is a Marine Corps order prescribing the procedure for obtaining *reserve officers* for membership on certain boards, such as retention, promotion, or retirement boards. A form of endorsement provides for acknowledgment of receipt of the orders by the addressee, but the space for the signature of the accused is blank. Patently, this Marine Corps order is not authority to place the accused on temporary active duty, without his consent and for the sole purpose of court-martial. Its purpose is to obtain reserve officers when there are "insufficient reserve officers of appropriate grade . . . on active duty in the area to constitute a board." Such reserve officers can be ordered to temporary active duty "with their consent." *Id.*, paragraph 4. Assuming MCO 5420.7A authorizes the call of a reserve officer for membership on a court-martial, the accused is not an officer, and there is no evidence in the record to show he consented to be called. Assuming further that we can disregard the authorities cited in the orders which called the accused to temporary active duty, and that we can look elsewhere for authorization to make him subject to the Uniform Code of Military Justice at times different from those prescribed by 10 USC § 270, no such authority has been cited to us. Our own research has uncovered no statute or regulation to authorize the call to temporary active duty of a reservist like the accused. Previous to the Uniform Code, section 301 of the Naval Reserve Act of 1938, supra, provided that a reservist who committed an offense during a regular drill period could be "returned to a duty status without . . . consent . . . [for the] period of time . . . required for disciplinary action." That provision, however, was repealed on enactment of the Uniform Code of Military Justice. Act of May 5, 1950, 81st Congress, 2d Session, section 14 (r), 64 Stat 148. In the absence of any such authority, neither of the orders directed to the accused established jurisdiction over him for the purpose of trial.[4]

Headnote 4

We turn now to the ground on which jurisdiction was sustained on intermediate review, namely, that jurisdiction attached on July 18, when the accused was concededly subject to the Uniform Code. It is well-settled that jurisdiction which attaches by timely commencement of proceedings against the accused survives a change of status on his part. The principle is discussed in paragraph 11*d*, Manual for Courts-Martial, supra, and has been given effect in a number of cases in this Court. See United States v Sippel, 4 USCMA 50, 15 CMR 50; United States v Rubenstein, 7 USCMA 523, 22 CMR 313. In the language of the Manual, supra, jurisdiction attaches "by commencement of action with a view to trial—as by apprehension, arrest, confinement, or filing of charges." Applying the rule to a reservist participating in scheduled drills, the Judge Advocate General of the Air Force has ruled that "jurisdiction may not lawfully be asserted unless prior to the termination of the training period, jurisdiction has attached by commencement of action with a view to trial—as by apprehension, arrest, confinement, filing of charges *or other similar action.*" (Emphasis supplied.) OP JAGAF 1953/9, 2 Digest of Opinions, Court-Martial § 45.7, page 164. In the *Rubenstein* case, supra, at page 529, a majority of this Court held that jurisdiction attached when the accused was informed "he was being investigated for the offenses in issue . . . and he was placed under restraint by being ordered to report daily" to the investigating officer. Appellate defense counsel contend that, even under this broad ruling, jurisdiction did not attach in this case because no restraint of any kind was imposed upon the accused

[4] Our conclusion as to the absence of authority for issuance of the orders to temporary active duty makes it unnecessary to consider whether authority to call a reservist to active duty for training under 10 USC § 270 includes authority to call him to active duty for the sole purpose of subjecting him to trial by court-martial. See United States v Hooper, 9 USCMA 637, 26 CMR 417.

and no charges were served upon him at a time when he was subject to the Uniform Code. Oppositely, the Government maintains that jurisdiction did attach because the accused was, in effect, "'held to answer' to higher authority." It relies especially upon an unpublished opinion by the board of review in United States v Hamm, CM 413302, decided March 11, 1966.

In the *Hamm* case, supra, the accused was a member of the National Guard of Oklahoma. He was ordered to six months active duty for training, effective in October 1964. The period of training was to end on April 18, 1965. On March 27, 1965, the accused perpetrated a robbery, but was almost immediately apprehended by the military police. Shortly thereafter, he was released to his company Charge of Quarters, who executed a document titled, "Receipt for Prisoner or Detained Person." That morning, or on the following day, he was placed in restriction by the commanding officer, who also initiated "flagging action" to retain him in the service beyond the scheduled release date, for the purpose of possible court-martial. On May 25, 1965, the accused was again confined and a formal charge was preferred against him on May 26. He escaped from confinement on July 6, but was returned to military control, and brought to trial on August 17, for the March robbery and for other offenses committed after the original release date. As to the robbery charge, the board of review held that jurisdiction existed to try the accused beyond the date of his scheduled release because of the prior action taken against him.

The holding in *Hamm* goes no further than the decision in *Rubenstein*.

Headnote 5

In both, the accused was placed under some form of restraint. In this case, no restraint of any sort, moral or physical, was imposed upon the accused. The record, in fact, indicates the contrary. The accused's commanding officer was instructed by the adjutant at District headquarters that the accused should not be retained beyond the termination of the drill session. Everything that was done reflects a clear intention to exercise no military control over the accused past the end of the July 18th drill session. It was clearly contemplated that such control would be asserted some time in the future by the issuance of orders calling him to active duty, if and when the District Director determined to refer the charge to trial. The frustration of that intention, because of the absence of authority to order the accused to active duty for court-martial, does not change the fact that the accused was not, as the Government contends, "held to answer" to higher authority. On the record, there was no institution of proceedings against the accused sufficient to attach jurisdiction on July 18. We conclude, therefore, that the court-martial had no jurisdiction over the accused and the offense at the time of trial.

The decision of the board of review is reversed. The findings of guilty and the sentence are set aside, and the charge is ordered dismissed.

Judge KILDAY concurs in the result.

FERGUSON, Judge (concurring in the result):

I concur in the result.

I agree fully with the Chief Judge that, on the facts of this case, no jurisdiction existed to try the accused, in light of the failure to take any action to attach jurisdiction and the orders which were improperly issued in the case. See United States v Rubenstein, 7 USCMA 523, 22 CMR 313, and United States v Wheeler, 10 USCMA 646, 28 CMR 212. As this serves to dispose of the case, it is unnecessary to go further and construe Uniform Code of Military Justice, Article 3, 10 USC § 803, in its application to the troublesome question of exercise of the power to try ordinary citizens by courts-martial on the basis of their tenuous connection with the armed forces through membership in the reserve forces and attendance at inactive duty training drills. Such an extraordinary exercise of military judicial authority over our modern day militiamen bears the closest exami-