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AVOIDING DANGEROUS OR VITAL MILITARY SERVICE: INTENT IN SHORT DESERTION

*Alfred Avins**

A. General considerations

Military desertion has traditionally been regarded as a most heinous species of military offense. To desert the service of one's country is considered the ultimate in neglect of a soldier's duties.

Of all the categories of desertion, shirking vital or hazardous duty, which usually occurs in time of war, is probably foremost in the catalogue of a soldier's crimes.¹ The performance of duty hazardous in itself and vital to the national welfare is the very reason for maintaining an armed force. Hence, the dereliction of deliberately avoiding it is punished with severity.

Article 85(a) of the Uniform Code of Military Justice provides as follows:

Any member of the armed forces of the United States who . . .

(2) quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service . . . is guilty of desertion.

The above section of the article punishing desertion is a relatively recent addition to the military law, and is commonly known as "short desertion" or, sometimes, "constructive desertion." This form of desertion is mainly of interest during time of war when armed combat necessitates the performance of many hazardous duties.

The two most common forms of dereliction forbidden by this section of the statute are absence without leave from a unit engaged in combat or about to go into combat, commonly referred to as "battlefield desertion," and absence without leave from a unit about to be shipped abroad, commonly called "embarkation desertion." The former can only be committed in time of war or similar hostilities, while the latter, although more frequent in time of war, is not confined to such periods.

Although the statute was designed to punish unauthorized absences from duty of national importance it does not talk in terms of whether the soldier has missed the particular service involved. Indeed, it is settled law that a soldier can be punished for deserting "with intent to avoid hazardous duty" even though he ultimately performed the duty which he had deserted to avoid.² The statute does not denounce the missing of vital or dangerous duties, but an unauthorized absence with an "intent to avoid hazardous duty or to shirk important service."

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1 See E.T.O. 15227, Mason, 29 E.T.O. 17, 19 (1945), where the board of review declared that "the evidence is therefore legally sufficient to sustain the conviction for the despicable offense of deserting the service of the United States in battle, for which he merits the disdain of courageous men and punishment by the country he would not serve."

2 E.T.O. 2368, Lybrand, 6 E.T.O. 333, 342 (1944): "The evidence that accused actually sailed with his organization lacks significance with respect to the intent that it would otherwise have in his favor . . . because of evidence that the embarkation was unintended and involuntary on his part."

The necessity of focusing on the intent of the accused, rather than on the objective fact as to whether he missed duties which the law can denominate as "hazardous" or "important," radically changes the manner in which the statute operates from that which would be true if the test were a wholly objective one not depending on the accused's mental state. This article will explore some of the problems raised by gearing the offense of short desertion to the mental state of a soldier, rather than to the physical results of his acts in actually missing duties.

B. Time of formation of intent

Article of War 28 of 1920, in substantially the same language as is used today, branded as a deserter one "who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service." The 1921 *Manual for Courts-Martial*, in interpreting this section provided that to prove the offense, the prosecution must show:

2. That at the time he absented himself either the organization to which he belonged, or he himself, was under orders or anticipated orders involving either (a) hazardous duty or (b) some important service, and that his absence without leave was so timed as to appear calculated to enable him to avoid such hazardous duty or to shirk such important service, as the case may be.³

Just so there can be no mistake as to the significance of the words "at the time he absented himself," the preceding clause, defining the proof for regular desertion, provides that "he intended, at the time of absenting himself or at some time during his absence, to remain away permanently."⁴ Thus, the 1921 *Manual* contrasts sharply the time when the requisite intent must be formed as respects these two different forms of desertion. The wording of the 1921 *Manual* comported with the then common understanding of the offense of desertion.

The very name "short desertion"⁵ denotes a relatively brief AWOL, during which it could hardly be expected that an accused could formulate and also put into effect a plan for evasion of duty unless he had formed the requisite intent prior to his absence. Indeed, if the accused does not form the necessary intent before leaving, his absence will in all probability prevent him from learning of impending duty which he would desire to avoid by staying away longer. The special situation which prompted enactment of the statute, wholesale desertion at the last minute before embarkation or combat,⁶ which is also reflected in the discussion in the 1921 *Manual* of this offense,⁷ corroborates this conclusion.

The 1928 *Manual* was not so careful. In the section on proof of desertion, it stated:

- (b) that he intended, at the time of absenting himself or at some time during his absence, to remain away permanently from such

3. *MANUAL FOR COURTS-MARTIAL*, U.S. ARMY, 1921, para. 409, p. 344.

4. *Ibid.*

5. *Id.* at 343.

6. *Hearings on S. 64*, A Bill to Establish Military Justice, pp. 763, 1158-59, 1162, *Before a Senate Subcommittee of the Committee on Military Affairs*, 66th Cong., 1st Sess. (1919).

7. *Supra* 3 at 344.

place, or to avoid hazardous duty, or to shirk important service as alleged.⁸

This above section came before a board of review of the European Theater of Operations in *United States v. Perry*.⁹ In that case the staff judge advocate stated in his review that although the evidence of intent to avoid service at the beginning of accused's unauthorized absence might have been inadequate, the evidence showed that the accused "conceived, entertained, and acted upon the positive mental intent to continue the period of their absence without leave for the specific purpose of avoiding combat duty."

The board of review held that conceiving the intent after the AWOL had commenced was not sufficient to constitute the offense. After noting that the 1921 *Manual* "did not apply the principle [of forming intent after the absence had commenced] to the quoted portion of Article of War 28, whose provisions were unambiguous to the effect that the intent to avoid hazardous duty or shirk important service *must concur in point of time with the quitting* of accused's organization or place of duty," the board declared of the above-quoted section of the 1928 *Manual*:

To the extent that this provision attempts to extend or amplify the unambiguous provisions of Article of War 28 it is unauthorized administrative legislation. It is hardly necessary to rely upon the principle of strict construction of penal statutes to reach this conclusion. Well established principles governing the elements of the offense of desertion under Article of War 28 indicate that the requisite intent must be entertained by the absentee *at the time he quits his organization or place of duty* in order to be guilty of a violation of that Article. (Emphasis by Board of Review.)¹⁰

It is noteworthy that this is the only case found before 1951 where a board of review struck down a provision of the *Manual for Courts-Martial* as in conflict with the Articles of War, a situation in sharp contrast to that now prevailing where the Court of Military Appeals rather often strikes down provisions of the *Manual* which appear to it to conflict with the Uniform Code of Military Justice.¹¹ Notwithstanding the uniqueness of the performance, the several boards of review in the European Theater of Operations were careful to follow *United States v. Perry* thereafter.¹² The point, however, does not seem to have arisen in any other board of review in any other theater or in Washington.

Despite the disregard of the above provision of the 1928 *Manual* in board of review decisions, it was copied verbatim into the 1949 manual.¹³ The 1951 *Manual* avoids the issue by simply quoting the statutory terminology.¹⁴ There

8 MANUAL FOR COURTS-MARTIAL, U.S. Army, 1928, para. 130a, p. 143.

9 E.T.O. 5958, Perry, 16 E.T.O. 61 (1945).

10 *Id.* at 70.

11 Fratcher, *Presidential Power to Regulate Military Justice; A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861 (1959).

12 E.T.O. 8147, Pierce, 19 E.T.O. 21, 25 (1945); E.T.O. 8700, Straub, 20 E.T.O. 1 (1945); E.T.O. 8708, Lee, 20 E.T.O. 15 (1945); E.T.O. 9565, Strange, 21 E.T.O. 89 (1945); E.T.O. 11869, Hise, 24 E.T.O. 342, 344 (1945); E.T.O. 12044, May, 25 E.T.O. 11, 12 (1945); E.T.O. 13103, Israel, 26 E.T.O. 125, 127 (1945); E.T.O. 13961, De Carlo, 27 E.T.O. 151, 153 (1945).

13 MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1949, para. 146a, p. 198.

14 MANUAL FOR COURTS-MARTIAL, U.S. 1951, para. 164a, p. 312.

is nothing to indicate, however, that the drafters were even aware of the problem.¹⁵

The state of the law today is uncertain. In *United States v. Shull*,¹⁶ Judge Brosman assumed that a conviction of short desertion would be sustained if the intent was formed "at the inception of or during his established unauthorized absence,"¹⁷ without discussing the point or indicating awareness of the conflict with prior cases. Judge Latimer in a dissent stated that "The law does not require that the intent to shirk important service be formed at the inception of the absence, it can be formed at any time while in that status."¹⁸ Here again, no awareness of prior decisions, or even a discussion of the point, was shown. And in *United States v. Taylor*,¹⁹ Judge Latimer reiterated that "It is not essential that the Government prove the intent was formed at the inception of the absence."²⁰ This dictum was neither necessary to the decision nor discussed at all.

The question of what the present interpretation ought to be is a close one. Arguing in favor of a construction that the intent must be formed at the time of the inception of the absence is the probability that this was the original understanding in 1920 and that the drafters of the Uniform Code of Military Justice did not intend to change the law. A contrary argument is that the drafters of the Code probably obtained their ideas of what the law was from the 1949 *Manual*, and in all probability, insofar as they did not change the statute itself, generally intended to continue the *Manual's* interpretation of the law.

Therefore, insofar as the scanty legislative history fights itself to a draw, we must look to policy grounds to resolve this question. It is submitted that, as a matter of policy, an intent formed at any time during absence should be sufficient. If this were the case, the law as to intent in short desertion would be brought in line with that governing regular desertion. This would not only eliminate a possible source of confusion, but also recognize the fact that as a practical matter an intention to evade hazardous or important duty formed during an absence is just as detrimental to the armed forces as one formed at the inception of the absence. In both cases the military is deprived of the man's services at a critical time. Thus, the more recent dictum of the Court of Military Appeals should be preferred to the older cases.

C. Intent and motive

The general rule in criminal law is that evidence of good motive for the commission of a crime is no defense even when specific intent is required.²¹ This rule has been applied to the offense of short desertion under a wide variety of circumstances.

The easiest situation to resolve occurs where the accused alleges that he

15 The discussion in the LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, U.S., 1951, p. 252, does not touch this point.

16 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952).

17 *Id.* at 179, 185.

18 *Id.* at 185, 191.

19 2 U.S.C.M.A. 389, 9 C.M.A. 19 (1953).

20 *Id.* at 392, 422. See *United States v. LaRue*, 13 C.M.R. 296 (C.M., 1953).

21 22 C.J.S., *Criminal Law*, § 31; 1 WHARTON'S CRIMINAL EVIDENCE § 166, p. 322, (12th ed. 1955); 1 CLARK & MARSHALL, *LAW OF CRIMES* 150-51, (1900).

sought to avoid hazardous or important duty because unqualified for it. Thus, boards of review have rejected defenses that accused was physically unfit for field duty,²² that he had a feeling of inadequacy,²³ that "he was going into the company as a soldier, for which he had no training, instead of being a cook, for which he was trained,"²⁴ that "he believed himself unqualified for front line duty,"²⁵ and that "he 'figured' he 'wasn't a rifleman.'" ²⁶ As one board declared:

Accused's statement . . . was that he had an earache . . . [but] he admitted his fright . . . [This] would not excuse him. Military experience is that cowards will use any excuse, however slight, to evade duty, even though the lives of their comrades and the country itself are in peril.²⁷

The above rule has even been applied where the accused alleged that his actions were motivated, not for his own good, but the good of the service. Thus, in one case the accused sought relief from his duties as a combat platoon leader because of his own estimation that he was not able to handle the responsibility. When such relief was denied on the eve of battle, accused went AWOL. The board held that "his *motive* was to promote the welfare of members of his platoon and others by removing himself from his command, [but] his *intention* was to avoid the hazardous duty and shirk the important service of performing that command in combat,"²⁸ and upheld the conviction.

In all the above cases, whether the actions of the accused were motivated by fear or otherwise,²⁹ effective realization of the desires of the accused required that he actually miss the duty he allegedly shirked. Hence there is really no problem in finding the requisite specific intent. A more difficult issue is presented where the accused deserted for reasons other than the desire to avoid hazardous duty, and during the period of desertion did in fact miss such duty.

The earliest case to present this problem completely avoided the issue.³⁰ There, the accused knew his battery was due to embark soon for overseas duty; indeed, his bags were already packed for the trip. He received his pay that day, and proceeded to go AWOL and drink up the proceeds. When he sobered up three days later, he returned voluntarily from the binge. His statement that he "didn't think much about" going AWOL, coming from a soldier of "four

22 C.M. 262836, Parmelee, 41 B.R. 159, 167 (1944).

23 United States v. Brooks, 1 C.M.R. 118, 123 (C.M., 1951), *aff'd* 1 U.S.C.M.A. 88, 1 C.M.R. 88 (1951).

24 M.T.O. 5890, Vollaro, 6 N.A.T.O.-M.T.O. 149 (1945).

25 E.T.O. 15138, Leslie, 28 E.T.O. 329, 331-32 (1945).

26 E.T.O. 9565, Strange, 21 E.T.O. 89, 92 (1945).

27 E.T.O. 8448, Tracy, 19 E.T.O. 201, 202 (1945). See also E.T.O. 12470, Mayo, 25 E.T.O. 195 (1945), where the board declared at 197:

If a man leaves existing hazardous duty and intends thereby to escape it, the law is not that he will be excused if personal reasons were a contributing cause. The law instead is that a man must subject his person and its desires to the service of his country, and stand and fight for the country's sake until death if necessary, though his whims or tragedies or personality or fears make him wish to be elsewhere. Any less severe rule would subordinate discipline to caprice and cowardice.

28 E.T.O. 9257, Schewe, 20 E.T.O. 163, 168 (1945).

29 Cf. E.T.O. 2368, Lybrand, 6 E.T.O. 333, 336, 341 (1944) (disliked present unit of assignment).

30 E.T.O. 105, Fowler, 1 E.T.O. 91 (1942).

or five years of service and experience," horrified the board of review, which held that he "exhibited a spirit of such callous indifference to his obligations and duties as a soldier that the court was justified in concluding that his departure and absence were intentional and deliberate."³¹

The problem that the case avoided was whether the mere fact that the AWOL was intentional made the accused guilty of intent to avoid foreign service. A subsequent case, however, made it clear that this was the legal doctrine on which the prior decision had rested.³² In that case the accused had a known propensity for drink. Shortly before his unit was expecting to resist an enemy counter-attack, accused went AWOL to get drunk, and so overindulged that he lost all sense of responsibility for performance of "essential duty at a crucial time." The board of review held that "his willingness to put himself *hors de combat* through drink necessarily involved an intention to shirk his duty, hazardous duty at that particular time and known by him to be such." The board further stated:

When a man has a known duty to perform, a deliberate engagement by him in conduct which he knows will render impossible performance by him of his duty certainly carries with it, legally, an intent *not* to perform his duty. And if as a consequence of his misconduct, involving such intent to flout duty, he separates himself from his command, he can properly be said to have *intentionally* absented himself. (Emphasis added).

Accordingly it is the opinion of the Board of Review that under the circumstances there was an intentional absenting of himself by accused from his command to avoid hazardous duty. Article of War 28 does not condemn such conduct only when it is inspired by fear. It is probably far worse for a man to keep out of combat through laziness or through preference for a few hours sleep than it is for a youngster who is so afraid that his feet won't move. The language of Article of War 28 is certainly susceptible of this conclusion.³³

The above doctrine was adhered to in a later case in the same theater where an accused failed to join his organization which was pulling out for combat because of his desire to gamble. The board declared that "even if his actions were motivated by a desire to gamble rather than by fear, he necessarily intended to shirk the hazardous duty which his gambling prevented him from performing."³⁴

Even the strict World War II decisions were confined to the proposition

³¹ *Id.* at 93.

³² E.T.O. 6626, Lipscomb, 17 E.T.O. 127 (1945).

³³ *Id.* at 130.

³⁴ E.T.O. 10690, Nolan, 23 E.T.O. 17, 20 (1945). See also *United States v. Parker*, 2 C.M.R. 457, 460 (C.M., 1952), where the board declared:

Accused . . . [stated] that he departed from Company I with the intent to avoid a transfer to Company L, believing such transfer would delay his return home. He added that he did not consider his job in "Forward Supply" as hazardous duty, and that he did not know what his job would be in Company L. Even if we accept the accused's testimony as credible, the interference is inescapable that the accused by his absence was attempting to avoid the hazards and perils which face a rifle company in the immediate operations against the enemy.

And see *United States v. Barnett*, 8 C.M.R. 653 (A.C.M., 1953), which although not explicit, looks in the same direction.

that an intent to go AWOL would be considered an intent to avoid particular duty only when absence at the particular time inevitably resulted in non-performance of the duty. Where there was a chance that the duty might still be performed the intent was not inferred.

A good illustration of this rule is found in one case wherein accused's unit had packed its bags, been issued rations, and was restricted to base, pending a move which would shortly occur. The soldier had previously left the last several nights to see his English sweetheart and always returned voluntarily. On the night in question, accused left camp at 8:30 P.M. to ask the girl to marry him, since he stated that his unit "might be leaving that night." After the girl had accepted his proposal, which was at 11:30 P.M., he started back to camp, walking 18 miles and arriving at about 6:30 the next morning. His unit had moved out in the middle of the night without him, and when the soldier returned he was arrested in barracks. The board could not find that this romantic interlude indicated an intent to avoid the move, saying that while "he was taking a chance" of missing the movement, the voluntary return and the short duration of absence negated the requisite intent.³⁵ Thus, at the time the Code was passed, the prevailing doctrine was that since a person is deemed to intend the natural and probable consequences of his acts, if the natural and probable consequences of accused's acts were such that he would miss hazardous or important service, then he was deemed to so intend even though missing such service had no relation to the reason why he went absent.

The first case to reach the Court of Military Appeals involving this problem, wherein an accused on shipment orders overstayed his leave to deal with domestic problems, did not directly consider the question posed by the above cases.³⁶ However, shortly thereafter the court did have to face this problem. In *United States v. Apple*,³⁷ the accused was in the front lines in Korea in a defensive position being subjected to enemy fire. He went AWOL for 13 days, and on trial claimed that he did not absent himself to avoid hazardous duty, but rather to see what had occasioned the confusion in his records with respect to rotation points. The court held that since "*as a matter of law*, the offense is not committed by reason of a naked unauthorized absence, without more, from a unit engaged in hazardous duty," (emphasis added), the law officer was in error in not instructing as to the lesser included offense of AWOL reasonably raised by accused's testimony. The court declared:

In terms of legal distinction it is manifest that desertion *with intent to avoid hazardous duty* is not identical with absence without leave *from a unit engaged in hazardous duty*. Instead, the entertainment of a particular purpose lies at the very heart of the desertion offense. . . . If accused's story on the stand was true, he did not desert his unit *with intent to avoid hazardous duty*. Although he may in fact have avoided it, his object instead was to secure clarification of his confused rotation point situation. . . . Our holding here in no sense involves a failure to recognize fully the distinction between "intent"

35 E.T.O. 564, Neville, 2 E.T.O. 135, 140-41 (1943). See C.M. 272610, Armas, 46 B.R. 319 (1945), for a similar case.

36 *United States v. Shull*, 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952).

37 2 U.S.C.M.A. 592, 10 C.M.R. 90 (1953).

and "motive" . . . traditional in the common law of crimes.³⁸
(Emphasis added)

While the Court of Military Appeals neither discussed nor specifically overruled the prior cases, it is clear that they no longer can be said to represent prevailing law. And of the two views, it seems that the more recent cases are to be preferred. The fiction that all persons are deemed to intend the natural and probable consequences of their actions does not assist analysis in this situation, where the extra-heavy punishment is not directed towards the non-performance of duty, but towards the purposeful evasion of duty. If this were otherwise, a soldier who failed to perform important or hazardous duty because he overslept and became AWOL in his sleep — a perfectly possible result in military law — could be charged with desertion even though the only time he could formulate the requisite intent was while sleeping, a factually absurd conclusion which not even the old cases were willing to accept.³⁹

The statute, however, directs its attention to an intent which can by its nature only be fulfilled through avoidance of the duty and which intent is pernicious because its effectuation necessarily entails nonperformance of critical duty. Other intents may or may not result in nonperformance of duty, depending on factors over which the accused not only has no control but by hypothesis is unconcerned with. To predicate the offense on other intents entails an inquiry as to how probable nonperformance of duty must be, an investigation which is by its very nature doomed to failure since no satisfactory dividing line can ever be drawn between cases wherein accused took a slim chance of nonperformance, where he took a considerable chance, and where he was almost certain to miss important or hazardous duty. No one who has had any experience with military service can doubt the proposition that if there is anything certain about military duties it is that both the time and necessity for their performance is uncertain, and the degree of uncertainty rises in proportion to the unusual, special, or extraordinary nature of the duty involved. To charge the accused with hindsight in evaluating the certainty of the duty is unfair, and to attempt to evaluate the probability as it seemed to him based on the information he is supposed to have possessed and the insights he is supposed to have had is too slippery a test to amount to more than a guessing game.

Nor is such an illusory yardstick necessary for any proper purpose. One who goes AWOL for reasons other than avoiding a particular duty will by hypothesis return when his ends are accomplished even though the duty, albeit

38 *Id.* at 593-94, 591-92. *Accord:* United States v. Squirrel, 2 U.S.C.M.A. 146, 7 C.M.R. 22 (1953); United States v. Wimp, 4 C.M.R. 509 (C.G.C.M., 1952); United States v. Guthrie, 12 C.M.R. 299 (C.M., 1953); United States v. Victor, 24 C.M.R. 433 (C.M., 1957). It might be noted that a World War II decision in a civilian court foreshadowed this rule. In *McCune v. Kilpatrick*, 53 F. Supp. 80, 89 (E. D. Va. 1943), the court said:

I do not believe, however, from the facts before me, that McCune left the ship with the intent to avoid hazardous duty, or to shirk important service. He had "pitched in" in the emergency, and prepared meals for five hundred additional troops with little help. When the Major told him in effect, he could not serve the officers, he could not serve the soldiers, he could not clear the top side to complete the preparation of the meals for the crew, until the Colonel was ready to eat, he felt he was unfairly treated, lost his temper, and in a fit of passion, jumped over the side as the ship was pulling away.

39 See E.T.O. 11869, Hise, 24 E.T.O. 342, 344 (1945).

fortuitously, still awaits him. One who seeks to evade the duty, on the other hand, will prolong his absence if need be to assure such evasion. Hence, non-performance by the latter is much more likely. Accordingly, a rational distinction can be made between the two classes of offenders even on the level of probability of nonperformance, and statutory coverage of the latter class alone is justified.

D. *Objective and subjective tests*

Even though an accused may absent himself without authority and with the specific purpose of avoiding a particular duty, the question still remains whether the proper test requires a determination confined solely to an inquiry as to the accused's state of mind or whether the accused's purpose must be measured by actual external facts. This inquiry can be broken down into two questions: (1) must the accused actually be subject to the duty he intends to shirk, and (2) is the nature of the duty to be determined by the accused's attitude towards it or by the facts and law measured through objective standards?

The first question is probably easier to answer than the second. A person who goes AWOL to attempt to avoid duty can only by definition intend to avoid duty to which he will in the future be subjected, for even if he is currently under orders to engage in the duty or is in fact so engaged at the time of absence, the duty to be avoided is of necessity future duty. But as one board put it, "since no one can have knowledge of the events of the future,"⁴⁰ an accused can never in logic go AWOL with knowledge that he will thereby avoid hazardous duty or shirk important service, as it is always possible that he would not be required to perform the duty had he remained. Accordingly, in every case of short desertion, the intent can only be one of evasion of anticipated duty, and not known duty. Further, to make conviction turn on whether the anticipation was correct would introduce into the case a host of fortuitous circumstances occurring after accused's absence which turned accused's fears into reality, and which he might have been totally unaware of at the time he went AWOL. Indeed, if the time of anticipated duty had not yet arrived when the trial is held, the court members would be required to shine up their own crystal balls. Conviction or acquittal should not be made to depend on factors so foreign to accused's own fault.

One case has suggested by way of dictum that it is sufficient if the accused reasonably prognosticated his future activities.⁴¹ There, accused, along with his unit, made an amphibious landing in southern France and pursued the Ger-

40 C.M. 227845, Sapp, 15 B.R. 379, 381 (1943).

41 E.T.O. 8172, St. Dennis, 19 E.T.O. 77 (1945). SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* 575 (1953), states:

Intent to avoid or shirk a non-existent but supposed hazardous duty or important service is not the intent required. If the duty or service is actually impending at the time of the alleged intent, however, the fact that its requirement is subsequently cancelled or the fact that the nature of the duty or service is subsequently changed to or becomes or turns out to be non-hazardous or unimportant does not negate the existence of the alleged intent. On the other hand, if a duty or service is not hazardous or important at the time of alleged intent, the fact that it subsequently becomes or turns

mans as they retreated up the River Rhone. When the unit halted, accused went AWOL to avoid further operations in the pursuit, stating: "I have seen plenty of boys torn up and I did not want to get it." The board upheld a conviction for short desertion, saying:

The prosecution was not required to prove that certain definite, specific hazards were immediately in prospect and that accused was cognizant of same. It sufficed if the evidence showed that accused was a member of or present with an organization which was engaged in a military mission where the hazards of death and bodily injury or of imprisonment would be involved in the usual course of events and that accused knew that these undisclosed perils awaited him and it was these perils he sought to avoid.

It would be a frustration of the purpose of Articles of War 58 and 28 if under the circumstances here disclosed the prosecution was required to prove that *particular* and *specific* hazards immediately awaited accused's organization in the performance of its prescribed mission and that accused had knowledge of the same. The statute does not require such restricted interpretation. Article of War 28 denounced absence without leave "to avoid hazardous duty." If the prosecution proved that accused was engaged in the performance of a duty where these hazards . . . although the time and place of their occurrence or existence were unknown when an accused left his organization . . . existed and that by course of prior events or as a result thereof he must have known of their future existence the burden of proof is sustained by the prosecution.⁴² (Emphasis added)

While there is some language in the above case about knowledge of the future existence of hazards, which as noted previously is a logical impossibility, the case can more reasonably be interpreted as requiring a reasonable anticipation of future hazards. Even this, however, is not a desirable test.

To start with, proving that the accused knew of facts which would create in his mind a reasonable belief as to the existence of future perils, and that he did so believe, is at best an uncertain undertaking.⁴³ Even in those cases where such proof is necessary because evidence of intent must be based on circumstantial evidence,⁴⁴ the fact that the available evidence creates only a suspicion

out to be hazardous or important is immaterial to the offense alleged. Thus, the mere fact that the accused's unit became engaged in combat after the accused's departure is insufficient to warrant an inference that such combat was imminent at the time of the accused's departure.

42 St. Dennis, *supra* note 41 at 81.

43 See E.T.O. 8700, Straub, 20 E.T.O. 1, 5-6 (1945), where the board declared:

The prosecution apparently sought to charge accused with knowledge of imminent hazardous duty by reason of the issuance of equipment and ammunition and the "common knowledge" that the company would not remain long in Palenberg. In the face of the positive testimony in the record that no one knew, at least before noon, 14 December 1944, whether or when the company would leave Palenberg or whether it was scheduled to return to the front, these circumstances are meager as a basis for the inference that the company members knew of impending hazardous duty. . . . there is insufficient proof that accused as an individual was aware of them.

44 Manual for Courts-Martial, U.S., 1951, para. 164a, p. 314, states that "there should be evidence of facts raising a reasonable inference that the accused knew with reasonable certainty that he would be required for such hazardous duty or important service." This only refers to proof by circumstantial evidence. See, e.g., CM 228619, Hammock, 16 BR 275, 277 (1943).

and no more will be fatal to the case.⁴⁵ To extend this requirement to cases where the accused's intent is known creates a gaping loophole for recalcitrant soldiers.

Moreover, neither logic nor fairness requires such a rule. It is perfectly possible for a person to intend to avoid a certain result and to take steps to effectuate this intent although he is firmly convinced that the probability of the result occurring even without these steps is remote or small. Thousands of fire, theft, and other casualty insurance policies are taken out every year by persons who intend to avoid financial loss occasioned by the contingent event and are taking steps to do so, even though they have good reason to believe that the probability of their suffering the loss is not only mathematically remote but can be so demonstrated by indisputable statistics. Certainly, the average male civilian in his early twenties who takes out term life or health insurance has a better chance of survival in good health than does a soldier for whom the exigencies of active military service always hold unknown perils even under the most peaceful conditions, yet no one would question the fact that the civilian intends to avoid financial loss occasioned by such hazard and that he was taking effectual and reasonable steps to do so. Recent events in American history, such as the surprise attack on Pearl Harbor and the unforeseen invasion of South Korea, are too fresh in our memories to be able to brand the specter of hazardous duty or important service in almost any situation a wholly unreasonable apparition. To make the test depend on hindsight is unfair, and to evaluate the state of accused's thinking based on what he should have believed is too amorphous a standard to be of any real value.

The need for the above rule is well illustrated in a case decided during World War II.⁴⁶ There accused went AWOL because he did not want to serve overseas in the infantry. Although he was at the time of absence in an infantry unit, and was scheduled to be transferred to a replacement depot from which soldiers were shipped overseas just prior to his absence, there was no evidence that he would have been shipped overseas at an early date or indeed that he would not have remained in the replacement depot for the duration of the war. Nevertheless, the board of review sustained the conviction for short desertion, saying:

In some of the "inference" cases there is certain language which indicates that to constitute this specific type of desertion under Article of War 28, there must be proof that accused was in fact, as distinguished from his belief, faced with the prospect of prompt embarkation for overseas duty. However, the Article of War does not state that such fact is an essential element of the offense. . . . Furthermore, in setting forth the essential elements of proof of this offense the Manual does not include as one of them

45 See C.M. 228401, Webster, 16 B.R. 167, 171 (1943):

It may be added that although one may surmise from the other evidence and the coincidence of his well-timed absence that the accused may have possessed the cowardly purpose of deserting his comrades in order to avoid a service perilous to them all, the Board of Review is under the duty of safeguarding the basic principle of American justice that in order to have a legal conviction "A man must not only be guilty but he must be proven guilty."

46 C.M. 270352, Uyechi, 45 B.R. 233 (1945).

proof that accused in fact was scheduled for hazardous duty or important service; it requires proof only that he *intended* to avoid hazardous duty or shirk important service (MCM, 1928, par. 130). In none of the cases in which this additional element was suggested was it the turning point of the opinion or essential to the decision. A careful reading of the embarkation cases indicates rather that it was a somewhat ambiguous way of stating that in inferring the intent of the accused, where there is no direct evidence thereof, proof that in fact he was scheduled for prompt overseas shipment and knew it established that he believed or had reason to believe that his embarkation for overseas duty was imminent and justified the court in inferring that his absence was with the intent to avoid it. Our conclusion that imminent embarkation as a fact, as distinguished from accused's belief, is not an essential element of the offense here alleged is supported by the opinion of the Board of Review in C.M. 223300, *Manashian*, 13 B.R. 363. There the proof established only that accused apprehended prompt embarkation for overseas duty but there was no proof that such imminent embarkation existed in fact.

In the instant case . . . at the time accused left his organization . . . he believed that the organization would embark for overseas service within the reasonably near future and that he absented himself with the specific intent of avoiding embarking with his organization. It is the opinion of the Board of Review that this constituted an intent to avoid hazardous duty within the meaning of Article of War 28, and that, accordingly, the evidence sustains the findings of guilty of the offense alleged.⁴⁷

In the case above, the accused might never have been shipped overseas. Numerous people in replacement depots were not so shipped. Moreover, had he gone overseas he might never have seen combat or engaged in other hazardous duty. He might have been transferred to another branch of service. The difficulties of evaluating all of these possibilities is ample demonstration of the utility of limiting inquiry to the state of the accused's mind alone.

The second branch of inquiry, whether the test for hazardous duty and important service should be subjective or objective, presents more difficult problems. The extreme paucity of authority in this area requires that the reso-

⁴⁷ *Id.* at 238. See also E.T.O. 14693, Zottoli, 28 E.T.O. 177, 181 (1945):

The hazardous duty is not shown to be immediate and of a specific nature. There is no evidence of a particular nature that the company to which accused was about to be and was later assigned was actually in combat or anticipated immediate combat. However, the date of accused's initial absence is extremely significant in view of the well-known combat situation then existing in the European Theater—a time when our forces, particularly the infantry, were heavily engaged with the enemy and replacement depots were functioning to the utmost to maintain the units at the front with sufficient men to replace casualties. The accused was in a *replacement* depot. He admitted that he knew he was going to be assigned as an *infantry replacement* and said "I knew I just couldn't take it *up there*" (underscoring by BR). This case does not present the problem of finding in the record evidence of the immediate and specific hazardous duty of accused's unit from which evidence it may be inferred that accused knew of the hazardous duty and intended by his unauthorized absence to avoid it. Here the accused's statement clearly discloses both his knowledge of the dangers ahead and his intent to avoid them. No question of inference is involved. The record is legally sufficient.

But see *United States v. Olson*, 11 C.M.R. 613, 616 (N.C.M., 1953): "One cannot intend to avoid a duty he does not know exists."

lution of the problem rest on reason and policy alone. In so analyzing this problem, it will be useful to consider the two categories of "hazardous duty" and "important service" separately.

Before doing this, however, it will help focus attention on the problem to note that the much-mooted question of whether a defendant can attempt a crime impossible of completion is not of relevance here. In such a situation the requisite specific intent is complete but the overt act cannot be carried into fruition.⁴⁸ Here, however, the overt act of going AWOL can be carried into completion as an element of the crime. The question is whether the specific intent is of the kind the offense requires.

Considering first the intent to avoid *hazardous* duty, we note at the outset that it is not necessary that the casualty or fatality rate be 100 per cent, to render the duty hazardous; in almost every duty there is some chance of survival, and hence few activities would qualify if this were required. Indeed, some survived the famous charge of the Light Brigade during the Crimean War, and the Japanese suicide squadrons during World War II. Likewise, a slight chance of injury does not render a duty hazardous; otherwise, all activities — even the safest — would fall under this rubric. The true definition of "hazardous" covers those duties with such an unusually high casualty rate that servicemen are deterred thereby. The fact that anticipation in a particular instance proves unfounded does not render the duty non-perilous if the type of duty is generally considered hazardous.⁴⁹

There are three variables in determining whether duty is hazardous, even after an objective, statistical compilation has been made as to the casualty rate in the particular activity. They are:

(1) The number of soldiers a true casualty picture would affect. Stated otherwise, the first possibility is that everyone knows objectively the actual hazard. A unit of statistical reporting clerks would be likely to fall under this group.

(2) The belief of accused's comrades. If the group is large enough, and the belief is commonly held, we can be fairly sure that the belief, although perhaps not accurate, is reasonable and based on some facts.⁵⁰ The universe we may be interested in for this inquiry will be all those facing the common hazard, and hence the group to whom we are directing the deterrent effect of the statute. This group may be geographical, for example, all personnel in a

48 Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962 (1930); Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L. J. 53 (1930).

49 E.T.O. 5953, Myers, 16 E.T.O. 57, 58-9 (1945); E.T.O. 5803, Alexander, 16 E.T.O. 1, 4 (1945). In E.T.O. 10743, Martin, 23 E.T.O. 117 (1945), the board of review declared at 120:

It was not necessary to show that the assault crossing, normally a hazardous operation, was, in fact, as hazardous as anticipated. The inference is compelling that accused absented himself to avoid the crossing—he declared his intention. The material intent was his intent at the time he absented himself without leave.

50 See Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong., 1st Sess., on H.R. 2553, Career Compensation for the Uniformed Forces (1949), p. 1765, where a doctor testified: "In the public eye, dealing with persons afflicted with leprosy is dangerous. But we think the chance of a physician or dentist contacting leprosy is practically nil. It is the type of duty that is disagreeable." However, a layman who failed to take proper precautions would certainly subject himself to some risk.

certain battle area facing an enemy offensive. We are interested in only their reactions because if they think the activity non-hazardous, none of them will go AWOL to avoid it, even though others think it perilous, and we will have our full complement of troops. The group may also be occupational, for example, all fliers of jet fighters. If they think the activity dangerous, some may absent themselves to avoid it although people outside of the restricted universe think it safe. These absences will none-the-less require a counter-deterrent.

(3) The accused himself. The accused may have a different belief from that of his comrades, and such a belief may be based on either superior knowledge or delusion.⁵¹ He may, on the other hand, have the same belief.

In combination, the above variables constitute the eight possible major combinations which may be used in testing for hazardous duty. Each of these broad categories can be varied somewhat to form sub-categories, but they will retain the same basic considerations as the major category. Thus, a determination as to what would objectively be considered hazardous duty may be judged only the beginning and not the end of the relevant inquiry.

In determining how much weight to give to each of the variables mentioned above, it must be remembered that the statute is primarily designated to deter human conduct caused by a particular state of mind — fear of potential danger. Since people act on their beliefs as to what the facts are, and not on the actual facts when unknown, primary emphasis must be placed on subjective considerations, *i.e.*, whether it was believed that the duty was hazardous. The term "belief as to hazard" is only a shorthand way of saying a belief as to a casualty rate for the activity high enough to cause a significant number of people to go AWOL. When the belief of the accused and the totality of the group we are interested in deterring coincide, it would seem that such belief should conclude the question.⁵² Where they diverge, it would appear that the objective facts should be dispositive.

For example, if the accused and his comrades believe that a certain duty will cause a fatality rate of 25%, and such rate will cause an appreciable number of absences to avoid the duty, a soldier who goes AWOL to avoid the duty should be punished as a deserter although the rate is only .025% because of

51 See E.T.O. 11258, Pergolizzi, 24 E.T.O. 65 (1945) (fear of dead bodies).

52 E.T.O. 14510, Collins, 28 E.T.O. 11 (1945), is reasonably susceptible of being read this way. There the board of review said at 12-13:

The Board of Review will take judicial notice that on 22 March 1945 the allied armies had no bridgehead across the Rhine, south of that at Remagen, more than 50 miles to the north of Oppenheim, and that on the night of 22 March the Third Army made its historic assault boat crossing of the Rhine, at Oppenheim. The question is therefore squarely presented whether prospective participation in that crossing was hazardous duty reasonably apparent to accused. The proof does not show the location of enemy troops, and that fact is too specific for judicial notice. However, the Rhine was the last great barrier before the heart of Germany, a broad river, and one crossed by invasion seldom in history. What perils lay beyond it were not then known, but it must have been evident to accused as it was to the world that the Germans must protect it or abandon any hope of peace without defeat. It could not have been anything but a fearful prospect, a dangerous and hazardous venture, and the court could rightly infer that accused intended to avoid it.

the need to deter the members of the unit from avoiding performance. Conversely, if both accused and the group believe the casualty rate to be nil, and accused shirks the duty, imposition of the heavier penalty is not necessary because the supposed lack of peril causes no absences through fear even though in actuality the duty is dangerous and hence the heavier deterrent is unnecessary.

Where the accused is right about the nature of the duty and the group is wrong, it would seem that his state of mind should govern. It would be incongruous to punish a soldier who knew duty was safe more heavily merely because his friends were wrong; conversely, to let a soldier who had more facts and knew duty was perilous escape with a lighter penalty because his information was more accurate than that of his comrades opens up a large loophole in the law unrelated to his individualized fault. In such cases individualized deterrence would seem more appropriate. This is true even though others who went AWOL to avoid the same duty with a different belief might be differently penalized. The superior knowledge or insight of accused warrants a special treatment.

Where the group's belief is correct, and accused is under a delusion, it would seem that accused's case should be governed by the belief of the group. Aside from the unlikelihood that accused will have a bona fide belief different from that of the group where the latter's belief is in fact accurate, the primary consideration in such a situation is the deterrent effect of the treatment of accused on his fellows. Thus, where duty is safe and the group knows it, there is no necessity for imposition of an especially heavy penalty on accused to deter others merely because he believes it to be dangerous. Conversely, where duty is perilous and known to be such to the unit, lenient treatment of accused because he believes the duty to be harmless risks other defections among the group by those who hope for similar treatment and are perhaps ready to feign a like belief. In this case, it is of importance that the group belief is correct because superiors cannot disabuse them of the fear by showing them the true facts as can be done when accused knows the duty is safe and the group erroneously believes otherwise.

The question of whether the test for important *non-hazardous* service should be a subjective or objective one rests on entirely different considerations. Aside from the few cases of disaffection, (*i.e.*, dislike of country, military service, unit, or superior,⁵³ and evasion of duty as a result of such dislike,) such avoidance usually stems from disinterest or indifference, or the unpleasant, disagreeable, or onerous nature of the duty. Such facts often result in servicemen preferring a few days of imprisonment for AWOL to performance of duty. By hypothesis, however, they will be deterred from shirking duty if they are treated as a deserter. Such a situation favors a completely objective test, *i.e.*, regardless of the intent or knowledge of accused, if the duty shirked is important, he is guilty of the crime. This rule would have the tendency to encourage would-be shirkers to carefully inquire as to the importance of the duty before going AWOL, and not to go AWOL when the duty is important, which is precisely

53 Cf. McCune v. Kilpatrick, *supra* note 38.

the conduct the statute is designed to foster. Of course, where facts subsequent to the AWOL change the prospective nature of the duty, these facts cannot be considered.⁵⁴

It might be noted that the above policy is diametrically opposed to that governing hazardous duty. Aside from revealing enough so that soldiers will not be overconfident, and will be prepared for hazard, no commander will deliberately scare his troops by telling them that one out of four will die before the day is past, even if he knows this is true. If anything, he will try to buoy up the men's hopes and minimize the risks to avoid panic, rather than reveal the gruesome details. Accordingly, we do not want servicemen engaged in hazardous undertakings to inquire too closely as to the precise hazard, and hence the law should not be framed to encourage this.

The converse is true as to important duty. Every commander will try to impress on his subordinates the importance of their tasks, even when they are not really vital. When the activity is so significant that one who shirks it is a deserter, commanders are likely to shout this from the housetops. To encourage absentees to make relevant inquiry is therefore a legitimate and desirable objective. Where the activity is hazardous as well as important, as many duties are, the motive dominating accused's mind should govern. This will typically be a desire to avoid hazardous duty.⁵⁵

E. Conclusion

The short desertion statute was originally created to punish an intent considered particularly pernicious to military success, but its framers never considered many of the problems which arise from the interpretation of the statute as regards the nature of the intent required. To pretend that decisions in respect to questions of intent stem from legislative history or Congressional desire is to decoy the guileless with a transparent fiction. Because of the absence of consideration given to such factors at the time the statute was framed and passed, resolution of the problems in this area must be based on policy considerations. It is believed that the above suggestions constitute appropriate choices of policy in this field.

⁵⁴ SNEDEKER, *op. cit.* *supra* note 41.

⁵⁵ *Cf.* E.T.O. 8610, Blake, 19 E.T.O. 345, 346 (1945), where the board of review declared: "From his abandonment of his comrades as they went into battle, the court could reasonably infer that his intent was cowardly."