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MISTRIALS IN COURTS-MARTIAL: A STUDY OF THE EVOLUTION OF THE JUDICIAL CHARACTER OF THE MILITARY JUDGE

PAUL E. WILSON*

INTRODUCTION

The judicially declared mistrial is a relatively new concept in the administration of military justice. The word "mistrial" does not appear in the Uniform Code of Military Justice, nor is it used in the current *Manual for Courts-Martial*. A little more than a decade ago the law officer's power to terminate a trial prior to findings, in the manner of the civilian judge, was consistently denied by service boards of review. When the power was finally recognized and confirmed by the Court of Military Appeals, the opinion of the court reflected the views of only two of its three members.¹ The development of the mistrial concept in court-martial procedure is an incident of the transition to a judicially administered system of military justice, and is illustrative of the emerging judicial stature of the law officer. The recognition of his power to terminate the trial of a matter referred by the commander, when the interests of justice so require, represents a significant stage in the development of an independent military judiciary.

NATURE OF THE REMEDY

A mistrial is a trial that is legally of no effect because of basic defects in the proceedings. It is the legal equivalent of no trial at all, and will be ordered only as a last resort when it is physically impossible to continue the trial or the record is infected with error so gross as to raise doubts as to the possibility of a just result if the trial continues. For the purpose of this inquiry, "mistrial" refers only to trials which are terminated by competent authority after evidence has been received on the issue of guilt of the accused and before findings have been returned by the court. It does not include those cases where the charges have been withdrawn or dismissed prior to trial nor does it include cases where the findings are set aside on review and a new trial is

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1. *United States v. Stringer*, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954).

ordered. A declaration of mistrial, therefore, is an order of the trial judge which terminates a trial in progress and discharges the jury or other trier of fact prior to the determination of the controverted issue.

The order declaring a mistrial is an interlocutory order.² It does not end the proceedings against the accused. Hence it is not reviewable until the case is completed. The request or consent of the accused is not necessary to a valid declaration of mistrial. On the contrary, when a free and fair hearing cannot be had, a mistrial should be declared even in the face of the accused's objection.³ From a pragmatic point of view, one of the most significant incidents of the mistrial is that even though the trial may have progressed beyond the point where the accused would otherwise have been placed in jeopardy, the lawful declaration of mistrial does not bar a subsequent trial for the same offense.

The declaration of mistrial is an exercise of judicial power, one that belongs exclusively to the trial judge in civilian courts. While at common law the trial court could not discharge a jury after it had been sworn in a *criminal* case, the power now exists in civil and criminal cases alike.⁴ The objective is sometimes accomplished by the fiction of the "withdrawal of a juror." But regardless of the technique or terminology employed, it is now universally recognized that an incident of the trial judge's duty to assure a fair trial is the power to use his discretion to terminate a proceeding in which fairness has become impossible.

MILITARY ANTECEDENTS OF THE MISTRIAL

Although the idea of the mistrial in military law is not unlike its counterpart in the civilian courts, its antecedents are quite different. Prior to the Uniform Code of Military Justice, no element of the court-martial had power to terminate a trial. The absence of this essential judicial power is not surprising when it is remembered that the tribunals administering military justice are not part of the judicial branch of the government, but instead are instrumentalities of the executive power. They have been conceived to possess no inherent powers, judicial or otherwise, but are competent to do only those things authorized by express statute or derived from military usage. The court-martial has been described as:

2. Quinn, C.J., in 17 C.M.R. at 138.

3. 17 C.M.R. at 132.

4. 53 AM. JUR. *Trials* § 970 (1954).

. . . a creature of *orders*, and except in so far as an independent discretion may be given by statute, it is as much subject to the orders of a competent superior as is any military body or person.⁵

So far as the court and the parties were concerned, the referral of charges for trial were orders of the commander, addressed to military subordinates, and, like other military orders, required obedience on the part of subordinates. A decision of the court-martial to terminate a trial before findings might have subjected the members of the court to penalties for insubordination.⁶

Patently, situations would arise wherein considerations of justice or policy, or both, might require the termination of a trial before its conclusion. In such cases the power to withdraw the charge belonged solely to the convening authority. He alone, as the representative of the United States, was authorized to withdraw charges before trial or to direct a *nolle prosequi* or other termination to be entered as to a charge of specification after the charges were placed before the court and after arraignment. The pre-existing practice may have suggested the provision of Paragraph 55 of the current *Manual for Courts-Martial*⁷ which authorizes the court-martial to suspend proceedings, pending application to the convening authority for directions, when the evidence does not support the specification but indicates a lesser offense.⁸

Also relevant to our present concern is that portion of Paragraph 56 of the *Manual* which provides:

5. 1 & 2 Winthrop, *Military Law and Procedures* 49 (2nd ed. Reprint 1920).

6. *Id.* at 155. Winthrop suggests that it would constitute a military offense for the court to amend the charge without authorization. Presumably an unauthorized termination of the trial before findings might be of the same nature.

7. The references herein are to the *MANUAL FOR COURTS-MARTIAL*, United States, 1951 [hereinafter cited as *M.C.M.* 1951]. The *MANUAL* is currently being revised. It is expected that pars. 55 and 56 will be redrafted to reflect the trends disclosed by the cases examined hereafter.

8. *M.C.M.* 1951, para. 55.

If at any time during the trial it becomes manifest to the court that the available evidence as to any specification is not legally sufficient to sustain a finding of guilty thereof or of any lesser included offense thereunder, but that there is substantial evidence, either before the court or offered, tending to prove that the accused is guilty of some other offense not alleged in any specification before the court, the court may, in its discretion, either suspend trial pending action on an application by the trial counsel to the convening authority for direction in the matter or it may proceed with the trial. In the latter event, a report of the matter may properly be made to the convening authority at the conclusion of the trial.

The convening authority may direct the prosecution to make a declaration of record that a certain specification, and when appropriate, the charge under which it is laid is withdrawn and will not be pursued further at the trial. A specification will be withdrawn only when directed by the convening authority who may give such direction either on his own initiative or on application duly made to him. The convening authority may not withdraw a specification if the court has finally terminated the proceedings by a finding or by a ruling which amounts to a finding of not guilty.⁹

It is probably a semantic error to speak of the convening authority's power to withdraw specifications or otherwise to terminate a trial prior to findings as the power to declare a mistrial. It is rather one of the incidents of military command that has no counterpart in the administration of justice in civilian courts. When he causes a trial to be terminated, the convening authority assumes to act as the guardian of justice in his court-martial jurisdiction. Whether such a rule is consistent with the objectives of the code is a matter of doubt and will be commented upon later. However, a consideration of the law officer's judicial power to adjudge mistrials must recognize the apparently parallel power of the convening authority expressly conferred in the code and noted by the *Manual*. Indeed, most of the cases dealing with mistrials analogizes the law officer's power in this respect to that of the convening authority and the limitations in the manual and code which expressly restrict his power are also made applicable to the law officer.

THE POWER TO DECLARE MISTRIALS—THE EMERGING JUDICIAL STATUTE OF THE LAW OFFICER

The creation of the law officer and the definition of his role in the general court-martial was an innovation in military law. Like all innovators, the framers of the code and their advisors were apparently unsure of the nature of the role that they had created. It is clear that it was the intention of the code to invest the law officer with powers similar to those of the civilian judge. At the same time, a strong military tradition and peculiar military needs and objectives required that distinctions be observed. Illustrative are the provisions of the code relating to rulings by the law officer.¹⁰ He may be overruled by members of the

9. M.C.M. 1951, para. 56.

10. UNIFORM CODE OF MILITARY JUSTICE, art. 51(b) [hereinafter cited as U.C.M.J.].

court-martial with respect to a holding on a motion for findings of not guilty, or the question of the accused's sanity. He has no power to sentence the convicted accused.¹¹

The power to declare mistrials is not expressly conferred by the code, nor is there evidence that such power was contemplated by the authors of the *Manual for Courts-Martial*. It is true that with certain exceptions, the law officer is authorized to rule on interlocutory questions generally.¹² A passing comment on the law officer's power to declare a mistrial is found in at least one place in the congressional hearings on the code prior to its enactment.¹³ A contemporaneous study by members of the Judge Advocate General's Corps points out that among the circumstances in which jeopardy will not attach even though evidence has been received, is the instance where "a mistrial is declared because of matters prejudicial to the accused or the government."¹⁴ But in each case, the reference is so casual that we cannot feel secure in the conclusion that the intent of the code was to confer upon the law officer the judicial power to declare mistrials.

These propositions are clear. First, no component of the court-martial had the power to declare a mistrial prior to the code.¹⁵ Second, subsequent to the enactment of the code, service boards of review of all the armed services held expressly that a court-martial and its component elements lacked the power to declare a mistrial and that the motion for mistrial was then unknown to military law.¹⁶ A statement in *United States v. Conway*¹⁷ sums up the view usually expressed. There among other grounds for reversal, it was urged that the law officer committed prejudicial error by declaring in open court that there was no provision for the law officer of a court-martial to declare a mistrial. The board comments:

We find no error here for we agree with the statement
Other provisions of the court-martial procedure as prescribed in

11. U.C.M.J., art. 52.

12. U.C.M.J., art. 51 (b).

13. *Hearings on H.R. 2498 Before the House Comm. on Armed Services*, 81st Cong., 1st Sess., at 1154.

14. JAG, LEGAL AND LEGISLATIVE BASIS; MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951).

15. *Supra* notes 5 and 6.

16. *United States v. Conway*, N.C.M. 228, 11 C.M.R. 625 (1952); *United States v. Beale*, C.G.C.M.S. 19655, 7 C.M.R. 469 (1952); *United States v. Simpson*, A.C.M. 3430, 4 C.M.R. (AF) 256 (1950); *United States v. Stevenson*, 45 B.R. 267, 284.

17. N.C.M. 228, 11 C.M.R. 625 (1952).

the code and manual are intended to ensure 'essential fairness' in the conduct of the trial. Collectively these amount to 'military due process'...¹⁸

In 1954, the problem of power to adjudge a mistrial was first considered by the Court of Military Appeals in *United States v. Stringer*.¹⁹ Narrowly speaking, the case did not involve an order of mistrial. An earlier trial had been terminated by the convening authority because of improper remarks by the president of the court-martial. When called for subsequent trial, the accused raised the defense of double jeopardy. Two principal questions were considered. First, the court held by the unanimous opinion of its members that a trial by court-martial may be terminated prior to findings by reason of "manifest necessity" without the attachment of jeopardy.²⁰ Second, the court considered without consensus the question of the proper agency to exercise the power. Chief Judge Quinn took the view that the power belonged to the law officer alone. Judge Brosman was inclined to the position that the power to terminate trials prior to findings was an exclusive power of the convening authority. Judge Latimer felt that the power belonged concurrently to both officers. Hence, although generally three different views were expressed, the power to terminate trials prior to findings was confirmed in both the law officer and the convening authority by a two to one vote.

The law officer's authority to adjudge mistrials has not been seriously questioned since *Stringer*. During the past decade it has been so often confirmed that the question is no longer raised. The recognition of this aspect of the law officer's role is clearly consistent with the declared intention of Congress to constitute the law officer as a judge to all intents and purposes.²¹ The law officer is not a mere figurehead in the courtroom drama. He must direct the trial along paths of recognized procedure in a manner reasonably calculated to bring an end to the hearing without prejudice to either party.²² His position as a judicial arbiter was most recently affirmed in *United States v. Waldron*²³ which recognized the law officer's power to declare a mistrial when the triers

18. 11 C.M.R. at 631.

19. 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954).

20. 17 C.M.R. at 129. See discussion of "manifest necessity" *infra* at page 337 *et seq.*

21. *United States v. Berry*, 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952).

22. *United States v. Jackson*, 3 U.S.C.M.A. 646, 14 C.M.R. 64 (1954).

23. 15 U.S.C.M.A. 628, 36 C.M.R. 126 (1966).

of fact disclosed evidence of pre-judgment of an important witness, thus casting substantial doubt upon the fairness or impartiality of the trial.

The power of the civilian counterpart of the law officer, the federal trial judge, to terminate a trial in the interests of justice was established many years ago in *United States v. Perez*²⁴ when the Supreme Court said:

We think that in all cases of this nature the law has invested the courts of justice with authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere.²⁵

To deny the law officer the power to terminate a proceeding in which the probability of justice has been impaired, is to deny him an essential attribute of the judicial office.

CONVENING AUTHORITY'S ROLE

The convening authority's power to terminate a trial prior to findings was apparently conceded in two sections of the manual: (1) Paragraph 55 authorizes a court which believes that the prosecution's evidence is insufficient to prove the crime alleged, but may show some other offense, to suspend trial pending an application by the trial counsel to the convening authority for direction. The necessary implication is that the convening authority may direct the trial to continue, or may terminate the present proceeding and cause new charges to be referred.²⁶ (2) Paragraph 56 authorizes the convening authority upon his own initiative or upon application to withdraw any pending specification and the charge under which it is laid, and to direct that it not be pursued further at the trial. Grounds for such withdrawal are enumerated in the manual. Certain safeguards are articulated and provide specifically that after evidence of guilt or innocence has been heard, the power will be exercised only with the greatest caution, under urgent circumstances for very plain and obvious causes; in no case will a specification be with-

24. 22 U.S. (9 Wheat.) 579 (1824).

25. *Id.* at 580.

26. M.C.M. 1951, para. 55(a).

drawn unfairly or arbitrarily to the accused; and when the withdrawal is after evidence has been taken, the reasons must be stated in the record. A withdrawal of specification under paragraph 56 precludes a subsequent trial only when occasioned by the insufficient evidence and without the fault of the accused.²⁷

The reported cases qualify paragraphs 55 and 56. In *United States v. Turkali*²⁸ the presentation of evidence had been concluded and the court-martial had deliberated ten hours when the president reopened the court and requested that additional witnesses be called by the prosecution. On being informed that the witnesses were not available the court suspended proceedings and sought directions from the convening authority under paragraph 55. Eight days later the convening authority directed that the trial continue and the accused moved for his discharge on the ground that the suspension under paragraph 55 was tantamount to acquittal. Although the question was not necessarily before the Court of Military Appeals, a majority gratuitously pointed out that the convening authority might have withdrawn the charge from the court-martial, even though all the evidence was in, and have caused the accused to be tried for another crime. In an opinion concurring in the result, Chief Judge Quinn offers several reasons why the procedure should be condemned, the most persuasive of which is that the procedure is fundamentally unfair in that it allows the court to supply the government with advisory findings as to the sufficiency of the evidence before a determinative result is reached.

The posture of the law remained as stated in *Turkali* until 1961 when the question was again considered in *United States v. Johnpier*.²⁹ In another gratuitous opinion, a majority of the court repudiated the position taken in *Turkali*. In *Johnpier* the law officer had apparently determined that in view of the evidence the charges had been improperly drawn. Therefore, he granted the prosecution's motion to refer the case back to the convening authority. The convening authority directed that the trial proceed under the charge as originally drawn. Thereupon the law officer declared a mistrial, believing that the court-martial might be influenced by the disclosure that the convening authority's views were contrary to those of the law officer. The accused moved to dismiss the subsequent prosecution on the ground that he had been previously in jeopardy for the same offense. The Court of Military Appeals

27. M.C.M. 1951, para. 56 (a) (b) (c).

28. 6 U.S.C.M.A. 340, 20 C.M.R. 56 (1955).

29. 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961).

took note of other grounds justifying the order of mistrial, and then unnecessarily but expressly overruled *Turkali* with this comment:

... we are convinced that the paragraph 55 procedure for suspension of trial in order to obtain the views of the convening authority is both archaic and unjudicious. It is contrary to the express language of Article 51 and violates the spirit of the Uniform Code and the purpose for which it was enacted.³⁰

Thus, the effect of *Johnpier* is to diminish materially the status of the convening authority with respect to the trial. Paragraph 55 had its counterpart in paragraph 70b, *Manual for Courts-Martial, 1949*; this in turn was taken from paragraph 73, *Manual for Courts-Martial, 1928*. All empowered the court to continue a case to refer defective specifications to the convening authority for directions as to further proceedings. The disapproval of this aspect of the convening authority's power is a significant step toward judicial control of the administration of military justice.

The holding in *Johnpier* apparently does not affect the power of the convening authority to withdraw specifications and charges under paragraph 56. When manifest necessity in the interests of justice or urgent military necessity requires, the convening authority may withdraw a specification and the charge under which it is alleged during the progress of the trial. A serious question arises when we seek justification for the power.

The convening authority performs a multi-role in the administration of military justice. As the representative of the government he convenes the court-martial and refers charges for trial. Subsequent to the trial, he performs judicial services as a reviewing agency. Consistent with these roles there is no legitimate objection to be made to the action of the convening authority who causes the withdrawal of specifications prior to trial or who, upon review subsequent to trial, disapproves findings for legal error. The problem arises when the convening authority is permitted to inject himself into a trial and decide whether the proceeding should continue or be terminated or suspended in order that other more effective action may be taken. Under most circumstances, such a prerogative is not a necessary incident of either his role as representative of the government or an appellate authority, and it is wholly inconsistent with the idea of a trial under the direction and control of

30. 30 C.M.R. at 94.

an independent judicial officer. Conceding the possibility that in the extraordinary case the national interest might require termination by the convening authority, the provisions of the manual seem too broad, and if implemented literally would seriously burden the orderly administration of military justice. Hence, the diminution of this aspect of the convening authority's role is wholly justifiable.

THE PROBLEM OF JEOPARDY

The Uniform Code of Military Justice, consistent with other systems of Anglo-American jurisprudence, protects the accused person from being twice tried for the same offense without his consent.³¹ Thus, the subsequent trial of one whose conviction or acquittal on a charge of specification has become final after review, is barred. A closer question arises in the case of the inconclusive termination of the criminal trial. When is the accused whose trial has ended without findings, but who has been arraigned and against whom evidence has been offered, liable to further prosecution? This is the overriding question in every case where a mistrial has been ordered.

Article 44(c) of the Code defines "trial" to include a proceeding that is terminated, after evidence has been introduced but prior to findings, without fault on the part of the accused. While the Article speaks of terminations by the convening authority or on motion of the prosecution, the limitation must also be applied to terminations by the law officer. The Congress intended that the accused should not be harassed with subsequent prosecutions when inadequate preparation or appraisal of the evidence in an earlier case has made failure inevitable.³² But in both civilian and military courts there are well-recognized situations in which a termination of a trial after evidence has been offered and before findings will not prejudice the power of the government to proceed with a subsequent prosecution. The objective of this section is to identify those situations.

At the outset it should be noted that in most cases the defense of former jeopardy is not available to the accused who has sought termination of the earlier trial. Hence, if the accused has made the motion for mistrial and it is incorrectly granted, he is estopped from pleading former jeopardy at a subsequent trial for the same offense.³³ At the same time,

31. U.C.M.J., art. 44.

32. *United States v. Stringer*, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954).

33. Cf. Concurring opinion of Quinn, C.J., in *United States v. Ivory*, 9 U.S.C.M.A. 516, 26 C.M.R. 296 (1958).

if the accused, through no fault of his own, is hopelessly prejudiced by error generated by the government to save a weak case, his asking a mistrial to avoid conviction should not deprive him of the opportunity to claim former jeopardy at a subsequent trial.³⁴

The *Manual's* list of several grounds for withdrawal of specifications is probably not exhaustive nor are the items mutually exclusive.³⁵ They include a substantial defect in the specification; insufficiency of available evidence to prove the specification; the fact that it is proposed to use an accused as a witness; manifest necessity in the interest of justice; interruptions caused by urgent and unforeseen military necessity, with no possibility of resumption within a reasonable time; and the introduction of inadmissible evidence so highly prejudicial to the government or the accused that the court is likely to be influenced thereby. Except for the failure of evidence without fault of the accused, as set out in Section 44 (c) of the Code, it was the apparent intent that the termination of the proceedings for any of the reasons mentioned would not preclude a subsequent trial.³⁶

In *Stringer* the Court of Military Appeals concluded that Congress had left the framers of the *Manual* free to adopt appropriate rules governing former jeopardy in courts-martial, and that the *Manual's* draftsmen had intended to adopt the federal rule relating to the circumstances under which jeopardy attaches following the presentation of evidence.³⁷ That rule, the foundation for which is *United States v. Perez*,³⁸ permits the termination of a trial, without jeopardy, when there is a manifest necessity or the ends of public justice would otherwise be defeated. The doctrine of manifest necessity had been applied in a military situation in *Wade v. Hunter*,³⁹ a case decided during the time that the Uniform Code of Military Justice was pending before the Congress. The trial of an accused charged with rape had been interrupted by a military troop movement during combat. Accordingly, the charges were withdrawn from the court-martial to which they were first referred and assigned to a command physically in a more favorable position to try the case. A plea of double jeopardy was interposed by the accused in the second court-martial convened to try the case. The plea was overruled by the

34. *Gori v. United States*, 364 U.S. 917 (1961).

35. M.C.M. 1951, para. 56B.

36. *Supra* note 14.

37. 17 C.M.R. at 128.

38. 22 U.S. (9 Wheat.) 579 (1824).

39. 336 U.S. 684 (1949).

court whose action was finally sustained by the Supreme Court of the United States. Relying extensively on the *Perez* case, the Court stated:

. . . a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.⁴⁰

Thus *Perez* and *Wade* and *Stringer* and the provisions of the *Manual* established beyond doubt that "manifest necessity" requires the termination of a trial by court-martial and precludes the subsequent defense of former jeopardy, even though evidence has been received on the issue of guilt. The most serious issue litigated since 1954 has been concerned with the meaning of "manifest necessity" and the measure of discretion to be accorded the law officer in making his determination.

GROUND FOR MISTRIAL—THE MEANING OF MANIFEST NECESSITY

The law officer may declare a mistrial upon the motion of either the prosecution or the defense, or he may do so *sua sponte*. However, it is a drastic remedy and the cases are consistent in their position that it should be used only as a last resort.⁴¹ In most instances other remedies are available to cure or avoid prejudicial error. The objectionable evidence may be stricken;⁴² cautionary or limiting instructions may serve as a palliative;⁴³ or in a proper case the law officer may excuse an objectionable member from the court.⁴⁴ The initial and usually the final determination of the particular relief to be granted lies in the discretion of the law officer. As the law officer is present in the court room he has the best opportunity to observe the impact of error on the court and to determine the appropriate corrective action. Ordinarily the appellate court will not invade the province of a law officer's discretion. Only when there is a clear abuse of discretion on his part, will the law officer's ruling be disturbed on review.⁴⁵

It is basic that the law officer's declaration is presumed to be valid. It is equally basic that the burden of proving an abuse of discretion rests upon the party who alleges it.

40. *Id.* at 689.

41. *Cf.* *United States v. Keleher*, 14 U.S.C.M.A. 125, 33 C.M.R. 337 (1963).

42. *United States v. Shamlian*, 9 U.S.C.M.A. 28, 25 C.M.R. 290 (1958).

43. *United States v. Keleher*, 14 U.S.C.M.A. 125, 33 C.M.R. 337 (1963).

44. *United States v. Batchelor*, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

45. *United States v. Shamlian*, 9 U.S.C.M.A. 28, 25 C.M.R. 290 (1958); *United States v. Patrick*, 8 U.S.C.M.A. 212, 24 C.M.R. 22 (1957).

Standards for the exercise of a discretionary power are difficult to articulate. The general situation that requires a mistrial has been reiterated by the court time and time again. Typical language is found in *United States v. Richard*,⁴⁶ where the court said:

This device is designed to cure errors which are manifestly prejudicial, and the effect of which cannot be obliterated by cautionary instructions or the ends of public justice would otherwise be defeated.⁴⁷

*United States v. Stringer*⁴⁸ goes a step further:

... a trial must be kept free from substantial doubt as to legality, fairness and impartiality. To some extent this goal envisages more than the mere rendition of correct decisions in particular cases. A judicial system operates effectively only with public confidence—and, naturally, that trust exists only if there also exists a belief that triers of fact act fairly.⁴⁹

The inference is that the declaration of mistrial should be used to avoid not only unfairness but such appearance of unfairness which might tend to undermine public confidence in the court-martial system. It should be noted, however, that as a matter of experience the expressed concern has been for possible prejudice to the accused rather than the jeopardy to the public confidence.

A mistrial must be granted whenever it appears to the law officer that some circumstance arising during the proceedings casts substantial doubt upon the fairness of the trial. While no court has attempted to make a definite list of occasions requiring or justifying a mistrial, an examination of all the decisions of the Court of Military Appeals will acquaint us with the law's current status.

On seven occasions the court of Military Appeals has held that a law officer abused his discretion in denying a motion for a mistrial. In each case the prejudicial statement or evidence had been stricken, and in all but one the law officer had admonished the court-martial to disregard the objectionable matter. In each case the appellate court found the error prejudicial—that men could not reasonably be expected to remain

46. 7 U.S.C.M.A. 46, 21 C.M.R. 172 (1956).

47. 21 C.M.R. at 177.

48. 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954).

49. 17 C.M.R. at 133.

uninfluenced in spite of the law officer's admonition. On the other hand, in twelve cases the Court of Military Appeals found that the denial of a motion for mistrial did not constitute an abuse of the law officer's discretion. In three other cases, the court found that to grant a motion for mistrial was a proper exercise of judicial discretion.

Each case clearly has been determined on its own facts. Errors of the same general character may or may not require mistrial, depending on the particular context in which they occur.

What constitutes an abuse of discretion and what decisions lie within the purview of the law officer's judicial discretion has not been, and probably cannot be, generally articulated in meaningful terms.

Inadmissible Evidence of Pre-Trial Confession or Admission. Three cases involved testimony concerning pre-trial confessions or admissions made by an accused who had not been admonished according to the requirements of Article 31. In each case the Court of Military Appeals found an abuse of discretion in the denial of a mistrial. From this we might conclude that the introduction of evidence of an inadmissible confession amounts to incurable prejudice, leaving no discretion in the law officer. However, in each case special circumstances appear. In both *United States v. Harris*⁵⁰ and *United States v. Diterlizzi*⁵¹ it was noted that the prejudicial admission concerned the only issue in the case, that other evidence on the issue was meager or inconclusive, and that members of the court-martial exhibited a reluctance to accept the ruling of the law officer excluding the statement. In *United States v. Grant*⁵² the court expressly rejected the idea that compelling evidence has any effect when a confession is introduced without showing compliance with the Code. However, the error in *Grant* was compounded by the improper testimony of a senior officer, occupying a command relationship to members of the court, to the effect that the accused was a despicable character, unworthy of belief by the court-martial.

A fourth case, *United States v. Justice*,⁵³ involved a pre-trial admission but is not particularly helpful in the consideration of the problem. In *Justice* the law officer reversed an earlier ruling and excluded a pre-trial statement that had been earlier admitted. He denied the accused's motion for mistrial, and instructed the court to disregard the statement. In examining the record, the Court of Military Appeals first expressed

50. 8 U.S.C.M.A. 199, 24 C.M.R. 9 (1957).

51. 8 U.S.C.M.A. 334, 24 C.M.R. 144 (1957).

52. 10 U.S.C.M.A. 585, 28 C.M.R. 151 (1959).

53. 13 U.S.C.M.A. 31, 32 C.M.R. 31 (1962).

the view that the statements were erroneously excluded. But, the court continues, assuming the evidence to have been inadmissible, the problem is one of "assessing the probable impact of the excluded evidence upon the court-martial." In the instant case, the majority of the court thought that the statement added nothing to the case established by other evidence—that it was an "unimportant crypticism." Hence, the direct and specific instruction to disregard was sufficient. If the language of *Justice* is taken at face value, it casts doubt on the idea of general prejudice advanced in *Grant*. The concern is for specific prejudice. However, the facts of *Justice* deprive the opinion of its virility. The excluded pre-trial statement was not only innocuous, but it was legally admissible and excluded through error. The decision does not appear to be relevant to the status of the inadmissible confession or admission that is erroneously brought to the court's attention.

On the basis of these cases we can conclude that the admission of evidence of a pre-trial admission or confession obtained without compliance with Article 31 probably requires a mistrial. However, the existence of aggravating circumstances strengthens the movant's position.

Disclosure of Prior Conviction. In two cases prejudice caused by prior convictions has been held to be sufficiently overcome by appropriate instructions. In a third, *United States v. Keleher*,⁵⁴ evidence of prior conviction was admitted on the merits during the cross-examination of the accused. Later the evidence was withdrawn. The law officer's action in denying a mistrial was sustained on appeal. Apparently the court was impressed by the fact that the evidence was admissible for impeachment purposes and all members of the court indicated their willingness in their ability to disregard the evidence.

In an earlier case, *United States v. Shamlian*,⁵⁵ the trial counsel informed the court of the fact of the accused's prior convictions and his adverse attitude toward service. The court held the law officer's admonition adequate to cure the prejudice. On the other hand, in *United States v. Richard*,⁵⁶ it was held an abuse of discretion to deny a mistrial after an officer called for service and the court-martial disclosed a knowledge of prior offenses in the presence of court members. The apparent reasons for the distinction are: (1) *Richard* involved a charge

54. 14 U.S.C.M.A. 125, 33 C.M.R. 337 (1963).

55. 9 U.S.C.M.A. 28, 25 C.M.R. 290 (1958).

56. 7 U.S.C.M.A. 46, 21 C.M.R. 172 (1956).

of felony grade—rape—while the crime in *Shamlian* was of a lesser nature—drunk on post; (2) the prior crimes in *Richard* were identified as being of the same nature as the one being tried, while in *Shamlian* the trial counsel's reference to previous convictions was general; (3) the disclosure in *Richard* was compounded by reference to a psychiatric examination and a polygraph test; (4) at least one member of the *Richard* court indicated an adverse reaction to the disclosure; (5) the evidence in *Richard* was less than compelling; and (6) no admonition to disregard the statement was given in *Richard*.

Generalizing, we conclude that disclosure of prior crimes or convictions does not per se require a mistrial. However, when the disclosure is compounded with other aggravating circumstances, the admonition to the court may not be sufficient.

Inflammatory Statements by or to Court Members. In *Richard*,⁵⁷ an officer called for service on the court-martial stated that he should be excused because he had served on another court-martial trying the accused for a similar crime, he knew of a pending investigation for still another similar crime, he knew of a psychiatric examination of the accused, and he knew of a polygraph test. In *United States v. Batchelor*,⁵⁸ a Congressional Medal of Honor holder called for service on a court-martial trying the accused for offenses involving disloyalty, stated that he had "formulated and expressed the opinion that the accused is a traitor." Both statements were made in the presence of the court. Both officers were, of course, forthwith excused. In *Richard* a mistrial was required but in *Batchelor* it was not an abuse of discretion to deny the mistrial. However, the distinction between the two cases is plain and rational. In *Richard* the prejudicial statements referred to matters of fact while in *Batchelor* the statement was one of opinion only. Its validity was not supported by reference to evidentiary matters.

In the *Grant*⁵⁹ case a senior officer witness, the commanding officer of the garrison at which the court met, testified that the accused had "the habit of writing rubber checks" and was a "psychopathic liar." While it was here held an abuse of discretion to deny a mistrial, it must be noted that the testimony of the witness also alluded to an inadmissible pre-trial confession. It cannot be said that the derogatory statements alone would have required a mistrial. On the other hand, the Court of Military Ap-

57. *Id.*

58. 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

59. 10 U.S.C.M.A. 585, 28 C.M.R. 151 (1959).

peals said "it is difficult to see how the members could erase from their minds the damning effects of [the] vituperative declarations and accord to the accused the fair trial to which he is entitled."

The president of the court-martial in *United States v. Lynch*⁶⁰ spoke frequently to other court members and in open court in an intemperate fashion about his own honor and that of the military service. It was held an abuse of discretion to deny a mistrial. The statements of the president demonstrated his lack of judiciousness and deprived the court of its capacity as a judicial tribunal.

These cases appear to support the general proposition that it may be an abuse of discretion to deny a defense motion for mistrial when the accused has been improperly and grievously injured by statements by or to court members. It is relevant whether the statement purported to be one of fact or one of opinion only, whether the declarant occupied a senior command relationship to any member of the court, or whether the witness is in a position otherwise to unduly influence members of the court.

Evidence of Lie Detection Test. One of the circumstances requiring a mistrial in *Richard*⁶¹ was the officer's statement that he had knowledge of a certain polygraph test. The context of the statement supported the inference that the test had been taken by the accused. The Court of Military Appeals thought this a circumstance that irreparably prejudiced the court. On the other hand, in *United States v. Wolf*,⁶² a witness testified that he, the witness, had taken a lie detector test. The testimony was stricken and no mistrial was required. The two cases have little similarity; hence, the different results cause no problem.

Generally, it can be said that evidence that the accused was subjected to a lie detector test, with no disclosure as to the results, is highly prejudicial to the accused and may require a mistrial particularly when other prejudicial disclosures have been made.

Bias Toward Witness. In *United States v. Waldron*,⁶³ several members of the court had served on another court-martial, trying another accused, in which testimony had been heard concerning activities of one Kang Tae Hyong who was called as a witness in the present case. Finding that the earlier contact with the witness might have produced some prejudgment as to his credibility, the law officer declared a mis-

60. 9 U.S.C.M.A. 523, 26 C.M.R. 303 (1958).

61. 9 U.S.C.M.A. 28, 25 C.M.R. 290 (1958).

62. 9 U.S.C.M.A. 137, 25 C.M.R. 399 (1958).

63. 15 U.S.C.M.A. 628, 36 C.M.R. 126 (1966).

trial over the objection of the accused. The Court of Military Appeals affirmed, recognizing that while ordinarily bias that will justify a mistrial is in favor of or against a party to the cause, prejudgment of an important witness by the triers of fact is just as discrediting to the fairness of the trial and as obstructive to the ends of justice as pre-existing bias for or against a party; and evidence as to such pre-judgment of an important witness may justify a mistrial. Yet, when a similar question was raised in *United States v. Simonds*,⁶⁴ a different result was reached. There, two members of the court had seen a document charging Moore, a prosecution witness, with an offense similar to the one for which the accused was being tried. While the defense did not request a mistrial and indeed tried on argument to turn suspicion for the instant offense on Moore, it was urged on appeal that a mistrial should have been granted. In this instance no mistrial was required, the appellate court suggesting that the test is whether the court members have acquired so fixed an opinion of the witness' credibility as to make it likely they would judge his truthfulness on the basis of this pre-existing opinion rather than on evidence.

Generally Inadmissible Evidence. Ordinarily an error in admitting evidence can be cured by 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 it cannot be erased reasonably from the mind of an ordinary person, is there an occasion for the law officer to grant a motion for mistrial. Thus, in *Patrick*⁶⁵ an isolated hearsay statement identifying the accused as one who was reputedly accepting money for making false entries in service records did not require a mistrial. In *United States v. Hurt*⁶⁶ the accused, on trial for a capital crime, was identified by a child witness as the person who had abducted the victim. The child was impeached and his testimony stricken. No member of the court indicated doubt as to his ability to disregard the testimony. It was not an abuse of discretion to deny a mistrial. A similar result was reached in *United States v. Wimberly*⁶⁷ where the court had seen exhibits that were later excluded.

Withdrawn Plea of Guilty. In *United States v. Walter*⁶⁸ the accused, charged with larceny, entered a plea of guilty to a lesser offense. The

64. 15 U.S.C.M.A. 641, 36 C.M.R. 139 (1966).

65. 8 U.S.C.M.A. 212, 24 C.M.R. 22 (1957).

66. 9 U.S.C.M.A. 735, 27 C.M.R. 3 (1958).

67. 15 U.S.C.M.A. 661, 36 C.M.R. 159 (1966).

68. 14 U.S.C.M.A. 142, 33 C.M.R. 354 (1963).

law officer, finding the plea to have been improvidently made, granted a motion to change the plea to not guilty. There was no motion for a mistrial and no admonition to the court to disregard the plea of guilty. After conviction, the accused argued that the law officer abused his discretion in failing, *sua sponte*, to declare a mistrial. The omission was found to be a proper exercise of judicial discretion and thus not reviewable. Such a duty arises only when the posture of the case casts substantial doubt on the fairness of the trial. In *Walter* the strength of the government's case and the paucity of the accused's evidence forestalled such doubt.

Other Possible Grounds for Mistrial. The most common grounds for mistrial in civilian courts is the failure of the jury to agree upon a verdict. This ground does not occur often in the court-martial as the requirement of unanimity is present only in capital cases; and, more particularly, in view of the *Manual's* provision that a finding of not guilty results if no other valid finding is reached.⁶⁹ Notwithstanding their improbability, "hung juries," do occur in courts-martial.⁷⁰ While a two-thirds vote is required to convict, reballoting can be required by a simple majority. Thus, where a majority of the court, but less than two-thirds, votes for conviction the court-martial fails to convict. However, if reconsideration is requested and those who voted to convict vote for a reballot, a new vote is required. Assuming that no one changes his mind the vote again fails to convict, and a further reconsideration may be required by the majority. This process may continue indefinitely and the court thus becomes effectively deadlocked.⁷¹ Also, a deadlock may arise in regard to the sentence. Findings of guilt and the sentence to be imposed are voted upon separately. Two-thirds of the court may concur in the finding of guilt, but it may be impossible to obtain the agreement of two-thirds upon the sentence. In this case a re-hearing is required on the sentence.⁷² Also, in civil courts, a common cause for mistrial is the illness or other disability of a juror after the trial has commenced. This fortuity is avoided in military trials by the provision of the *Manual* relating to absence and replacement of members.⁷³ In the infrequent cases of deadlock, it seems certain that the physical inability of the

69. M.C.M. 1951, para. 74 (d) (3).

70. For an extensive comment on this subject, see Henson, *The Hung Jury: A Court Martial Dilemma*, 35 MIL. L. REV. 59 (1967).

71. See *United States v. Nash*, 5 U.S.C.M.A. 550, 18 C.M.R. 174 (1955).

72. *United States v. Walker*, 7 U.S.C.M.A. 669, 23 C.M.R. 133 (1957).

73. M.C.M. 1951, para. 41.

court to continue the trial within the framework of the law is sufficient ground for mistrial, provided the inability is not caused by the prosecution's fault.

A recent case, *United States v. Liberator*,⁷⁴ was based on the presence of unauthorized persons in the closed session in which the court deliberated on findings. A sergeant from the base legal office had entered the room momentarily to bring the members coffee after voting on the findings that had taken place. The denial of the mistrial was sustained. The facts were found to rebut any presumption of prejudice, particularly in view of the accused's plea of guilty.

The Discretion to Grant. No Court of Military Appeals decision has held that a law officer abused his discretion in granting a mistrial. Two decisions have held otherwise. In *United States v. Schilling*⁷⁵ the law officer declared a mistrial on account of the breakdown of the recording device used to make the record. The law officer was held justified in declaring a mistrial under these circumstances. In the *Johmpier*⁷⁶ case, the mistrial was declared because the law officer felt his position with the court had been prejudiced by disclosures of his being "overruled" on a matter of law by the convening authority. The order of mistrial was justified.

It seems a correct generalization that notice of an error in the course of the trial which is of such a nature as to vitiate the result justifies the declaration of a mistrial, even in the face of an objection by the accused.

Board of Review Decisions. Several reported decisions of service boards are relevant to our present interests and enlarge the case law of mistrials. Boards have held that the law officer abused his discretion in refusing to grant a mistrial when: (1) a witness who corroborated the testimony of the chief victim in a rape prosecution became so emotionally upset that she could not be cross-examined, the mere striking of her testimony and admonition of the court being insufficient to remove the prejudice⁷⁷ and (2) the division commander had briefed his officers as to command policies on sentencing, although the officers on the court-martial said they would not be influenced thereby.⁷⁸ It is not an abuse of discretion to deny a mistrial in a case where (1) five of eight members of the court read a newspaper account of an out of court hearing

74. 14 U.S.C.M.A. 499, 34 C.M.R. 279 (1964).

75. 9 U.S.C.M.A. 482, 22 C.M.R. 272 (1957).

76. 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961).

77. *Courier*, C.G.C.M. 9896, 32 C.M.R. 717 (1962).

78. *Webster*, A.C.M. 15734, 27 C.M.R. 956 (1960).

and were later excused and replaced,⁷⁹ or (2) a person was stationed in the courtroom to signal the witness when his testimony approached a sensitive security area.⁸⁰

It was no error to grant mistrials in three cases where improvident guilty pleas were entered in open court and rejected by the law officer.⁸¹ Also, where the law officer declared a mistrial on account of improper remarks by the president of the court-martial, the objection of the accused on the ground that a witness would not be available for a later trial did not make the declaration improper.⁸² And a mistrial declared in order to obtain a change of venue where the court has been subjected to command influence is proper.⁸³ A mistrial may properly be granted on account of a breakdown of the recording device.⁸⁴ Finally, a mistrial was declared when the president of the court-martial indicated an unwillingness to abide by the law officer's determination of admissibility.⁸⁵

A SUGGESTED STATEMENT OF STANDARDS

It is patently impossible to reduce the law governing mistrials before courts-martial to simple, easily stated rules to be applied routinely by law officers. The ultimate objective—to assure fairness in military trials—remains constant. The circumstances under which claims of unfairness arise are never repeated. Hence, it is essential that in each instance the discretion to order mistrials be vested in an agency of the court-martial who can evaluate the totality of the circumstances and determine whether the probability of a fair trial has been impaired. In the General Court-Martial the discretion has properly been vested in the law officer. He is a professional jurist, present in the courtroom and able to assess the impact of alleged prejudicial matter. The cases suggest many factors that may, together or alone, be determinative: whether the prejudicial matter goes to a point supported or unsupported by other evidence; whether the members of the court-martial exhibit a willingness or reluctance to heed the admonition to disregard the prejudicial circumstances; whether the prejudicial statement was made by a senior officer, in a position to influence members of the court; whether the prejudicial

79. Cook, A.C.M. 17411, 31 C.M.R. 607 (1960).

80. Kaufman, A.C.M. 18074, 33 C.M.R. 748 (1962).

81. Burns, 23 C.M.R. 614 (1957) (C.M. 395207); Watt, 32 C.M.R. 504 (1962) (C.M. 407459); Scarbrough, 28 C.M.R. 527 (1959) (C.M. 401819).

82. Bowen, N.C.M. 56-02093, 22 C.M.R. 671 (1956).

83. Long, A.C.M. 14066, 24 C.M.R. 847 (1957).

84. Hook, A.C.M. 12847, 23 C.M.R. 750 (1956).

85. Reese, N.C.M. 56-03467, 24 C.M.R. 467 (1956).

statement purported to be a statement of fact or opinion; whether evidence incites hostility or animosity or is degrading or character destroying; and finally whether the prejudice goes to impair the judicial character of the court or the independence of the law officer. The list has no discernible limits and will continue to expand as more cases are decided.

An effort to enumerate the circumstances that require or justify a declaration of mistrial may be fruitless. At the same time, the phrase "manifest necessity" is little more than an epithet. A more meaningful statement of the general criteria ought to be helpful. The following, which borrows heavily from the Model Penal Code,⁸⁶ is suggested as a proper guide for the declaration of mistrials in courts-martial.

1. The law officer shall terminate a trial anytime before findings when he determines:
 - (a) It is physically impossible to proceed with the trial in conformity with the law; or
 - (b) There is a legal defect in the proceedings which would make any judgment rendered upon the findings reversible as a matter of law; or
 - (c) Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the accused or the government; or
 - (d) A substantial question exists as to the objectivity of the court or its willingness to be bound by the law officer's instructions.
2. The convening authority may direct the termination of a trial by court-martial prior to findings when required by urgent and unforeseen military necessity.⁸⁷
3. A subsequent prosecution based on the same conduct, for violation of the same provision of the code is not barred when the trial is terminated after arraignment and before findings when:
 - (a) The termination is for any reason mentioned in 1 and 2 above.
 - (b) The accused consents to the termination or waives, by motion or otherwise, his right to object to the termination.

86. MODEL PENAL CODE § 1.08(4) (P.O.D. 1962).

87. The cases do not so limit the convening authority. However, military necessity seems the only rational basis to permit the convening authority to intrude upon a trial in progress.