Criminal Absenteeism Under Military Law

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Notes

CRIMINAL ABSENTEEISM UNDER MILITARY LAW

Dionysius counted his men and cried bitterly, “We were three hundred, but now there are not even enough Phocaeans to man a penteconter. Spirits cannot move oars or raise sails.”

The Etrusan, by Mika Waltari
(Translated by Lily Leino)

INTRODUCTION

This note attempts to analyze the military crimes pertaining to unauthorized absenteeism—absence without leave (AWOL) and desertion. (The latter crime encompasses the elements of the former but additionally requires the element of intent.) Prior to this analysis, a brief look should be taken at the scope of the problem: its prevalence, its motivation, and the rationale for the imposition of criminal sanctions.

Unlawful absence\(^1\) is certainly the most prevalent of military offenses,\(^2\) so much so in fact that one author has referred to it as an “occupational disease.”\(^3\) Although unauthorized (unlawful) absences accounted for less than half of the offenses in the U.S. Army during World War I,\(^4\) World War II saw a vast increase in the rate of military absence offenses. Records indicate that over half of the offenses committed in the Army during World War II were absentee offenses\(^5\) and that 80 to 94 percent of the offenses in the Navy during this period were unauthorized absences.\(^6\) Recent figures show that the

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1 The terms “unlawful absence,” “unauthorized absenteeism,” “criminal absenteeism,” and “wrongful absenteeism” as used in this note are meant to encompass all forms of unlawful absence from military service, including “Absence Without Leave” (AWOL) and “Desertion.” The latter term encompasses AWOL but additionally requires an intent to abandon the service permanently or an intent to avoid hazardous duty or important service.


Present absentee rate is 29 per thousand.\(^7\) This means that there are 50,000 to 65,000 unlawful military absenteees a year\(^8\) which account for over 80 percent of present military offenses.\(^9\) Moreover, these absences cost the government $100,000,000 a year in official action and lost time.\(^10\)

Absenteeism may be "prompted by a variety of motives—fear, laziness, hysteria, or any emotional imbalance."\(^11\) Replying to an inquiry as to the cause of an increase in the rate of absenteeism in 1969, the Deputy Chief of Staff for Army Personnel said: "We are getting more kooks into the Army for one thing. We are getting more young men who are coming in undisciplined, the product of a society that trains them to resist authority."\(^12\) (He later testified that the desertion rate in 1969 was less than one-third of the rate during World War II.)\(^13\) Homesickness, domestic problems, and paternity difficulties may contribute to absenteeism.\(^14\) It is also generally accepted that the immature and uneducated are prone to absent themselves without authority.\(^15\) In any event, when the outward pull exceeds the inward pull, absence usually occurs.\(^16\)

The severity of sanctions for wrongful absence under military law is presumably based upon the severity of the consequences of such absence.\(^17\) As long as countries find it necessary to maintain armies

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\(^12\) Testimony of Lt. Gen. A. Connor, \textit{supra} note 6.
\(^13\) \textit{Id.}
\(^15\) Racism may also be a cause of desertion. See 93 \textit{TIME}, Dec. 14, 1970, at 39, 40.

Perhaps the high absentee rate among uneducated servicemen has recently prompted the Armed Forces to seek a reduction in their quota of low I.Q. inductees. \textit{See Courier Journal} (Louisville), Oct. 26, 1971, \S 8 B at 3, col. 1. The relationship between absenteeism and low education may also be a factor in the success rate of the services' absentee reprocessing centers such as the Army's Correctional Training Facility at Fort Riley, Kansas and the Air Force's Retraining Group at Lowry Air Force Base. The latter facility boasts a success rate of 89 percent. \textit{See} (Maj. Gen.) Cheney, \textit{Report of TJAG—Air Force, 42 Judge Advocates} J. May, 1970 at 8, 12.


In order to emphasize the importance of military status to the crime of (Continued on next page)
either for defense or aggression, real or imagined, military service will be regarded as more than a "job." It follows then that, if military forces are to be regarded as a necessity, the maintenance of a sufficient number of properly disciplined individuals to compose those forces is essential. Moreover, the interrelation of the individual duty to the protection of the group necessitates the suppression of some individual liberties. More recently, atomic and technological "advancements" in warfare have increased the importance of assuring that the individual soldier remains at his assigned duties. Sanctions for wrongful absenteeisms under military law have been designed, therefore, much like all military punishment, "not as a curative or therapeutic [measure], but rather as the 'horrible' example of what can happen to you if you don't watch out."

**History of Military Absentee Statutes**

Unauthorized absenteeism is by no means a problem confined to American armed forces, nor is it peculiar to modern warfare. Desertion was a capital offense in time of war under Roman military law, and peace time desertion was a noncapital crime with the degree of

Wrongful military absenteeism, this crime is often compared to absence from civilian employment. E.g., R. Everett, Military Justice 1-2 (1956); Prugh, Book Review, 62 Dick. L. Rev. 364 (1958). At least one author has compared the military offense of absence without leave with the civilian offense of vagrancy, the former being "objectionable absence" and the latter being "objectional presence." Wurfel, Book Review, 33 Notre Dame Lawyer 659 (1958). However, in view of the rationale presented for sanctioning wrongful military absence (i.e., the individual absence greatly harms the group) perhaps it would be more appropriate to compare the military criminal offense with the civilian criminal offense of non support of the family or desertion of the family. See R. Clark, The Law of Domestic Relations § 6.5 (1968); R. Perkins, Criminal Law 604-06 (2d ed. 1969).


20 "In the military, by necessity, emphasis must be placed on the security of the group rather than on the value and integrity of the individual." Reid v. Covert, 354 U.S. 1, 39 (1957). See also, G. Glenn & A. Schiller, The Army and the Law 1-2 (1943). This is not to say however that the individual soldier is completely without protection of individual rights. E. Byrnes, Military Law 3 (1970).


22 Maj. Gen. Rulewitch (U.S.M.C. Ret.), Book Review, 44 A.B.A.J. 970 (1958). The author of this note is neither advocating nor repudiating the rationale for imposing criminal penalties on wrongful military absentees. Rather, an attempt has been made to merely present a brief overview of the existing rationale for such sanctions.

punishment depending on the time, place and circumstances. In 1385 A.D., the Articles of War of Richard II cautioned: "[L]et no one be so hardy as to remove himself, or quit his quarters, on any account whatsoever, under pain of forfeiture of horse and armour, and his body to be in arrest, and at the King's will." Likewise, horse and armour could be lost if one dared to venture on "an expedition by night or by day, unless with the knowledge and by the permission of the cheiftain of the battail in which he is [located]." Nor did one dare absent his watch "on pain of having his head cut off."

In July of 1419, King Henry V at his headquarters at Mantes, France, initiated his Ordinances of War, the twenty-fourth section of which provided penalties "[f]or departing from the ost[e] without leve." Three years later in 1422, The Statutes and Ordinances to be Keped in Time of Werre—a revised version of Henry V's Ordinances of War—added further restrictions, not unlike those Articles of Richard II. The 1422 Statutes and Ordinances prohibited the abandonment of lodging once assigned, and further provided that "no man make no ridying by day ne by night but by the license and knowledge of the chevestens of the batavelle."

During this time, Sweden had also been developing a codified system of military laws to combat military truancy. Under his Articles

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25 ARTICLES OF WAR OF RICHARD II, art. V (1385). These articles are printed in full in W. Winthrop, MILITARY LAW AND PRECEDENTS 904-06 (2d ed. 1920) [hereinafter cited as Winthrop].
26 Id. art. XIV.
27 Id. art. XX. A further caution against quartering oneself other than by assignment of the herbergers appears at XXV, id. art. XXV.
28 ORDINANCES OF WAR MADE BY KING HENRY V AT MAWNT § 24 (1419), quoted in A. AVINS, THE LAW OF AWOL 35 (1957) [Avins obtained these Ordinances from THE BLACK BOOK OF THE ADMIRALTY 472 (T. Twiss ed. 1871).]
Section 24 provided:
Also that woman departe from the stale withoute leve & licence of his lord or maister, uppon the peyn that he that otherwise departeth to be arreste & in the warde of the marshall & at the Kynges wille of his lyff; and also to lose alle his wynnyng of that day, reserved to this lord or maister the thridde of his wynnyng, and to the lord of the stale surplus of the same wynnyng womne by hym that same day, and so from day to day til the ordinance be kepte. Id.
30 Notes 25-27 supra.
31 THE STATUTES AND ORDINANCES TO BE KEPED IN TIME OF WERRE § 5 (1422) cited in AVINS at 35.
32 Id. at § 32; AVINS at 36.
Other early military articles prohibiting unauthorized absences include the ORDINANCES OF WARE of Henry VIII (1813), the LAWS AND ORDINANCES MILITARIE of Robert, Earl of Leychester (1586), THE LAWS AND ORDER OF WARE of the Lord Lieutenant of Ireland (1638), and the Earl of Essex's LAWS AND ORDINANCES OF WARE (1642). AVINS at 36.
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and Military Lawes to be Observed in the Warres. King Gustavas Adolphus in 1621 listed at least twenty offenses pertaining to absenteeism. The crimes of missing movement, failure to repair, and avoiding hazardous duty were all covered. Under Adolphus's Articles not only could individual soldiers be punished for their abandonment as in earlier military articles, but provisions were also included to punish entire regiments, troops and companies which refused to advance and remain engaged with the enemy.

Under James II, England again revised its military laws in 1688. The first British Military Act of 1689 specifically used the word "desert" and provided that those offenders "shall suffer death or such other punishment as by a court-martial shall be inflicted." Since the American Colonies used the British Military Act of 1689 as a model for their own military laws, it came as no surprise that the first American Articles of War, executed on June 30, 1775, were modeled after the British Articles of War in force at the beginning of the Revolutionary War. The authors of the early American Articles

33 Articles and Military Lawes to be Observed in the Warres, Code of Articles of King Gustavas Adolphus of Sweden (1621). These articles have been translated and printed in Ward, Anmadversions of Warre (1639) and are reprinted in Winthrop at 907-18.
34 Id. arts. 49, 51-64, 78, 107, 130 & 131.
35 Id. arts. 53, 54 & 57.
36 Id. art. 52.
37 Id. arts. 55, 56, 58-60, 62-64 & 66.
38 Id. arts. 58, 64, 66. Of the remaining articles, 49 and 51 pertain to abandoning watch; Article 61 prohibited unauthorized absences on "any occasion of service"; Article 78 demanded that "every man shall be contented with that Quarters that shall be given him . . ."; Article 107 cautioned: "No soldier is to forsake his colours, and to put himself under the entertainment of any other Colonell or Garrison, or to ramble about the Country without he hath his Colonell's Pass . . ."; Articles 130 and 131 were directed at officers and forbade their authorizing leave for their subordinates or themselves without the permission of the "Generall chiefe Commander" or "Gouvernour."
39 See Rules and Articles for the Better Government of His Majesties Land-Forces in Pay arts. XX, XXII, XVIII, XXX, XXXII, XXXV (1688). The entire text of James II articles may be found under the title Articles of War of James II in Winthrop at 920-28.
40 An Act for Punishing Officers or Soldiers who shall Mutiny or Desert their Majesties Service (1689) is cited in toto in Winthrop at 929-30.
41 Id.
42 Avins at 36. Compare The British Mutiny Act (1689) reprinted in Winthrop at 929 with Massachusetts Articles of War (1775) reprinted at Winthrop at 947. See also Beckwith et al, Lawful Actions of State Military Forces 144 (1844).
43 American Articles of War (1775). [These articles are reprinted in Winthrop at 953.]
44 Manual for Courts-Martial ix (1917) [hereinafter cited as M.C.M. (1917)]. See also Avins at 37.
45 The British Articles of War (1965) as reprinted in Winthrop at 931, were officially entitled: Rules and Articles for the Betterment of Government of Our Horse and Foot Guard, and all other our Forces in our Kingdoms of Great Britain and Ireland, Dominions Beyond the Seas and Foreign Parts.
of War, like their British predecessors, enumerated a variety of wrongful absences as separate offenses. For example, chaplains were specifically required not to absents themselves; soldiers were also prohibited from being found one mile from camp without leave; and officers could be prosecuted if they dared to "lie out of" their "quarters, garrison, or camp."\footnote{\textit{Articles of War} (1775); \textit{Additional Articles of War} (1775); \textit{Articles of War} (1776); \textit{American Articles} (1786); \textit{Articles of War} (1806), 2 Stat. 359; \textit{Articles of War} (1874), 18 Stat. 230.}

The American \textit{Articles of War of 1917} consolidated several of the previous absentee provisions found in the 1874 \textit{Articles of War}\footnote{\textit{See M.C.M. 308 (1917); Compare \textit{Articles of War} arts. 31-35 (1874), 18 Stat. 230, 233 with \textit{Articles of War} art. 61 (1917), 39 Stat. 650, 660.} and reworded the provisions on desertion.\footnote{\textit{Compare \textit{Articles of War} arts. 47, 49 (1874), 18 Stat. 230, 234 with \textit{Articles of War} arts. 28, 58, 107 (1917), 39 Stat. 650, 655, 660, 667.} Although the 1920 revision of the \textit{Articles of War} introduced many changes in court-martial procedure,\footnote{\textit{Manual for Courts-Martial} vii (1928) [hereinafter cited as M.C.M. (1928)].} articles 28 and 58 (desertion) and 61 (absence without leave) remained unaltered.\footnote{\textit{See \textit{Articles of War} arts. 58, 61 (1920), 41 Stat. 787.}} In 1951, the Uniform Code of Military Justice\footnote{\textit{64 Stat. 108 (1950).}} became effective and again consolidated and modified the wording of the desertion and absence without leave (AWOL) articles.\footnote{\textit{See F. Weiner, The Uniform Code of Military Justice 197-99 (1950).}} Subsequent alterations in the Code have not affected these provisions. Today these punitive articles read as follows:

\begin{quote}
Article 85. Desertion

(a) Any member of the armed forces of the United States who—

(1) without proper authority goes or remains absent from his place of service, organization, or place of duty with intent to remain away therefrom permanently; or

(2) quits his unit or organization or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact he has not been so regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion.
\end{quote}
(b) Any officer of the armed forces who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempted desertion shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempted desertion occurs at any other time, by such punishment, other than death, as a court-martial may direct.66

Article 86. Absence without leave

Any member of the armed forces who, without proper authority—

(1) fails to go to his appointed place of duty at the time prescribed; or

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or other place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.57

THE UNLAWFUL ABSENCE

Initiation of the Absence

To establish an unlawful absence there must be proof that the absence was initiated and that it was without proper authority.68 Absence may, and often does, mean that the accused physically removed himself from the premises of a military installation. However, the unauthorized divestation of military control is all that is necessary to establish the prohibited act.69 For example, one could be just as unlawfully absent by hiding on a military installation as another who absents himself by walking away from it.70 Neither of these individuals is performing his duty; neither is amenable to orders; neither had proper authority for his action; and neither is under military control.

Not only may an absence be initiated actively, but the divestation of control may occur in a physically passive manner as when the serviceman fails to appear at his appointed place of duty. This passive absenteeism may be occasioned not only by a failure to report to a certain place for specific duties (failure to repair) but also by a failure to return to the proper station upon the expiration of an authorized leave.

It may appear that a passive absentee is no more absent after his failure to report for duty than before he was due to report. However, this reasoning fails to distinguish between physical distance from a military authority figure and the divestation of military control. One who remains home on leave or assignment may be physically removed from a military commander but he is absent on authorization and, as such, is still constructively under military control. On the other hand, the wilful refusal to submit to orders altering that assignment or the intentional refusal to return upon expiration of leave is a wilful refusal to further submit oneself to military control. Therefore, divestation of constructive military control has been effectuated.

One who is on isolated assignment (for example, a one-man patrol) or on assignment with a nonmilitary organization has not abandoned constructive military control as long as he observes the limits of his assignment. Likewise, one captured by the enemy has not initiated an unauthorized absence. On the other hand, if while on a non-military or isolated assignment a soldier abandons that assignment, military control is divested and he is absent without leave. Similarly, if a prisoner of war escapes and is reasonably provided with an opportunity to return to actual military control but refuses to return, he has abandoned constructive military control and is unlawfully absent.

At one time it was possible for a serviceman to abandon his leave by going beyond prescribed distance limits from his duty station.

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61 M.C.M. ¶ 165 (1969).
62 United States v. Scott, C. M. 358366, 9 C.M.R. 241 (1952); Byrne at 56. In the Scott case, the accused was convicted of unauthorized absence because he overstayed his leave to assist an R.O.T.C. officer complete an accident investigation in which Scott was not directly involved.
65 See id.; United States v. Fischer, A.C.M. 4099, 1 C.M.R. 667 (1951); Avins at 67.
66 DIGEST OF OPINIONS OF JUDGE ADVOCATE GENERAL OF THE ARMY 1912-1940, ¶ 416(3) (383.6, Sept. 13, 1918) (1942) [hereinafter cited as DIG. Ops. 1912-1940].
67 See note 65 supra.
68 See note 66 supra.
69 See generally note 66 supra.
Moreover, one's leave could be revoked without his receiving actual notice (revocation of leave by law) where, because of extraordinary circumstances, the serviceman should have no reasonable doubt that his senior officers desire his return. Revocation of leave by law was the basis relied on by a Navy court-martial to convict one sailor who, while on authorized leave, failed to return to his ship after the attack upon Pearl Harbor. Fortunately, neither revocation by law nor abandonment of leave appear to be valid law today.

The physical inability of a serviceman to return following his leave may validly negate a charge of AWOL. However, this inability must not be occasioned by the accused's own impropriety or misconduct. Thus, an accused who is unconscious in a civilian hospital at the expiration of his leave is not absent without leave. On the other hand, if a soldier is on authorized leave and apprehended and held by civilian authorities beyond the termination date of his leave, his military absentee status will depend upon whether he is acquitted or convicted of a civilian crime. If he is convicted of a civilian crime, the military presumes that his wrongful actions were the cause of his absence. If he is acquitted, he is presumed to have been unable to return through no fault of his own and is therefore not subject to conviction for unauthorized absence.

While this civilian conviction rule may appear to be a logical extension of the rationale supporting military absentee law, the doctrine can be carried to an extreme. For example, in United States v. Myhre, the accused, a minor, was arrested by the New York City police one morning at 5 a.m. His leave was authorized until 7 a.m. of that same day. He was held for three months and finally allowed to appear before the Court of Special Sessions at which time he pleaded guilty to the charge of "youthful offender" on the advice of his "legal aid

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71 Avins at 89 citing C.M.D. 1-1942, p. 273.
76 See note 74 supra.
lawyer." The civilian court "sentenced [him] to the Elmira Reception Center for an undefined term not to exceed three years." His "sentence" was then suspended and he was returned to military control. A court-martial subsequently found him guilty of unauthorized absence and sentenced him to partial forfeitures of his pay and allowances, a bad-conduct discharge, and confinement at hard labor for five months.

Previously, the Court of Military Appeals had held that, for purposes of impeachment, a juvenile proceeding is not to be considered a civilian conviction. Counsel for the appellant urged that because of this previous decision in regard to impeachment, the military court should consider the accused's absence as the result of a civilian apprehension which did not result in a conviction. Therefore, applying the civilian conviction doctrine, it was urged that appellant's absence should have been excused. The court rejected appellant's contentions and held that the absence was occasioned by the appellant's own "willful misconduct." Nor did the fact that New York did not consider an adjudication of "youthful offender" to be a criminal conviction affect the court's decision to affirm the AWOL conviction. The military court did not dwell on its rationale for treating the New York non-criminal adjudication as a criminal conviction, it merely said that the absence had been the result of the accused voluntarily engaging in a "prohibited act."

It is difficult to understand how the civilian conviction doctrine can deter absence without leave. If the state legislature decides that the punishments they have provided for crimes within their borders are sufficient deterrents, why should the military attempt to increase the punishment for the offense by initiating a charge of unauthorized absence against a convicted serviceman? This practice may even encourage extensive and energetic litigation of the most minor civilian offenses thereby costing both the service and the civilian courts many lost man hours. This doctrine also encourages a serviceman to flee from civilian jurisdiction at the first sign of possible apprehension rather than taking a chance of conviction on a minor civilian charge followed by a military sentence for AWOL. The irony of this doctrine is disclosed by the procedure followed when a soldier returns to duty after fleeing civilian jurisdiction. He may be subsequently returned to the civilian authorities for prosecution, but his lost time is not

78 Id. at 33, 25 C.M.R. at 295.
79 Id.
81 See N.Y. Code Crim. P. § 913-n (1953).
considered AWOL even if he is convicted. It therefore appears that an AWOL conviction under this doctrine depends not upon whether the accused was absent through his own fault, but upon whether the accused can reach a military installation before civilian authorities apprehend him. The penalty for running too slowly may be a dishonorable discharge and confinement at hard labor. Finally, it appears that to allow a court-martial conviction for AWOL under the civilian conviction doctrine is to contradict the holding of the Supreme Court in O'Callahan v. Parker. To allow such action is to allow court-martial jurisdiction and additional punishment for a nonservice connected crime which O'Callahan prohibited. It is no answer to say that O'Callahan is inapplicable since AWOL is a service connected crime, because the willful action could not become a "service connected crime" until after the accused was apprehended and held beyond his authorized period of absence.

Duration of the Wrongful Absence

Although desertion and AWOL are completed offenses at their inception, the duration of the absence is a mitigating circumstance affecting the extent of punishment. Since the duration of an unlawful absence continues from the divestation of military control until the return to military control, an unauthorized absence once initiated is unaffected by an inability to return. This is true even where an unlawful absentee is arrested on a civilian charge and acquitted, or where he is physically unable to return due to an illness that arose after the initiation of the unauthorized absence. Of course, the inability

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84 See M.C.M. ¶ 127c, Table of Maximum Punishments (1969).
85 O'Callan v. Parker, 395 U.S. 258 (1969). In O'Callahan, a sergeant was convicted by a court-martial for assault, house breaking, and assault with intent to rape. These crimes were all committed in a civilian hotel while the accused was on an evening pass and dressed in civilian clothing. The Supreme Court held that the court-martial had no jurisdiction to try the crimes in question. Because these crimes were not service connected and were committed off the post while on an evening pass, the petitioner was entitled to trial by a civilian court. To decide otherwise would be to deprive him of his constitutional rights to indictment by a grand jury and to a trial by a petit jury in a civilian court.
89 Id.
to return may be considered as an extenuating circumstance for sentencing purposes.90 Once an absentee returns to military control the duration of his unauthorized absence has ceased and any further unauthorized relinquishment of military control results not in a continuation of the original offense, but in a second, separate unlawful act. Of course, the government cannot divide a continuous absence into several shorter offenses.91

In the event that a termination date for an unauthorized absence is unascertaintable, the Court of Military Appeals has held in *United States v. Lovell*92 that the accused may be found guilty of only a one day absence. The argument has been made that where the date of the accused's return to military control is unascertainable, he should be presumed to have continued his absence. This argument was dismissed by the Court in *Lovell* with the following reasoning:

> The presumption of continuance [of the unauthorized absence] does not merely flow forward, as the government contends, but it flows backward. . . . At some point the backward flow of the presumption meets the forward flow. Any attempt to fix that point is sheer speculation. Consequently, the presumption of continuance cannot supply the necessary proof of an aggravation. There must be other positive evidence of the accused's return to military control.93

The maximum permissible punishment for absence without leave may increase according to the length of the absence. Although the Uniform Code of Military Justice has provided that one convicted of being absent without leave "shall be punished as a court-martial may direct,"94 the President has placed limitations on the amount of punishment which may be imposed.95 Because of these limitations, one who is absent without leave for less than three days may be confined at hard labor for not more than one month. An absence of more than three but less than thirty days may, upon conviction, result in confinement for six months. Finally, an absence of thirty or more days may subject a convicted serviceman to one year's confinement at hard labor and a dishonorable discharge.96 Therefore, the exact determination of

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90 Id.
95 See M.C.M. ¶ 127c, *Table of Maximum Punishments* (1969).
96 Id.
the number of hours an accused was absent may be important in order
to ascertain whether that duration has passed the less-than-three-days
or less-than-thirty days limits. In computing the duration of the
absence, any continuous period of absence less than twenty-four hours
is counted as one day. However, even though departure and return
are proven to have occurred on separate days, in the absence of proof
of the exact hours of both departure and return the accused is pre-
sumed to have departed and returned at exactly the same time of day
on those separate dates. Therefore, if an unauthorized absence is
proved to have been initiated at 6 a.m. (0600 hours) on December 24
and to have been terminated at 11 p.m. (2300 hours) on December
27, the accused has been absent for 89 hours or 4 days. In contrast, if
the proof only establishes an absence from December 24 to December
27, the accused has been absent only 72 hours or 3 days.97

Termination of the Wrongful Absence

Termination of the wrongful absence occurs when the accused
returns to either actual or constructive military control. Much like
determining the inception of the absence, the return to military control
is more important in determining the cessation of the absence than is
the physical return to a military organization or installation. A known
absentee who returns in civilian clothes to his organization for a very
short while before departing does not necessarily terminate his unlaw-
ful absence.98 By the same token, it is no longer necessary for an
accused to return to his own organization or service to terminate his
absence.99 Thus, termination of a wrongful absence may occur when a
sailor surrenders to Air Force personnel100 or when a soldier sur-
renders to a recruiting officer;101 of course, the military cannot refuse
to exercise control over a surrendering absentee in order to prolong
his absence.102 This is not to say that mere control over an absentee
is of itself sufficient to terminate an absence. Knowledgeable control
is required. Moreover, the knowledge required is not simply knowl-
edge of the accused's name, rank or service number.103 There must

97 See M.C.M. ¶ 127c(3) (1969). See also United States v. Krutsinger, 15
99 See United States v. Self, C.M. 411832, 35 C.M.R. 557 (1965);
United States v. Mayer, C.G.C.M. 9761, 4 C.M.R. 505 (1952); United States v.
100 Id.
103 In July, 1969, the armed forces replaced the old service number with the
social security account number (SSAN).
be a knowledge that the accused is an unauthorized absentee. Therefore, the reinlistment and subsequent service by an accused may cause him to be under physical military control, but it will not serve to terminate his original absence if the authorities exercising control over him are unaware of his status.

Two of the most extreme examples of the knowledgeable-control requirement occurred during the Korean War. In Korean cities which contained large troop concentrations, summary courts-martial were established to try offenders “on the spot” for minor offenses. On at least two occasions, courts-martial were held in which a soldier who was AWOL from his unit was convicted on another minor offense. Control in both cases was obviously exercised effectively over the accuseds and the courts-martial were informed of the accuseds’ names, ranks and organizations. But, the courts were not aware of their AWOL status. The Court of Military Appeals held that neither accused had terminated his unlawful absence through this submission to a court-martial. In reaching its decision, the court placed much emphasis upon maintaining the effectiveness of the transient courts-martial. “Referral to every soldier’s parent organization in order to determine his status would make difficult if not impossible the prompt and effective disciplinary action on minor offenses for which these courts exist... Here there was neither actual knowledge nor reasonable opportunity to obtain such knowledge.” Trial by the accused’s parent organization occasions a different result, for then the burden would have been upon “that organization to know or ascertain his duty status.”

This decision does not appear completely unreasonable. However, the court placed a burden upon the accused to disclose his status:

[U]nless an unauthorized absentee makes it known to the court, they would remain ignorant of his status. ... If the absentee discloses his status so that the military authorities have full knowledge of all the facts, they could not, with propriety, contend that the absence was not legally terminated.

Under this decision, in order for his absence to be terminated the accused, who is under military control to the extent of his being court-martialed, is required to volunteer information concerning his status.

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105 Dic. Ops. 1912-1940 at 266, citing C.M. 157067 (1923).
108 Id.
109 Id.
But, in volunteering information concerning his status, he is volunteering information that he is absent without leave. Therefore, to confess the status is to confess the crime. Further, since the punishment for an unauthorized absence may increase with the increase of the duration of the absence, it appears that the accused is being compelled, on threat of additional punishment, to confess that he has committed that very crime. Yet, in neither of these cases did the court mention the implications of their decision on the soldiers' right against self-incrimination.110

Termination of an unauthorized absence may also occur constructively without military authorities exercising direct control over the absentee. The most typical example of constructive termination occurs when civilian authorities receive official notice of the absentee’s status and apprehend him pursuant to that notice.111 Regardless of whether one views such action as a form of agency or determines that the government is estopped from denying the exercise of military control,112 the absence has been terminated. Furthermore, when an accused has been apprehended by civilian authorities on a criminal charge and proper military authorities are given notice of his AWOL status and that he is being held for return to actual military control, the absence has been terminated.113

The receipt of a discharge while in an absentee status may terminate


Professor Avins has called the decision in Jackson “correct.” However, Avins discussed only the policy rationale for considering the absence continuous and did not discuss the accused’s constitutional rights. Avins at 75. The drafters of the Uniform Code of Military Justice were apparently quite concerned that the serviceman be guaranteed his right against self-incrimination. Article 31 of the Uniform Code provides:

(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate himself.

(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this code shall compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement shall be received in evidence against him in a trial by court-martial. 10 U.S.C. § 831 (1956).


112 See Avins at 80.

that absence.\textsuperscript{114} In any event, military courts would then have no jurisdiction over the accused\textsuperscript{115} so that his absentee status would be functionally terminated. However, when an accused remains absent beyond the expiration date of his original enlistment, he ordinarily does not receive a discharge. In such cases, the unauthorized absence continues because Congress has specifically provided that lost time occurring during an enlistment must be served.\textsuperscript{116}

\textbf{Desertion—The Element of Intent}

Traditionally, the crime of desertion is established by proving that the accused was absent without leave and that he intended to remain absent permanently.\textsuperscript{117} The intent to remain away permanently may be shown to have occurred either at the inception of the unauthorized absence or at some point within the duration of that absence.\textsuperscript{118}Normally, the conduct of the accused and circumstances surrounding his absence must be used to create an inference that he intended to remain permanently absent.\textsuperscript{119} Seldom is direct proof of such an intent available.\textsuperscript{120}

Circumstances and actions of the accused, prior to and at the time of departure, which are often helpful to determine intent may include proof that the accused was under investigation or awaiting charges at the time of his absence\textsuperscript{121} or that he was undergoing a sentence of confinement.\textsuperscript{122} Prior convictions of unauthorized absence may also

\begin{footnotes}
\footnoteref{114}See Avins at 76.
\footnoteref{117}M.C.M. ¶ 164a (1969).
\footnoteref{120}Id.
indicate a pattern of consistent refusal to submit to military control. However, there must be a logical connection between the prior conviction and the alleged intent; an isolated conviction for a 35 minute AWOL is of doubtful value to prove an intent to remain permanently absent. The length of the absence, the method of termination (arrest or surrender), the distance traveled, and the direction of travel may shed light on the intent of the accused. Whether the accused attempted to secret his absence by lying, discarding military identification, wearing civilian clothes, and using assumed names or erroneous identification, may all be indicative of his specific intent to remain permanently absent. Of course, each of these circumstances may be weighed in light of the other circumstances. For example, a ten hour absence may be a desertion where the accused escaped from confinement and was thereafter apprehended. By the same token, an absence following an investigation of fraud and bigamy may be an AWOL offense rather than desertion where the accused had a previously exemplary record including prior honorable discharges.

The 1951 Manual for Courts-Martial provided that mere unrefuted proof of an extended unauthorized absence was sufficient to

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130 See generally cases cited at note 132 infra.
establish an inference of an intent to desert and could therefore justify a desertion conviction. However, in United States v. Cothern, the Court of Military Appeals struck down a conviction of desertion where the law officer gave an instruction based upon that Manual's provision. The court said: "Neither the law officer nor the Manual for Courts-Martial . . . may substitute a period of absence for the necessary ingredient of intent—regardless of the character of such a period."

The court founded its opinion upon the following statement by the United States Supreme Court in Morrissette v. United States:

[A] presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect.

The Cothern decision was widely criticized as contrary to existing military case law and as an erroneous interpretation of Morrissette. However, as was later noted by the Court of Military Appeals, to allow a deserter's conviction to stand solely on the basis of an absence, which was not "satisfactorily" explained, has the effect of shifting the burden of proof on the accused to establish his innocence. Certainly, if the accused did in fact intend to desert and thereby remain absent for a prolonged period, it is not unreasonable to require the government to provide some evidence, of the type previously mentioned, to establish that intent. Otherwise, if it is impossible for the government to discover any such evidence despite a much prolonged

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135 M.C.M. ¶ 164a (1951).
136 Under the 1951 MANUAL FOR COURTS-MARTIAL, the "Law Officer" was an officer on active duty who was a member of the bar "of a Federal Court or of the highest court of a State of the United States and who [had been] certified to be qualified for duty by the Judge Advocate General of the armed force of which he [was] a member." His duties approached those of a civilian judge in that he advised the court on issues of law and instructed the court on the elements of the offenses charged. M.C.M. ¶¶ 4e, 73 (1951). The term "Law Officer" is no longer applicable to the military court system. The Law Officer has been replaced by the Military Judge. M.C.M. ¶¶ 4e, 73 (1969).
138 Id. at 161, 23 C.M.R. at 385.
139 342 U.S. 246 (1952). In Morrissette, the Supreme Court held that criminal intent is an essential element of the crime of "knowing" conversion of government property. The civilian defendant in this case had been convicted of knowingly removing bomb casings from an Air Force practice bombing range. Apparently the defendant thought the casings were abandoned. Id.
140 342 U.S. at 275.
absence, how can it be said that the accused's intent to desert has been established beyond a reasonable doubt?\footnote{143}

\textit{The Intent to Avoid "Hazardous Duty" or "Important Service"}

In 1920, the Articles of War\footnote{144} broadened the crime of desertion by the addition of the following provision:

Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter.\footnote{145}

In substance, this addition remains today.\footnote{146}

The offenses of "unauthorized absence with the intent to avoid hazardous duty" and "unauthorized absence with the intent to shirk important service" share many common attributes. Both require an unauthorized absence.\footnote{147} Moreover, the absence must be accompanied by a specific intent to avoid a specific duty or service.\footnote{148} Merely establishing that the accused did avoid such duty or service by his absence does not necessarily prove desertion.\footnote{149} Therefore, it is necessary to prove that the accused knew that he was likely to be required to perform such duty or service.\footnote{150} Constructive knowledge is not sufficient.\footnote{151} In order to establish the accused's knowledge of his assignment to hazardous duty or important service, the government may show: that the accused had received a personal notice or warning of the assignment;\footnote{152} that his organization had received notice as a group and that the accused was present when such notice was tendered;\footnote{153} or that other circumstances surrounding the unauthorized absence, how can it be said that the accused's intent to desert has been established beyond a reasonable doubt?\footnote{143}

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\footnote{143} Critics of the \textit{Cotherm} decision have apparently removed their criticism from the courts to the legislature. In May, 1970, the Judge Advocate General of the Army reported that "the Army is seeking legislation to give the military judge exclusive power over sentencing and also legislation to make a sixty-day AWOL, desertion without proof of intent." \textit{Maj. Gen. K. Hodson, Report of T.J.A.G.—Army, The Judge Advocate J.}, May, 1970 at 7.


\footnote{145} \textit{Id.} at 284, 3 C.M.R. at 18. \textit{See also M.C.M. 1928, 209 at art. 28.} A relatively extensive history of these forms of desertion appears in \textit{Avins, A History of Short Desertion}, 13 \textit{Mil. L. Rev.} 143 (1961).

\footnote{146} 10 U.S.C. § 885 (1956).


\footnote{151} \textit{See cases cited at notes 148-50 supra.}

\footnote{152} \textit{See M.C.M. ¶ 164a (1969).}

absence indicated that the accused knew of his assignment to hazardous duty or important service.\textsuperscript{154}

Despite their similarities, hazardous duty and important service are not correlative.\textsuperscript{155} The determination of what constitutes "hazardous duty" may appear relatively simple and usually is. For example, there is little doubt that duty involving violent armed confrontation with the enemy is hazardous.\textsuperscript{156} However, the Court of Military Appeals has held that hazardous duty is not to be limited to front line confrontations. A medic in a reserve combat platoon may avoid hazardous duty by his absence.\textsuperscript{157} Moreover, avoiding duty in the Korean War\textsuperscript{158} or the Vietnam War\textsuperscript{159} does not necessarily mean the avoidance of hazardous duty in the military criminal sense. In hopes of clarifying the situation, one author has advocated a functional approach based upon mortality and casualty rates; he would define as "hazardous" only those duties which have high mortality or casualty rates.\textsuperscript{160} The court has not as yet accepted this proposal.

The determination of whether a particular service or assignment is "important" is a question of fact which depends upon the circumstances of the particular case.\textsuperscript{161} Nevertheless, it requires "something more" than ordinary service to be considered important.\textsuperscript{162} Marching from South Carolina to "Camp Knox," Kentucky, is not "important service."\textsuperscript{163} And, contrary to the 1951 \textit{Manual for Courts-Martial},\textsuperscript{164} all foreign duty is not necessarily important service within the meaning of this offense.\textsuperscript{165} While all military service may in a general sense be important in time of war, this does not mean that all Korean or Vietnam duty\textsuperscript{166} has been or is "important" within the meaning of the desertion provisions.

\textsuperscript{163} \textit{Dick. Ops. 1912-1940} \textit{§ 416}(5) at 266.
\textsuperscript{164} M.C.M. \textit{§ 164a} (1951).
In determining what service is "important," the court has found a wide range of duties to fall under that category. Ordinary training may not be "important," but "basic" training is. The duties of a rifleman in Korea are not necessarily important, but the duties of a cook on an ice breaker involved in Operation Deep Freeze in the Antarctic may be "important." Service in Vietnam is not necessarily important, but the service performed by a warehouseman on Guam in support of air operations over Vietnam has been held to be "important." In determining that basic training is "important," the test applied was one of congressional intent. Previously, such training did not appear to be considered important. However, the Court of Military Appeals held that because of the passage of the 1951 amendments to the Universal Military Training and Service Act which required four months of basic training prior to the assignment of personnel to foreign duty, Congress intended basic training to be "important."

Apparently, the importance of the overall operation in which the accused is participating does aid in determining whether the individual's service is important. Moreover, "[t]he test is clearly not whether the individual's service is 'critical' to the success of the mission, but whether he is performing an essential function, for it is obvious that the absent cook . . . was not critical to the mission."

DEFENSE OF THE UNLAWFUL ABSENCE

There are three defenses which, because of their peculiar relationship to criminal absenteeism, merit a brief discussion. These are: the expiration of the statute of limitations; an honest mistake of fact; and the constructive condonation of the wrongful absence.

The Statute of Limitations

In peacetime the statute of limitations for absence without leave is

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168 M.C.M. § 164a (2) (1969).
174 See Dig. Ops. 1912-1940 § 385 at 193; see also, Avins "Important Service" in Military Law, 110 Penn. L. Rev. 685, 695 (1962).
two years; for desertion, it is three years.\textsuperscript{179} Since neither AWOL nor desertion are continuing offenses but are complete as of their inception,\textsuperscript{180} the statute may run prior to the accused's return to active duty. However, such is not usually the case since the mere receipt of sworn charges by the officer exercising summary court-martial jurisdiction serves to toll the statute.\textsuperscript{181} The statute of limitations is not applicable to absences occurring in "time of war."\textsuperscript{182} In this regard, the definition of "war" is more dependent upon the circumstances surrounding the particular conflict than upon a congressional declaration.\textsuperscript{183} Thus, not only was the statute of limitations suspended for absences occurring in World War I,\textsuperscript{184} but there was also a similar suspension in the Boxer Rebellion\textsuperscript{185} and the Korean Conflict.\textsuperscript{186} Likewise, the Vietnam War has served to suspend the statute.\textsuperscript{187}

\section*{Mistake of Fact}

In order for "mistake of fact" to be a valid defense to an unauthorized absence, the mistake must be both honest and reasonable. The usual appellate discussion revolves around the reasonableness of the mistake.\textsuperscript{188} The fact that an accused received a letter from his commanding officer which led the accused to believe his leave was still in existence may be a reasonable mistake.\textsuperscript{189} On the other hand, one who allows himself to be drummed out of the service by an obviously illegal court-martial composed solely of enlisted men has not necessarily justified his mistaken belief.\textsuperscript{190} "Reasonable" also means that the accused's misapprehension must have been a valid defense had the

\begin{thebibliography}{99}
\bibitem{179} 10 U.S.C. § 843 (1956).
\bibitem{184} \textit{Dig. Ops. 1912-1940} at 266.
\bibitem{185} \textit{Dig. Ops. 1862-1912} at 173.
\bibitem{189} \textit{See} United States v. Corder, A.C.M. 1854, 1 A.F. (C.M.R.) 715 (1949) discussed in Avins at 184.
\bibitem{190} \textit{See generally} \textit{Dig. Ops. 1862-1912} at 400.
\end{thebibliography}
facts been as he believed.\textsuperscript{191} To illustrate, if an accused went absent on a Wednesday but thought it was Thursday and had no authority to absent himself on either Wednesday or Thursday, his mistake of fact is no defense to his unlawful absence. The difficulty of determining what is "reasonable" was recently demonstrated in \textit{United States v. McCrown}.\textsuperscript{192} In this case, the accused missed a formation allegedly because he was unaware that his watch stopped while he was in the Post Exchange (PX). In upholding the conviction, the Court of Military Appeals inferred that "the accused's failure to make the formation did not result from a reasonable belief that he had 'plenty of time' to make it." This inference was apparently based upon the distance from the PX to the formation area; the accused's failure to return immediately to the formation after checking his watch; and his failure to again check his watch until his return.\textsuperscript{193} In a vigorous dissent, Judge Ferguson echoed the sentiments of stopped watch victims everywhere:

\begin{quote}
It is a rare person, indeed, who has not been late for an appointment or meeting of some sort, because of reliance on a timepiece which has failed to function properly. Since the Court of Military Review accepted the accused's testimony as honest, I believe that it erred in finding it not reasonable.\textsuperscript{194}
\end{quote}

It appears, therefore, that the reasonableness of the mistake of fact is primarily a factual determination that may depend more upon intuition than specific legal guidelines.

\textbf{Condonation}

If an officer exercising general court-martial jurisdiction over a deserter knowingly restores that individual to active duty without reservation, that officer has condoned the accused's actions and thereby barred further trial on that offense.\textsuperscript{195} This defense is based upon the assumption that the commander is responsible for maintaining discipline and that if he sees no grave disciplinary problem there is no reason to try the offender.\textsuperscript{196} The Court of Military Appeals has con-

\textsuperscript{193} Id. at 410, 43 C.M.R. at 250.
\textsuperscript{194} Id. at 412, 43 C.M.R. at 452.
\textsuperscript{196} See Avins at 268.
trued the defense of condonation quite narrowly so that its practical effect is limited. Not every officer or authority can condone desertion; it must be a general court-martial convening authority. Moreover, this general court-martial convening authority must have full knowledge of the accused's actions.

Although all the elements of AWOL are included within desertion, and condonation is a complete defense to desertion, condonation is not a defense to AWOL. The rationale for this exclusion leaves much to be desired. One writer has implied that to include AWOL under the condonation defense would be to encourage the incarceration of those minor offenders who are awaiting trial. This assumption has no merit, for commanders may always restore offenders to duty with the reservation that there is no bar to trial. Even the Court of Military Appeals has expressed some doubt as to the wisdom of the exclusion but has refused to broaden the rule "without legislative sanction." At one time, American courts apparently accepted condonation as a bar to AWOL. Indeed, British military law, after which our absentee laws were patterned, may include any military crime under the condonation defense. It has been suggested that the only reason American military courts refuse to include AWOL within the condonation defense is that early American writers were slack in restating the law in early manuals, and subsequent manual authors

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197 See cases cited at note 195 supra.
198 Article 22 U.C.M.J. lists the qualifications of a general court-martial convening authority.
(a) General courts-martial may be convened by—
(1) the President of the United States;
(2) the Secretary concerned;
(3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;
(4) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;
(5) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;
(6) any other commanding officer designated by the Secretary concerned; or
(7) any other commanding officer in any of the armed forces when empowered by the President.
(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him. 10 U.S.C. § 822 (1956).
200 See generally Avis at 269.
202 See Dist. Ops. 1862-1912 at 16. See also Avis at 268.
203 See notes 42-49 supra and accompanying text.
While this may be plausible, it is a distasteful rationale for denying the defense.

CONCLUSION

Superficially, it appears most unconscionable to subject any American citizen to criminal penalties for merely travelling from one part of the country to another. Such action is particularly heinous when the citizen is a homesick minor “going home to mother,” or a concerned husband visiting his expectant wife. However, with the military defense oriented value system under which our world functions, such criminal sanctions may be rationalized on the basis of societal necessity. In any event, the dilemma of individual freedom versus societal necessity should be carefully analyzed. Attempts to subvert individual freedoms (including the freedom to travel) should be cautiously restricted to those instances where the rationalization for the limitations apply. More specifically, if societal necessity demands that a citizen subject himself to military control in order to maintain a highly disciplined defense system, sanctions should not be imposed to restrict his freedom to travel unless those sanctions serve to maintain such a system. Present military law on the civilian conviction doctrine and the defense of condonation allows punishment for unauthorized absence without supporting the rationalization behind that punishment. In both of these areas, sanctions may be imposed for one who absents himself from military control even though his punishment provides no deterrent for that or other absences.

Criminal absenteeism under military law has been undergoing evolutionary changes for several centuries. And, while decisions such as Cothern and O'Callahan are doing much toward the maintenance and advancement of the balance between individual rights and group necessity, there is still room for growth. Not only is there a need for reappraisal of the civilian conviction doctrine and the defense of condonation, but the courts would do well to reweigh the knowledge-before-termination requirement, with particular emphasis upon the individual's right against self incrimination.

Sammy S. Knight

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205 Avins at 270.

Although citizenship is not divested via entry into military service, the status of the individual does change in that he is thereby subjected to the laws and customs governing the armed forces. In re Morrissey, 137 U.S. 157 (1890); In re Grimley 137 U.S. 147 (1890); G. Glenn & A. Schiller, The Army and the Law 3 (1943).