prior to amendment (emphasis added).

under Article 15.[199] The avowed purposes of this change were to (1) correct, educate, and reform minor offenders, (2) to preserve the minor offender's service record from unnecessary stigmatization by criminal convictions, and (3) to promote speedy and effective discipline for minor offenses with less personnel than are necessary for trial by court-martial.[200] In furtherance of these salutary and remedial purposes, the Manual was amended to broaden the definition of "minor offenses"—appropriate for disposition under Article 15. As amended, the Manual now provides:

> The term offense, as used in connection with the authority to impose disciplinary punishment under Article 15 for minor offenses, includes only those acts or omissions constituting offenses under the punitive articles of the Uniform Code of Miltiary Justice. The nature of an offense, and the circumstances surrounding its commission, are *among the factors* which must be considered in determining whether or not it is minor in nature. *Generally*, the term includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by summary court-martial. The term "minor" *ordinarily* does not include misconduct of a kind which, if tried by general court-martial, could be punished by *dishonorable discharge* or confinement *for more than one year*." [201]

A detailed comparison of the old and new Manual provisions is worthwhile. It reveals that:

a. the old Manual "rules" have been drastically reduced to the status of general *guidelines* only.

b. the old criterion regarding "moral turpitude" has been completely abandoned.

c. the old provision that offenses punishable by death are "not minor" has been dropped.

d. the rule that offenses punishable by "one year or more" are "not minor" has been substantially changed. It now provides that *ordinarily* offenses punishable by dishonorable discharge or confinement for "*more than* one year" are not minor.

e. the only criteria that remain unchanged are the provisions that all the facts and circumstanes must be considered, and that generally a "minor" offense involves no greater degree of criminality than the average offense tried by summary court-martial. Plainly, however, the latter criterion has been greatly *diluted* by the expanded guidelines concerning maximum punishment, *supra*—if an offense punishable by dishonorable discharge or confinement for more than one year (or even death) may properly be considered "minor," depending on the circumstances, then it is clear that felonies and general court-martial type offenses are contemplated as within the legitimate zone of consideration.

The Army regulation loosens this definition still further in implementation of the remedial purposes of the new Article 15:

> Although the term "minor" ordinarily does not include misconduct of a type which, if tried by a general court-martial, could be punished by dishonorable discharge or confinement for more than one year, *this is not a hard and fast rule*, and due regard to all the circumstances of the offense might indicate that action under Article 15 would be appropriate even in a case falling within this category. *Violations of or failures to obey general orders or regulations* may properly be considered as constituting minor offenses when the *prohibited conduct is itself of a minor nature* when considered apart from the fact that it is prohibited by a general order or regulation.[202]

In addition, it is provided that nonjudicial punishment should be administered at the lowest level of command commensurate with the needs of justice and discipline,[203] that the commander "must thoroughly evaluate each case on an individual basis"[204] and that (assuming

---

[199] See *supra* note 189.

[200] See Sen. Rep. No. 1911, 87th Cong., 2d Sess. (Aug. 28, 1962); H.R. Rep. No. 1612, 87th Cong., 2d Sess. (April 17, 1962); MCM, 1951, para. 129*a*, *b*; Miller, *The New Article 15*, 18 ARMY No. 6 at 18, 28 (Jan. 1968).

[201] MCM, 1951, para. 128*b* (emphasis added).

[202] AR 22-15, para. 3*d* (emphasis added). It will be noted that the Regulation does not mention the "summary court-martial" guideline of the Manual.

[203] *Id.*, para. 6.

[204] MCM, 1951, para. 129*a*.

administrative, nonpunitive measures are considered insufficient) minor offenses "should ordinarily" be dealt with under Article 15, "unless it is clear that only trial by court-martial will meet the needs of justice and discipline."[205]

Thus, it is apparent that in furtherance of the Congressional policies behind the expansion of Article 15, the concept of "minor offense" has been greatly expanded. The flat rules of the old Manual have been replaced by an expanded and highly flexible set of guidelines. A synthesis of the Manual and Army regulation would seem to produce the following general outline of the "minor offense" concept:

a. Offenses normally tried by summary court are minor.

b. Offenses normally tried by special court-martial (or which carry a maximum punishment of a bad conduct discharge or confinement for one year) may ordinarily be considered minor.

c. Offenses normally tried by general court-martial (or punishable by dishonorable discharge or confinement for more than one year) are *ordinarily not* minor, *but:*

(1) this is not a hard and fast rule, and all the facts and circumstances of the particular case must be considered, and

(2) violations of general orders or regulations are to be evaluated by the seriousness of the underlying conduct involved.

For instance, such offenses as larceny and violations of general orders may now quite appropriately be considered "minor" depending on the circumstances of the case.[206] In short, according to the Manual and Regulation, there is no offense which may never be considered "minor."[207] Great emphasis is placed on all the facts and circumstances of the individual case, as well as the discretion and judgment of the individual's immediate commanding officer.

The thrust of these changes is to remove any *definite* criteria for reviewing the correctness of the commander's determination that the offense (and the offender) is "minor." It is inevitable that under the increased emphasis on correction and rehabilitation without resort to criminal trial, commanders are going to be imposing nonjudicial punishment in many more cases in which reasonable men could differ over whether the offense was "minor" under all the circumstances.[208] The effectiveness of the new Article 15 must in great measure rest on the discretion and good judgment of commanders at the lowest level of command, who are closest to the situation and the individual accused. It may be expected that the new expanded Article 15 will have its impact on the procedure for raising prior nonjudicial punishment in bar of subsequent trial for the same offense.

3. Procedure. As with other motions to dismiss, a motion to dismiss raising former nonjudicial punishment should ordinarily be made before plea is entered, but may be made at any time before conclusion of the hearing of the case.[209] Presumably, the law officer would rule finally on the motion.[210] If no motion is made at this stage, then any objection to trial on the ground of former punishment is waived.[211]

Normally the burden would be on the accused to establish the validity of his motion to dismiss.[212] In the case of former punishment under the new Article 15, however, it may well be that

---

[205] *Ibid.*

[206] See Miller, *supra* note 200.

[207] Nevertheless, since the offenses of murder and spying carry a mandatory minimum sentence, it must be assumed that those offenses may never properly be treated as minor. See UCMJ, Arts. 118(1) and (4), 106. Furthermore, it is difficult to conceive how a capital offense could be treated as "minor" under most circumstances.

[208] Compare the analysis in NCM 58-01699, Mahoney, 27 CMR 898 (1958).

[209] MCM, 1951, para. 67*a*. One can conceive of a situation in which the motion would not be in order until *after* findings; *i.e.*, when a serious offense is charged, but the court finds the accused guilty only of a lesser included minor offense, for which nonjudicial punishment has already been imposed.

[210] See ch. XII, *supra*. If an issue of fact is raised by conflicting preliminary evidence on the motion, the dictum of United States v. Ornelas (*supra*, notes 10-12 and accompanying text) would require that the issue be submitted to the court members for decision. The Manual takes an opposite view. In support of the Manual rule, it should be noted that a motion to bar based on former nonjudicial punishment was not known to the common law, and a civilian would not, therefore, have a constitutional right to jury determination of the issue. See ch. XII, *supra*.

[211] See ch. XII, *supra*. This is the Manual view. MCM, 1951, para. 67*a*. In United States v. Harding, 11 USCMA 674, 29 CMR 490 (1960), a majority of the Court declined to base its opinion on a finding of waiver, but stated: "We do not disagree with the reasoning of the board of review on the question of waiver." Judge Ferguson, however, refused to apply waiver in that case on the grounds that a timely motion is not necessary when a pure question of law would be affected thereby.

[212] See ch. XII, *supra*.

the accused need only establish that nonjudicial punishment for the same offense has been imposed and enforced (*i.e.*, that his commander considered the offense "minor" in view of his character and all the facts and circumstances of the case); the burden would then fall on the prosecution to demonstrate that the commander *abused his discretion* by considering the offense "minor." This would seem to be the net impact of the broadened definition of "minor offense", the increased emphasis on the commander's judgment of "all the facts and circumstances," and the Congressional and Presidential policies involved, which have been discussed in paragraph 2, *supra*.

Thus it would appear that henceforth, the accused may make a *prima facie* showing in support of the motion to dismiss by simply showing the nonjudicial punishment imposed, and the prosecution may rebut it only by showing an abuse of discretion on the part of the officer who imposed the punishment. This result seems both desirable and appropriate, certainly in cases in which the offense in question comes within the suggested guidelines of the Manual and Regulations, discussed *supra*. The original commander's decision to deal with the offense under Article 15 is an amalgam of policy, judgment, and complex factual determination, which is entitled to great weight. If, in any particular case, reasonable men could differ over whether the offense is "minor" under all the facts and circumstances, then the commander did not abuse his discretion in considering it "minor," and the nonjudicial punishment should bar trial for the offense.

For the reasons discussed in this section, cases under prior law—discussing the minor offense concept—should be approached with extreme caution.[213] Because of the sweeping remedial changes to Article 15, the Court should, and probably will make a fresh start on this problem.

---

[213] Such cases as United States v. Williams, 10 USCMA 615, 24 CMR 181 (1959); NCM 58-01699, Mahoney, 27 CMR 898 (1958); ACM 6516, Yray, 10 CMR 618 (1953) are undoubtedly still good law. It seems probable, however, that cases such as United States v. Fretwell, 11 USCMA 377, 29 CMR 193 (1960) would be decided differently under present law.

On the other hand, a case such as United States v. Harding, 11 USCMA 674, 29 CMR 490 (1960) might well be decided the same way under present law, since Harding involved former "minor punishment . . . for infractions of discipline," *under Art. 15*, rather than nonjudicial punishment under Art. 15. Although in United States v. Williams, *supra*, the Court had equated the two Articles for purposes of determining what was a "minor offense," (see *supra* note 197, and accompanying text) the concept of "infractions of discipline" appropriate for action under Art. 15 has not kept pace with the dramatic expansion of the "minor offense" concept under Art. 15.

The policy reasons for differentiating between the two Articles are crystal clear: the commander, under Article 15, is faced with the problem of taking swift and firm action to maintain discipline and order in the confinement facility—a community of persons all already charged with offenses serious enough to warrant confinement and trial, and who are bound for trial anyway. By contrast, the company commander does not have a unit composed of alleged felons, and is in a position to make a calm and deliberate election between Article 15 and trial, based on his knowledge of the offender, and all the circumstances of the offense, and with a view toward correction, rehabilitation, and the avoidance of unnecessary trials.

Because the purposes of the two Articles are so different, a casual attempt to interchange the "minor offense" concept between the two (for purposes of barring subsequent trial) can only serve to confuse and impair both provisions, by hamstringing the confinement officer in his efforts to maintain order, or by frustrating the company commander, in his efforts to effectuate the individualized, rehabilitative and remedial purposes of Article 15.

CHAPTER XIV

PLEAS

References: Article 45, UCMJ; paragraph 70, MCM, 1951.

Section I. INTRODUCTION

After the parties have been afforded the opportunity to make motions,[1] and to obtain proper relief thereby,[2] the trial counsel calls upon the accused to plead.[3] The plea is not part of the arraignment.[4] Unlike the civilian procedure where a jury is impanelled after the plea,[5] the court members who are to try the case have already been selected.[6] Neither the Code by implication, nor the Manual authorize the law officer to accept a plea of *noll contendere*.[7] In this respect the Manual provides: [8]

> In court-martial procedure, pleas include guilty, not guilty, and pleas corresponding to permissible findings of lesser included offenses.

Section II. PARAGRAPH 70*a*, MCM, 1951, EFFECT OF PLEA

1. Plea of Not Guilty. A plea of guilty or not guilty waives the right to make motions for appropriate relief,[9] although the law officer for good cause shown can grant relief from such waiver.[10] Thus a plea of not guilty waives any objection to the misspelling of the accused's name in the specification,[11] although such a plea does not relieve the prosecution of the burden of proving that the accused is the same person named in the specification when the defense raises that issue as a defense, instead of as a motion for appropriate relief.[12]

2. Standing Mute. Unlike federal criminal procedure,[13] in military criminal procedure it has been stated that the plea of *nolo contendere* is not authorized.[14] If the accused refuses to plead, a plea of not guilty will be entered for him.[15] In such a case the Manual provides that "an accused does not waive any objections otherwise waived by a plea."[16] Thus, according to the Manual, the accused by standing mute does not waive the right to make any motions for appropriate relief. Such a waiver might occur, however, if not raised prior to the termination of trial.[17]

---

[1] See chs. XI–XIII *supra;* MCM, 1951, app. 8*a*, p. 508.

[2] *Ibid.*

[3] MCM, 1951, app. 8*a*, p. 508.

[4] MCM, 1951, para. 65.

[5] The civilian's constitutional right to a jury trial is waived by a guilty plea. *Ex parte* Sherwood, 177 F. Supp. 411 (D.C. Ore. 1959, cert. denied, 363 U.S. 851). Thus it would be a wasteful procedure to impanel a jury without first ascertaining the accused's plea. *Cf.*, Fed. R. Crim. P. 23.

[6] The opportunity to challenge is presented before motions. See chs. X, XI, *supra.*

[7] CM 351498, Davis, 4 CMR 195 (1952). A Federal trial judge has the discretion to accept or reject such a plea. Fed. R. Crim. P. 11.

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

[9] *Ibid.*

[10] MCM, 1951, para. 67*b*, 69*a*.

[11] CM 318728, Ohmuru, 68 BR 23 (1947).

[12] But see CM 387850, Slabonek, 21 CMR 374 (1956), *pet denied*, 21 CMR 240: Accused's plea of not guilty to a desertion charge, together with independent proof, showed the accused was the person named in the morning report as initially AWOL. It is submitted that this conclusion ignores the principle that a plea of not guilty "contraverts the existence of every fact essential to constitute the crime charged." Davis v. United States, 160 U.S. 469 (1895). The Manual does state that a plea waives objection to a "misnomer of the accused," MCM, 1951, para. 70*a*. But such an objection would not dispute the fact that accused was the person named in the specification.

[13] Fed. R. Crim. P. 13.

[14] CM 351498, Davis, 4 CMR 195 (1952).

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

[16] *Ibid.*

[17] MCM, 1951, para. 67. In civilian state procedures, by standing mute, the accused admits nothing as to jurisdiction over the person. See Abbott, *Criminal Trial Practice* (4th ed., 1939) at 77, 78.

3. Plea of Guilty. *a. General.* An accepted voluntary plea of guilty, made providently and with knowledge of its consequences, constitutes a judicial confession to all material allegations to which the plea relates.[18]

b. Effect on prior motions. The plea of guilty does not waive the effect of a prior erroneous denial of a motion to dismiss.[19] Thus where an accused pleaded guilty following the law officer's erroneous denial of a motion to dismiss for lack of speedy trial, the issue was reserved for consideration on appeal.[20]

c. Effect on requirement of proof. The Manual provides that a plea of guilty "authorizes conviction of the offense *to which the plea relates* without further proof."[21] Thus, and because appellate authorities have refused to apply the doctrine of res judicata at the same trial, the present rule is that where the accused pleads guilty to one specification and not guilty to another, a fact admitted by his guilty plea to the first specification must nevertheless be proved by the Government on the trial of the second specification, even though the fact is the same.

Illustrative Case

United States v. *Caszatt,*
11 USCMA 708, 29 CMR 521 (1960)

The accused pleaded guilty to willfully disobeying Sergeant T's order to go to a certain classroom and not guilty to the willful disobedience of Captain L's subsequent and identical order, given shortly after the sergeant's order. The law officer instructed the court that it could permissibly infer from accused's admission that he "willfully" disobeyed the sergeant's order, that he also possessed the same intent when he disobeyed captain's order. The accused was convicted of both charges.

Opinion. Conviction of willfully disobeying the Captain's order reversed.

Service boards of review have consistently held that admissions implicit in a plea of guilty to one offense cannot be used as evidence to support the findings of guilty of an essential element of a separate and different offense. United States v. Day, 23 CMR 691; United States v. Dorrell, 18 CMR 424; United States v. Hughes, 7 CMR 229; United States v. Steiner, 3 CMR (AF) 160. The rule was stated in the *Dorrell* case as follows:

> "We are constrained to hold that an accused's plea of guilty to one offense is not available as evidence tending to prove an entirely different offense when neither offense is included in the other as a lesser offense thereof.
>
> * * * * *
>
> ". . . To hold a plea of guilty to one offense as an admission supplying a fact common to that offense and also to a completely separate offense to which the accused has pleaded not guilty would in effect deprive the accused of a substantial right accorded him by law.
>
> "We do not mean to infer that a plea of guilty to a lesser included offense cannot be used to establish facts and elements common to both the greater and lesser offense within the same specification (with the possible limitation on a plea of guilty to unauthorized absence within a charge of desertion as specifically provided for by para. 164*a*, MCM, 1951). See NCM 183, Wasco, 8 CMR 580. We are unable, however, to find any basis in law for using a guilty plea to one specification to supply proof of any of the essential elements of another specification."

The rule of exclusion stated in the cited cases is consistent with the principle that evidence of the commission of another offense of even the same general character is not normally admissible as evidence of guilt of another offense. See United States v. Pavoni, 5 USCMA 591, 18 CMR 215; United States v. Shipman, 9 USCMA 665, 26 CMR 445. Nor is proof of the conviction of an offense admissible as evidence to establish the existence of a fact required in the prosecution of another offense under the principle of *res judicata.* Although it has been said

---

[18] MCM, 1951, para. 70*b* (2).

[19] The plea does waive motions for appropriate relief. MCM, 1951, para. 70*a*.

[20] United States v. Brown, 10 USCMA 498; 28 CMR 64 (1959); see also United States v. Fretwell, 11 USCMA 377, 29 CMR 193 (1961) (motion to dismiss based on prior imposition of nonjudicial punishment).

[21] MCM, 1951, para. 70*b* (2). (Emphasis supplied.)

that the doctrine of *res judicata* applies in the criminal as well as in the civil law, no authority has been presented to us, and we know of none, which entitles the Government to use a conviction, or a judicial confession of one offense, as affirmative proof of the existence of an essential fact in the prosecution for another offense. See Sealfon v. United States, 332, US 575, 92 L ed 180, 68 S Ct 237. The doctrine is a rule of estoppel which operates against the Government, not the accused.

Note. In *Dorrell,*[22] the accused pleaded guilty to one specification of AWOL and not guilty to negligently missing his ship's movement during the same period of AWOL. It was held that his plea of guilty to AWOL could not by itself establish the proof that he was absent when the ship sailed. The basis of the decision was the wording of paragraph 70*b*(2) of the Manual; there it is stated that the plea of guilty admits only those facts of the specification to which the plea relates. Under this reasoning, however, a plea of guilty to the lesser included offense of AWOL should obviate proof of the elements of AWOL when the prosecution attempts to prove the greater offense of desertion—to which accused has pleaded not guilty. In this respect, the Manual rule of evidence somewhat ambiguously provides:[23]

> However, a plea of guilty of absence without leave to a charge of desertion is not in itself a sufficient basis for conviction of desertion. No inference of an intent to remain absent permanently arises from any admission involved in the plea, and to warrant a conviction of desertion. . . . *evidence of a prolonged absence or of other circumstances must be introduced* from which the intent to desert can be inferred. [Emphasis supplied.]

Read literally, this portion of the Manual is susceptible of the interpretation that the plea of guilty to AWOL cannot supply the necessary proof of those elements of the charge of desertion; on the other hand it could be taken to mean that the issue of intent must be proved, although in doing so the admitted fact of AWOL might be used to support proper inference. The latter seems more reconcilable with the Court of Military Appeals decisions analyzing the effect of pleading guilty to other lesser included offenses.[24]

d. To a capital offense. For a definition of a "capital offense" see paragraph 15, MCM, 1951. An accused may not legally plead guilty to such an offense.[25] When he has been improperly allowed to do so, and convicted thereon, regardless of the sentence imposed,[26] his plea of guilty has not obviated proof of the offense, and the conviction must be reversed.[27] The effect of the error may not be erased retroactively by the general court-martial convening authority then declaring the case noncapital.[28]

Section III. PARAGRAPH 70*b*, MCM, 1951, PROCEDURE ON GUILTY PLEA

1. General. Since a plea of guilty amounts to a confession of guilt, the record of trial must show that the plea was voluntary, and made with full appreciation of its consequences. This is particularly true in the case of a plea made as a result of a pretrial agreement with the convening authority, wherein the latter, in return for accused's offer to plead guilty, promises to take some ameliorative action with respect to the charges (such as reducing or dropping a charge) or the sentence (agreeing to approve no more than a maximum stipulated punishment). In such a case, the apparent inducement for pleading guilty creates an inference that the plea was involuntary, and thus requires a clear showing that it was made with full consciousness of guilt.

a. Agreements. a. General. Nothing in the Manual specifically authorizes the convening authority to enter a pretrial contract with the accused, in

---

[22] NCM 881, Dorrell, 18 CMR 424 (1954).

[23] MCM, 1951, para. 164*a*.

[24] *E.g.*, United States v. Owens, 11 USCMA 38, 28 CMR 262 (1959), and cases cited therein: Accused, charged with larceny, pleaded guilty to wrongful appropriation. *Held:* It was harmless error for the law officer to fail to instruct on the elements of the lesser included offenses because the accused's plea of guilty left in issue only his intent to steal.

[25] UCMJ, Art. 45(b).

[26] CM 390507, *Takafuji,* 21 CMR 511 (1956).

[27] *Ibid.*, cf., CM 356878, *Teal,* 6 CMR 348 (1952), where independent evidence of guilt was held to authorize the affirmance of a conviction of a lesser included, noncapital offense.

[28] CM 374052, Smith 17 CMR 406 (1954). Under [illegible] MCM, 1951, para. 15, the general court-martial convening [illegible] *when referring the case to trial,* may direct that an offense [illegible] which the death penalty if authorized to be treated as [illegible] See, *e.g.*, United States v. Anderten, 4 USCMA [illegible] (1954).

consideration for the latter's pleas of guilty. The practice was first urged in 1953 (during the Korean War) by Major General Shaw, then the Assistant Judge Advocate General of the Army, as being consonant with civilian practice and, in appropriate cases, mutually advantageous to the Government and the accused.[29] Although such agreements are solely within the discretion of the local convening authority the practice of guilty pleas based on pretrial agreements immediately became almost universal in the Army, with beneficial results to both the accused and the Government. In 1958, the Navy sanctioned the practice.

b. Policies of the Judge Advocate General of the Army. The accused should not be prejudiced by the pretrial agreement. If the offer to plead guilty is refused, it should not be included in the allied papers unless so requested by the defense.[30]

When the accused in a general court-martial pleads guilty pursuant to a pretrial agreement, the staff judge advocate's review should contain a brief statement of the agreement.[31]

The pretrial agreement may not legally preclude accused's right to present matter in extenuation and mitigation.[32]

The offer must originate with the accused.[33]

The offer accepted by the convening authority must be appropriate to the offense.[34]

The staff judge advocate will request the views of the trial counsel and will recommend acceptance of the plea of guilty only if the evidence of accused's guilt is convincing. Unreasonable multiplication of charges tending to induce an involuntary guilty plea will be avoided.[35]

The agreement must be written and unambiguous.[36]

The court-martial must be made sufficiently aware of the circumstances of the offense so that it may adjudge an appropriate sentence.[37]

The law officer, in an out-of-court hearing should determine that accused: (1) understands the agreement (2) knows he may withdraw his guilty plea before sentence (3) is satisfied with appointed counsel (4) is pleading guilty because he *is* guilty and (5) knows the meaning and effect of the plea.[38]

3. Acceptance of guilty plea. "The question of whether the plea will be received will be treated as an interlocutory one."[39] Presumably, therefore, the law officer of a general court-martial has the duty to rule finally on whether or not to accept the plea.[40] The question of whether to accept the plea arises when there is doubt as to its voluntary or provident nature. In one such instance, however, the Court of Military Appeals indicated that the members themselves might have the right to reject an apparently improvident guilty plea.[41] Assuming that the law officer possessed the exclusive power to accept or reject the plea, the question arises as to whether he could abuse his discretion in rejecting a guilty plea in such a manner as to prejudice the accused. Certainly the accused has no absolute right to have his guilty plea accepted.[42] But if he will profit from the acceptance of such a plea (as a result of a pretrial agreement with the convening authority)[43] it is possible that an arbitrary rejection of his plea might nevertheless require the con-

---

[29] Letter to Army Staff Judge Advocates, 23 April 1953.
[30] JAGJ/1956/6550, 20 Aug 1956.
[31] JAGM, 25 June 1953.
[33] JAGJ 1956/7801, 24 Oct 1956.
[32] DA Msg No. 525595, 8 May 1957 (Originated by opinion of JAGJ 1957/3748).
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.* It does not seem unreasonable to require as a condition precedent to entering the contract, that the accused stipulate to a set of facts sufficient to advise the members of the nature of the offense. Otherwise the prosecution must actually introduce evidence to provide a factual background for sentencing; but one of the purposes of the pretrial agreement is to spare the government this expense. On the other hand the defense is not handicapped by rules of evidence in presenting matters in mitigation or extenuation. See ch. XIX, *infra.*
[38] DA Msg., *supra* note 33.
[39] MCM, 1951, para. 70*b*(4).
[40] UCMJ, Article 51(b).
[41] United States v. Cook, 12 USCMA 518, 31 CMR 104 (1961): After a verdict of guilty of aggravated assault with a "chain", as a result of accused's plea based on a pretrial agreement, a court member asked to see the chain. The law officer denied the request because of unavailability of the requested evidence. In a per curiam opinion the court observed that the allied papers in the record of trial cast some doubt as to the dangerous character of the "chain". In reversing, the court reasoned that "the court-martial might well have exercised its right to . . . 'refuse to accept . . . [the] plea of guilty'. Manual for Courts-Martial United States, 1951, paragraph 70. . . . see article 45(a), Uniform Code of Military Justice."
[42] CM 401819, Scarbrough, 28 CMR 527 (1959).
[43] It is suggested that the pretrial agreement require the guilty plea to be "accepted"; otherwise an accused might satisfy the "contract" by merely pleading guilty, but then proceeding to contest the case.

vening authority to adhere to his pretrial agreement.[44]

In determining whether to accept the plea the law officer must first ascertain, in addition to the voluntary nature of the plea, whether or not it is provident. Therefore in an out-of-court hearing he should be allowed to hear from the accused's own lips in precise detail whether the latter admits the particular allegations of the specification.[45] It is extremely doubtful that any such admissions could be used against the accused should he change his mind and decide to plead not guilty.[46]

In explaining the consequences of the guilty plea the law officer must correctly advise the accused of the maximum authorized punishments.[47] In doing so he need not advise the accused of the collateral effect of administrative laws and regulations not directly concerned with the Uniform Code of Military Justice.[48]

In case of possibly multiplicatious specifications, where the pretrial agreement indicates a possible misunderstanding as to the maximum authorized punishment, the law officer should obtain from the accused an admission that the latter would still plead guilty, even if the maximum authorized punishment were less than indicated in the pretrial agreement.

4. Rejection of guilty plea. *a. General.* Although the law officer in an out-of-court hearing initially may have determined the accused's guilty plea to be voluntary and provident, events transpiring then or later in the trial (usually during the presentencing procedures) may indicate that the plea should not have been accepted. In such a case, the Code provides[49] "a plea of not guilty shall be entered . . . and the court shall proceed as though he had pleaded not guilty".

b. Improvident or inconsistent plea. An "improvident" plea of guilty is closely connected with inadequate representation of counsel in that it indicates the latter's unawareness of the existence of a legal defense or a misunderstanding of the pretrial agreement by accused or his counsel. Thus a plea of guilty to a bad check charge was held improvident where defense counsel made an unsworn statement that the check was given to discharge a gambling debt. Neither the counsel nor the law officer realized that this would have been a defense to the charge.[50]

Closely allied, if not identical to the question of the providency of a plea, is that of its consistency. A plea of guilty is inconsistent with guilt if the material facts of the specification are controverted.[51] The determination of the trial level on whether matter "inconsistent" with the plea of guilty has been raised depends on [illegible] factors: (1) how introduced the apparent inconsistency—the government or the defense—the accused or his counsel,[52] (2) nature of the matter—was it the sworn or unsworn statement of the accused or mere "puffing" in defense argument, (3) the existence of a pretrial agreement. This last factor should weigh heavily in the determination of an "in-

---

[44] See the separate concurring opinion in CM 401819, Scarbrough, *supra* note 42, at 581.

[45] See: United States v. Palacios, 9 USCMA 621, 26 CMR 401 (1958); Judge Ferguson's dissenting opinion in United States v. Watkins, 11 USCMA 611, 29 CMR 427 (1960). United States v. Stivers, 12 USCMA 315, 30 CMR 315 (1961). *Quaere:* An accused has a very advantageous pretrial agreement. At the out-of-court hearing he denies the allegations but begs to have guilty plea accepted because "I know the court members will not believe me and will give me a stiff sentence." As defense counsel, what advice would you give accused? As law officer, what would be your actions? See United States v. Henn, 13 USCMA 124, 32 CMR 124 (1962); compare the opinions of Judges Quinn and Ferguson in United States v. Watkins, *supra*.

[46] *Cf*, United States v. Daniels, 11 USCMA 22, 28 CMR 276 (1959).

[47] MCM, 1951, para. 70b(2); see also MCM, 1951, pp. 509, 510, cited in United States v. Zemartis, 10 USCMA 350, 27 CMR 427 (1959).

[48] United States v. Pajak, 11 USCMA 686, 29 CMR 502 (1960): Pursuant to a pretrial agreement that the convening authority would approve no sentence in excess of reprimand, a fine, and loss of promotion numbers, accused pleaded guilty. The accused, who was sentenced to a reprimand as a result of being convicted of a fraud against the government, did not know that in his case application of the Hiss Act (68 Stat. 1142, 5 USC § 2281) could make him to lose his retirement benefits.

[49] UCMJ, Art. 45(a); see also MCM, 1951, para. 70b(4).

[50] United States v. Lenton, 6 USCMA 690, 25 CMR 494 (1958). The court verified the statement by examining [illegible] statement in the pretrial advice.

[51] United States v. Kitchen, 5 USCMA 541, 18 CMR 165 (1955).

[52] ACM 7505, Irons, 12 CMR 946 (1953). On a plea of guilty to desertion the prosecution presented overwhelming evidence of guilt, but also introduced a pretrial statement of accused wherein the accused stated he never intended to desert. Opinion: The plea was not inconsistent because the defense did not introduce the statement and the record of trial otherwise showed [illegible] inconsistent. See also United States v. Hinton, 8 USCMA 89, 23 CMR 269 (1957).

[53] United States v. Hinton.

consistent" plea because of its possible inducement to plead guilty.[54]

Illustrative Cases

United States v. *Kitchen*,
5 USCMA 541, 18 CMR 165 (1955)

Accused airman, charged with desertion from 3 April to 6 November 1953, terminated by apprehension, pleaded guilty to the lesser included of AWOL (terminated by apprehension). He then testified that he had "turned in" during September 1953, to a recruiting officer who told accused arrangements would be made to pick him up at his home. The only issue submitted to the court members was accused's intent to desert. He was found guilty as charged. *Opinion* [J. Brosman, Ch J. Quinn concurring and J. Latimer dissenting] Such unrebutted testimony, given before the findings, was inconsistent with accused's plea that (1) he had absented himself continuously as alleged and (2) did not surrender to military authorities. The law officer therefore erred in failing to enter a plea of not guilty of the lesser included offense and in not requiring the court members to find conclusive proof of every element of the principal offense.

Note. Since the Air Force has not sanctioned pretrial agreements, it is assumed that there was none here. In this respect it is significant that both Judges Quinn and Ferguson have expressed their doubts as to the "salutory" nature of the "negotiated plea program."[55]

United States v. *Hinton*,
8 USCMA 39, 23 CMR 263 (1957)

Before a special court-martial the accused airman pleaded guilty to charge of larceny. The prosecution introduced a confession wherein accused had stated: "I am in a mental condition where whenever I see something, I feel I have to take it, even though I do not need it." Also, during the sentence proceedings defense counsel in an "unsworn statement" on behalf of accused stated that accused was "to some degree a kleptomaniac." The trial counsel then suggested that if defense counsel had misgivings as to his client's mental condition he should obtain a psychiatric examination. Nevertheless the case proceeded to sentence and completion. Appellate defense counsel urged that the guilty plea was improvident.

Opinion: Conviction affirmed. All the articles stolen—a radio, liquor, gasoline, hubcaps, and probably the clothing—were put to good use by the accused.

The accused argues strenuously that the evidence is sufficient to raise at least an issue as to his mental capacity to entertain the specific intent required for the offense charged. . . . Giving maximum effect to "the preferred rating" accorded insanity, we can assume the correctness of this argument. However, the assumption does not require the conclusion that the accused's plea is inconsistent with it or that the plea was improvident.

Incidental evidence of a mental condition is not proof of the existence of the condition to that degree which the law requires before it will hold harmless a person who commits an act which, but for the condition, would be criminal. Thus, in United States v. Wright, 6 USCMA 186, 19 CMR 312, we held that a statement by the accused that he was "very much under the influence of alcohol . . . [that he] lost his head . . . couldn't control . . . [himself, and] didn't know or understand what . . . [he] was doing" was insufficient to justify setting aside his plea of guilty to a larceny charge.

* * * * *

In a guilty plea case we cannot disregard the probability that the accused and his counsel weighed the evidence and determined that it was inadequate for an effective legal defense or to negate the existence of a specific intent. As a result, they could well have decided to disregard the evidence in favor of the possible advantage of a guilty plea. See Newman, Pleading Guilty for Considerations, A Study of Bargain Justice, 46 The Journal of Criminal Law, Criminology and Police

[54] See United States v. Wright, 6 USCMA 186, 19 CMR 312 (1955): At an Army special court-martial accused's conviction of wrongful appropriation of a motor vehicle based on his unsworn guilty not made pursuant to a pretrial agreement was affirmed on appeal. It was held that his unsworn statement during the presentencing proceedings that he was "very much under the influence of alcohol" and "really didn't know or understand what I was doing" was not inconsistent with his plea.

[55] United States v. Watkins, 11 USCMA 611, 29 CMR 427 (1960).

Science 780 (1956). The critical question, therefore, is whether the accused and his counsel were aware of the legal effect of the evidence claimed to be inconsistent with the plea of guilty.

* * * * *

The supposed unsworn statement by the accused is actually an argument by counsel on the sentence. In it, defense counsel clearly shows that he did not regard the accused as of unsound mind. True, he argued that the accused's crimes were not in any way premeditatively planned, and that they indicate "to some degree [the accused is] a kleptomaniac." In the context of the whole argument, these remarks are plainly intended as advocate's oratory, not a statement of fact or reasonable belief. Thus, after adverting to the accused's "limited intelligence and limited ability," defense counsel maintained that the court-martial must "take into account just what measures were taken by . . . his NCOIC and the squadron commander, to properly assign him to a section which would bring out the best" in the accused. Moreover, it is not contended on this appeal that the accused is anything but legally sane and fully responsible for the offenses for which he was convicted or even that he has any other meritorious defense. Under the circumstances, we must conclude that the plea of guilty was not improvidently entered. Indeed, on this record it would be "a hollow gesture" if we were to set aside the plea of guilty and order a rehearing." United States v. Wright, supra, page 189.

Note. As in *Kitchen, supra,* in *Hinton* there was no indication that accused's pleas were based on a pretrial agreement. The opinion's reference to the "possible advantages of a guilty plea" may refer to the tactical advantage gained by the defense in not having the details of the offense paraded before the members of the court-martial, as well as the proposition that a plea of guilty is a factor in mitigation of punishment.[56]

c. Disposition of Case: Except in the Air Force,[57] the present procedure on acceptance of a guilty plea is for the members immediately to go through the formality of bringing in a verdict of guilty[58] and then to hear evidence relative to the sentence. Thus it is generally during the latter proceeding that evidence inconsistent with the plea of guilty is raised by the defense, more often than not following the introduction by the prosecution of a stipulation of facts giving the background of the offense.[59] Once inconsistent matter is raised the law officer will give the accused an opportunity to withdraw it.[60] If the accused declines to do so, or wishes for his own reasons to change his plea to not guilty,[61] "the court will proceed to trial and judgment as if he had pleaded not guilty."[62]

How the court will proceed depends, of course, on whether the particular court-martial can remain properly uninfluenced by the prior proceedings. If it cannot, then the accused should be entitled to the remedy of a mistrial.[63] On the other hand if the accused merely wished to withdraw his plea without having presented any inconsistent matter or admission against his interest, the same court-martial might very well be able to proceed to an impartial trial on the merits. Before determining whether the members of the court-martial have been permanently influenced, it is first necessary to determine if they have been *properly* influenced: that is, do they have a *right* to consider the matter presented before the withdrawal of the

[56] See United States v. Rake, 11 USCMA 159, 28 CMR 383 (1960); United States v. Babers, 11 USCMA 163, 28 CMR 387 (1960).

[57] The present practise in the Air Force on a guilty plea is for the prosecution to present a prima facie case. ACM 8881, Smigelski, 16 CMR 878 (1954).

[58] Although it is nonprejudicial error for the law officer to enter a verdict of guilty, the Court of Military Appeals has discouraged this practice as being contrary to the Code. United States v. Cruz, 10 USCMA 458, 28 CMR 24 (1959).

[59] See *supra* note 87.

[60] MCM, 1951, para. 70*b*(4).

[61] "[H]e should be *permitted to do so*" [emphasis supplied], MCM, 1951, para. 70*b*(4). An Air Force board of review, whose opinion on this point was not adopted by The Judge Advocate General of the Air Force, held the accused has no absolute right to withdraw a guilty plea. ACM S-11879, Hodges, 20 CMR 754 (1955). This is in accordance with the civilian Federal procedure where some cause must appear for withdrawing the plea. Fed. R. Crim. P. 32(d); Vasquez v. United States, 279 F. 2d 84 (10th Cir. 1960). In Army cases, however, because the accused is initially advised that he has a right to withdraw his plea at any time (see *supra* note 38 and accompanying text), he must be permitted to withdraw his plea for any reason. This is probably the law in all the services. There is, however, an exception in the case where an appellate court has finally approved a conviction but has ordered a rehearing on the sentence only. In such a case unless the appellate court has previously offered accused a right to withdraw his guilty plea [see opinion of Ch. J. Quinn in United States v. McCoy, 12 USCMA 68, 30 CMR 68 (1960)] the accused has no right to withdraw his plea at the rehearing. United States v. Kepperling, 11 USCMA 280, 29 CMR 96 (1960).

[62] UCMJ, Art. 45.

[63] See ch. XIII, *supra.*

plea? If they do, then it is not necessary to consider limiting instructions, the need for declaring a mistrial or other curative devices.

In this respect a Manual provision[64] lends itself to an interpretation that incriminating evidence presented *before* the findings may be considered by the court-martial on the merits, even though the plea of guilty (and its dependent finding of guilty) is subsequently withdrawn:

> Matter which is presented to the court *after* findings of guilty have been announced may not be considered as evidence against the accused in determining the legal sufficiency of such findings of guilty upon review. [Emphasis supplied.]

Although one Army board of review[65] so construed this Manual provision there have been no subsequent holdings to this effect. The absence of similar opinions could be due to the present procedure of presenting mitigating evidence *after* the findings, or it could be due to the subsequent development of a contrary attitude by the Court of Military Appeals. For instance, in *United States v. Daniels*[66] the court refused to allow the government to make use against the accused in a rehearing, of the stipulation of fact entered into at the first trial as part of the pretrial agreement to plead guilty. It held that the plea and the stipulation were "so closely woven into a single judicial act that they should be measured by the same rule."[67] That is, if the guilty plea is withdrawn, then those matters connected with it or made of a part of it should also be withdrawn. Under this reasoning it should make no difference whether a stipulation of fact—or the accused's testimony—was received before or after the plea. The matter should not then be considered by the court members after the plea of guilty is withdrawn.

Even if the court members are not allowed to consider such incriminating evidence, the question still remains as to whether they can be expected to remain uninfluenced by it. As in any decision involving a declaration of a mistrial, the resolution of the problem rests within the discretion of the trial judge or law officer. It may be that he feels even the bare fact that accused has pleaded guilty in open court[68] is sufficient grounds for declaring a mistrial when the plea is withdrawn. There are limits to the exercise of the law officer's discretion in this area and in some cases the declaration of a mistrial may be the only proper procedure.[69]

---

[64] MCM, 1951, para. 75*a*.

[65] CM 388200, Garland, 21 CMR 427 (1956): The sole basis for accused's affirmed conviction was his own testimony given after his guilty plea (which was withdrawn) but before any findings.

[66] 11 USCMA 22, 28 CMR 276 (1959).

[67] 11 USCMA 22, 27, 28; 28 CMR 276, 281, 282.

[68] It would seem good practice, therefore, for the law officer to listen to the accused's plea out of hearing of the members. If in subsequent interrogation of accused in the out-of-court hearing it develops that the plea was improvident, it can then be changed to not guilty without the court members ever being aware of the initial plea.

[69] CM 401819, Scarbrough, 28 CMR 527 (1959): "A detailed stipulation of fact was in evidence. The stipulation together with their original plea of guilty . . . made at a manifest necessity that a mistrial be declared. . . ."

CHAPTER XV

MISCELLANEOUS MATTERS RELATING TO THE PRESENTATION OF EVIDENCE

References: Paragraph 53; appendix 8*a*, pages 510–517, Manual for Courts-Martial, 1951.

Section I. INTRODUCTION

Following the plea of not guilty, evidence on the merits is received. The rules of evidence and procedure during this part of the trial are roughly similar to those in a Federal criminal trial court, with certain modifications. The law officer, particularly, is assimilated to the image of a *Federal* judge with much of the latter's discretion in regulating the conduct of the trial.

Section II. PARAGRAPHS 44*g*(2), 48*h*, MCM, 1951, OPENING STATEMENT

Counsel for the prosecution[1] and for the defense[2] may make an opening statement immediately before the presentation of his case. In exceptional cases the law officer may permit like statements to be made at later stages in the proceedings.[3] The statement should be limited to a brief resume of the facts intended to be proved and should not include argument.[4] A deliberate statement of fact for which the proponent knows he has no supporting admissible evidence may constitute prejudicial error.[5] Counsel must avoid references to legal authorities in making their opening statements. In this respect, the Manual suggests that the trial counsel of a general court-martial, following accused's plea, present legal authorities to the court.[6] This procedure has been declared archaic and inapplicable to a general court-martial, which receives its instructions on the law from the law officer.[7]

The opening statement, particularly, in a complicated case, has value in that it apprises the members of the evidence to be offered and the order in which it is presented. It should therefore be encouraged, rather than discouraged,[8] especially because it is a matter of right.[9]

Section III. WITNESSES

1. Exclusion from courtroom. Witnesses are generally excluded from the courtroom.[10] Failure to follow this procedure may entitle counsel, on request, to an instruction that the court members may consider his presence in court during the presentation of other evidence, in weighing that witnesses's testimony. As a further device to insure truthful testimony the law officer has discretion to put the witness

[1] MCM, 1951, para. 44*g*(2); *Id.*, app. 8*a*, p. 510.

[2] MCM, 1951, para. 48*h*; *Id.*, app. 8*a*, p. 516. The Manual also authorizes the defense to make an opening statement immediately following that of the prosecution. *Id.*, para. 48*h*. Thus the time for the defense to make an opening statement appears within the discretion of the law officer.

[3] MCM, 1951, paras. 44*g*(2), 48*h*.

[4] *Ibid.* This is the generally accepted American rule. Busch, *"Law and Tactics in Jury Trials"* (1949 ed.), § 222.

[5] Busch, *op. cit. supra* note 4, § 224.

[6] MCM, 1951, para. 44*g*(2); *Id.*, app. 8*a*, p. 510.

[7] *United States v. Hall*, 2 USCMA 521, 10 CMR 19 (1953).

[8] MCM, 1951, app. 8*a*, p. 510; "No opening statement is required and none should be made unless it will clarify the procedure to be followed as to the case."

[9] Abbott, *Criminal Trial Practice* (4th ed. 1939), § 249.

[10] MCM, 1951, para. 53*f*.

"under the rule", and advise the witness not to discuss his testimony with anyone except counsel for either side or the accused.[11] If, during the trial there is a showing that an attempt has been made to influence the testimony of a witness the law officer has discretion to order the segregation of that witness.[12]

2. Order of examination.[13] The law officer, as a trial judge, has discretion in limiting the number of redirect[14] and recross[15] examinations by counsel and court members. On completion of questioning by the counsel the law officer may conduct an examination of the witness; "thereafter, if necessary, members of the court may ask questions. . . ." [16] The law officer also has discretion to permit counsel who has rested to reopen his case for the introduction of testimony previously omitted, even though it is not for purpose of rebutting evidence introduced by opposing counsel.[17]

3. Court witnesses. Despite the Manual provisions which imply that the *law officer* will determine which witness, if any, will be called by the court,[18] the Court of Military Appeals has stated that the court-martial [the *members* collectively] has the "unrestricted right to call for further witnesses, subject only to the law officer's determination of admissibility".[19] This practice is contrary to the generally accepted Federal rule which allows the trial judge—not the jury—the discretion to determine whether additional evidence shall be obtained.[20] Regardless of the "unrestricted right" of the court-martial to call for additional evidence, if the nature of its request on its face clearly indicates the evidence would be cumulative or otherwise inadmissible the law officer should have the right to refuse the request, although presently he should proceed cautiously in this area.

Illustrative Case

United States v. *Salley*,
7 USCMA 603, 23 CMR 67 (1957)

Accused pleaded not guilty to assaulting his superior officer and to feloniously assaulting an NCO. After both sides had rested the president of the court-martial, who then apparently was concerned with the mental condition of the accused, stated that "the court" would like available medical records pertaining to the accused's sanity. The law officer indicated that such records would be inadmissible but that witnesses could supply admissible information. Thereupon the president of the court, after being assured that accused did not plead insanity, withdrew the court's request. The Board of Review approved the conviction.

Opinion:

The accused argues that the law officer's advice with respect to the medical records was error in that it foreclosed the court from obtaining additional evidence as authorized under paragraph 54*b*, Manual for Courts-Martial, United States, 1951, as we have construed that authorization in United States v. Parker, 7 USCMA 182, 21 CMR 308. In the Parker case, supra, we held that the right of the court to request additional evidence was discretionary, and it had the unrestricted right to call for further witnesses subject only to the law officer's determination of admissibility:

"In view of the authorities above announced we are of the opinion that it is discretionary as to whether or not the court will order further evidence to be introduced after it has retired to deliberate on the findings. In reaching this determination we have not over-

---

[11] MCM, 1951, app. 8*a*, p. 511.

[12] See United States v. Borner, 3 USCMA 306, 12 CMR 62 (1953).

[13] See MCM, 1951, para. 54*a*; DA Pam 27–172, "Evidence" (1962) at 444.

[14] Busch, *Law and Tactics in Jury Trials* § 269.

[15] *Id.* § 339; see also 6 Wigmore on Evidence (3rd Ed), §§ 1898, 1899.

[16] MCM, 1951, para. 54*a*. See ch. IV, *supra*.

[17] *Supra* note 14. See also MCM, 1951, para. 71*a*. *Quaere:* Is it ethically proper for a law officer to discipline the prosecutor or defense counsel who deliberately withheld his evidence by refusing to allow him to present it after he has rested?

[18] MCM, 1951, para. 54*b* provides that when the "court" needs more evidence for "proper determination of the matter before it, or is not satisfied that it has received all available . . . evidence on an issue before it" it may take action to secure additional evidence. [Emphasis supplied]. MCM, 1951, app. 8*a*, p. 511, provides that "the law officer will rule finally as to whether the witness will be called." Finally, in defining the word "court", as used in para. 54*b*, the Manual states, in para. 57*b*, "This paragraph [57] applies to all interlocutory questions. . . . Any statement . . . in this manual to the effect that a certain question should be decided by the court is not to be *understood as making an exception to the foregoing rule. See, for example,* . . . 54, . . .". [Emphasis supplied].

[19] See United States v. Salley, 7 USCMA 603, 23 CMR 67 (1957).

[20] Jianole v. United States, 299 F. 496 (8th Cir. 1924), cited and rejected in United States v. Parker, 7 USCMA 182, 21 CMR 308 (1956); *Parker* was the foundation of the *Salley* decision.

looked the provision in the procedural guide of the Manual (page 517) that the law officer 'will rule finally as to whether the witness will be called.' Nor do we ignore Article 51(*b*) of the Code that makes interlocutory rulings by the law officer final. In construing these two provisions, together with the procedure authorized in paragraph 54*b* of the Manual, we hold that a court-martial has the unrestricted right to call for further witnesses, subject only to the law officer's determination of admissibility."

It is clear in this case that the law officer did no more than possibly indicate how he might rule with regard to the evidence requested. He did not foreclose the right of the court to obtain such evidence. While the court expressed a desire to see the medical reports growing out of an observation of the accused following the incident, the law officer indicated that the court was not necessarily entitled to have presented all of the hospital data compiled with respect to the accused. It would have only been authorized to examine the reports insofar as they might have qualified as an official record or business entry exception to the hearsay rule. Probably the nature of the data could only have been qualified under the latter exception. This would have meant calling a witness, or witnesses, to lay a foundation showing the established practice of keeping and recording such information. The law officer offered to call these witnesses if the court so desired. At no place in the record do we find any evidence that the law officer suggested that the court could not obtain this evidence, and we are singularly unimpressed by the defense argument that even though the law officer advised the court that the testimony of the witnesses who examined the accused would have been admissible, he erred by his failure to explain to them the mechanics of obtaining the actual presence of such individuals. This requires a degree of naivete which we are unwilling to ascribe to the members of the court. It is manifest from the record that the court was aware of its rights to request and obtain the evidence and that it made an informed choice to "withdraw its request" and that it had "no objection to proceeding as we are going."

In view of our determination that the right to call additional witnesses was not foreclosed by the law officer, we deem it necessary to discuss the correctness of those hypothecated rulings on evidence not offered.

The decision of the board of review is affirmed.

Note. The *Salley* opinion indicates the danger of the law officer's making advance, hypothetical rulings on the admissibility of the requested evidence. Also, in *Salley*, the president spoke in the name of the "court". If an individual member should express a desire for further testimony the law officer should, if there is an objection by any other member of the court, have the members decide the question by majority vote.

Section IV. STIPULATIONS[22]

The law officer may reject a stipulation of fact or of testimony at his discretion. If a stipulation is withdrawn by an accused during the trial, the law officer must decide if the same court is qualified to continue to hear the case.

Section V. INSTRUCTIONS AS TO EVIDENTIARY MATTERS

1. General. In a criminal trial as a part of due process the accused has a right to expect that the jury instructed as to (1) the law of the case, (2) the elements to be proved, and (3) the relation of the particular evidence adduced to the particular issues involved.[23] The last category of instructional rights is concerned with the right to have the law officer instruct the members on the limited effect to be accorded certain evidence for the reason that the mem-

[21] UCMJ, Art. 52(c).
[22] See DA Pam 27-172, "Evidence" (1962), ch. XXXVIII.
[23] Bird v. United States, 180 U.S. 356 (1901); Phelps v. United States, 252 F 2d 49 (5th Cir. 1958).

bers might otherwise—and illegally—draw an additional inference as to the use to be given the evidence admitted. An illustration is the effect to be given evidence of prior acts of misconduct by the accused, received in evidence solely to show that the accused had a particular state of mind. The court members could logically—but improperly—reason from that evidence that because the accused is a bad man he probably committed the crime charged.

"Instructions" also may emphasize that great —instead of limited—weight is to be given to certain evidence. Thus evidence of the accused's good character, especially in a charge involving moral turpitude, may indicate his innocence.[24]

Depending on the importance of the particular class of evidence, certain rules have been laid down as to when "limiting" instructions must be given without request and when they must be given only on request. Even when not required, *sua sponte*, the law officer should insure that the court members give a fair appraisal to the evidence. In certain circumstances, however, it is conceivable that defense counsel for tactical reasons could expressly waive the giving of a *sua sponte* instruction. Thus a coaccused might not desire a repetition of the instruction that his accomplice's admissions are not to be considered as evidence against him.

2. Sua sponte. The following are some typical examples of when the law officer must, without request, give instructions on the limited effect to be accorded evidence which he has admitted. They deal generally with that type of evidence of such a crucial nature that instructions are considered essential to prevent the members of the court from misconstruing it. It should be emphasized, however, that the particular situation in each trial must determine when limiting instructions must be given sua sponte; evidence admitted to show prior acts of misconduct by the accused;[25] admission of accomplice not to be considered against coaccused;[26] effect of law officer admitting accused's confession or admission in evidence;[27] effect to be accorded prior inconsistent statements;[28] effect to be accorded inadmissible evidence used as a basis for an expert opinion.[29]

3. On request. When requested, the law officer is required to give such instructions as the weight to be given the uncorroborated testimony of accomplices,[30] and sex victims[31] and the effect of evidence of the accused's good character.[32] Generally, when requested, he must give instructions embodying a correct statement of law and necessary for the members' proper evaluation of the evidence, though he may do so in his own words. The law officer need not, however, give instructions on mere permissible inferences not embodying a mandatory rule of law.[33]

4. When given. If so requested, the law officer in his concluding charge[34] to the court members should repeat his previous instructions on the effect to be given certain evidence. Absent a request, his failure to so instruct would not be error,[35] although it is conceivable

---

[24] United States v. Phillips, 3 USCMA 137, 11 CMR 137 (1953), discussed in DA Pam 27-172, "Evidence" (1962), at p. 55.

[25] United States v. Lewis, 14 USCMA 79, 33 CMR 291 (1963); United States v. Back, 13 USCMA 568, 33 CMR 100 (1963); United States v. Hoy, 12 USCMA 554, 31 CMR 140 (1961).

[26] MCM, 1951, para. 140*b*; CM 351645, Morris, 4 CMR 300 (1952); *cf.* United States v. Borner, 3 USCMA 806, 12 CMR 62 (1953), discussed in DA Pam 27-172 "Evidence", at 212.

[27] See ch. XI, *supra*, Section IV, para. 6*d*.

[28] MCM, 1951, para. 153, states that the "law officer . . . *should* instruct . . . that such proof is to be considered for that purpose only [impeachment] and not for the purpose of establishing the truth of the matters asserted in the statement." [Emphasis supplied]. "Should" has been interpreted as "must". United States v. Zeigler, 12 USCMA 604, 31 CMR 190 (1962); ACM 13805, Abernathy, 24 CMR 765 (1957).

[29] MCM, 1951, para. 138*e*. It has also been suggested that the law officer instruct, sua sponte, on the weight to be given the answer to a hypothetical question, and instruct, in his discretion, on the weight to be given an opinion on an ultimate issue. See DA Pam 27-9, "The Law Officer" (1958) app. XXVII, p. 183.

[30] United States v. Bey, 4 USCMA 665, 16 CMR 239 (1954), discussed in DA Pam 27-172, "Evidence" (1962) at 410.

[31] MCM, 1951, para. 153*a*; United States v. Polak, 10 USCMA 13, 27 CMR 87 (1958).

[32] United States v. Phillips, 3 USCMA 137, 11 CMR 137 (1953).

[33] United States v. Baldwin, 10 USCMA 193, 27 CMR 267 (1959): Not error for law officer to refuse defense requested instruction that "if the court finds that any witness has falsely testified to a material matter, the court may disregard the entire testimony of such witness." See discussion in DA Pam 27-172, "Evidence" (1962) at 412.

[34] For the law officer's duties with respect to final instructions following counsel's argument, see ch. XVII.

[35] *Cf.* United States v. Williams, 13 USCMA 208, 32 CMR 208 (1962); United States v. Borner, 3 USCMA 806, 12 CMR 62 (1953).

that in some circumstances the particular evidence would be of such a vital nature that the law officer's failure to repeat an instruction at the close of the case, even absent a request, would be error and prejudicial.

On the other hand, assuming the accused has a right to the requested instruction, it might be nonprejudicial error for the law officer to refuse to give the instruction when it concerns a relatively minor point, when he has previously instructed the members at the time of the admission of the evidence, and where his concluding charge would be rendered less concise thereby.

Section VI. PARAGRAPH 54*e*, VIEWS AND INSPECTIONS

For the procedure to be followed, see paragraph 54*e*, Manual for Courts-Martial, 1951. The law officer may, in the exercise of his discretion permit the court personnel to view the scene of the alleged offense or of any other pertinent place.[36] A view is justified, however, only in the exceptional case where it is necessary for the court members to understand the evidence before it. Thus it is not error for the law officer to refuse a defense request for a view, where photographs and sketches in evidence adequately described the premises.[37] Although the Manual states that the viewing of a scene is not "evidence,"[38] the label would seem to be immaterial, as undoubtedly the court members consider it as such.[39] In any event, an unauthorized view of the premises by a member will be treated as if he had wrongfully consulted evidence not received in open court.[40]

Section VII. PARAGRAPH 53*h*, MCM, 1951, EXPLANATION OF RIGHTS OF THE ACCUSED

1. General. The law officer (or president of the special court-martial) must explain to the accused his rights when the record of trial shows that he does not understand them.[41] Certain rights, however, are considered so fundamental that the Manual requires them to be explained to the accused *unless* the record of trial affirmatively shows that the accused understands them. This is so even though defense counsel is initially required by the Manual to explain to the accused all his rights.[42] Some of the basic rights are the accused's right: to plead not guilty;[43] to make a motion based on the statute of limitations;[44] to testify both on the involuntary nature of a purported confession[45] and on the merits;[46] to assistance of counsel with qualifications equivalent to trial counsel.[47]

2. Procedure. A statement by defense counsel that he has advised accused of his particular right should normally obviate the giving of any instruction.[48] If it becomes necessary, however, to advise the accused of his rights, the advice should be given out of the hearing of the members of the court-martial. In this way, the members' attention will not be called unnecessarily and prejudicially, to the accused's failure to assert the right.

---

[36] MCM, 1951, para. 54*e*.

[37] United States v. Borner, *supra* note 35.

[38] *Supra* note 36.

[39] Comment of Justice Cardoza in Snyder v. Massachusetts, 241 U.S. 97 (1934): The "inevitable effect" of a view "is that of evidence no matter what label the judge may choose to give it." In United States v. Wolfe, *infra* note 40, the Court of Military Appeals did not decide if a view was "evidence."

[40] United States v. Wolfe, 8 USCMA 247, 24 CMR 57 (1957): Defense counsel who at time must have known of the unauthorized view, was estopped from objecting to it for the first time after announcement of the sentence.

[41] MCM, 1951, para. 53*h*.

[42] *Id.*, para. 48*f*, but see United States v. Endsley.

[43] MCM, 1951, para. 70; ch. XIV, *supra*.

[44] MCM, 1951, para. 68*c*; ch. XIII, *supra*.

[45] MCM, 1951, para. 53*h*, 140*a*, 140*b*; ch. XI, *supra*.

[46] MCM, 1951, para. 53*h*, 148*e*, 149*b*; MCM, 1951, app. 8*a*, pp. 509, 513, 514, 516. General advice is sufficient. The law officer need not give advance rulings on the possible scope of particular phases of cross-examination. See United States v. Wannenwetsch, 12 USCMA 64, 30 CMR 64 (1960).

[47] MCM, 1951, para. 61*f*(1)(b); ACM 11220, Gudobba, 20 CMR 864 (1959).

[48] United States v. Endsley, 10 USCMA 255, 27 CMR 329 (1959).

Illustrative Case

United States v. *Endsley*, 10 USCMA 255, 27 CMR 329 (1959)

After the prosecution had rested its case, the defense counsel stated to the law officer that he had advised the accused of his testimonial rights, and that the latter wished to remain silent. Nevertheless, the law officer, in open court, again advised the accused of his rights, using the detailed advice suggested in appendix 8*a* of the Manual at pages 516, 517.

Opinion:

"The record of trial clearly displays an abundance of . . . solicitude for the rights of the accused by the law officer." However, "The procedure followed by the law officer in the instant case appears to be a hold-over from the time when the accused was not represented by a qualified lawyer and it was uncertain as to whether he would be properly advised of his rights . . . . We regard the procedure as unnecessary and undesirable under the system developed under the Uniform Code. . . .

"When the accused is represented by qualified counsel, there should be little need for the law officer to advise him regarding his fundamental rights since any qualified counsel should be fully aware of his obligation to render advice to his client in this regard. Undoubtedly, if the defense counsel announces that the accused has been so advised, there would appear to be no necessity for any action by the law officer. In this regard, affirmative action by the law officer would ordinarily be limited to those cases where no showing has been made, or a showing which the law officer finds to be inadequate has been offered that the accused has been adequately informed as to his fundamental right to testify or not to testify. . . . In any event, should the law officer feel impelled to inform the accused in this regard, we believe it would be a far better practice to call defense counsel to the bench and inquire accordingly or to act in an out-of-court session if necessary. In this connection, we take occasion to criticize the statement in paragraph 53*h* of the Manual, supra, that such explanation be given to the accused "in open court," since such a procedure might result in emphasizing the accused's failure to testify in the minds of the court-martial members."

CHAPTER XVI

MOTIONS BASED ON THE EVIDENCE

References: Articles 51(b), 52(c), UCMJ; paragraphs 57, 71, 120–122, MCM, 1951.

INTRODUCTION

Motions based on the evidence are generally those which attack the sufficiency of the prosecution's case. Unlike motions in bar which do admit the allegations, but set up new matter in bar of trial,[1] a motion based on the evidence necessarily denies at least one essential element of the charge by attacking sufficiency of the evidence in support thereof. The three principal "motions" based on the evidence are a (1) motion for a finding of not guilty, (2) motion raising the "defense" of res judicata, (3) motion raising the question of accused's sanity.

Section I. PARAGRAPH 71*a*, MCM, 1951, MOTION FOR A FINDING OF NOT GUILTY

1. General. A motion for finding of not guilty is the procedural device whereby the defense may test the legal sufficiency of the prosecution's evidence. It is similar to the Federal motion for judgment of acquittal,[2] allowing the Federal judge in an appropriate case to enter an acquittal for the accused.[3]

2. When made. As under the Federal procedure, the motion may be made at the end of the prosecution's case, after the defense has rested, or at both times.[4]

3. By whom. Although the motion normally is made by the defense, it would seem entirely proper for the law officer, in the interest of justice, to himself enter such a motion on behalf of the defense.[5]

4. Procedure on ruling. *a. General.* Unlike civilian procedure, the law officer's ruling granting or sustaining the motion is subject to the objection of any court member.[6] If an objection is made, then the court members in secret, oral ballot decide the ruling by majority vote, a tie vote being a determination against the accused.[7] In order to intelligently object, the members must first be instructed on the elements of the offense and the standard of proof required.[8]

b. Argument in open court. Because the law officer's ruling is subject to objection by any member, the accused has a right to present his argument in support of the motion in open court.[9] It has even been stated that this includes the right to cite facts of the cases he offers in support of his argument, because the members of the court are "the triers of the fact and, in effect, of the law as well."[10] In this respect it is submitted that the only legal question for the members to decide is the legal sufficiency

---

[1] See chs. XI, XIII, *supra.*

[2] Fed. R. Crim. P. 29a.

[3] In many states the judge does not have the greater power of the Federal judge to grant a directed verdict. See Winningham, The Dilemma of the Directed Acquittal, 15 Vand. L.R. 899 (1962).

[4] MCM, 1951, para. 71a.

[5] *Ibid, Quaere:* Is it proper for a law officer to "kill the accused with kindness" by offering sua sponte, to grant a motion for a finding of not guilty unless the prosecution can offer specified evidence which it inadvertently overlooked?

[6] MCM, 1951, para. 57*d*(1).

[7] UCMJ, Arts. 51(b), 51(c).

[8] United States v. McCants, 10 USCMA 344, 27 CMR 420 (1959).

[9] United States v. Boutl, 9 USCMA 228, 26 CMR 8 (1958).

[10] See 9 USCMA 228, 233, 26 CMR 8, 13.

of the evidence, within the legal framework of the law officer's instructions. To preclude the defense arguing extraneous facts of cases holding incorrect law, the law officer in an appropriate case might be well advised first, in an out-of-court hearing to hear the defense argument on the law, and settle it then and there. The law officer could then restrict the subsequent open court argument to the question of the legal sufficiency of the evidence within his predetermined version of the law of the case.

c. Standard of proof. If there is any substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every element of the offense charged *or included in any specification to which the motion is directed,* the motion will not be granted.[11]

This test has been held not to require proof of each element beyond a reasonable doubt.[12] In Federal criminal procedure,[13] as well as military practice,[14] the defense evidence—contradicting or rebutting the prosecution evidence—may not be considered.

d. Deferring ruling. "The court in its discretion may defer action on any such motion . . . and permit or *require* the trial counsel to reopen the case for the prosecution and to produce any available evidence." [15] It is presumed that the word "court" means either the law officer [16] or the members of the court.[17] In absence of an obviously fraudulent and deliberately defective prosecution, however, it is doubtful that either the law officer or the court members properly could *require* the prosecution to produce more Government evidence provided the evidence already introduced was not ambiguous or uncertain. To do so would compromise their required standard of impartiality.[18]

Illustrative Case

United States v. *Kennedy,* 8 USCMA 251, 24 CMR 61 (1957)

The accused was convicted of sodomy. At the trial the only witness, who was a partner in the alleged offense, confirmed the prosecutor's pretrial suspicion that he would refuse to testify. The witness was then excused and, at trial counsel's suggestion, defense counsel made a motion for a finding of not guilty. The law officer admitted that there was insufficient evidence, but deferred ruling on the motion and declared a continuance in the trial, during which time he advised trial counsel's superiors that he would grant a prosecution request for a 5-day continuance, presumably to allow pressure to be brought upon the reluctant witness. A 5-day continuance was requested and granted. Pressure was brought to bear, and the witness testified against the accused.

Opinion: Case dismissed.

> We have no reason to disagree with the principle that a law officer is not a mere figurehead and that he has discretion to grant a continuance or permit a party to reopen a case and present further evidence. But we do insist that a reasonable showing to support either action must be made in court with a reporter present, in the presence of the accused and his counsel, and without the aid of interlopers. This record is completely devoid of any evidence presented in open court to justify a continuance.
>
> Certainly when trial counsel, who had ample time to prepare his case, joined in the motion for dismissal, it should have been apparent to anyone that the Government could not proceed unless the recalcitrant witness was coerced into changing his story.
>
> The foregoing action by the law officer is not in keeping with the role of a judge, and it is violative of paragraph 39*b* of the

[11] MCM, 1951, para. 71*a*. [Emphasis supplied]. This anachronism which purports to prohibit the law officer from granting a motion directed to the principal offense, leaving the lesser included offense in issue, may conflict with Article 52(c), which has no such limitation on offenses subject to the motion. There appears to be no such restriction in Federal criminal procedure.

[12] CM 404884, Gluch, 30 CMR 594 (1961); *but see* Linden v. United States, 254 F. 2d 560 (4th Cir. 1958).

[13] United States v. Wilson, 178 F. Supp. 881 (D.C. 1959).

[14] DA Pam 27-9, The Law Officer (1958), para. 81*d*.

[15] MCM, 1951, para. 71*a*. [Emphasis supplied]; *see also id.* para. 54*b*, making it the responsibility of "the court" to "require trial counsel to recall a witness, summon new witnesses, or to make an investigation . . . with a view to discovering and producing additional witnesses."

[16] See United States v. Kennedy, 8 USCMA 251, 24 CMR 61 (1957).

[17] See United States v. Salley, 7 USCMA 803, 23 CMR 67 (1959), discussed in ch. XV, *supra.*

[18] See pertinent discussion in chs. IV, V, *supra.*

Manual for Courts-Martial, United States, 1951. In spelling out his duties, this section states:

"The law officer is responsible for the fair and orderly conduct of the proceedings in accordance with law in all cases which are referred to the court to which he is appointed."

We have always assumed that that provision requires a law officer to be impartial as between the parties, and it is obvious that, unwittingly or not, the presiding official in this case became an interested party for the Government. That is not the behavior of a fair and impartial judge. His duty is to resolve the case before him and not to become a zealot for law enforcement.

5. **Effect of ruling.** *a. General.* If finally sustained, the ruling results in an acquittal.[19] If the motion is denied, the trial proceeds on the merits. In his final instructions to the court members, the law officer, if requested by defense counsel, should remind the members of the different standard of proof involved, emphasizing that on a motion for a finding of not guilty: (1) the defense evidence is not considered and the prosecutor enjoys all favorable inferences arising from his own evidence (2) proof beyond a reasonable doubt was not then required.

b. Effect of erroneous denial of motion. It has been stated that if an accused has been convicted on sufficient evidence, the prior, erroneous denial of a motion for a finding of not guilty is rendered nonprejudicial; thus, where the law officer erred in not sustaining the motion it has been held that the subsequent testimonial admissions of the accused rendered the error nonprejudicial.[20]

Section II. PARAGRAPH 71*b*, MCM, 1951, RES JUDICATA[21]

1. **General.** "The defense of res judicata is based on the rule that any issue of fact of law put in issue and finally determined by a court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial even if the second trial is for another offense." [22]

The defense was developed to fill up the two important gaps left by the former jeopardy protection: (1) former jeopardy did not apply where the first trial had not proceeded to receipt of evidence (thus a first proceeding terminated by a motion in bar of trial would not be "a trial"). (2) A second proceeding for a different offense would not be within the former jeopardy protection because it would not be a trial for the *same* offense.

The first gap was filled by the United States Supreme Court's eventual application of the already accepted *civil* (as distinguished from *criminal*) doctrine of res judicata: "A cause of action once decided will not be relitigated, nor will any essential issue determined therein be relitigated in the same or any other cause of action between the same parties." If "another cause of action" is involved, then the cause is "collateral," hence the term "collateral estoppel" is included within the broader definition of "res judicata" defined above.

The need for collateral estoppel in criminal proceedings was relatively slight at common law because the "former jeopardy" protection was sufficient at a time when one criminal act or transaction would result in only one prosecution. During the last century, however, with the creation of a matrix of purely statutory offenses that were not technically the "same offense," it became apparent that some additional defense was needed to protect the accused against the unwarranted harassment resulting from successive prosecutions for what were only technically separate offenses.

---

[19] MCM, 1951, para. 71*a*; UCMJ, Art. 62(b) (1).

[20] ACM 4602, Wai, 3 CMR 728 (1952), pet. denied 3 CMR 151, citing Federal cases to the effect that the defense in attempting an acquittal must assume the risk of bolstering the prosecution's case. *Quaere:* Where appointed defense counsel puts the accused on the stand and the latter supplies the deficiency in proof is there not the possibility of inadequate representation? In *McCants, supra* note 8, it was noted that the case was not "close", so the failure to instruct was nonprejudicial.

[21] For an exhausting and brilliant discussion of this doctrine see Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960), at 29-48.

[22] MCM, 1951, para. 71*b*.

But before applying the more narrow doctrine of collateral estoppel, it was first necessary to determine if the broader civil doctrine of *res judicata* applied to criminal proceedings. In 1916 the United States Supreme Court decided that it did in the landmark case of *United States* v. *Oppenheimer*.[23] At the first trial, in *Oppenheimer*, the accused had made a plea in bar of trial, based on the statute of limitations. The facts were not in issue and the plea was sustained, albeit on an erroneous conception of the law. When the accused was reindicted for the *same* offense, he successfully interposed the former judgment by another plea in bar. Under the Government Appeals Act[24] the Government appealed the second judgment of acquittal directly to the United States Supreme Court, arguing that there had been no "jeopardy" because there had never been any "trial" on the merits; that is, that judgment entered upon the sustaining of a mere plea in bar did not come within the protection of the Fifth Amendment. Mr. Justice Holmes concluded that just because the jeopardy provision was expressly spelled out in the Fifth Amendment did not mean that it excluded any other protection of the Fifth Amendment, such as the application to criminal proceedings of the preexisting civil doctrine of res judicata.

> It cannot be that the safeguards of the person, so often and so rightfully mentioned with some reverence, are less than those that protect from a liability in debt.

By thus adopting the broad civil gambit of res judicata, *Oppenheimer* opened the way for subsequent Federal decisions[25] holding the included doctrine of collateral estoppel operative against the Government, on trials for *different* offenses. Collateral estoppel was first recognized in the military in *United States* v. *Lawton*,[26] wherein it was held that issues of fact and law decided in a court-martial for one offense were binding upon the Government in the subsequent trial for a different offense. Accordingly, the 1949 Manual for Courts-Martial[27] included the rule as it now stands in the 1951 Manual for Courts-Martial.

2. Issue of law or fact. The present Manual rule applies the doctrine to "any issue of fact or law". These words, therefore, seem to make no distinction, in the application of the rule, between legal or factual issues. There is, however, language in a 1954 decision of the United States Court of Military Appeals to indicate that doctrine did not apply "to an unmixed question of law".[28] Nevertheless, examination of this decision discloses that nothing more than a pure question of law was involved, and that despite this the doctrine of res judicata was applied to protect the accused. This result is in accord with the parent case of *United States* v. *Oppenheimer*, which, after all, was itself concerned with an unmixed question of law, because the facts were not disputed in that case, and hence there was no issue of credibility. Bearing in mind that the reason for applying res judicata to criminal cases is to prevent unwarranted harassment of an accused, it should not matter whether this is accomplished by giving finality to a decision of law or a decision of fact.

Quaere: What is the *same* question of fact or law? Suppose that a first trial for offense A, the defense successfully objected to the admission of a confession to offenses A and B by producing evidence in conflict with the prosecution evidence tending to show that the single confession was legally obtained. The law officer's decision therefore, was a factual one. After an acquittal of offense A, based on the insufficiency of the prosecution's evidence of guilt, the accused is tried for offense B—at least a technically different offense, and therefore without the protection of "former jeopardy." At this second trial the prosecution introduces new evidence tending to show that the confession was obtained legally; the accused objects to the admissibility of this confession on the grounds that the same issue had been decided in his favor at the trial for offense A. Does the factor of new evidence at the second trial make the question of admissibility of the confession a *different* question of fact? The

---

[23] United States v. Oppenheimer, 242 U.S. 85 (1916).
[24] 18 USC § 3731.
[25] See Sealfon v. United States, 332 U.S. 575 (1948), and cases cited therein.
[26] 28 B.R. (E.T.O.) 293, 301 (1943).
[27] MCM, 1949, para. 72b.
[28] United States v. Smith, 4 USCMA 369, 375, 15 CMR 369, at 375 (1954).

answer to this question will depend, probably, on the extent to which the appellate agencies wish to estop the Government. If estoppel were to be based on mere lack of diligence and the prosecution could show that it was not negligent in failing to discover the new evidence at the first trial, then it is conceivable that at least on a purely interlocutory question—ruled on by the *law officer*—the issue raised at the second trial might be held a *different* question. On the other hand, it may well be that more effect should be given to a jury verdict than to the interlocutory ruling of a judicial officer.

Illustrative Case

United States v. *Hooten*, 12 USCMA 339, 30 CMR 339 (1961)

The accused was initially acquitted by a special court-martial of worthless check offenses, the acquittal being based on his testimony that he had given a woman some money to deposit before he wrote the check, and also being based on the woman's testimony that she had received the mentioned sum, but forgot to deposit it. After the acquittal, apparently, it was revealed to the Government that the woman had been urged successfully by the accused to perjure herself at the trial; that the accused had not given her any such sum of money. Accordingly, the accused was charged at a general court-martial with (1) perjured testimony that he gave money to be deposited, (2) that he conspired to have the woman perjure herself (the perjury being alleged as the overt act). Although the defense asserted res judicata, he was convicted of both charges. The board of review disapproved the accused's conviction for perjury, but approved the conviction of the conspiracy charge. The property of his convictions on both counts were certified to the Court of Military Appeals.

Opinion: Both charges dismissed on the basis of res judicata. Accused's acquittal of the bad check charges resulted from his testimony *and* that of the woman. Therefore the truthfulness of his testimony cannot be attacked at a subsequent trial for perjury, *United States* v. *Martin*, 8 USCMA 346, 24 CMR 156 (1957). Likewise the conspiracy charge must be set aside; for the overt act alleged is that the woman did testify falsely to the effect that the accused gave her the sum of money to deposit. The acquittal of the bad check charges also necessarily depended upon the truthfulness of her testimony, which cannot later be attacked as false in a trial for a different offense.

Note. The Court of Military Appeals stresses the ultimate fact question decided at the first trial, rather than the evidence in support thereof. Nowhere in *Hooten* did the court even mention the fact that the subornation of perjury could have been discoverable at the first trial, nor that the woman's testimony to this effect at the second trial raised a new issue of fact. Perhaps the Government could have avoided the result in *Hooten* by alleging as the overt act a fact which had not been previously determined, as, for example, the accused's solicitation of the witness to commit perjury. Whether or not she complied would then have been irrelevant to the charge.

3. **"Put in issue and finally determined."** On a purely interlocutory decision by the judge or the law officer—such as his sustaining a defense motion[29] or objection to the evidence[30] the issue of law or fact is clearly pinpointed; at a subsequent trial for a collateral offense the defense need only produce the record of the first trial which clearly shows the particular objection or motion, with the evidence and argument in support thereof and the precise ruling thereon.

The basis of an acquittal by a *jury* verdict, however, is not always as easy to discern. Pretermitting for the moment the possibility of a purely irrational verdict motivated by a desire to resist an unpopular prosecution,[31] the jury or court members may have been presented with defense evidence raising a reasonable doubt as to the existence of two alternative defenses. For instance, two members of a seven member court-martial may have acquitted the accused because of a reasonable doubt as to his sanity; the other member voting for acquittal may have found the accused sane, but had a reasonable doubt as to whether he was present at the scene of the crime (assuming the defense of alibi was also raised.) In this case, two defenses were "put in issue";

[29] United States v. Oppenheimer, *supra* note 28.

[30] United States v. Smith, *supra* note 28.

[31] See Dunn v. United States, 284 U.S. 390 (1932) addressing the effect to be given inconsistent verdicts at the same trial, *but see* the excellent criticism of rationale of *Dunn* in Comment, *Inconsistent Verdicts in a Federal Criminal Trial*, 60 Colum. L. Rev. 1095 (1960).

none was "determined." [32] In the military cases upholding estoppel by verdict, emphasis has been given to the fact that only one real defense was raised; [33] there are no decisions as yet on the disposition of a case where two or more defenses are raised. In determining what was the single, rational basis of acquittal (in order to apply the doctrine of collateral estoppel by verdict,) the United States Court of Military Appeals will not restrict the scope of res judicata. Thus, in *Hooten*, the Government urged that the testimony of the woman and the accused *"did not necessarily"* cause the acquittal because the defense of mistake of fact was also raised.[34] The court rejected this argument as attributing "too narrow a scope to the defense of *res judicata*" [35] and appeared to adopt the board of review's interpretation that the testimony of the woman and of the accused was "the most reasonable explanation for failing to find the accused guilty."

Assuming that the question of fact or law *was* put in issue and determined, there still remains the problem of whether it has been *"finally"* determined. In the case of a motion in bar of trial based on a pure question of law, the Manual purports to allow the convening authority to overrule the law officer.[36] Possibly, therefore, the law officer's ruling granting such a motion does not become final until the convening authority approves his ruling by taking final action to dismiss the charge.

Likewise, in the case of a *rehearing* following initial conviction, it might be argued that the interlocutory rulings of the law officer at the first trial, and which favored the accused, could be asserted by the accused at the rehearing as "final" rulings in his favor. In this respect the Manual does provide that issues of law and fact "cannot be disputed between the same parties in a subsequent trial *even if the second trial is for another offense*".[37]

Although the emphasized words could imply that at the rehearing the accused is entitled to the benefit of favorable rulings at the first trial, the wording could be based on a desire to give finality to a favorable motion in bar at a second trial, not technically a rehearing.[38] Bearing in mind that the doctrine of res judicata is designed to prevent harassment of the accused by filling in the gaps in the "former jeopardy" protection, the second explanation of the ambiguous Manual provision seems the logical one: A military accused is not "harassed" by a rehearing following a conviction on prima facie evidence.[39] The rehearing is apparently no more than a continuation of the first proceeding and is ordered to protect the rights of the accused. Thus it would seem that the law officer at the rehearing should not be bound by the evidentiary rulings of the law officer at the first trial.[40] The same rationale should apply to mistrials.[41] A fair indication that res judicata will not apply to a normal rehearing situation is the treatment of the trial "law of the case", as applied to the law officer's instructions on the general issue. These instructions are the result of decisions on interlocutory questions and thus are binding on the court members. But if the court members, in defiance of the incorrect law given them by law officers should convict the accused, the appellate court will support the trial judiciary by ordering a rehearing; at the rehearing, however, the incorrect instructions favoring the accused need *not* be adhered to; [42] rather, under the *appellate* law of the case, the law officer at the rehearing must follow the correct law in his instructions or rulings.[43]

---

[32] This reasoning was offered as the basis of the much-criticized majority opinion in Hoag v. New Jersey, 356 U.S. 4641 (1958). The four dissenting Justices correctly pointed out that only *one* defense—lack of identification—was presented for the jury's determination.

[33] See CM 370251, Underwood, 15 CMR 487 (1954).

[34] United States v. Hooten, 12 USCMA 339, 30 CMR 339 (1961).

[35] *Ibid.*

[36] See the discussion of the legality of MCM, 1951, para. 67*f*, Ch. XI, *supra*; see also 18 U.S.C. § 3731.

[37] MCM, 1951, para. 71*b*. [Empahis supplied.]

[38] As in United States v. Oppenheimer, *supra* note 23. Nevertheless the obvious ambiguity of the Manual provision remains to be resolved by judicial decision.

[39] See discussion on former jeopardy in ch. XI, *supra*.

[40] See, CM 398680, Godwin, 26 CMR 600 (1958).

[41] *Cf.* United States v. Johnpier, 12 USCMA 90, 30 CMR 90 (1961); compare CM 291186, Barnes, 22 CMR 489 (1956). But consider the practice of judicial comity. *Cf.* United States v. Wheeler, 256 F 2d 745 (3d Cir. 1958).

[42] CM 392838, Anders, 23 CMR 448 (1957) discussed in Sect. IV, ch. XI, *supra*: The law officer improperly required higher proof for a perjury conviction than required by existing law. The court members convicted on evidence that would ordinarily have been sufficient, but was insufficient under the law officer's instructions. A rehearing was ordered.

[43] *Cf.*, CM 398866, Wallace, 27 CMR 805 (1958). The law officer at the rehearing would be bound by the board of review's decision that the law officer at the first trial had improperly received evidence obtained as a result of illegal search and seizure.

4. **"By a court of competent jurisdiction".** The only question here is whether certain minor courts such as a summary court-martial or an equivalent civilian court such as a justice of the peace, is a "court of competent jurisdiction". Since, in such proceedings, there is generally no formal record of trial upon which to decide if the issue were raised, and because the court itself may be a layman without any substantial knowledge of the law, more likely than not such a court would not be "a court of competent jurisdiction". A court of record, on the other hand, should be a "court of competent jurisdiction" even for the purpose of deciding the issue of its lack of jurisdiction.[44]

5. **Between the same parties.** Since the basis of the estoppel is the prevention of one particular government's harassment of the accused by trials for separate offenses, it stands to reason that another government should not be penalized for failing to act when it did not have its day in court. Thus, at least as long as former jeopardy does not apply vis-á-vis federal and state trials, neither will res judicata. For instance, a state acquittal because of alibi will not preclude the federal prosecutor from proving the accused's presence at the scene of the crime.

The only unwarranted departure from the requirement of sameness of parties has been in the area of crimes committed by joint offenders. Ignoring the vagaries of different jury verdicts, for some time federal court have held[45] that the acquittal on the merits of one of two sole conspirators bars the subsequent trial of the other.[46] The United States Court of Military Appeals has extended this doctrine to set aside the prior conviction of an accused, whose sole conspirator was subsequently acquitted.[47] However, when faced with substantially the same question as applied to the effect of a subsequent acquittal of a principal upon the prior conviction of an accessory after the fact,[48] the court declined to follow its prior rationale in *United States* v. *Kidd*.[49] Perhaps this is an indication that the court will someday reexamine its holding in *Kidd*.

6. **Procedure.** Depending on the nature of the issue raised, res judicata is a "defense" or a "rule of evidence." For instance, in the rare case where an accused is rearraigned on the same charge which had been previously dismissed as a result of the sustaining of a motion in bar of trial,[50] the issue would be raised as a "defense" by a motion in bar that could properly be asserted before receipt of evidence on the merits. The burden would be on the accused to establish his contention that the issue was the same and had been decided in his favor;[51] because it would be an interlocutory question, the law officer would make the final ruling.[52]

On the other hand if the accused is arraigned on a different charge, his problem is to assert finality to an issue of fact or law previously decided in his favor by verdict or a ruling of the law officer or judge at an earlier trial for a different offense. This can be done by objecting to the prosecution[53] evidence offered in support of this issue provided it is the same—for if the point had been "finally" decided it could not be in issue at the instant trial, and the prosecution evidence is therefore irrelevant. In this situation res judicata is really a "rule of

---

[44] MCM, 1951, para. 685.

[45] See cases cited in United States v. Kidd, 13 USCMA 184, 188, 32 CMR 184, 188 (1962).

[46] Recognizing the fallacy of the reasoning behind the rule, Illinois in the recodification of its statutes has expressly excluded such a rule. See "Proceedings before A.B.A. Section of Criminal Law, St. Louis, Mo., August 7–10, 1961," p. 10.

[47] United States v. Kidd, *supra* note 45. In his concurring opinion Chief Judge Quinn stated that the true basis of the decision was res judicata.

[48] United States v. Marsh, 13 USCMA 252, 32 CMR 252 (1962).

[49] *Supra* note 45. The court did not even mention *Kidd*, decided shortly before *Marsh*. The basis of its holding was a questionable interpretation of the legislative intent behind UCMJ, Art, 77, defining the crime of being an accessory after the fact.

[50] United States v. Oppenheimer, *supra* note 28.

[51] See sec. III, ch. XI, *supra*.

[52] United States v. Smith, 4 USCMA 389, 393, 15 CMR 389, 393, (1954).

[53] The doctrine of mutuality of estoppel does not apply to the criminal, as distinguished from the civil, application of res judicata, for to do so probably would unconstitutionally deprive an accused of his VIth Amendment rights to jury trial and the confrontation of witnesses. See United States v. De Angelo, 138 F. 2d 466 (3d Cir. 1948). In certain cases, however, which deal with his "status", the Government is allowed to introduce as evidence a prior determination adverse to the accused—usually in the form of a previous conviction. Thus, in trial for being a deported alien illegally in the United States, the Government legally could introduce a record of trial showing the accused's previous conviction for illegal entry, wherein it was shown that accused's claim of citizenship by birth was decided adversely to the accused. United States v. Rangel-Perez, 179 F. Supp. 619 (S.D. Calif. 1959). The accused in such a case, however, is allowed to dispute this evidence. In this respect, the Manual may be in error where it precludes the accused from attacking a prior conviction for fraudulent separation. MCM, 1951, para. 71b.

evidence".[54] If the law officer or judge excludes the evidence, the accused is usually entitled to an acquittal on the merits unless the prosecution has introduced legally sufficient evidence of an entirely different nature and which was not barred by the application of res judicata. The Manual recognizes this application of the doctrine of estoppel when it suggests:[55]

> A motion raising the defense of res judicata should ordinarily be made after the prosecution has rested its case or later unless it can be shown at an earlier stage of the trial that the issue[s] of fact or law . . . are the same.

The prosecution's evidence is usually entwined with the evidence on the merits, and therefore the law officer usually cannot tell if the same issue is being relitigated until he has heard all the evidence, unless the parties initially stipulate to what the evidence will be. In this latter case the law officer can make his ruling at the beginning of the trial, and both parties will know in advance what evidence is admissible. If the defense objection is sustained by the law officer and the prosecution admits he has no additional evidence not barred by res judicata, a motion for a finding of not guilty should follow. The required sustaining of this motion will protect the accused from a subsequent trial.[56] As in any general objection to the admissibility of prosecution evidence, the defense has the burden of establishing his contention by a preponderance of the evidence.[57]

In ruling on the objection, the law officer must decide precisely what issue was decided at the other trial. As stated earlier, this is no problem if the first issue was decided by the law officer;[58] but if the issue was allegedly decided by the verdict, he reexamines the record of the former trial with particular attention to: (1) the evidence raising defenses (2) the arguments of counsel (3) the instructions of the law officer to the court members (4) questions by members of the court-martial.[59]

Section III. PARAGRAPHS 120–124, MCM, 1951, MOTIONS RAISING THE ISSUE OF INSANITY

1. General. The term "insanity", as used in this section, includes both the accused's lack of mental responsibility for the offense charged and his lack of mental capacity to understand the proceedings at the time of trial. The issue of mental responsibility goes to the merits of the case, that is, to the question of the accused's guilt or innocence. The substantive rule on mental responsibility, applicable in cases tried by courts-martial is:

> A person is not mentally responsible in a criminal sense for an offense unless he was at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right.[60]

The issue of the accused's lack of mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense[61] only affects the fairness of the trial. If the accused does not possess the requisite mental capacity to stand trial, then the proceedings must be continued until the accused regains the required mental capacity. To create a reasonable doubt as to mental incapacity, there is no requirement that the accused have a mental disease,

---

[54] United States v. Carlisi, 32 F. Supp. 479 (E.D. N.Y., 1940), cited with approval in United States v. De Angelo, 138 F. 2d 466 (3d Cir. 1943).

[55] MCM, 1951, para. 71b.

[56] Whereas if the law officer sustained a "motion to dismiss" based on res judicata, his ruling might not be final—being subject to appeal by the Government. See MCM, 1951, para. 67f, discussed in sec. V, ch. XI, *supra*.

[57] See sec. III, ch. XI, *supra*, discussing exceptions to general rule.

[58] United States v. Smith, *supra* note 52.

[59] CM 370251, Underwood, 15 CMR 487 (1954): Although it is improper to compromise the secrecy of the court-martial members' deliberations by allowing them to testify as to the basis of the prior acquittal.

[60] MCM, 1951, para. 120c. This rule has not been disapproved by the Court of Military Appeals. Cf. United States v. Smith, 5 USCMA 314, 17 CMR 814 (1954). The Powell Report recommended that a new rule, very similar to the proposed American Law Institute rule, be substituted for the present. The proposed test is as follows:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or conform his conduct to the requirements of the law." P. 118, Report to the Secretary of the Army by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, 18 January 1960. (Henceforth referred to as the "Powell Report.")

[61] MCM, 1951, para. 120b.

defect, or derangement. Nor is it necessary that the condition of incapacity have existed at the time the offense was committed.

Related to insanity is the doctrine sometimes referred to as "partial mental responsibility". More accurately the issue involved is the lack of ability to form the specific intent, to premeditate, or to entertain a specific knowledge, whichever might be a necessary element of the offense charged. This lack of ability to intend is not treated the same as the other issues of insanity.

The procedure for raising and deciding questions of insanity are designed specifically to afford maximum protection to the accused. The Manual directs that if any officer concerned with the disposition of the charges, the investigating officer, trial counsel, or defense counsel feel there is reason to believe the accused is insane or was insane at the time the offense was committed, these beliefs and observations should be reported through appropriate channels in order that an inquiry into the accused's mental condition may be conducted before the trial. If there appears to be a substantial basis for believing the accused insane, a board of medical officers shall be convened to examine the accused and report on his mental condition.[62] Although the defense counsel would usually raise the issue by presenting evidence of the accused's insanity, it is incumbent upon the law officer to call for evidence if inquiry into the accused's mental condition seems warranted.[63]

Three distinct problem areas present themselves in any discussion of motions raising insanity. They are (1) the duty to inquire into the accused's mental condition, (2) motions based on the accused's mental incapacity, and (3) motions based on the accused's lack of responsibility.

2. **Duty to inquire.** *a. General.* Any member of the court, the law officer, trial counsel or defense counsel may request or make a motion that inquiry into the accused's mental condition be made. A "bare assertion from a reliable source" that the accused appears to be insane is sufficient basis for an inquiry. Evidence, not substantial enough to raise the question of insanity as an essential issue of fact in the case, still can support a decision to make further inquiry into the mental condition of the accused.[64] Usually the defense counsel will have conducted his own inquiry and in an appropriate case will be ready to present to the court evidence sufficient to raise the issue of insanity.

b. Procedure. After a request, or motion for further inquiry has been made, the law officer rules on the motion. His ruling on the motion for inquiry is treated as a question involving insanity, and thus falls within the Article 51(b) exception to the finality of interlocutory rulings by the law officer.[65] His ruling is, therefore, subject to objection by any member of the court. If there is no objection, the ruling is final.

If any member of the court does object to the ruling, then the court must be closed and vote on the ruling. The law officer should give instructions on what is involved in his ruling, before asking if there are any objections.[66] The court must be instructed on the consequences and the evidentiary standards which will warrant further inquiry. If any member objects, these instructions must be repeated before the court closes to vote. A majority vote decides the question, with a tie vote constituting a determination against the accused.[67]

[illegible] that a medical board report [illegible] necessarily admissible in evidence [illegible] examined by the law officer for the limited purpose of deciding if further inquiry into the accused's mental condition should be made. In case a member of the court objects to the ruling, the Manual directs that the *court* may also examine the report for the same limited purpose.[68]

---

[62] MCM, 1951, para. 121.

[63] MCM, 1951, para. 122*a*.

[64] MCM, 1951, para. 122*b*.

[65] The law officer rules finally upon all interlocutory matters except motions for a finding of not guilty and questions of the accused's insanity. UCMJ, Arts. 51(b).

[66] *Cf.*, United States v. Williams, [illegible] (1954).

[67] UCMJ, Arts. 51(b) and [illegible] "The Law Officer" (1958), para. 42*a*.

[68] MCM, 1951, para. 122*c*.

Illustrative Case

United States v. *Concepcion-Velez*, 4 USCMA 183, 15 CMR 183 (1954)

The law officer, after examining a medical board's report on the accused's mental condition, denied a motion for further inquiry, subject to an objection by any member of the court. When a member objected, the court was allowed to examine the report despite the defense counsel's hearsay objection. The law officer then gave instructions to the court that the report was admitted for the limited purpose of determining whether further inquiry should be made and that it did not constitute evidence as to the guilt or innocence of the accused. The court then decided no further inquiry was necessary.

Opinion: [Per Judge Latimer with Judge Brosman concurring]. "The evidence necessary to make the preliminary determination on whether to proceed with an inquiry need not meet the tests of admissibility required of evidence admitted on the merits." The Manual provides that any evidence used to determine the issue of further inquiry will be limited to that purpose. The accused's inability to cross-examine on the report can be remedied by calling the board members as witnesses if desired.

Chief Judge Quinn dissented because, in his opinion, the accused was denied the right to confront witnesses against him and to cross-examine all adverse witnesses.

COMMENT: Of the members of the Court that decided *Concepcion-Velez*, only Chief Judge Quinn, the dissenter, still sits on the Court. It might be pointed out that only one other judge need join Judge Quinn to make his dissent the majority of the Court.

Usually interlocutory questions involving insanity are ruled on by the law officer subject to objection by any member of the court-martial A defense motion or request for a continuance in order to obtain more evidence concerning the accused's mental condition is not considered as a question involving insanity, and as such the law officer's ruling is not subject to objection by the court members.

Illustrative Cases

United States v. *Frye*, 8 USCMA 137, 23 CMR 361 (1957)

The defense counsel requested a continuance in order that he might have more time to have the accused examined by other psychiatrists. The law officer denied the continuance, and the trial proceeded without the mental responsibility of the accused being brought into issue. The Board of Review decided that the denial of the continuance by the law officer was an abuse of discretion prejudicial to the accused. *Opinion:* The Court of Military Appeals reversed and returned the case to the Board for further inquiry into the accused's mental condition.

COMMENT: The three opinions did not treat the law officer's failure to grant the continuance as if it were a special kind of continuance. Each judge examined the facts to determine if there had been an abuse of discretion. There was no discussion at all of whether the ruling on the continuance should have been made subject to the objection by the court members. The Court's decision that there was no abuse of discretion on the law officer's part leads one to believe that this continuance, although the request does involve the accused's mental condition, should be treated as any other continuance.

ACM 16784, *Cook*, 30 CMR 805 (1960)

The law officer on his own motion granted a continuance to the defense, subject to objection by the court members, in order that the case could be sent back to the convening authority "to establish the capacity of the accused to stand trial." The president of the court-martial objected, and in closed session, the court voted not to sustain the law officer's ruling. The trial proceeded.

Opinion: In determining the propriety of submitting the law officer's ruling to the court members, the Board of Review said: "[W]e initially note that the law officer may be called upon—by defense counsel's motion or by other circumstances—to rule on four distinct propositions: (1) a continuance to permit the defense counsel to obtain psychiatric evidence; (2) a continuance to permit the defense counsel to request relief or assistance from the con-