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## Challenges Against Jurors in Courts-Martial

Karl R. Rábago

*Elisabeth Haub School of Law at Pace University*

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# Challenges Against Jurors in Courts-Martial<sup>1</sup>

## I. Introduction

It has been said that "[m]ilitary justice is *not* to justice what military music is to music. U.S. military courts provide more safeguards for individual rights than any system of justice in the world."<sup>2</sup> One of the most important safeguards provided for the military defendant is the right to have his attorney conduct a *voir dire* of the jury in an attempt to have the case heard by impartial court members.<sup>3</sup> The peculiarities of the military juror selection process<sup>4</sup> and the limitations on peremptory challenges in courts-martial<sup>5</sup> heighten the importance of a well-prepared and skillfully presented *voir dire*. And yet, the *voir dire* and challenging portions of the trial often receive only cursory treatment by both military attorneys and civilian attorneys practicing in military courts.

The peculiarities in the selection process and the resulting typical composition of the military jury provide excellent reasons for conducting a thorough *voir dire*. Despite sporadic interest in changing the selection process,<sup>6</sup> it appears that these reasons will remain. The members of a court-martial are appointed to their duty as court

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1. For a brief but informative introduction to the military justice system, see Lederer, *The Road to the Military Courthouse*, [ABA] (1976). For a more in-depth treatment, see E. BYRNE, *MILITARY LAW*, [Naval Institute Press] (3d ed. 1981).

2. M. BELL, *MY LIFE ON TRIAL* 356 (1977) (emphasis in original).

3. Jurors in the military justice system are interchangeably referred to as jurors, court members, or members. The "jury" is the jury or the panel.

4. The most striking difference between the military system and other systems is that military juries are not chosen at random. See generally Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193 (1973); Brookshire, *Juror Selection under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972); Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F.L. REV. 343 (1978).

5. "Each accused and the trial counsel is entitled to one peremptory challenge. . . ." UNIFORM CODE OF MILITARY JUSTICE, art. 41(b), 10 U.S.C. § 841 (1976) [The UNIFORM CODE OF MILITARY JUSTICE is codified in 10 U.S.C. §§ 801-941 and is hereinafter cited as U.C.M.J. or Code.].

6. There is currently a bill before the United States House of Representatives proposing a random selection of military jurors, fixed numbers of jurors, and increased numbers of peremptory challenges, H.R. 6130, 97th Cong., 2d Sess. (1982), and one before the United States Senate proposing less drastic reform, S. 2521, 97th Cong., 2d Sess. (1982); see also, articles cited *supra* note 4.

members by the "convening authority"<sup>7</sup> typically for a period of several months,<sup>8</sup> during which time they decide all cases brought before them.<sup>9</sup> They are members of the convening authority's command, and are selected personally by the convening authority on the basis of age, training, experience, length of service, and judicial temperament.<sup>10</sup> Most often, though, the selection is made from a list of potential members submitted by subordinate commanders, compiled by a staff judge advocate or legal officer, and containing little if anything more than the name, rank, social security number, and unit of assignment<sup>11</sup> of each potential member. The convening authority can make the most competent selection decisions when he<sup>12</sup> personally knows the member, and for the rest, rank is the most obvious discriminator. Unfortunately the higher ranking members of the court usually have played or do play a significant role in maintaining discipline within their respective units.<sup>13</sup> Despite this apparent conflict between the member's role in the military community (and the convening authority's interest in maintaining discipline within his command) and the interests of fairness and impartiality, the court member as a commissioned warrant officer (and the enlisted member when requested by the accused)<sup>14</sup> is presumed capable of putting aside personal feelings, biases, and outside influences preventing him

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7. The convening authority is that commander empowered to make the final decision concerning whether or not there will be a trial. The size of the installation and the particular command is determinative of that power. *See* U.C.M.J., arts. 22-24, 10 U.S.C. §§ 822-24 (1976). There are three levels of court-martial, varying according to the sentencing power and procedures used in each, *see* MANUAL FOR COURTS-MARTIAL, paras. 14-16 (rev. ed. 1969). [The Manual for Courts-Martial implements the Code by Executive Order and is hereinafter cited as M.C.M. or the Manual.]. Since the accused is not entitled to trial by jury in a summary court-martial, such proceedings will not be discussed in this Note. *See* M.C.M., para. 79.

8. "When practicable, the convening authority should change the composition of courts-martial from time to time to provide the maximum opportunity for eligible personnel to gain experience . . ." M.C.M., para. 37a.

9. The convening authority may appoint more than one standing panel and in convening courts-martial, detail cases to them on an alternating or other basis.

10. U.C.M.J., art. 25(d)(2), 10 U.S.C. § 825 (1976); M.C.M., para. 4d.

11. The Manual, para. 4b, pursuant to U.C.M.J., art. 25(c)(2), 10 U.S.C. § 825 (1976), defines a "unit" as the smallest organization for which a separate daily status report is prepared.

12. This Note, for the sake of uniformity only, uses the masculine gender throughout.

13. When an officer has reached a relatively high rank in his service he usually has, with the possible exception of some specialties such as medical doctors, had at least one assignment as a commander or leader in which he was directly responsible for the maintenance of discipline and morale.

14. *See* U.C.M.J., art. 25(c)(1), 10 U.S.C. § 825 (1976); M.C.M., para. 61h.

from fairly and impartially hearing the case and deciding the sentence.<sup>15</sup> It is against the member who maintains an "inelastic attitude"<sup>16</sup> in regard to a particular defendant or crime that a challenge for cause lies. The attorney practicing in military court can best protect the interests of his client, lay the proper foundation for successful challenges for cause, and most advantageously exercise the accused's right to the peremptory challenge only through a competent eliciting of responses from and analysis of the members both during and before *voir dire*.

This Note will summarize the provisions of the *Uniform Code of Military Justice* and the *Manual for Courts-Martial* as well as the decisions of the military appellate courts<sup>17</sup> in order to assist counsel in preparing for the conduct of *voir dire* and the challenge procedure. The Note will also discuss pre-trial preparation for the *voir dire*. The goals are to help the military attorney make better use of his client's right to challenge members of the court; and to give the civilian attorney a better understanding of the challenge process in courts-martial so that he will be more inclined to accept the case of the military defendant.<sup>18</sup> This Note will also discuss many of the skills and techniques regularly utilized in civilian courts that can be brought to the military justice system.

## II. The Challenge for Cause

The *Uniform Code of Military Justice* [hereinafter the *Code*] provides the statutory basis for the military justice system and the conduct of

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15. Court members take an oath to this general effect. See M.C.M., para. 114b.

16. See *infra* text accompanying notes 98-104.

17. There are two levels of appellate courts. Each service has its court of military review (such as the Army Court of Military Review). Those courts were originally entitled "Boards of Review" and decisions from those will be distinguished in the citation. The highest level of military appellate review is at the United States Court of Military Appeals, which hears cases from the lower courts of review.

18. . . . (1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

"(A) by military counsel detailed under section 827 of this title (article 27); or

"(B) by military counsel of his own selection if that counsel is reasonably available . . . .

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused . . . .

U.C.M.J., art. 38(b), 10 U.S.C. § 838 (1976).

courts-martial. The rights and privileges of the accused in the military justice system are not, therefore, based on the Constitution, but on the laws enacted by Congress.<sup>19</sup> In *United States v. Clay*, the Court of Military Appeals identified the right to challenge members of the court for cause or peremptorily as one of the fundamental rights in "military due process."<sup>20</sup> The *Code* provides that:

The military judge<sup>21</sup> and members of a general or special court-martial may be challenged by the accused . . . for cause stated to the court. The military judge, or, if none, the court,<sup>22</sup> shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time.<sup>23</sup> Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.<sup>24</sup>

The provisions of the *Code* are expanded upon and procedures are established for the conduct of courts-martial in the *Manual for Courts-Martial*, [hereinafter the *Manual*]. The *Manual* is prescribed by Executive Order pursuant to the *Code*.<sup>25</sup> The *Manual* provides the grounds for challenges for cause:

Among the grounds for challenges for cause against members of special and general courts-martial and, unless otherwise indicated by the context, the military judge are the following:

- (1) That the challenged military judge or member is not eligible to serve as a military judge or member, respectively, on courts-martial.
- (2) That he is not a member or military judge of the court.
- (3) That he is the accuser as to any offense charged. . . .
- (4) That he will be a witness for the prosecution. . . .
- (5) That he was the investigating officer as to any offense charged. . . .
- (6) That he has acted as counsel for the prosecution or the accused as to any offense charged.
- (7) That upon a rehearing or a new or other trial of the case he was a member of the court which first heard the case.
- (8) That he is an enlisted member of the same unit as the accused. . . .

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19. *United States v. Clay*, 1 C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

20. *Id.*

21. See M.C.M., para. 62g, for limitations on inquiry into eligibility of the military judge, and see para. 62h for the procedure for inquiry.

22. See M.C.M., para. 62h (3), for the procedure used in special courts-martial without a military judge.

23. Thus a challenge to the "array" is not allowed. *But see infra* text accompanying footnote 124.

24. U.C.M.J., art. 41(a), 10 U.S.C. § 841 (1976).

25. U.C.M.J., art. 36, 10 U.S.C. § 836 (1976).

(9) That he has forwarded the charges in the case with his personal recommendation concerning trial by court-martial.

(10) That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged, except that this shall not necessarily apply to a military judge who has formed or expressed such an opinion solely in his role as military judge sitting alone in a previous trial of the same or a closely related case.

(11) That he has acted in the same case as the convening authority or as the legal officer or staff judge advocate to the convening authority.

(12) That he will act in the same case as the reviewing authority . . . or as the legal officer or staff judge advocate to the reviewing authority. . . .

(13) Any other facts indicating that he should not sit as a member or military judge in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality. . . .<sup>26</sup>

The *Manual* and the courts do not always treat all these grounds for challenges for cause the same. When it is shown that a member (or the military judge) is subject to challenge under the first eight listed grounds, "and the fact is not disputed, the military judge or member will be excused forthwith."<sup>27</sup> It is therefore not necessary for the accused to challenge such a member and the judge may *sua sponte* excuse the member.<sup>28</sup> The failure to excuse such a member may result in disapproval on jurisdictional grounds<sup>29</sup> and though such result is possible in the case of any of the above listed challenges when good cause is shown,<sup>30</sup> courts have retained the posture that there is a difference between the kinds of challenges.<sup>31</sup>

In military courts, as in the Federal courts,<sup>32</sup> wide discretion is vested in the judge (or court if there is no judge) in passing on challenges. The *Manual* states that "[t]he military judge . . . should be

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26. M.C.M., para. 62*f*. Grounds for challenge under para. 62*f*(6) and (7) are readily discernible and will not be discussed further. Grounds for challenge under para. 62*f*(11) and (12) are treated simultaneously.

27. M.C.M., para. 62*c*, but see para. 62*h*(4) for actions to be taken if the court is reduced below a quorum. The Code establishes the quorum for the general court-martial at five members, and special courts-martial at three members. U.C.M.J., art. 16, 10 U.S.C. § 816 (1976).

28. *United States v. Seabrooks*, 48 C.M.R. 471, 472-73 (N.C.M.R. 1974).

29. M.C.M., para. 62*h*(2).

30. *See id.*

31. *United States v. Tagert*, 11 M.J. 677 (N.M.C.M.R. 1981). *But cf.* *United States v. Baker*, 2 M.J. 773 (A.C.M.R. 1976) (suggesting that such distinctions are no longer valid).

32. *See* 50 C.J.S. JURIES 278(c) (1955) and federal cases cited therein.

liberal in passing on challenges, but need not sustain a challenge upon the mere assertion of the challenger. The burden of maintaining a challenge rests on the challenging party."<sup>33</sup> His decision will only be reversed where an abuse of discretion and prejudice is shown.<sup>34</sup> The continued presence of a member subject to a challenge under the first eight grounds will normally satisfy the requirement for a showing of prejudice, but a challenge may be waived.<sup>35</sup>

#### A. Challenges for Ineligibility

The members of a court-martial must be eligible to serve in accordance with the provisions of the *Code* and the *Manual*. Typically, ineligible members will not be appointed to serve, but counsel may need to ascertain service or local regulations<sup>36</sup> affecting eligibility. While any service member on active duty is eligible for service as a juror,<sup>37</sup> providing his rank is not lower than that of the accused,<sup>38</sup> individual services may provide that personnel in specific duty assignments are not eligible to serve. Counsel should seek to identify the existence of such regulations in the event a member is assigned whose qualifications to serve are questionable. There may be, for example, service or local regulations prohibiting medical officers or legally qualified officers from serving as members of a court-martial.

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33. M.C.M., para. 62*h*(2).

34. *United States v. Stennis*, 12 M.J. 813, 816 (N.M.C.M.R. 1981); *United States v. Autrey*, 12 M.J. 547, 551 (A.C.M.R. 1981); *United States v. Harris*, 11 M.J. 589, 591 (A.F.C.M.R. 1981), *petition granted*, 11 M.J. 284 (C.M.A. 1981). When the court finds that a challenge for cause is improperly denied, reversal follows. *See, e.g.*, *United States v. Karnes*, 23 C.M.A. 537, 1 M.J. 92 (1975); *United States v. Tucker*, 16 C.M.A. 318, 36 C.M.R. 474 (1966); *United States v. Barnes*, 12 M.J. 956 (A.F.C.M.R. 1982); *United States v. Goodman*, 3 M.J. 1106 (N.C.M.R. 1977); *United States v. Hampton*, 50 C.M.R. 232 (A.C.M.R. 1975). Where the accused has pled guilty, reversal pertains only to the sentence. *See, e.g.*, *United States v. Cosgrove*, 24 C.M.A. 1, 1 M.J. 199 (1975); *United States v. Baker*, 2 M.J. 773 (A.C.M.R. 1976); *United States v. Bann*, 50 C.M.R. 384 (A.F.C.M.R. 1975); *United States v. Toon*, 48 C.M.R. 139 (A.C.M.R. 1973).

35. *See United States v. Bush*, 12 M.J. 647, 648 (A.F.C.M.R. 1981); *United States v. Tagert*, 11 M.J. 677, 681 (N.M.C.M.R. 1981); *United States v. Bland*, 6 M.J. 565, 568 (N.M.C.R. 1978); *United States v. Henderson*, 11 C.M.A. 556, 29 C.M.R. 372 (1960); *United States v. Dyche*, 8 C.M.A. 430, 433, 24 C.M.R. 240, 243 (1957).

36. Such regulations may be promulgated by a Department or subordinate command and while a regulation conflicting with the Code or Manual must fall, proper regulations implementing or supplementing the Code or Manual are allowed. *Compare United States v. Bowles*, 7 M.J. 591, 592 (N.C.M.R. 1979) (judicial circuit rule required judges to conduct *voir dire*) with *United States v. Bland*, 6 M.J. 565, 567-68 (N.M.C.R. 1978) (under Navy regulation, Medical Service Corps officers exempted from jury duty).

37. U.C.M.J., art. 25, 10 U.S.C. § 825 (1976); M.C.M., para. 4*c*.

38. M.C.M., para. 4*c*.

These regulations do not disqualify the members from serving under the provisions of the *Code* or the *Manual*<sup>39</sup> and a challenge based on those grounds may properly be denied.<sup>40</sup> Likewise, a failure to assert the proper grounds for the challenge at trial will preclude the raising of the issue on appeal. The specific service or local regulation is the appropriate ground for such a challenge. Although problems with eligibility of court members are not frequently encountered in current practice, counsel must exercise care to ensure that such members are properly removed or that the issue is properly preserved for appeal. Of course, where the member is only disqualified by virtue of a service or local regulation the challenge may be waived.

### *B. Challenges Against Members Not Properly Appointed*

Whether a court member is properly a member of the court may be determined from examination of the court-martial convening and appointing orders.<sup>41</sup> As previously indicated, court members must be appointed individually to service as jurors by the convening authority.<sup>42</sup> Failure to have court members properly appointed is most likely to occur where a number of members are excused and replaced,<sup>43</sup> and several convening orders are used. The *Code* and the *Manual* provide the correct procedure for the excusal and substitution of members.<sup>44</sup> A member may be permanently excused from the court-martial as a result of challenge or other reasons without appointment of a substitute as long as the court is not reduced below a quorum. The Court of Military Appeals has distinguished between the permanent removal of a member and his excused absence from one or more sessions of the trial.<sup>45</sup> The excused absence of a member is not equivalent to his removal from the court and "affirmative action" need not be taken to reappoint such a member.<sup>46</sup> The *Manual* provides the steps to be taken if a member is absent from or newly

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39. See *United States v. Worrell*, 3 M.J. 817, 820 nn. 2-4 (A.F.C.M.R. 1977).

40. 6 M.J. 565.

41. M.C.M., para. 36b; see also *id.* app. 4.

42. *United States v. Harnish*, 12 C.M.A. 443, 31 C.M.R. 29 (1961).

43. M.C.M., para. 37c, authorizes such changes to be made orally. The Naval services have experienced some problems with oral modifications; see *supra* note 41; *United States v. Coleman*, 19 C.M.A. 524, 42 C.M.R. 126 (1970).

44. U.C.M.J., art. 29, 10 U.S.C. § 829 (1976); M.C.M., para. 37. But see *United States v. Bracero-Velez*, 49 C.M.R. 22 (A.F.C.M.R. 1974) (defense waived objection to the addition of members even though the court had not been reduced below a quorum).

45. *United States v. Herrington*, 8 M.J. 194 (C.M.A. 1980).

46. See *id.* at 195.



detailed to some portion of the trial.<sup>47</sup>

Dealing with the procedures and forms used in the appointment process is routine for the military defense counsel. Civilian counsel should rely on his expertise and familiarity in ensuring that the members are all properly appointed.<sup>48</sup>

### C. *The Member as Accuser*

A member is also disqualified from participation in a court-martial if he is the accuser of the charged offenses. The *Code* defines the accuser as one who "signs and swears to charges," one who "directs that charges nominally be signed and sworn to by another," or one who has an interest "other than an official interest in the prosecution of the accused."<sup>49</sup> Typically, the accuser will be the commander exercising immediate jurisdiction under article 15 of the *Code*,<sup>50</sup> that is, the first commander in the accused's chain of command empowered to impose non-judicial punishment. However, any person subject to the *Code*<sup>51</sup> may prefer charges,<sup>52</sup> even if he himself has been charged, is under arrest, or in confinement.<sup>53</sup> The accuser must sign and swear to the charges under oath before a commissioned officer of the armed forces authorized to administer oaths. The trial counsel will normally disclose any instance of an accuser being detailed to the court after informing the court of the general nature of the charge.<sup>54</sup> This situation is not one counsel should reasonably expect to encounter.<sup>55</sup>

### D. *The Member Who Acts as a Prosecution Witness*

A member may not be a witness for the prosecution. The *Manual* provides that the term "witness" includes not only someone who testifies personally in court, but anyone whose declaration is received as

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47. M.C.M., para. 41c-f.

48. It is recommended that in all but the most unusual situations the detailed military defense counsel remain on the case. His status as an officer and his understanding of military procedure will make him a great asset.

49. U.C.M.J., art. 1(9), 10 U.S.C. § 801 (1976).

50. 10 U.S.C. § 815 (1976); see M.C.M., para. 29b.

51. U.C.M.J., art. 2, 10 U.S.C. § 802 (1976).

52. U.C.M.J., art. 30, 10 U.S.C. § 830 (1976); M.C.M., para. 29b.

53. M.C.M., para. 29b.

54. For a guide to court-martial procedure, see M.C.M., app. 8.

55. Such an occurrence is readily identified by comparing the charge sheet (see M.C.M., app. 5) with the convening order(s), and alert defense counsel may be able to arrange the member/accuser's excusal prior to trial.

evidence for any purpose, "including written affidavit or otherwise."<sup>56</sup> The character of a member's testimony will be the determinative factor labeling him a witness for the prosecution, but the *Manual* provides that in case of doubt he will be excused.<sup>57</sup>

No reported case deals with this issue of considering the member as a witness for the prosecution when he was formally called to testify, challenged, and retained as a member. Those few reported cases on the subject deal with the situation in which a member has given unsolicited information in open court or the questioning of a witness has been alleged to demonstrate partisan behavior on the part of the member. The Court of Military Appeals has seldom dealt with instances involving testimony of a member on behalf of the government. In fact, only one reported case deals with the problem. In *United States v. Henderson*,<sup>58</sup> a court member—who was also a medical doctor—identified for the record the medical term for the place where a bullet struck a victim.<sup>59</sup> The court determined the member's statement to be an "innocuous in-court aid to the participants,"<sup>60</sup> since the point of entry was not contested, no objection was made by the defense, and no prejudice was asserted. The court was unwilling to find that the member's conduct amounted to testimony.

The problem of a court member who, by his questioning of witnesses, displays a partisan attitude has largely been obviated by Rule 614 of the Military Rules of Evidence.<sup>61</sup> The Rule requires that questions by members first be reduced to writing and submitted to the judge for a ruling as to their propriety before the attorney can ask them of the witness. The Rule also provides that counsel may object to the questions at the time of their submission or at the first available opportunity when the members are not present.

The analysis of the Military Rules contained in the *Manual* points out in reference to Rule 614, that "[a]lthough the Rule states that its intent is to ensure that the questions will 'be in a form acceptable to

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56. M.C.M., para. 63. The *Manual* cites as an example the situation in which a member has authenticated an official record introduced in evidence by the prosecution—such as the authentication by a member as unit personnel officer of the morning status report showing the accused's unauthorized absence. The introduction of such evidence makes the member a witness even if he does not testify in person.

57. *See id.*

58. 11 C.M.A. 556, 29 C.M.R. 372 (1960).

59. *Id.* at 574, 29 C.M.R. at 385.

60. *Id.*

61. M.C.M., Ch. XXVII, MIL. R. EVID. 614.

the military judge,<sup>62</sup> it is not the intent of the Committee to grant carte blanche to the military judge in this matter."<sup>62</sup> In attempting to determine the point at which allowed questions become grounds for challenge, it may be useful to compare two pre-Rule cases dealing with questions by members of the court.

In *United States v. Worrell*,<sup>63</sup> an Air Force Court of Military Review ruled that questions asked of the accused by a member did not make the member a witness. In *Worrell*, the member's questions revealed a correct understanding by the member of Air Force policy on personality disorders. The court ruled that the information he gave struck at the core of the accused's defense of lack of mental responsibility. The court held that the question asked "did not amount to evidence which struck at that core."<sup>64</sup> The member's questions of the accused revealed information about the amount of duty Air Force doctors were required to perform, in response to the accused's assertion in sworn testimony that he pulled an inordinate amount of such duty. While the court found this information extraneous and irrelevant, it ultimately found the evidence non-prejudicial because the member never explicitly sought to refute or challenge the accused's assertions, and because the trial counsel never capitalized on the information in his arguments. The most crucial factor in the outcome, however, was that the defense counsel never sought to challenge the member or ask for a mistrial, in or out of the presence of the members, as the court noted he could have done. The testimony by a member at trial is not a jurisdictional defect and can be waived.<sup>65</sup> The court ruled that the defense counsel's failure to act, in view of the combination of circumstances, added up to "more than mere silent acquiescence in the presence of a court member who, by questioning witnesses during trial, allegedly became a witness for the prosecution."<sup>66</sup> The court saw no possibility of harm to the accused nor standing to complain on appeal.

In *United States v. Ivey*,<sup>67</sup> an Army Board of Review found that a member became a witness for the prosecution when he provided technical information relating to the operation of certain weapons.

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62. M.C.M., app. 18.

63. 3 M.J. 817 (A.F.C.M.R. 1977).

64. *Id.* at 821 (emphasis added).

65. *Supra* note 63 at 822.

66. *Id.*

67. 37 C.M.R. 626 (A.B.R. 1967).

The member, though not sworn, informed the court that he was familiar with the particular type of weapon involved in the case, and at the law officer's request, refuted the appellant's contention that it was impossible to determine how many bullets were in the clip of the weapon. At the conclusion of the court-martial the trial counsel capitalized on the revelations by the court member in his closing argument. In reversing the conviction, the court found that the defense counsel did not affirmatively waive his objection to the testimony by the witness and speculated that he remained silent to prevent prejudicing the remaining members against his client.

The lesson of the cases seems to be that in the event a member provides information for the court, whether in the form of questions or otherwise, the best tactic for both the defense and prosecution is to attempt to challenge the member in an out-of-court hearing. The statements must be sufficiently prejudicial, and if a challenge is denied counsel may request that the judge instruct the other members on the role the information may play in their deliberations.

#### *E. The Member as Investigating Officer*

The charges in a court-martial are processed through several levels before actually reaching the trial. An investigation, informal or otherwise, may possibly be conducted during several of these steps. An individual who conducts such an investigation is subject to challenge for cause. The *Manual* applies the term "investigating officer" to a person who, under the provisions of article 32 of the *Code*,<sup>68</sup> has investigated "the offense or a closely related offense alleged to have been committed by the accused."<sup>69</sup> All charges preferred to trial by general court-martial must be investigated in accordance with article 32 of the *Code*<sup>70</sup> and paragraph 34 of the *Manual*. A final report of investigation is completed, with the investigating officer's signature and his recommendations concerning the disposition of the charges. The charges may be ultimately disposed of by trial at any level, or by no trial at all. A copy of the report of investigation<sup>71</sup> will normally be provided to defense counsel with the charge sheet.

The *Manual* further provides that "[t]he term also includes any other person who . . . has conducted a personal investigation of a

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68. 10 U.S.C. § 832 (1976).

69. M.C.M., para. 64.

70. 10 U.S.C. § 832 (1976).

71. See M.C.M., app. 7.

general matter involving the particular offense."<sup>72</sup> Thus a member who, in his duties as security or duty officer, is called to perform an informal investigation of the offense(s) may be disqualified from sitting as a member.<sup>73</sup> On the other hand, a member who as Post Provost Marshall (roughly equivalent to a chief of police) received and forwarded the report of a victim's death and subsequently received and forwarded information that the accused was suspected of murder was not disqualified as an "investigating officer."<sup>74</sup> In *United States v. Burkhalter*,<sup>75</sup> the Court of Military Appeals held that the denial of a challenge against a member who, as information officer, had received information about the offense for ultimate public distribution constituted reversible error.

If a standard is to be derived from the cases, it appears that the member must have affirmatively investigated the charges at the scene of the incident, interviewed witnesses, or collated information about the incident for submission as some form of report. Mere contact with information about the charges in the normal course of a member's duties will not be sufficient to label him an investigating officer. As with some of the other grounds for challenge, the fact that a member acted as an investigating officer can be affirmatively waived and once the fact is made known to counsel a failure to challenge may be interpreted as waiver.<sup>76</sup>

#### *F. The Enlisted Member Assigned to the Accused's Unit*

An enlisted member may be challenged for cause if he is a member of the accused's unit. A unit within the terms of the *Manual* is the smallest organization for which a separate daily strength report<sup>77</sup> is prepared.<sup>78</sup> The *Code* provides that in no case may a unit be larger than a "company, squadron, ship's crew, or body corresponding to one of them."<sup>79</sup>

In one recently reported Navy-Marine Corps Court of Military

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72. M.C.M., para. 64.

73. *United States v. Bound*, 1 C.M.A. 224, 2 C.M.R. 130 (1952).

74. *United States v. Edwards*, 4 C.M.A. 299, 15 C.M.R. 299 (1954).

75. 17 C.M.A. 266, 38 C.M.R. 64 (1967).

76. *United States v. Dyche*, 8 C.M.A. 430, 24 C.M.R. 240 (1957).

77. This report, although varying in form from service to service, is merely a report of the status of personnel assigned to the unit. It will normally include an explanation of the difference between unit assigned strength and the number of persons reporting for duty.

78. M.C.M., para. 4b.

79. U.C.M.J., art. 25(b)(2), 10 U.S.C. § 825 (1976).

Review case, the court ruled that a challenge on such grounds could be and had been waived:

Only if there is no effective waiver of such a disqualification, as when it appears for the first time after the trial is finished, is it considered jurisdictional in that it has deprived the accused of a trial before a properly constituted court. If such a disqualification arises during the trial, after findings and before sentence, and is not waived, it merely deprives the court-martial of jurisdiction to continue with the trial until the court is properly re-constituted. In other words, it is not the type of jurisdictional defect that is incurable by waiver . . .

"In this case, there was clearly an intelligent and conscious waiver by both parties of the disqualification of the two enlisted members assigned to the [accused's unit]. The Government cannot complain as the convening authority appointed them with full knowledge of the circumstances. That they were assigned to the same [unit] as the accused is fully disclosed by the very order that appointed them to the court, a matter that could not have escaped the attention of the accused who saw fit to forego objection or challenge."<sup>80</sup>

[W]e believe appellant's "conscious waiver lifted the cloak of ineligibility" from [the member]. "When qualified counsel take a calculated risk, they cannot be relieved of the consequences merely because the right may be fundamental." Most important, however, "while we do not recommend to military judges that they accept waivers of substantial rights which are granted by the Code, we do not propose to support a rule which would permit defending counsel to induce error and then seek to take advantage of it on appeal."<sup>81</sup>

As the court explained, the fact that the member and accused are of the same unit will be readily apparent from the convening order, and diligence on the part of counsel in scrutinizing the orders should preclude the occurrence of the problem. A member who is formerly of the same unit as the accused may be subject to challenge under paragraph 62f(13) of the *Manual* if the former relationship gives rise to such a challenge.

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80. *United States v. Scott*, 25 C.M.R. 636, 640-41 (A.B.R. 1957), *quoted in* *United States v. Tagert*, 11 M.J. 677, 681 (N.C.M.R. 1981).

81. *United States v. Beer*, 6 C.M.A. 180, 184-85, 19 C.M.R. 306, 310-11 (1955), *quoted in* *Tagert*, 11 M.J. at 682.

G. *The Member Who Has Made Personal Recommendations Concerning the Charges*

Each commander in the accused's chain of command, as well as the article 32 or other investigating officer will normally make recommendations for the disposition of the charges against the accused. The *Manual* provides that such members may be challenged for cause. This challenge has not been interpreted narrowly and in *United States v. Strawbridge*<sup>82</sup> an Army Board of Review held that a member was disqualified since he had forwarded the charges in a closely related case dealing with a co-accused. Likewise, an officer who forwarded charges while temporarily acting as the commander in the commander's absence would also be disqualified.

H. *Positive and Definite Opinion as to Guilt*

A challenge for cause will properly lie against any member who expresses a "positive and definite opinion" concerning the guilt or innocence of the accused. Not surprisingly, there are few cases dealing with the expression of definite opinions. Such an opinion may also take the form of a refusal to abide by the rule that the accused is presumed innocent until proven guilty beyond a reasonable doubt. In *United States v. Sutton*,<sup>83</sup> the Court of Military Appeals reversed the conviction where the law officer precluded the defense counsel's inquiry into a member's acceptance of the rule. The risk as the court found it is that a member may "fail to accord the proper scope to the presumption of innocence and may be imbued with the concept that the accused must be blameworthy, else he would not stand arraigned at the bar of justice."<sup>84</sup>

The greatest danger is not that a member with definite opinions as to the guilt of the accused will be allowed to remain on the panel, but rather that in disclosing his opinion and any basis for it, he will thereby prejudice the remaining members. As the initial stages of *voir dire* are conducted before the entire panel, counsel must be careful to ensure that the member, in disclosing his opinion, does not reveal information which would prejudice the other members. In *United States v. Richard*,<sup>85</sup> the Court of Military Appeals set aside the conviction

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82. 21 C.M.R. 482 (A.B.R. 1956).

83. 15 C.M.A. 531, 36 C.M.R. 29 (1965).

84. *Id.* at 536, 36 C.M.R. at 34.

85. 7 C.M.A. 46, 21 C.M.R. 172 (1956).

tion where a member revealed in open court that he had been a member of a court-martial that had tried the accused for a related offense, that he had been approached by the Criminal Investigation Division regarding another related offense, that he had been consulted by a psychiatrist who had interviewed the accused, and that he was aware of a polygraph examination of the accused. Whereas curative instructions might preclude error in some cases, the court ruled that "every syllable contained the seeds of prejudice" and "[o]nly a harvest of harm could result," and that it was "impossible to wipe out the harm already done."<sup>86</sup> To prevent the possibility of prejudice, the trial counsel will usually request that disclosures concerning possible grounds for challenge be made in a general form and not include specific details.<sup>87</sup> In beginning his *voir dire* of the panel, counsel may wish to reiterate the instruction of the *Manual*: "In disclosing grounds for challenge, personnel should state only the ultimate nature of the circumstances which in their opinion makes them subject to challenge, and not details such as derogatory information regarding the accused."<sup>88</sup>

*I. The Member as Convening Authority, Reviewing Authority, or Judge Advocate*

The grounds for challenge contained in paragraphs 62f(11) and (12) of the *Manual* serve to prevent the potential for bias when the same officer who had scrutinized the evidence against the accused prior to trial, made legal recommendations on that evidence, or reviewed the validity of the findings and sentence also had the responsibility of determining guilt or innocence and sentence. Thus a member only temporarily acting as the commander may not appoint himself as a member of a court-martial.<sup>89</sup> If the convening or reviewing authority or legal officer were appointed as a member, the resulting error is cured by his removal from the court<sup>90</sup> or his excusal

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86. *Id.* at 51, 21 C.M.R. at 177. See also *United States v. Aaron*, 1 M.J. 1052 (N.C.M.R. 1976) (although defense counsel did not move for mistrial, the court reversed because of a strong risk of prejudice). Cf. *United States v. Washington*, 8 C.M.A. 588, 25 C.M.R. 92 (1958) (where the court failed to find prejudice in the member's comments).

87. See M.C.M., app. 8b.

88. M.C.M., para. 62b.

89. *United States v. Masminster*, 7 C.M.R. 593 (A.F.B.R. 1953).

90. See *United States v. Baker*, 7 C.M.R. 736 (A.F.B.R. 1953); in which the member was peremptorily challenged.



before the court is convened.<sup>91</sup>

*J. Other Facts Indicating Grounds for Challenge*

The *Manual* provides, in addition to the above-enumerated specific grounds, that certain other facts may indicate that a member should not sit on a court-martial in order to insure the proceedings are "free from substantial doubt as to legality, fairness, and impartiality."<sup>92</sup> The *Manual* provides these examples:

That [the member] will be a witness for the defense; that he testified or submitted a written statement in connection with the investigation of the charges, unless at the request of the accused; that he has officially expressed an opinion as to the mental condition of the accused; that, when it can be avoided, a member is junior in rank or grade to the accused; that he has a direct personal interest in the result of the trial; that he is in any way closely related to the accused; that he participated as a member or as counsel in the trial of a closely related case; that he is decidedly hostile or friendly to the accused; that, not having been present as a member when testimony on the merits was heard, or other important proceedings were held in the case, his sitting as a member will involve an appreciable risk of injury to the substantial rights of an accused, which risk will not be avoided by a reading of the record.<sup>93</sup>

The many cases dealing with challenges under paragraph 62f(13) of the *Manual* indicate with some specificity the facts necessary to sustain a challenge on the ground that the member's continued presence will cast doubt on the legality, fairness, and impartiality of the trial. The general test applied to an assertion that the military judge has improperly denied a challenge for cause against a member is, however, that enunciated in the landmark case of *United States v. Parker*.<sup>94</sup> *Parker* stands for the proposition that the determination of the validity of a challenge for cause lies within the discretion of the military judge and his ruling will not be overturned in the absence of an abuse of discretion and a showing of prejudice to the accused. Regarding any member challenged for cause under paragraph 62f(13), the court ruled that "[t]he real test is whether [the member] is mentally free to render an impartial finding and sentence based on

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91. *United States v. Ebbing*, 50 C.M.R. 425 (N.C.M.R. 1975) (en banc); *United States v. Worline*, 50 C.M.R. 47 (N.C.M.R. 1974) (both ruling that although the member succeeded to the position of convening authority, the accused's election for trial by judge alone cured any error).

92. M.C.M., para. 62f(13).

93. *Id.*

94. 6 C.M.A. 274, 19 C.M.R. 400 (1955).

the law and the evidence."<sup>95</sup>

The absence of the requisite mental freedom was termed an "inelastic attitude" by the court in *United States v. Cleveland*.<sup>96</sup> Since that decision, all the subsequent cases have ultimately ruled on whether or not a challenged member harbored this inelastic attitude. The concept of mental inelasticity is not one that is easily applied:

The issue of impartiality is generally ensconced in the term "elastic attitude", which, both theoretically and figuratively, reflects the desired characteristic of military court members charged with the awesome power of determining whether the government has met the necessary burden of proof, and in cases where guilt has been determined, the sentencing of criminal offenders under the Code.<sup>97</sup> We recognize that in the *voir dire* process we are evaluating and weighing the responses of laymen to oftentimes convoluted and sometimes confusing questions, with the responses thereto subject to selective interpretation. We do not, without deliberation, substitute ourselves for the trial judge's application of this easy to articulate, but difficult to apply, concept.<sup>98</sup>

The cases reveal a judicial, if not easily ascertainable, distinction between an inelastic attitude and a mere predisposition. While the courts state that "a mere predisposition . . . is not, standing alone, sufficient to disqualify a member,"<sup>99</sup> and that "a general or abstract bias . . . is not necessarily disqualifying,"<sup>100</sup> no clear lines have been drawn between inelasticity and mere predisposition. In addition, most members will respond affirmatively when asked if they can set aside their predispositions in favor of the judge's instructions and the evidence before them. In one case a member stated that he followed a personal rule in dealing with AWOL offenses that included always giving the maximum punishment.<sup>101</sup> An Army Court of Military Review found that because the member indicated that he would decide the punishment based on "what comes up in court"<sup>102</sup> his com-

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95. *Id.* at 284-85, 19 C.M.R. at 410-11.

96. 15 C.M.A. 213, 217, 35 C.M.R. 185, 189 (1965).

97. Citation omitted.

98. *United States v. Stennis*, 12 M.J. 813, 816 (N.M.C.M.R. 1981).

99. *United States v. McGowan*, 7 M.J. 205, 206 (C.M.A. 1979). *See also* *United States v. Tippet*, 9 M.J. 106, 107 (C.M.A. 1980); *United States v. Tucker*, 16 C.M.A. 318, 36 C.M.R. 474 (1966); *United States v. Fort*, 16 C.M.A. 86, 36 C.M.R. 242 (1966).

100. *United States v. Deain*, 5 C.M.A. 44, 49, 17 C.M.R. 44, 49 (1954). *See also* *United States v. Mitchell*, 11 M.J. 907, 911 (A.C.M.R. 1981); *United States v. Chaplin*, 8 M.J. 621, 624-25 (N.C.M.R. 1979); *United States v. Cleveland*, 15 C.M.A. 213, 215, 35 C.M.R. 185, 187 (1965).

101. *United States v. Sewell*, 1 M.J. 630, 634 (A.C.M.R. 1975).

102. *Id.*

ments did not reflect an inelastic attitude and the challenge for cause was properly denied. In some circumstances, though, the courts will not take the member's assertions at face value. In *United States v. Bann*,<sup>103</sup> although a member with an admitted predisposition against drug offenders promised to listen carefully to all the evidence and to refrain from making a decision, the court concluded that "his bias against drug offenders was profound and intransigent, and that such state of mind deprived him of the impartial judgment guaranteed to the accused."<sup>104</sup>

The trial judge, in ruling on a challenge, must consider a member's potentially disqualifying predispositions and his indications of a readiness to abide by the judge's instructions. Most situations are not at the extremes and it is difficult to determine how intransigent a predisposition must be to become an inelastic attitude. It is not surprising, then, that the appellate courts have adopted the standard requiring a clear showing of prejudice and an abuse of discretion on the part of the trial judge before reversing his rulings.

It also follows that jurors may be fairly easily rehabilitated for continued service on the panel by the judge or trial counsel during *voir dire*. The attempted rehabilitation of potentially disqualified members through questioning and instructions by the trial judge was specifically condoned by the Court of Military Appeals in *United States v. Tucker*<sup>105</sup> as a means of determining whether a member will yield to the evidence and the judge's instructions. In *Tucker*, the defense alleged that questioning during *voir dire* revealed a member's inelastic attitude towards punishment. Though holding that the law officer erred in denying a challenge against the member, the court commented:

A court member is not presumed to be learned in the law; his answer to a question such as that asked by defense counsel may merely reflect an assumption that the law demands that some type of punishment be imposed upon the guilty. With proper instructions, and on further questioning, the court member may disclose that his view as to punishment is not predetermined and unalterable. Rather, it may appear that the court member is wholly willing to assess an appropriate punishment upon the basis of the evidence and the law presented in open court. Regrettably, the law

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103. 50 C.M.R. 384 (A.F.C.M.R. 1975).

104. *Id.* at 387.

105. 16 C.M.A. 318, 36 C.M.R. 474 (1966).

officer did not perceive the appropriateness of further inquiry.<sup>106</sup>

Rehabilitation of potentially disqualified members need not be the sole domain of the trial counsel and military judge. Given the wide discretion vested in the judge, and the consistent holdings of the appellate courts that the judge's rulings will not be overturned except for an abuse of discretion, the defense counsel who senses that a challenge will ultimately be denied may wish to consider rehabilitating, and simultaneously indoctrinating, the member.<sup>107</sup>

At this point it would be useful to consider some of the commonly asserted grounds for challenge under paragraph 62f(13) of the *Manual*. While all such challenges are ultimately resolved according to the standards discussed above, a few have been treated by the appellate courts with enough care to give a better understanding of when those challenges will properly lie.

1. *Predisposition Concerning Sentence*—The area which has given rise to most of the law today concerning challenges involves assertions of an inelastic attitude towards a particular punishment. Of those, nearly all deal with a predisposition to adjudge a punitive discharge.<sup>108</sup> A punitive discharge is regarded as the worst possible punishment, transcending confinement, reduction in rank, and fines in its effect and duration. In attempting to ascertain whether a member has an inelastic predisposition to impose a punitive discharge on conviction, defense counsel will usually ask the member a

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106. *Id.* at 320, 36 C.M.R. at 476.

107. For an excellent discussion of *voir dire* techniques, including the indoctrination of members through *voir dire*, see Holdaway, *Voir Dire—A Neglected Tool of Advocacy*, 40 MIL. L. REV. 1 (1968). See also generally, Bennett, *Psychological Methods of Jury Selection in the Typical Criminal Case*, SELECTED MATERIALS ON TRIAL PRACTICE (National College for Criminal Defense, Bates College of Law, University of Houston 1981).

108. The two kinds of punitive discharges are the dishonorable discharge and the bad-conduct discharge. A complete loss of benefits normally accruing at termination of service, a federal felony record, and substantial prejudice in the civilian world are all incident to a punitive discharge. A general court-martial may impose either, while a special court-martial, if properly convened (a "BCD-special"), may impose a bad conduct discharge. Additionally, courts-martial are empowered to adjudge forfeitures of pay, fines, confinement, dismissal (for commissioned officers), and other ancillary punishments. The maximum punishments allowed for each offense are listed in M.C.M., para. 127c, and a general court-martial is empowered to adjudge any of those punishments, M.C.M., para. 14b. A special court-martial may impose any punishment except death, dishonorable discharge, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months, M.C.M., para. 15b. Paragraph 15b also sets out the procedural requirements that must be met in order for a special court-martial to adjudge a bad conduct discharge.

question substantially as follows: Do you feel that a conviction for the offense of which the accused is charged (or has been found guilty) would warrant a punitive discharge, regardless of matters in extenuation or mitigation?<sup>109</sup>

In reaching a decision whether a member's responses reveal an inelastic attitude toward the imposition of a punitive discharge based solely upon the nature of the offense, the courts today often rely on the decisions of the Court of Military Appeals in *United States v. Cosgrove*<sup>110</sup> and *United States v. Karnes*.<sup>111</sup> In *Cosgrove* the court ruled that the following colloquy revealed an inelastic attitude:

Q. [DEFENSE COUNSEL] Do you feel that in any case involving LSD, use, sale or transfer in the military, that a punitive discharge should be awarded?

MEMBER: If the person is found guilty, I think so, yes.

Q. If we present no facts in mitigation of an attempted sale, would your feeling be that some sort of punitive discharge is indicated?

MEMBER: If the plea was guilty with no mitigating circumstances, I would . . . I would have to say yes, a punitive discharge would be appropriate.<sup>112</sup>

The questions and responses in *Karnes* are also instructive. In spite of the trial judge's apparent satisfaction with the member after he intervened in the *voir dire*, the court ruled that the responses "clearly reflected an inelastic attitude."<sup>113</sup>

IC [Individual Counsel]: . . . Do you have a preconceived bias in favor of excluding someone from the service that would be convicted of this offense?

MEMBER: Disregarding any extenuation or mitigation?

IC: Right.

MEMBER: If he were convicted of this offense I would be in favor of excluding him from the Marine Corps.

MJ [Military Judge]: Now Captain by that do you mean by that

109. See generally *United States v. Stennis*, 12 M.J. 813 (N.C.M.R. 1981); *United States v. Goodman*, 3 M.J. 1106 (N.C.M.R. 1977); *United States v. Sewell*, 1 M.J. 630 (A.C.M.R. 1975); *United States v. Bann*, 50 C.M.R. 384 (A.F.C.M.R. 1975); *United States v. Kelly*, 42 C.M.R. 817 (A.C.M.R. 1970); *United States v. Fort*, 16 C.M.A. 86, 36 C.M.R. 242 (1966); *United States v. Chavis*, 32 C.M.R. 645 (A.B.R. 1963); *United States v. Lynch*, 9 C.M.A. 523, 26 C.M.R. 303 (1958); *United States v. Parker*, 6 C.M.A. 274, 19 C.M.R. 400 (1955). See *infra* text accompanying notes 114-116, but cf. *United States v. Barton*, 48 C.M.R. 358 (N.C.M.R. 1973) (for an example of the wrong way to inquire into a sentence predisposition).

110. 24 C.M.A. 4, 1 M.J. 199 (1975).

111. 23 C.M.A. 537, 1 M.J. 92 (1975).

112. 24 C.M.A. at \_\_\_\_, 1 M.J. at 199-200.

113. 23 C.M.A. at 538, 1 M.J. at 94.

that this charge is serious enough to warrant a punitive discharge?  
[sic]

MEMBER: Yes, sir: I do.

MJ: Do you mean that regardless of what is introduced in extenuation and mitigation that you will award a punitive discharge?

MEMBER: No, sir: I didn't understand the question to mean that. I am saying that if there were no extenuating or mitigating circumstances and he were guilty of specification two, I feel that this is an offense is [sic] such that he must be discharged under other than honorable conditions.

MJ: But there are matters that could be introduced that would change your mind?

MEMBER: I don't know, with that charge it would be hard for me to conceive of a mitigating circumstance that would force someone to sell marihuana or any other dangerous drug. I can't conceive in my own mind something that would be mitigating.

MJ: Would you be willing to listen with an open mind to the matters brought out in extenuation and mitigation?

MEMBER: Yes, sir.

MJ: Would you [be] able to consider these matters in arriving at your sentence?

MEMBER: Yes, sir.

MJ: Are you saying that it is possible that there is something or that it is impossible that there is something that would change your mind?

MEMBER: I am not saying that it is impossible. I just can't imagine what it would be.

MJ: You don't know what the circumstances would be but you are not excluding the possibility?

MEMBER: No, sir; I am not excluding it.<sup>114</sup>

The Court of Military Appeals has not quoted responses by members in any of its reported decisions since *Cosgrove* and *Karnes*,<sup>115</sup> perhaps because of a fear that subsequent lower court decisions would apply a "like *Karnes* or *Cosgrove*" test to member's responses. With

114. 23 C.M.A. at 537-38, 1 M.J. at 93-94.

115. But see *United States v. Tippit*, 9 M.J. 106 (C.M.A. 1980) in which the court offered these comments about the questions propounded by counsel:

[I]t is appropriate to allow considerable leeway to counsel in the *voir dire* examination of court members as they seek to ascertain whether a challenge for cause should be asserted. However, latitude for counsel in propounding questions to court members about their reactions to hypothetical situations should not become an invitation to reversible error. The military judge has a responsibility to assure [sic] that the court members are open-minded and will render findings and, if necessary, impose a sentence based on the evidence before them. However, he need not engage in minute dissection of responses by members to artful, sometimes ambiguous, inquiries from counsel. Unless it is apparent to us from the record of the *voir dire* that a court member has a closed mind about the case he is to try, denial by the military judge of a challenge for cause should not be reversed.

*Id.* at 107-108.

only three exceptions,<sup>116</sup> courts have not made this application. The reason lies largely in another Court of Military Appeals decision, *United States v. McGowan*.<sup>117</sup> There the court distinguished the *Karnes* and *Cosgrove* situation from one where the members merely indicated a predisposition to adjudge "some punishment"<sup>118</sup> upon conviction, again reiterating that the test lies in determining whether the member will yield easily to the evidence presented and the judge's instructions.

In one case decided by a Navy Court of Military Review,<sup>119</sup> the court focused primarily on the semantic make-up of the questions propounded by the defense counsel. The court pointed out that the questions posed in *Cosgrove* were couched in terms of the members' "feelings," what punishment they "should" award, and what sort of punishment they felt was "indicated." Contrasting these with the "unambiguous terms" employed in another Navy case,<sup>120</sup> the court pointed out that inelastic should mean "rigid," "unyielding" or "inflexible," and that some forums (apparently the Court of Military Appeals in *Cosgrove*) may have been too quick to find inelasticity.

If the number of cases dealing with the subject is any indication, the risk that any given member may be predisposed as to a particular sentence is relatively large. For example, the officer who sits on a special court-martial empowered to adjudge a bad conduct discharge or a general court-martial may walk into court believing that a punitive discharge is the desire of the accused's chain of command, given the level of trial chosen.<sup>121</sup> As someone who has probably had some form of command experience, he may have made recommendations or applied disciplinary policies on exactly that basis. Thus, even where a successful challenge for cause appears unlikely, the indoctrinative effect of proper questioning on sentencing predisposition

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116. See *United States v. Chaplin*, 8 M.J. 621 (N.C.M.R. 1979); *United States v. Goodman*, 3 M.J. 1106 (N.C.M.R. 1977); *United States v. Sewell*, 1 M.J. 630 (A.C.M.R. 1975). In *United States v. Tippit*, 9 M.J. 106 (C.M.A. 1980), the court engaged in such a comparison. Defense alleged that the responses of the members were indistinguishable from those of the members in *Karnes* and *Cosgrove*.

117. 7 M.J. 205 (C.M.A. 1979).

118. *Id.* at 206.

119. *United States v. Chaplin*, 8 M.J. 621 (N.C.M.R. 1979).

120. *United States v. Goodman*, 3 M.J. 1106 (N.C.M.R. 1977).

121. See generally *United States v. Sutton*, 15 C.M.A. 531, 36 C.M.R. 29 (1965); *United States v. Carver*, 6 C.M.A. 258, 19 C.M.R. 384 (1955); *United States v. Deain*, 5 C.M.A. 44, 17 C.M.R. 44 (1954) (all dealing with a presumption of guilt associated with the mere presence of the accused at trial).

may be beneficial to the accused. When the accused presents a great deal of evidence in extenuation or mitigation, the argument for such questioning becomes stronger.

2. *Command Influence*—Members of the court are frequently challenged as having been subject to improper command influence from either within or without the court. Where the influence is claimed to lie within the court, such as where one member is rated by another, challenges against the allegedly affected members are appropriate. Where the influence is alleged to be exerted from outside the court, such as by the convening authority, the civilian defense counsel may find himself on unfamiliar ground. Neither the *Manual* nor the *Code* contains a provision for a challenge to the array. The appropriate remedy probably lies in an objection to the method of selection, or as a motion for appropriate relief,<sup>122</sup> seeking re-selection of court members. If such influence is not detected until after the trial has commenced, a motion for mistrial would be in order.

The members of a court-martial arrive at a verdict and sentence by secret ballot,<sup>123</sup> so the mere fact that a member prepares evaluations of another member is not grounds for challenge against either.<sup>124</sup> As the Court of Military Appeals said in the landmark case of *United States v. Deain*,<sup>125</sup> "no reasonable man would believe that the senior is put in a position to exert undue control over the deliberations of the other. Their association as court members and the submission of a fitness report is not incompatible."<sup>126</sup> In *Deain*, however, the court found improper command influence because the reports were evaluations of the member's performance as a court member. The *Manual* specifically prohibits such evaluations:

In the preparation of an effectiveness, fitness or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assign-

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122. See generally M.C.M., para. 69; *United States v. Young*, 49 C.M.R. 133 (A.F.C.M.R. 1974); *United States v. Ginn*, 44 C.M.R. 484 (A.C.M.R. 1971).

123. U.C.M.J., art. 51(a), 10 U.S.C. § 851 (1976); M.C.M., para. 74d.

124. *United States v. Adams*, 36 C.M.R. 718 (A.B.R. 1966); *United States v. Wade*, 35 C.M.R. 685 (A.B.R. 1958). Likewise, the mere fact that one member is another's commander, *United States v. Michaud*, 48 C.M.R. 379 (N.C.M.R. 1973), or that the member is on the convening authority's staff and will be evaluated by that officer, *United States v. Ambalada*, 1 M.J. 1132 (N.C.M.R. 1977), is not per se disqualifying.

125. 5 C.M.A. 44, 17 C.M.R. 44 (1954).

126. *Id.* at 52, 17 C.M.R. at 52.



ment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the code may consider or evaluate the performance of duty of any such member as a member of a court-martial.<sup>127</sup>

The *Manual* cannot, of course, prevent the impressionable junior member from unconsciously giving undue weight to the comments of his superior in the deliberation room. The member who evaluates another member is always a good candidate for the peremptory challenge.

A common ground for challenges based on command influence is that the convening authority or other commander has unlawfully attempted to influence the court. Such conduct, unless pursuant to a course "designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial,"<sup>128</sup> is also prohibited by the *Manual*:

Convening authorities and other commanding officers are expressly forbidden to censure, reprimand, or admonish a court or any member, military judge, or counsel thereof, with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any other convening, approving or reviewing authority with respect to their judicial acts.<sup>129</sup>

Where the improper exertion of command influence has been asserted, it has usually resulted from some form of an enunciation of policy. The cases dealing with the subject often are concerned with the effect that such statements have had on the utterer's ability to serve impartially as convening and/or reviewing authority. As the Court of Military Appeals stated the rule, "[i]t is a commander's prerogative to determine . . . policies and to promulgate them as he sees fit. However, it is clearly not within a commander's prerogative to inject his policies into judicial proceedings."<sup>130</sup> Even when the court finds that the commander's policy statements do not disqualify him from reviewing the case, it may find that the court members were

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127. M.C.M., para. 38c.

128. M.C.M., para. 38c(1).

129. M.C.M., para. 38c.

130. *United States v. Estrada*, 7 C.M.A. 635, 638, 23 C.M.R. 99, 102 (1957).

improperly influenced. In *United States v. Toon*,<sup>131</sup> the commander issued a statement indicating that the only appropriate punishment for selling drugs was a punitive discharge. The trial court denied challenges against the members who had read the statement. The appellate court, however, set aside the sentence even though the members insisted that they were not influenced and in spite of the court's ruling that the commander was not disqualified from reviewing the case.

The Court of Military Appeals has condemned as improper remarks by commanders directed specifically at court members, those referring to the particular facts of a pending court-martial, those criticizing sentences adjudged in previous courts-martial or particular combinations of punishments, those asking for particular sentences, those asking for separation or severe sentences for particular offenses, those that discriminate against the accused because of his military status, those which attempt to influence the disposition of charges by subordinate commanders, and those that are capitalized upon by trial counsel in an attempt to influence the court.<sup>132</sup>

While the Court of Military Appeals has indicated that the existence or even appearance of command influence creates a rebuttable presumption of prejudice,<sup>133</sup> the presumption is rebutted by a choice of trial by judge alone.<sup>134</sup> The accused does not, however, have the right to *voir dire* the panel before the court is assembled—that is, before making the election of trial by members or trial before the military judge.<sup>135</sup>

Where the commander's remarks were made a long time before the court-martial,<sup>136</sup> or in the case where the comments are decided not to have been improper,<sup>137</sup> the test to be applied will be whether

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131. 48 C.M.R. 139 (A.C.M.R. 1973).

132. See *United States v. Toon*, 48 C.M.R. 139, 144 (A.C.M.R. 1973) (dissent by Judge Taylor and cases cited therein).

133. *United States v. Johnson*, 14 C.M.A. 548, 551, 34 C.M.R. 328, 331 (1964).

134. *United States v. Chambers*, 49 C.M.R. 220, 223 (A.F.C.M.R. 1974); but see *United States v. Greene*, 20 C.M.A. 232, 43 C.M.R. 72 (1970) (demonstrating that an election to be tried by judge alone does not waive the error for appeal).

135. *United States v. Chambers*, 49 C.M.R. 220, 222 (A.F.C.M.R. 1974); *United States v. Hill*, 45 C.M.R. 904 (N.C.M.R. 1972); *United States v. Dupree*, 45 C.M.R. 456 (A.F.C.M.R. 1972).

136. See *United States v. Wood*, 13 C.M.A. 217, 32 C.M.R. 217 (1962) (policy letter issued twenty-two months prior to trial).

137. See *United States v. Toon*, 48 C.M.R. 139, 141 (A.C.M.R. 1973) (prejudicial effect on convening authority of prior statement negated by subsequent statement by convening authority).

the member will easily yield to the evidence presented and the judge's instructions.<sup>138</sup> In those two instances, inquiry must be carefully conducted, if at all, for the appellate court may question defense counsel who "[h]aving raised the most inflammatory matter during *voir dire*, . . . immediately complain at the perception of some heat."<sup>139</sup>

3. *The Appearance of Evil*—The courts are also sensitive to the "appearance of evil" in courts-martial. In almost every situation the "evil" manifests itself as an indirect result of some command influences; usually in the selection process.<sup>140</sup> The courts have understandably been unable to articulate a specific test for the "appearance of evil." As an Army Court of Military Review<sup>141</sup> said in a case in which a member had been working in the trial counsel's office:

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138. See *supra* cases cited in notes 99-100.

139. *United States v. Chaplin*, 8 M.J. 621, 625 (N.C.M.R. 1979).

140. A body of military case law concerning the selection process has developed, primarily based upon the well-reasoned decisions of the United States Court of Military Appeals in *United States v. Crawford*, 15 C.M.A. 31, 35 C.M.R. 3 (1964) and *United States v. Greene*, 20 C.M.A. 232, 43 C.M.R. 72 (1970). *Crawford* stands for the proposition that while a selection procedure which arbitrarily excludes certain groups of eligible jurors from service is prohibited, the convening authority may legitimately look first to indicators such as rank, age and military experience when selecting eligible jurors. *Greene* reversed the conviction of the defendant where the convening authority improperly delegated his responsibility to personally select the members of the court. The courts will presume that the convening authority properly exercised his responsibilities and in one Air Force Court of Military Review case, the court indicated that a mere showing through a convening order, that the members were of high rank was insufficient to sustain the allegation that lower ranking service men were improperly excluded. *United States v. Townsend*, 12 M.J. 861 (A.F.C.M.R. 1981). Counsel faced with a panel of high ranking members may wish to view all documents relating to the selection process for that panel in order to ensure that the procedures outlined in the Manual and Code were properly followed. See *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978) (reversing the conviction where the convening authority had allowed administrative personnel to select specific enlisted members from a larger list he had selected); *United States v. Rice*, 3 M.J. 1094 (N.C.M.R. 1977) (approving of the practice whereby subordinate commanders submitted a number of names from which the authority made specific selections). See generally *United States v. Aho*, 8 M.J. 236 (C.M.A. 1980); *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979); *United States v. Delp*, 11 M.J. 836 (A.C.M.R. 1981); *United States v. Firmin*, 8 M.J. 895 (A.C.M.R. 1979); *United States v. Stokes*, 8 M.J. 694 (A.F.C.M.R. 1979); *United States v. Perl*, 2 M.J. 1269 (A.C.M.R. 1976).

It is also well established that the military defendant has no right to trial by peers under U.S. CONST. amend. VI. See *Ex Parte Quirin*, 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942); *United States v. Kemp*, 22 C.M.A. 152, 46 C.M.R. 152 (1973). See also *United States v. Guilford*, 8 M.J. 598 (A.C.M.R. 1979); *United States v. Montgomery*, 5 M.J. 832 (A.C.M.R. 1978); *United States v. Wolff*, 5 M.J. 923 (N.C.M.R. 1978).

141. *United States v. Hampton*, 50 C.M.R. 232 (A.C.M.R. 1975).

The "appearance of evil" must be recognized for what it is, an appearance, a first impression. Full or even rational examination by the public of facts giving rise to the "appearance" is not the norm. We find it difficult to believe that either the accused or the public could be convinced that a justice system that allows a member of the prosecutor's staff to remain on the jury is fair. This Court cannot add its imprimatur to such practice.<sup>142</sup>

In some instances, though, courts have approved an arguably "evil" situation. The accused in *United States v. Noyd*<sup>143</sup> was an officer whose defense to the charge of disobeying an order to train pilots was that he was a conscientious objector. He probably perceived some "evil" when it was revealed that all but one of the court-members had recently returned from duty in Southeast Asia. An Air Force Board of Review did not. In affirming the findings and sentence the court explained that combat service was not per se disqualifying and that the members expressed a willingness to try the case on the basis of the evidence and instructions. The court also found that there was no evidence of an improper selection procedure, and that the sentence adjudged was lenient.<sup>144</sup> As the court said in closing, "[a]n accused is not entitled to favorable court members[,] . . . any particular kind of juror<sup>145</sup> . . . [or] to jurors who believe him innocent; however, he does have an unqualified right to jurors whose minds are uncommitted."<sup>146</sup>

In *United States v. Hedges*,<sup>147</sup> however, "the appearance of a hand-picked court was too strong to be ignored."<sup>148</sup> Hedges faced a panel comprised of nine officers, and as appellate counsel depicted civilian counterparts to their military duties, the panel included "an attorney general, a sheriff of a county, a chief of police of a city, an investigating agent for the state, and the warden of a penitentiary."<sup>149</sup> As Judge Latimer stated in his forceful concurring opinion:

Of course, an accused is not entitled to be tried by individuals who have tendencies to be lenient but neither should he be judged by minions of law enforcement agencies. In that connection I might paraphrase an old saying by stating that one military policeman might not break an accused's back, but five would. And, specifi-

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142. *Id.* at 233.

143. 39 C.M.R. 937 (A.B.R. 1968).

144. *Id.* at 943.

145. Citation omitted.

146. *United States v. Noyd*, 39 C.M.R. 937, 943 (A.B.R. 1968).

147. 11 C.M.A. 642, 29 C.M.R. 458 (1960).

148. *Id.* at 643, 29 C.M.R. at 459.

149. *Hedges*, 11 C.M.A. at 645, 29 C.M.R. at 461 (Judge Latimer concurring).

cally in the case at bar, while any one of the chosen officers might not discolor the essential fairness of the trial, when five to seven are coalesced into a panel of nine, the hue turns dark.<sup>150</sup>

The relatively tight-knit nature of the military community<sup>151</sup> has also resulted in situations which cast substantial doubt on the fairness of a trial. In two Army Court of Military Review cases involving trial counsel who also served as legal advisors for court members,<sup>152</sup> contrary results were reached apparently on the basis of the members' responses to similar questions. In *United States v. Baker*,<sup>153</sup> the member indicated that his position as legal advisor "might make an impact"<sup>154</sup> on him as he considered the relative weights of counsel's arguments. The court noted that such a personal relationship may be disqualifying on the basis of implied bias, but mere acquaintance is not.<sup>155</sup> In *United States v. Mitchell*,<sup>156</sup> the court cited *Baker* for the proposition that "an actual or implied bias must be shown."<sup>157</sup> The court found that although the member stated that the trial counsel had obtained convictions in all eighty courts-martial the member had convened, the member was not disqualified. The court justified its holding by stating that the relationship would not affect the member's "presumption of the [accused's] innocence, his ability to abide by the military judge's instructions, or his determination to base his decision on the evidence presented."<sup>158</sup>

Finally, instances of improper conduct by the member may give rise to challenges. Such conduct typically includes comments or acts

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150. *Id.* at 646, 29 C.M.R. at 462.

151. The situation at a typical medium or large military installation may be illustrative: The service member probably deals with members of ten or more units other than his own on a regular basis. He may live in military housing, with neighbors from units other than his own, and his children may attend schools on the installation for dependents. He may go to a church on the installation and may regularly visit the officer or NCO club after work. The installation probably organizes adult and youth organizations to which the member, his wife, or children may belong. He may also attend local or service schools with members of other units, and invariably knows members of other units from previous assignments. The pyramid rank structure in the military necessarily increases these contacts for officers and enlisted men as they advance in rank.

152. Such a situation may arise where the trial counsel prosecutes a case arising in another jurisdiction within the same larger command.

153. 2 M.J. 773 (A.C.M.R. 1976).

154. *Id.* at 775.

155. *Id.*

156. 11 M.J. 907 (A.C.M.R. 1981).

157. *United States v. Baker*, 2 M.J. 773, 776 (A.C.M.R. 1976).

158. *United States v. Mitchell*, 11 M.J. 907, 910 (A.C.M.R. 1981).

by the members, either in<sup>159</sup> or out<sup>160</sup> of court, which demonstrate that the member cannot be impartial. In some cases, such conduct may be held non-prejudicial as in *United States v. Cooper*.<sup>161</sup> In *Cooper*, the member, in response to a pre-trial questionnaire indicated that he had a strong prejudice against certain troops.<sup>162</sup> He was not disqualified from sitting as a member after the seriousness of his duties was impressed upon him.<sup>163</sup>

In *United States v. Rosser*,<sup>164</sup> the court ruled that a motion for mistrial should have been granted because, among other reasons, a member engaged in a conversation with the accused's commander in which he learned of the commander's desire to have the accused separated from the service. Additionally, the member later indicated that he had not worn all of his authorized decorations in order to avoid being removed from the court. The court ruled that the real issue at stake was the integrity of the court-martial and found the trial judge remiss in his duty "to avoid the appearance of evil in his courtroom and . . . foster public confidence in court-martial proceedings."<sup>165</sup>

Although few decisions are based solely on the "appearance of evil," its presence can be an important factor in the final determination of a challenge for cause. Astute counsel should remain sensitive to situations which bring into question the legality, fairness, or impartiality of the court or its members.

### III. The Peremptory Challenge

The decision of whether to exercise the sole peremptory challenge afforded each side in a court-martial<sup>166</sup> must always be made in light

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159. See *United States v. Lamela*, 7 M.J. 277 (C.M.A. 1979); *United States v. Cleveland*, 6 M.J. 939 (A.C.M.R. 1979); *United States v. Little*, 44 C.M.R. 833 (A.F.C.M.R. 1971); *United States v. Sears*, 6 C.M.A. 661, 20 C.M.R. 377 (1956).

160. See *United States v. Witherspoon*, 12 M.J. 588 (A.C.M.R. 1981); *United States v. Rogers*, 11 C.M.A. 669, 29 C.M.R. 485 (1960).

161. 8 M.J. 538 (N.C.M.R. 1979).

162. *Id.* at 539.

163. See *id.*

164. 6 M.J. 267 (C.M.A. 1979).

165. *Id.* at 273. See also *United States v. Barnes*, 12 M.J. 956 (A.F.C.M.R. 1982) (the court reversed where four members had sat on a closely related trial earlier in the day, and in spite of the members' assertions that they were unaffected by their previous knowledge).

166. The courts have found that the granting of more than one peremptory challenge is error, but in the rare cases where that has happened, the courts have ruled the error non-prejudicial; see *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973); *United States v. Chaplin*, 8 M.J. 621 (N.C.M.R. 1979).

of any previously made challenges for cause. As in other courts, the exercise of the peremptory challenge may be required to preserve the issue of a denied challenge for cause,<sup>167</sup> and its competent exercise is justification for broad *voir dire* questioning.<sup>168</sup> Because of some of the unique features of courts-martial, the peremptory challenge may also be used to play the court-martial numbers game to obtain a favorably sized jury.

### A. General

The peremptory challenge may be used "before, during or after challenges for cause, against a member unsuccessfully challenged for cause, or against a new member if the challenge is not previously utilized in the trial. It cannot be used against the military judge."<sup>169</sup> The use of the challenge is limited to the time set aside for the making of challenges, and the judge may properly deny a peremptory challenge that is untimely. In *United States v. Noreen*,<sup>170</sup> a judge was upheld in his decision to refuse defense counsel the opportunity to exercise a previously unused peremptory challenge, even though on

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167. See *United States v. Bush*, 12 M.J. 647 (A.F.C.M.R. 1981); *United States v. Russell*, 43 C.M.R. 807 (A.C.M.R. 1971); but cf. *United States v. Cooper*, 8 M.J. 538 (N.C.M.R. 1979); *United States v. Boyd*, 7 M.J. 282 (C.M.A. 1979); *United States v. Shaffer*, 2 C.M.A. 75, 6 C.M.R. 75 (1952) (where defense argued that denial of a challenge for cause "compelled" the exercise of the peremptory challenge).

168. Curtailment of the *voir dire* by the military judge may also prejudice the accused. The judge should give wide latitude to counsel's examination of members. *United States v. Parker*, 6 C.M.A. 274, 19 C.M.R. 400 (1955). The judge may not rule specific questions by counsel as "asked and answered" as the result of the judge's general inquiry. *United States v. Dixon*, 8 M.J. 858 (N.C.M.R. 1980); *United States v. Jemmings*, 50 C.M.R. 247 (A.C.M.R. 1975), modified, 1 M.J. 414 (C.M.A. 1976). A policy allowing only the judge to ask questions in *voir dire* is improper, *United States v. Bowles*, 7 M.J. 591 (N.C.M.R. 1979), *aff'd*, 8 M.J. 99 (C.M.A. 1979), but a trial judge may require the submission of questions in writing and ask them himself, *United States v. Slubowski*, 7 M.J. 461 (C.M.A. 1979). The judge may, of course, prevent "fishing expeditions," *United States v. Barton*, 48 C.M.R. 358 (N.C.M.R. 1973); and prevent counsel from trying to obtain a verdict during the *voir dire*, *United States v. Freeman*, 15 C.M.A. 126, 35 C.M.R. 98 (1964). Counsel may properly inquire as to a member's propensity to believe certain witnesses, *United States v. Pollack*, 9 M.J. 577 (A.F.C.M.R. 1980); *United States v. Tomchek*, 4 M.J. 66 (C.M.A. 1977); *United States v. Huntsman*, 22 C.M.A. 100, 46 C.M.R. 100 (1973); a member's racial or ethnic prejudices, *United States v. Witherspoon*, 12 M.J. 588 (A.C.M.R. 1981); his amenability to the reasonable doubt rule, *United States v. Sutton*, 15 C.M.A. 531, 36 C.M.R. 29 (1965); his religious beliefs, *United States v. Walbert*, 32 C.M.R. 945 (A.F.B.R. 1963); his attitude toward the rank of the accused, *United States v. Wood*, 13 C.M.A. 217, 32 C.M.R. 217 (1962); or whether he was affected by another member's improper statements, *United States v. Batchelor*, 7 C.M.A. 354, 22 C.M.R. 144 (1956).

169. M.C.M., para. 62e.

170. 48 C.M.R. 228 (A.C.M.R. 1973).

the second day of trial the judge announced that he would be willing to grant a previously denied challenge for cause.

The use of the peremptory challenge to remove a member unsuccessfully challenged for cause is a double-edged sword. On the one hand, a member against whom a challenge for cause is weighed is probably not a desirable juror, but unless the appellate courts find an appreciable risk of prejudice to the accused, challenging him peremptorily will usually cure any error caused by his continued presence as a member.<sup>171</sup> Only if the appellate courts are satisfied that the improper denial of a challenge for cause compelled the exercise of the peremptory challenge will they reverse for prejudicial error.<sup>172</sup> In *United States v. Russel*<sup>173</sup> the court refused to take issue with a peremptory challenge exercised against a member who has not been challenged for cause:

Our concern is, however, only to insure that the court that tried the accused was fairly and impartially constituted without regard to how this composition was achieved. We cannot nor should we inquire as to why the appellant exercised his peremptory challenge. To hold otherwise would deprive the challenge of its peremptory character. The only precondition to the preservation of the issue before us is that the peremptory challenge be utilized and not simply abandoned.<sup>174</sup>

It is undisputed, however, that a complete failure to exercise the peremptory challenge waives any error arising from the denial of a challenge for cause.<sup>175</sup>

### *B. The Peremptory Challenge and the "Numbers Game"*

The court-martial panel need not be composed of any specific number of members, except in regard to the statutory minimums.<sup>176</sup> The *Manual* provides that except in cases where the death penalty is made mandatory by law<sup>177</sup> no person shall be found guilty of an offense (where the accused pleads not guilty) except by a concurrence

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171. See *United States v. Harris*, 11 M.J. 589, 592 (A.F.C.M.R. 1981), *pet. granted*, 11 M.J. 284 (C.M.A. 1981); *United States v. Chaplin*, 8 M.J. 621, 626 (N.C.M.R. 1979); *United States v. Brakefield*, 43 C.M.R. 828, 832 (A.C.M.R. 1971); *United States v. Reece*, 29 C.M.R. 837, 843 (A.F.B.R. 1960).

172. See *supra* note 167.

173. 43 C.M.R. 807 (A.C.M.R. 1971).

174. *Id.* at 810.

175. *Supra* note 167.

176. *Supra* note 27.

177. See, e.g., U.C.M.J., art. 106, 10 U.S.C. § 906 (1976).



of two-thirds of the members present to vote.<sup>178</sup> Two-thirds concurrence is also necessary to adjudge sentence, except in death penalty cases, which require concurrence of all members present, or in sentences of more than ten years confinement, in which three-fourths concurrence is required.<sup>179</sup> The *Manual* further provides that "[i]f, in computing the number of votes *required*, a fraction results, the fraction will be counted as one . . . ."<sup>180</sup> Therefore, a "numbers game" can be played in attempting to obtain a favorably sized jury. Basically the idea is to obtain a jury which gives the best numerical or percentage opportunity for success. A jury composed of five members would be advantageous to the accused. In that case, the government needs 80% agreement on the verdict and on any sentence, while the defense need only have 40%, or two members. While the defense bears a slightly increased percentage requirement (from the theoretical 34%) the government's increase is far greater in absolute terms, since four of the five members must concur.<sup>181</sup> Another advantage to the defense in playing the numbers game may be that the government usually must exercise its challenges first.<sup>182</sup>

Playing the numbers game does not take the place of intelligently exercised peremptory challenges. Peremptory challenges should be based on perceived biases not amounting to grounds for a challenge for cause. Also, where a peremptory challenge would remove the high ranking member that counsel fears will "run" the jury room, but its exercise would put the defense in an inferior numerical posi-

178. M.C.M., para. 74d(3). See also U.C.M.J., art. 52(a)(2), 10 U.S.C. § 852 (1976).

179. M.C.M., para. 76b(3). See also U.C.M.J., art. 52(b), 10 U.S.C. § 852 (1956).

180. M.C.M., paras. 74d(3), 76b(3) (emphasis added).

181. A simple analysis of the mathematics of the "numbers game" reveals:

	NUMBERS OF MEMBERS											
	3*	4*	5*	6	7	8	9	10	11	12	13	
No. req. for guilty	2	3	4	4	5	6	6	7	8	8	9	
Percent req. for guilty	66	75	80	66	71	75	66	70	73	66	69	
No. req. for not guilty	2	2	2	3	3	3	4	4	4	5	5	
Percent req. for not guilty	66	50	40	50	43	38	44	40	36	42	38	
Best time to challenge**	D	P	P	D	P	P	D	P	P	D	P	
Best ratio**	P	D	D	P	D	D	P	D	D	P	D	

\* These figures primarily apply to special courts-martial where the quorum is three members.

\*\* P = prosecution, D = defense.

Adapted from materials provided to author from U.S. Army Judge Advocate General's School, on file at *Review of Litigation* office.

182. M.C.M., para. 62a.

tion, the challenge probably is better exercised. Counsel also must understand that the accused "is not entitled to any particular number of court members, provided of course the minimum number is met."<sup>183</sup> In *United States v. Seabrooks*,<sup>184</sup> the defense was not successful in arguing that the accused was prejudiced by a denial of the tactical advantage accompanying a favorable numbers situation when a member was excused over a defense objection. It would follow that it could not be successfully argued that prejudice remains where defense counsel fails to exercise a peremptory challenge in the face of a denied challenge for cause solely to preserve a favorable numbers situation. Generally, the numbers game is best used where counsel perceives that no other discriminators indicate advantageous exercise or non-exercise of the peremptory challenge, or that all such factors are in balance.

### III. Pre-Trial Preparation for *Voir Dire*

Pre-trial preparation for the *voir dire* warrants great attention by counsel. In addition to providing a good basis for the conduct of *voir dire*, because the members of a court-martial are known in advance, such preparation will greatly assist defense counsel and the accused in making certain choices: whether to go to trial with the judge alone, or if a panel is preferred, whether to request enlisted members. The military defense counsel at the installation where the trial is conducted and the panel members themselves are the best sources of information about the members individually and their behavior as a panel. Information may be sought through records, questionnaires, and conversations.

#### A. *Personnel Files and Background Information*

Military personnel files may be obtained from the records branch of the Adjutant General's office or the personnel office at the installation. Such files should be examined as soon as the composition of the court is known. Included within them is information about family, personal, and military background, source of commission, civilian and military schooling, and past and present duty assignments. In one case decided by an Army Court of Military Review,<sup>185</sup> the court

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183. *United States v. Noreen*, 48 C.M.R. 228, 235 (A.C.M.R. 1973).

184. 48 C.M.R. 471, 473 (N.C.M.R. 1974).

185. *United States v. Perry*, 47 C.M.R. 89 (A.C.M.R. 1973).

considered it "advisable that some form of background information on persons appointed to courts-martial be made available to counsel at the trial level."<sup>186</sup> The court, however, went on to hold that the accused was not prejudiced by the government's denial of access to personnel files. The court declined to state whether the background information should include such files.<sup>187</sup> The court noted that such files are preferred by counsel because they contain desirable information in capsule form, but that alternative methods to obtain the information were available.<sup>188</sup> If the government refuses all files of a court member, counsel may seek discovery of the documents or may request that the information be provided in some alternative form.

Such background information can provide a good starting point for *voir dire* questioning. Obviously, an officer who has seen combat may be an undesirable juror in a case involving dereliction of duty. Similarly, an officer member whose military records reflect enlisted service may be more compassionately disposed to mitigating evidence in an enlisted man's trial for absence without leave. Information about the members also can provide a basis for establishing a rapport with the jury.

### B. Pre-Trial Questionnaires

The use of questionnaires completed by members incident to their appointment to a court-martial also serves as a means of securing information about the members and a useful tool to prepare for *voir dire*. Such a practice would yield the additional benefit of reducing the likelihood of counsel conducting a "fishing expedition" during the *voir dire* and would thus simultaneously expedite the challenge process. Surprisingly, the reported cases reveal that to date

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186. *Id.* at 92.

187. *See id.*

188. *See United States v. Credit*, 2 M.J. 631 (A.F.C.M.R. 1976), *rev'd on other grounds*, 4 M.J. 115 (C.M.A. 1978), *aff'd on further review*, 6 M.J. 719 (A.F.C.M.R. 1978), 8 M.J. 190 (C.M.A. 1980); holding that

[u]pon appropriate demand, trial defense counsel should be furnished those personnel records which the Freedom of Information Act [5 U.S.C. 552] requires to be released to any member of the public. . . . Information that has generally been held to be releasable under the [act] includes: a) date of birth, b) sex, c) race, d) marital status, including names, sex, age, number of dependents, e) home of record, at least of the member's original hometown, f) education and schooling: the major area of study, school, year of graduation, and degree received, g) present and past duty assignments, and h) awards and decorations received, and the character of discharges from military service that may have been received.

2 M.J. at 642.

such questionnaires have been used only in Navy courts-martial.<sup>189</sup> One possible explanation for the lack of use of pre-trial questionnaires in the other services is the fear that, questions having been asked, further exploration by counsel would be met with predisposed and adamantly consistent responses. Counsel who rely on their subjective interpretation of a member's responses to questions may be reluctant to derive that interpretation from a sheet of paper, without the benefit of kinesic, paralinguistic and verbal clues<sup>190</sup> available from the spontaneity of in-person questioning.

In light of the absence of any significant litigation concerning such pre-trial questionnaires, few guidelines are established. The Court of Military Appeals has affirmed a Navy Court of Military Review case suggesting that the questionnaires should be appended to the record as appellate exhibits,<sup>191</sup> but in another Navy case, a board held that a failure to append the questionnaires did not automatically make the record non-verbatim.<sup>192</sup> Perhaps the best use of questionnaires lies in obtaining information as a foundation for more in-depth questioning. The goal should be to obtain information not already available in the member's personnel file, while taking care not to jeopardize the spontaneity desired for more crucial questions.<sup>193</sup> Questions highly individualized for the accused's trial could be developed but a general type questionnaire would yield the best results. The use of such questionnaires can never replace thorough in-court questioning of members; however, given their potential for assisting in the conduct of *voir dire*, pre-trial questionnaires should see more widespread usage. No doctrinal or practical impediments to their use exist in Army, Air Force, or Coast Guard.

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189. See *United States v. Cooper*, 8 M.J. 538 (N.C.M.R. 1979); *United States v. Slubowski*, 7 M.J. 461 (C.M.A. 1979); *United States v. Lowman*, 1 M.J. 1149 (N.C.M.R. 1977).

190. See Suggs & Sales, *Using Communicative Cues to Evaluate Prospective Jurors During the Voir Dire*, 20 ARIZ. L. REV. 629 (1978); Note, *The Use of Social Science Techniques in the Jury Selection Process*, 2 REV. LITIGATION 2 (1982).

191. See *United States v. Slubowski*, 5 M.J. 882 n.2 (N.C.M.R. 1978), *aff'd*, 7 M.J. 461 (C.M.A. 1979) (noting with approval the use of questionnaires).

192. *United States v. Barnes*, 12 M.J. 614, 615 (N.M.C.M.R. 1981) (questionnaires were not a material portion of the proceedings).

193. Questions like "What do you feel is the most serious discipline problem facing your unit today?" or "Which of your duty assignments did you like the most (or least) and why?" may shed light on predispositions that could potentially be developed into valid challenges for cause. A question such as "Are you inelastically predisposed to adjudge a bad conduct discharge for the offense of \_\_\_\_\_?" is an extreme example of the kind of question that not only bears the risk of confusing the member, but possibly predisposing his response to any such question.

*C. Military Defense Counsel as Sources*

Civilian counsel have another great source of information about court members in the military defense attorneys assigned to the installation where the court-martial is to take place. Because the members are usually selected as a panel that serves for some period of time, often hearing several courts-martial, and because of the relatively tight-knit nature of the military community on any installation, military defense counsel will possess a wealth of information and perceptions about court members.

Military counsel usually can identify the members who will tend to run the jury room, those who have been successfully challenged for cause, those who are consistently good sources of clemency recommendations,<sup>194</sup> and those panels that consistently give severe sentences.

At this point it may be useful to consider some arguably valid assumptions that can be made about court-martial panels, the validity of which may also be determined from the local military defense counsel. A newly appointed panel will likely feel somewhat obligated to find defendants brought before them guilty,<sup>195</sup> but may be reluctant to give harsh sentences. As experience on the panel increases the member may be less likely to feel the obligation to render a guilty verdict, but he will have been somewhat desensitized to imposing a severe sentence. As the members become more experienced they probably will be less susceptible to *voir dire* conducted primarily as an indoctrination tool, the members having developed their own rules and standards based on their experience. For example, the panel that gave four months confinement to a serviceman convicted of a twenty day AWOL would not be inclined to give any less for a twenty-five day AWOL in the absence of some distinguishing matters in extenuation or mitigation. In cases where the accused is going before a seasoned panel it is advisable that counsel observe one or more courts-martial before that panel to gain some insight into its behavior. Just as importantly, counsel will also be making himself familiar to the members.<sup>196</sup> Defense counsel going before a panel

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194. See M.C.M., paras. 48t(1), 77.

195. See *supra* note 121.

196. It could be argued that the best *voir dire* can be practiced around the coffee machine during recesses in other courts-martial or at other neutral locations. While such a practice could never be officially condoned, there is something to be said for gauging the personality of a member in a casual setting, as opposed to the formality of the courtroom. The members

with which they are unfamiliar should consult defense attorneys who have experience with that panel.

#### IV. Conclusion

In seeking to insure that courts-martial provide the accused with the maximum opportunity to be fairly and impartially tried, the *Code* and the *Manual* provide that the court members may be challenged for cause as well as peremptorily. While the *Code* permits only one peremptory challenge per side, the broad grant of potential grounds for challenges for cause under paragraph 62f(13) of the *Manual* allows wide discretion to the military judge. Counsel may do his part to ensure the jury's fairness and impartiality by thoroughly preparing for the *voir dire* and intelligently exercising the accused's right to challenge the members of the court.

*Captain Karl R. Rabago*

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would also have the opportunity to meet defense counsel in a non-adversarial atmosphere. The military practice of appointing standing court-martial boards is particularly well suited to the use of such a technique. Of course, counsel should avoid any conduct which may be challenged on ethical grounds.