PROOF OF INTENT IN SHORT DESERTION

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INTRODUCTION

Article 85(a)(2) of the Uniform Code of Military Justice punishes as a deserter anyone who quits his organization or place of duty with intent to avoid hazardous duty or shirk important service. The crime is capital in time of war, and indeed the only serviceman executed during World War II for a purely military offense was shot by firing squad for this crime.[1] Hence the offense is of considerable importance, and the manner in which so capital a military crime is to be proven is worth careful examination.

The earliest standard for proving the offense is found in the 1921 Manual for Courts-Martial, which states that it should appear that at the time accused went AWOL either he or his unit was under orders or anticipated orders for duty and that accused's "absence without leave was so timed as to appear calculated to enable him to avoid such hazardous duty or to shirk important service, as the case may be."[2] The present manual is equally cryptic and incomplete. After noting that the proof should show that accused "knew with reasonable certainty" that he would have to perform the duty in question, the Manual suggests three ways of showing this: that accused was informed of the imminence of the duty, that he was present when his unit was so informed, or that accused was away for so long that he must have had reasonable cause to know that he would miss the duty in question.[3]

It is obvious that the above discussion can hardly be considered definitive or all-inclusive. Indeed, in all probability, it omits more situations than it covers. At best, the present Manual presents only fragmentary suggestions; at worst it is absolutely silent. This cannot be deemed to be an adequate yardstick for testing the legal significance of various factors in proving short desertion.

This article will explore the factors considered, and which should be considered, in the proof of the intent to avoid hazardous duty or shirk important service. In so doing, it will seek to clarify the various relevant cases and to point up some of the inadequacies of the present manual's standards.

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* See Contributors' Section, p. 263, for biographical data.

1 Slovik, 15 E.T.O. 151 (1945).

2 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶409 at 344.

3 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶164a at 314-15.

STATEMENTS BY ACCUSED

It is often said that intent can only be proved by circumstances.[4] Of course, in general a person's state of mind cannot otherwise be demonstrated, but from time to time direct evidence of intent may be gathered from the accused's declarations. In such a situation, circumstantial evidence of intent is unnecessary.

The clearest proof of intent exists when the accused admits it in court.[5] Thus, there is no problem of proof when the accused confesses he went absent to avoid combat,[6] admits dislike of or inability to endure fighting,[7] expresses "his extreme disgruntlement with his status as a member of a combat unit,"[8] states that he went absent to avoid being in the infantry,[9] or confesses that his departure was due to fright at potential hazards.[10]

In addition to such complete confessions of intent, there are a number of expressions which have been held to constitute significant admissions and to form direct evidence of the requisite intent. Many of these statements will recur repeatedly in similar short desertion cases. Because of their frequent repetition, they constitute a very incriminating item of evidence, and therefore are listed below, as follows:

(1) The accused said that he was "scared,"[11] or that he "was scared and yellow but [he] kept thinking more and more about getting away from it,"[12] or that he was "just yellow,"[13] or was in "mortal terror,"[14] or that "while in Ukrange we were subjected to heavy enemy fire and I was very scared, my nerves went to pieces and I left."[15]

(2) The accused stated he "couldn't take it,"[16] or "couldn't take it any more or longer,"[17] or "couldn't face it,"[18] or "cannot stand it up

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[4] Rose, 43 B.R. 377, 378 (1944).
[5] Silberschmidt, 9 E.T.O. 295 (1944).
[6] Bronson, 33 E.T.O. 91 (1945); Hart, 27 E.T.O. 355 (1945); Allen, 27 E.T.O. 93 (1945). See also Slovik, 15 E.T.O. 151 (1945); Fendorak, 15 E.T.O. 185 (1945).
[7] Ryan, 34 E.T.O. 297 (1946); Davis, 32 E.T.O. 25 (1945); Sabella, 31 E.T.O. 33 (1945); Mabry, 2 N.A.T.O.-M.T.O. 277 (1943).
[8] Englese, 28 E.T.O. 173, 175 (1945).
[9] Uyechi, 45 B.R. 233, 235 (1945); Tolbert, 4 N.A.T.O.-M.T.O. 217 (1944).
[10] Fiorentino, 19 E.T.O. 31 (1945); Yochum, 19 E.T.O. 35 (1945).
[11] Fisher, 30 E.T.O. 199 (1945); Fors, 29 E.T.O. 309 (1945); Sabatino, 24 E.T.O. 51 (1945); Kramer, 18 E.T.O. 285 (1945); Alexander, 16 E.T.O. 1 (1945); Carroll, 14 E.T.O. 185 (1945); Roth, 10 E.T.O. 103 (1944).
[12] Vincent, 18 E.T.O. 243 (1945).
[13] Mangiapane, 22 E.T.O. 235, 237 (1945).
[14] Magnanti, 18 E.T.O. 15 (1945).
[15] Stalte, 17 E.T.O. 231 (1945).
[16] Zottoli, 28 E.T.O. 177, 181 (1945); Straub, 20 E.T.O. 1 (1945); Alexander, 16 E.T.O. 1 (1945); Pugliano, 14 E.T.O. 145 (1945).
[17] Burtis, 19 E.T.O. 1 (1945); ("it is all right at first but then I started getting too much"); Box, 17 E.T.O. 115 (1945); Marchetti, 16 E.T.O. 111 (1945).
[18] Fors, 29 E.T.O. 309 (1945).

there,"[19] or "couldn't take any more combat,"[20] or similar expressions.[21]

(3) The accused "was afraid to move up,"[22] or stated his "fear of being in that company was so great I went AWOL,"[23] or "I haven't got the guts and I can't go,"[24] or "I was afraid they would send me back to the lines and I just can't take that stuff any more."[25]

(4) The accused said "I wanted to live,"[26] or "this is no place for me,"[27] or "it is murder up there,"[28] or he "would rather go to the stockade than to the lines,"[29] or "if the shells ever start to come over, he wouldn't be around."[30]

(5) The accused declared that "the front line doesn't appeal to me,"[31] or that he was "tired of fighting and fed up on combat,"[32] or that "I wanted a rest from soldiering,"[33] or that "he did not intend to sweat out this war by facing Jerry bullets,"[34] or similar thoughts.[35]

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[19] Slonaker, 17 E.T.O. 281 (1945) ("couldn't stand front line duty" and "didn't want to go back"); Robertson, 15 E.T.O. 195 (1945) ("can't stand artillery fire"); Bender, 14 E.T.O. 309 (1945); Pemberton, 14 E.T.O. 283 (1945).

[20] Hadala, 28 E.T.O. 31 (1945) Piantedosi, 14 E.T.O. 287 (1945); ("I couldn't take the shell fire"); Killen, 14 E.T.O. 297, 299 (1944) ("I left because I couldn't take the shelling any more. I do not believe I could go up and take it again").

[21] United States v. Young, 3 C.M.R. 313 (1952) ("I just can't take these patrols"); Ferrara, 31 E.T.O. 219 (1945) (accused had been "up in the line for about three months and had gotten pretty shaky and reached the point where he couldn't take it any more"); Kollman, 19 E.T.O. 205 (1945) (accused "was too frightened to move out with them. I couldn't go on and face the shells, so I remained behind"); Johnson, 4 N.A.T.O.-M.T.O. 399 (1944) ("I left my organization because I did not think I could stand it to go back to the front lines").

[22] Souza, 16 E.T.O. 361 (1945); Schiavone, 23 E.T.O. 263 (1945) ("quite afraid").

[23] Cramer, M.O.-J.A.G.A. 122 (1950).

[24] Philbrook, 4 N.A.T.O.-M.T.O. 221 (1944).

[25] Morris, 19 E.T.O. 189 (1945). See also Hopkins, 32 E.T.O. 387 (1945) ("nervous"); Scheier, 21 E.T.O. 245 (1945) (accused "started hearing the 240 mm artillery going off and I started getting nervous and I wanted to get away from it all").

[26] Weeks, 26 E.T.O. 393 (1945); Torgerson, 17 E.T.O. 81 (1945) (accused "didn't think very much of that after being up there and pulled back knocked-out tanks and seen guys in them after they had been hit"); St. Dennis, 19 E.T.O. 77 (1945) ("I have seen plenty of boys torn up and I did not want to get it").

[27] Brattesani, 24 E.T.O. 375 (1945).

[28] Reed, 17 E.T.O. 213 (1945).

[29] Ford, 14 E.T.O. 249 (1945); Mackey, 28 E.T.O. 231 (1945) (accused said he would rather be court-martialed than killed).

[30] Martin, 23 E.T.O. 117 (1945); Urban, 12 E.T.O. 1 (1944) ("I will see you in a couple of weeks in the guardhouse, maybe. I am taking a vacation").

[31] Lawson, 14 E.T.O. 303 (1945); Rodriguez, 16 E.T.O. 211 (1945) ("I didn't want to go back to the lines").

[32] Cross, 26 E.T.O. 55 (1945).

[33] Giombetti, 17 E.T.O. 345 (1945); Urban, 12 E.T.O. 1 (1944) ("I just don't want to fly any more, and I never did like to fly, anyway"); Pettapiece, 4 E.T.O. 289 (1944) (accused told his commander "that he would not make another amphibious landing and that he thought he had done his part in the war and deserved a break").

[34] Pergolizzi, 24 E.T.O. 65 (1945).

[35] Barker, 17 E.T.O. 331 (1945) ("I got to thinking of the artillery up there and decided not to go back"); United States v. Sutton, 3 C.M.R. 162 (1952) ("if I couldn't drive for the 2d Division, why fight for them").

The above expressions of intent are, of course, of exceptional importance because they express in a direct way the reason behind accused's unauthorized absence. While they are all germane to a combat situation, other declarations which expose accused's motives in going absent would be equally relevant and persuasive in determining whether accused had the requisite intent. Thus, if an accused, who was assigned to an important duty to be carried on at a lonely spot, expressed a distaste for loneliness prior to an unauthorized absence, such a declaration would constitute strong evidence of intent to avoid the important service, since accused's state of mind would shed light on his intent.[36]

Nor need the declaration come before the AWOL. In one case accused went AWOL from a unit engaged in combat; while away he met wounded men from his company, and when told of the heavy casualties the unit had sustained in combat, he said: "Maybe it was a good thing I wasn't there." It was held that such evidence was indicative of his intent at the time he initially went absent.[37] Likewise, in another case, where accused was absent without leave from an organization in an active combat zone during a German offensive and when apprehended stated that there were "not enough men in the Army to take him back to the front lines," the board of review declared: "Accused's statements . . . when confronted with return to combat of his intent not to serve in action again, was some evidence from which reasonable inferences may be drawn as to the state of his mind 19 days before."[38]

In addition to the highly probative statements of intent, motive, or feeling outlined above, several cases have dealt with statements by accused which are further removed in the inferential chain of reasoning from the requisite intent and yet found them to be relevant to the issue. In one, accused was in a replacement battalion area being shipped back to his own unit in combat. The day of shipment he went AWOL, and returned the next day after the shipment had left. It was held relevant that he had been seen among a group of men discussing ways of "beating a shipment."[39] In a similar case, it was held probative of intent to avoid shipment into combat that accused told the court that he had missed two prior shipments and that others also had missed shipments and had not been punished for it.[40] And in a third case, accused's statement that "I waited until news of a successful landing in Sicily reached me before I turned in to the

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[36] LARKIN AND MUNSTER, MILITARY EVIDENCE, §5.43 at 111-18 (1959).
[37] Pizzitola, 3 A.-P. 11, 15 (1945).
[38] Jusiak, 21 E.T.O. 119, 123 (1945).
[39] Donofrio, 3 N.A.T.O.-M.T.O. 73 (1944).
[40] Donohue, 3 N.A.T.O.-M.T.O. 151 (1944).

military police" was properly held to show an intent to avoid hazardous duty because it could be expected that the initial invasion would be especially dangerous.[41]

In all of the above cases, the chain of inference is from the statement to the fact that the accused desired to avoid combat, to the fact that this was his purpose and intent in going AWOL, to the legal conclusion that accused was a deserter. In *United States v. Manashian,*[42] however, the inferential chain was completely reversed. In that case, accused, stationed at Fort Dix, New Jersey, went AWOL to his home in Chicago, intending, after a short absence, to turn himself in there so that he parents could see him. He testified that while units were being moved overseas from Fort Dix, he did not expect his own organization to go. After a short absence, he surrendered in uniform in Chicago. He was "upset" and crying, and said: "Here I am, and shoot me if you want." He testified that his emotional state existed because "most naturally I was scared, and I thought, wartime desertion, I would be shot." Accused's father stated that he "forced" accused to surrender.

The board of review, in upholding the conviction for short desertion, reasoned that accused's statement that he would be shot was a tacit admission that he believed he was a deserter. From this the board reasoned that accused so believed because he knew that his intent in going AWOL was to avoid embarkation, and hence the court was justified in inferring that accused in fact had such an intention. Accordingly, this evidence rebutted accused's denial of intent to avoid embarkation, and accused's conviction was upheld.

Where statements made by the accused show his intent, such statements will be sufficient evidence thereof even though the usual circumstances showing such intent are absent. This fact was clearly pointed out in *United States v. Uyechi,*[43] where the board of review, in commenting upon the insufficiency of the circumstantial evidence to support an inference of intent to desert, declared:

> In the present case, however, we are *not* faced with the problem of *inferring* intent inasmuch as there is direct evidence in the record as to accused's intent. Accused stated that he absented himself because he did not like the infantry; that he was willing to go overseas in some other branch of the service but not as an infantryman. It is evident from this that accused did not intend to go overseas as an infantryman and that he absented himself to avoid overseas shipment as an infantryman. Thus, there is direct proof that when he absented himself without leave he did so with the intent

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[41] Mabry, 2 N.A.T.O.-M.T.O. 277 (1943).
[42] Manashian, 13 B.R. 363 (1942)
[43] Uyechi, 45 B.R. 233 (1945)

to avoid overseas shipment as an infantryman, and it becomes unnecessary in this case to draw any inference as to accused's intent: he has admitted what his intent was.[44]

ABSENCE TO AVOID COMBAT

Probably one of the most common types of short desertion is absence without leave to avoid engaging in combat. Because of the frequency of this offense, there have been numerous cases thereof reported, and the criteria for proving AWOL to avoid combat through circumstantial evidence have gradually become crystallized. They are, in addition to proof of the absence, (1) that accused or his organization was under orders or anticipated orders involving hazardous duty, namely, combat with hostile forces; (2) that the accused was aware of this anticipated duty; and (3) that at the time he went absent, or during his absence, he entertained the specific intent to avoid the duty.[45]

In reality, the last-named requirement is the ultimate conclusion, and is not an independent element to be proved at all, for the cases uniformly hold that the court-martial may infer the presence of the intent if the other elements are shown and no other reasonable explanation appears.[46] Thus, one board of review declared after these first two elements were shown:

> On these facts, a strong presumption of guilt was created. The burden of going forward with the evidence shifted and found all of accused silent. From these facts, unexplained, the court was justified in inferring that the absence without leave of accused was accompanied by the intention . . . to avoid hazardous duty, or to shirk important service.[47]

The typical so-called "battle-line desertion" finds the accused going absent without leave from a unit actually engaged in combat[48] or moving into a combat situation.[49] In such cases, there is little prob-

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[44] *Id.*, at 237.
[45] Reid, 33 E.T.O. 87 (1945).
[46] *Ibid.*
[47] Nichols, 29 E.T.O. 67 (1945).
[48] United States v. Squirrel, 2 U.S.C.M.A. 146, 7 C.M.R. 22 (1953); Dolberry, 34 E.T.O. 181 (1946); Pack, 6 N.A.T.O.-M.T.O. 13 (1945); Pleban, 4 N.A.T.O.-M.T.O. 355 (1944); Robinson, 4 N.A.T.O.-M.T.O. 297 (1944); McCullough, 2 N.A.T.O.-M.T.O. 175 (1943); Barbieri, 1 N.A.T.O.-M.T.O. 293 (1943); McCann, 1 N.A.T.O.-M.T.O. 129 (1943); Hahn, 2 C.B.I.-I.B.T. 165 (1944); Schryver, 2 C.B.I.-I.B.T. 159 (1944). See Milner, 17 E.T.O. 119 (1945) (AWOL from unit in battle suffering 85% casualties).
[49] Whitehead, 29 E.T.O. 33 (1945); Mastropieta, 22 E.T.O. 67 (1945); Torgerson, 17 E.T.O. 81 (1945); Brothers, 12 E.T.O. 397 (1944); Bellville, 5 N.A.T.O.-M.T.O. 249 (1945); Crismond, 5 N.A.T.O.-M.T.O. 223 (1944); Lemaster, 5 N.A.T.O.-M.T.O. 93 (1944); Funaro, 5 N.A.T.O.-M.T.O. 87 (1944); Mauriquez, 5 N.A.T.O.-M.T.O. 81 (1944); Coffey, 4 N.A.T.O.-M.T.O. 379 (1944); Dorsey, 4 N.A.T.O.-M.T.O. 371 (1944); Williams, 4 N.A.T.O.-M.T.O. 287 (1944); Cafazzo,

lem of finding the above elements sufficient to support the necessary inference. As a board of review noted in one typical case:

> Accused absented himself without authority . . . while his company was "dug in" in the front lines or near thereto in the Hurtgen Forest. Enemy shell fire was passing overhead. Reinforcements were being received in the company and preparations were being made for an attack against the enemy. It is a well-known historical fact of which the court could take judicial notice that the battle of the Hurtgen Forest was one of the most vicious, bloody and hard-fought of the campaign of northern Europe.[50]

In the typical "battle-line desertion" case, the accused goes absent without leave just before the hazardous duty is to commence and returns after it is over. This timing has been held to be of much significance. One board of review declared:

> It is no mere coincidence but a highly incriminating fact that accused's absence commenced immediately prior to this important action and terminated after the conclusion of the conflict. By his timely and conveniently arranged absence he avoided the hazards and perils of battle endured by his fellow soldiers.[51]

The two most important issues in determining whether circumstantial evidence will support an inference of intent to shirk combat duties are, first, whether the duty ordered was imminent, and, secondly, whether accused knew that the duty was imminent. This requirement of hazardous duty at an early date is fundamental in proving the requisite intent.

The reason why failure to show that the accused's unit was engaging in or very shortly anticipating hazardous duty at the time of

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4 N.A.T.O.-M.T.O. 207 (1944); Silva, 4 N.A.T.O.-M.T.O. 183 (1944); Himes, 4 N.A.T.O.-M.T.O. 43 (1944); Disher, 4 N.A.T.O.-M.T.O. 23 (1944); Grabowski, 3 N.A.T.O.-M.T.O. 383 (1944); Jamruska, 3 N.A.T.O.-M.T.O. 363 (1944); Weissinger, 3 N.A.T.O.-M.T.O. 339 (1944); Crance, 3 N.A.T.O.-M.T.O. 37 (1944); Jacobsen, 2 A.-P. 383 (1945).

[50] Davis, 27 E.T.O. 309, 310-11 (1945). See also Guest, 3 N.A.T.O.-M.T.O. 61, 63 (1944), where the board declared:

> The duty of the organization was to keep the enemy from coming into Tebessa, and it was subject to attack and actual combat with the enemy at any time. Under these circumstances the court was warranted in concluding that accused absented himself with the specific intent of avoiding the hazardous duty of engaging in combat with the enemy.

[51] Love, 12 E.T.O. 167, 168 (1945). And note Box, 17 E.T.O. 115, 117 (1945):

> Accused was a member of an emergency detachment which had been dispatched on a mission of great importance. In company with the men of his unit he marched to the front, engaged the enemy and encountered their shellfire. At the crucial moment when his organization was under attack and his services most needed, he left his command and did not return until the enemy action was concluded. . . . The only credible inference which can be drawn . . . is that he understood that his presence at his post of duty involved tremendous risks of his life and that he deliberately absented himself to avoid these battle hazards.

accused's absence is fatal to proof of the necessary intent in the ordinary case,[52] is that unless an inference can be drawn from the propitious timing of the AWOL the mere fact of absence alone lacks probative value. There may be any one of a number of reasons why an accused would go AWOL, even from a combat unit, besides intent to avoid battle hazards, and unless all absences therefrom are automatically equated to desertion,[53] no inference of intent can be drawn from absence without more. It is only when the timing of the absence is such that it comes at just the right moment to enable accused to avoid the duty that it may be inferred that this convenient timing was not a coincidence, but that the absence was planned to occur at this time, and that the reason for such careful planning as to the time of the absence was a purpose to avoid the duty involved.[54]

A leading case illustrating the necessity for showing imminence of duty is *United States v. Perry.*[55] There, the accused were members of a tank destroyer unit which landed in France after the allied invasion and moved into a rest area where it reorganized, repaired, and cleaned its equipment and awaited the arrival of the rest of the division. The unit remained awaiting orders to move up to the front and to engage in another drive, and the board of review found that "it may reasonably be inferred from this evidence that the unit was under anticipated orders involving active combat duty against the enemy."

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[52] Rogers, 17 E.T.O. 274 (1945).

[53] Leone, 30 E.T.O. 257, 259-60 (1945):

> Accused absented themselves from a rest area where their company had been for four or five days undergoing training and "preparation for a move upon completion of our assignment." The record contains not the slightest evidence of when or where the company was to move or did move—to say nothing of accused's knowledge thereof. Training of a combat unit imports ultimate combat, but is not proof of its imminency and is insufficient alone to support an inference of an intent to avoid hazardous duty; otherwise, all absences without leave from combat units would support findings of an intent to avoid hazardous duty. Though accused absented themselves from a rest area which was some three miles from the front lines, [it] . . . was not . . . being subjected to shelling, occasional or otherwise. The Board of Review is of the opinion that the court could not properly infer from the circumstances shown that either accused was aware of the existence of imminence of hazardous duty and absented himself to avoid such duty.

[54] Note MANUAL FOR COURTS-MARTIAL, U.S., 1921, ¶409 at 344: "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." See also Petruso, 13 E.T.O. 235, 237 (1945):

> The evidence presents a perfect pattern of the offense of absence without leave with intent to avoid hazardous duty. The accused suffered superficial minor wounds which were pronounced non-disabling. He legitimately appeared at the aid station for treatment. With full knowledge that his unit was engaged in an attack on the enemy, he availed himself of the opportunity thus afforded him to avoid further hazards of battle. For three days he remained in comparative safety while his fellow soldiers faced the greatest of battle dangers. When the attack was over he conveniently returned to his command.

[55] Perry, 16 E.T.O. 61 (1945).

However, the board found that no one knew where or when the duty would commence, and that all that was known was that it would begin "some time or other." Indeed, at the time accused went AWOL, men were permitted to absent themselves from the area for the purpose of visiting friends in neighboring units. Accordingly, it was held that there was no evidence on which an inference of intent to avoid hazardous duty could be based. The board declared:

> [The prosecution] failed to prove that such duty was imminent at the time accused departed without authority. . . . It is clear that proof or inference of accused's knowledge that their unit would *eventually* move forward in hazardous operations is insufficient. . . . [In prior] cases the units of the accused involved were actually engaged in combat or in highly important tactical missions either at or shortly after the commencement of his unauthorized absence. . . . [This case differs because] there is no evidence as to how long after accuseds' departure, Company A came into contact with the enemy. Evidence that their unit landed on the continent of Europe, proceeded inland some 400 miles, and was expected at some indefinite future time to move forward to a place where it would eventually engage in tactical operations against the enemy is not, in the Board's opinion, per se probative of an intent on their part, concurrent with their absenting themselves without authority, to avoid the hazardous duty of active combat duty against the enemy.[56]

The above doctrine is clearly correct. The accused might have left to visit friends, or have a good time, or go sightseeing, or for other purposes unrelated to hazardous duty. Where such duty is remote, it cannot be expected to weigh more heavily than anything else in the mind of an absentee. It is only when the prospective duty is almost upon the accused that it can be inferred that it weighed most heavily in his mind.[57]

A major problem of imminence of hazardous duty occurs when the accused's unit is in a rest or reserve status. As the above case shows, imminence of duty is not ordinarily presumed in such a situation, but where the unit has been ordered to go back shortly into combat,[58] or where it can be anticipated that such orders will soon be received,[59] imminence of the duty will be considered as established.

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[56] *Id.*, at 68-9.

[57] Weaver, 1 N.A.T.O.-M.T.O. 317 (1943); De Loggio, 30 E.T.O. 19 (1945). See United States v. Johnson, 1 U.S.C.M.A. 536, 4 C.M.R. 128 (1952); Brown, 22 E.T.O. 63 (1945).

[58] Ruggiero, 5 N.A.T.O.-M.T.O. 271 (1945).

[59] Valenzuela, 4 N.A.T.O.-M.T.O. 301 (1944) ("Being in regimental reserve he had reason to anticipate early return to active combat"). See also Holmes, 24 E.T.O. 139, 141-42 (1945):

> The company at the time of accused's departure, had been engaged in combat operations against the German army and . . . further duty of the same hazardous character not only impended but actually occurred throughout the entire period of absence. Although the company was in a "rest area" when

This is especially true where the accused's unit is rotated with others in combat so that it has a certain period of fighting and a fixed period of rest,[60] or where the rest is only a "temporary lull" in fighting.[61]

In addition to a status whereby accused's unit is precluded from engaging in hazardous duty, an inference that accused intended to shirk duty cannot be drawn where he himself is in such a status personally, because in such cases it is unlikely that a person would go AWOL to avoid a duty to which he would in all probability not be subjected.[62] The most controversy here has revolved around those absentees who were in arrest or confinement at the time of absence. As one board of review declared, "in the absence of an affirmative showing that the accused was reasonably subject to release from confinement to participate in hazardous duty and that he knew it, the fact that the accused was in confinement at the time of his departure . . . casts a reasonable doubt upon whether he intended to avoid hazardous duty on that date."[63] But there are decisions which disagree with this.[64]

Of course, it is logical to hold that where accused is in confinement, and he goes AWOL after being informed that he is being released from confinement to be sent back to a unit in combat, the status of confinement still subsisting at the time of the absence does not preclude an inference that the accused went absent to avoid hazardous duty because the accused knows that at an early date his protective status is being terminated and that hazardous duty is therefore in fact imminent.[65] But the cases have gone beyond this, and have held that the status of confinement, restraint, or arrest even without a showing of probable termination does not negate an inference of intent to avoid combat on the theory that such "temporary status of restraint did not render [accused] immune from such hazardous duty or important service which his commanding officer might have seen fit to impose upon him at any time and clearly did not preclude

accused absented himself it was there for purposes of reequipment and maintenance and continued on patrol duty throughout. The area, moreover, was within 400-500 yards of a point reached by enemy artillery fire and hence could not have been far distant from the zone of active combat operations. It was a matter of general knowledge in the company that it would be in the area only a few days before jumping off again and that accused had such knowledge may reasonably be inferred from his presence with the company. . . . Under the circumstances the court was justified in its finding that he was aware of impending hazardous duty and that he absented himself with the design of avoiding it.

[60] Myhand, 16 E.T.O. 81 (1945).

[61] Bowles, 15 E.T.O. 307 (1945). See also May, 25 E.T.O. 11 (1945) ("temporary surcease from the perils ahead").

[62] United States v. Bryant, 13 C.M.R. 867 (1953); Spitzer, 27 E.T.O. 233 (1945) (trainee with service company as truck driver).

[63] United States v. Gendron, 3 C.M.R. 212, 215 (1952).

[64] Kenehan, 24 E.T.O. 378, 381 (1945), where the board declared that "it is immaterial that accused at the time of departure was in arrest in quarters."

[65] Camberdella, 5 N.A.T.O.-M.T.O. 245 (1945); Emory, 6 N.A.T.O.-M.T.O. 51 (1945); Romanowski, 29 E.T.O. 159 (1945).

the commission by him of the alleged offense of desertion."[66] As a leading board of review decision declared:

> Moreover, his restraint might at any time be directly terminated, or constructively terminated by an order to perform military duty or duties, hazardous or otherwise, inconsistent with his restraint. The termination of his restraint was a matter resting in the judgment of his commanding officer. Should the necessity arise, as it well might, that officer could immediately order accused into active duty of a hazardous nature directly or indirectly related to action against the enemy. . . . The imminence of hazardous duty for accused, who was immediately available for its performance at the time he left his place of duty without authority, as a practical matter was no less than it would have been for soldiers granted permission to sleep or rest in the cellar, or to stay there temporarily for any other purpose for an indefinite period. For soldiers in and near the front line of battle where manpower is always a vital and prime necessity, hazardous duty is ever present or imminent, regardless of the fact that they may be temporarily relieved from active participation in combat for a wide variety of reasons.[67]

The fallacy of the above cases is that they equate possible termination of accused's protective status based on speculation that accused's services might be needed so badly he might be restored to duty with probable termination based on facts which were known to the accused and which indicated clearly that termination was not merely possible but imminent. The above cases then go on to speculate that accused feared this possible termination and went absent to avoid the consequences. Such a rule perverts the requirement of imminence of duty to base the requisite inference on.

Of course, a status of confinement does not in law, any more than in fact, preclude the entertainment of the requisite intent; indeed, the accused may have a delusion. Nor does such status alter the rule that where the absence is for the purpose of evading a supposed duty of an important or hazardous nature, the accused is guilty of short desertion. What the status of confinement does is to reduce the probability that such duty is imminent, and by so doing reduce the proba-

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[66] Pergolizzi, 24 E.T.O. 65, 69 (1945). *Accord*: United States v. Mattox, 2 C.M.R. 361 (1952).

[67] Conklin, 18 E.T.O. 95, 99 (1945). See also Paxson, 19 E.T.O. 171, 176-77 (1945):

> In each instance when accused left without authority, he was in arrest of quarters by order of his company commander, inferentially pending court-martial trial for his prior absence or absences. The fact that accused was in a status of restraint pending trial did not render him immune from the hazardous duty of participation in operations against the enemy. . . . Before each absence he was present with his company, which was continually moving forward and attacking the enemy, and he was available, although in temporary arrest of quarters, for any duty, hazardous or otherwise, which his commanding officer might see fit at any time to impose upon him.

bility that the accused went absent to avoid combat below that sufficient to support an inference that this was the motivating purpose.

The vice in the above case is that if it proves anything, it proves too much. Certainly, manpower is a prime need at the front, and hence all soldiers can anticipate the possibility of combat; even those in non-combatant arms may be pressed into service in a desperate situation, as they have in times passed. But it does not follow that such service is either probable or imminent for them, and hence while it is possible that they went AWOL to avoid this type of duty, the degree of probability of AWOL to avoid a duty on the part of those not soon to be subject thereto is too slight to permit an inference from the absence alone that this was the motivating intent.

The same line of reasoning follows in the case of a soldier in confinement. Soldiers in line units are only put in confinement when their derelictions are of such gravity as to warrant withdrawing their services from their unit, and presumably the same manpower considerations which governed the initial decision to deprive the unit of the soldier's services will continue to obtain under the same circumstances. Hence, only a significantly changed, more desperate situation, could induce the accused's commander to terminate the restraint, and unless the accused is aware of this change of situation, a fact which must be demonstrated, he has every reason to believe that he will continue in his protective status. Since, therefore, the probability of termination is slight, an unauthorized absence does not prove that the accused went AWOL to avoid so slight a risk, and accordingly the above cases are not sound.

In addition to proving imminence of hazardous duty, the prosecution is required to prove that accused had knowledge of such imminence,[68] and actual, not constructive, knowledge is required.[69] Nor will a showing that during accused's absence his unit engaged in hazardous duty cure this defect.[70] The evidence of knowledge must be precise, and must pinpoint the facts giving rise to an inference of such knowledge on or before the date of the accused's departure.[71]

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[68] United States v. Tilton, 4 U.S.C.M.A. 120, 15 C.M.R. 120 (1954); United States v. Le Blanc, 2 C.M.R. 612 (1952); Cerrito, 27 E.T.O. 229 (1945).

[69] United States v. Stabler, 4 U.S.C.M.A. 125, 127, 15 C.M.R. 125, 127 (1954).

[70] De Carlo, 27 E.T.O. 151, 153 (1945); Israel, 26 E.T.O. 125, 127 (1945); Lee, 20 E.T.O. 15, 17 (1945); Ramirez, 18 E.T.O. 167, 169 (1945).

[71] Israel, 26 E.T.O. 125 (1945). See also King, 6 E.T.O. 1, 4 (1945):

> The only evidence that accused when he absented himself knew or had reason to believe that his organization was about to engage in such duty, consists of opinions and conclusions of the executive officer of his company as to "indications" and "common knowledge" of impending combat in the company. . . . There is . . . no proof in the record with respect to accused's presence in his unit either at the time of the "common knowledge" or "conversation" in regard

Vague testimony, such as the fact that the accused's unit was at the time he went AWOL in a defensive position,[72] or that he was at an unidentified rear command post,[73] or at S-1 rear,[74] is not sufficient in the absence of a showing that such place itself was either hazardous or because of its location conveyed the threat of future hazards.

The court-martial may, however, draw an inference that the accused had actual knowledge of impending hazards from circumstantial evidence.[75] Thus, for example, when a soldier is in a unit engaging in a well-known battle such as the Battle of the Bulge, judicial notice may be taken of the lines of battle and it may be inferred that he was aware of the normal incidents of combat activity.[76] Likewise, when a unit is small, the court may infer that knowledge of impending hazards disseminated to the whole unit was shared by the soldier who subsequently went AWOL.[77] And evidence that the defendant was close to the battle line will support an inference that he knew the meaning of the sounds which accompanied the fighting.[78] As one board declared:

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to prospective combat or at the time the battalion commander informed his command it "was going somewhere." Such vital facts in the prosecution's case are left to the imagination or at best to speculative inferences which are as exculpatory as they are inculpatory.

[72] Ramirez, 18 E.T.O. 167 (1945); Lee, 20 E.T.O. 15 (1945).

[73] Skuczas, 29 E.T.O. 7 (1945).

[74] Inzitari, 31 E.T.O. 327, 329 (1945).

[75] McFalls, 32 E.T.O. 11 (1945).

[76] Carlson, 17 E.T.O. 255 (1945); Podesta, 26 E.T.O. 397 (1945). See also Romanowski, 29 E.T.O. 159, 162 (1945), where the board declared: "His knowledge of the tactical situation may be inferred from his admission that he knew his organization was in the lines—which can only mean the lines of battle—and that he departed to avoid being sent there."

[77] Myhand, 16 E.T.O. 81, 84-5 (1945), where the board declared:

> In the instant case it was shown that the unit of which accused were members had been fighting near Hunningen, Belgium, for approximately three weeks. It was the regimental policy to rotate the units so that each battalion spent four days in the line followed by two days in the rest area after which it again returned to the line. Also, although the tactical situation at the front was static at the time and the platoon was occupying a defensive position, some twenty casualties had been suffered in the company from mortar and artillery fire during the preceding three weeks and it is thus evident that the orders or anticipated orders to return to the line involved hazardous duty.
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> . . . Lieutenant Forcade also testified that, in directing the platoon sergeant and platoon guide to inform the men of the order, he followed the method usually employed by him to get information to his platoon and which was normally sufficient to accomplish the purpose intended. This being true, and in view of the smallness of the unit, the physical proximity of the members thereof to one another, and the fact that at least two of the members of the squad knew of the order, the court might well have been justified in inferring that [accused] also had knowledge thereof.

[78] Toon, 24 E.T.O. 117, 120 (1945) ("While it does not appear that accused was told his company was in combat, the evidence discloses that his company was about a mile away being subjected to enemy artillery and mortar fire. In the absence of evidence to the contrary, it may be assumed that accused was aware of the bursting of the artillery and mortar shells and the meaning thereof"); Irwin,

> During combat, that there will be certain unmistakable battle activity in and around regimental installations is so self-evident as to be axiomatic within the military knowledge of line officers. . . . There had been the continued rapid movement of the campaign. There is also to be considered the fact that accused was then at an aid station within four miles of the front lines, where he could hardly have failed to see and hear friendly and enemy cannon and to observe the tenseness, the excitement of men, and the rush of traffic. They are the inevitable accompaniments of battle which at a regimental installation could not have been unobserved or misunderstood. Accused received notice of his assignment to a battalion section, which, as he must have known from experience, meant duties as a company aid man or litter bearer in close proximity to the front lines. Hazardous duty related to combat, of which he had knowledge and experience, was therefore imminent, and it may be inferred that he left with specific intent to avoid it.[79]

As an alternative to imminence of hazardous duty, an intent to avoid such duty may be inferred when accused is absent so long that he must have known both that he would be ordered on hazardous duty and would avoid it by the long period of unauthorized absence.[80] Such an inference can only be drawn with caution, and is warranted only in the clearest cases, because the changing circumstances of military duty make it at best difficult to predict with any degree of certainty that a particular individual will have to engage in hazardous duty unless such duty is imminent, and hence the probability that a person would leave to avoid non-imminent hazardous duty which he might never have to face, thus subjecting himself to punishment for AWOL unnecessarily, is equally diminished. The temptation to use hindsight, which is strong in such a case, must be resisted, and only if the evasion of duty appeared reasonably certain to follow as a consequence from the AWOL can the inference be drawn. However, where hazardous duty recurs on a fixed schedule, the inference may be drawn although the duty is not imminent. Thus, in one case where an accused, who was a member of a bomber crew, went AWOL for a period beyond the normal interval between missions, the board said:

> Another consideration weighs against accused. Shortly before he absented himself and in the same conversation in which he told the co-pilot that he intended to quit flying, accused stated "I will

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21 E.T.O. 233, 235 (1945) ("All the military world knows, there was not a possibility that accused could be at a battalion command post within four kilometers of battle and not know of the existence thereof").

[79] Pittala, 17 E.T.O. 131, 133-34 (1945).

[80] Wallrath, 66 B.R. 71, 715 (1946). See MANUAL FOR COURTS-MARTIAL §164a, 314-15 (U. S. Army, 1951), where it is stated that the inference of intent to avoid duty may be drawn if "the period of his absence was of such duration and under such circumstances that the accused must have had reasonable cause to know that he would miss a certain hazardous duty or important service."

see you in a couple of weeks in the guardhouse, maybe. I am taking a vacation." The court could reasonably have found that the period of absence he contemplated was so long that as an experienced member of a combat crew, aware of the frequency of his previous missions, he knew that he would miss flying on a combat mission during such absence.[81]

In addition to those circumstances mentioned above which would tend to show that accused entertained the specific intent to avoid combat, the court must of course take into consideration those items of evidence which give rise to a contrary inference. Foremost among such items is the fact that accused volunteered for the hazardous duty,[82] for it is unlikely that a person would seek to avoid duty unless he had an aversion thereto, and people do not normally volunteer for duties they do not want to engage in.

Also of significance is the fact that the defendant returned before the hazardous duty commenced,[83] or had planned to do so.[84] Likewise, an inference of motivating aversion to combat is dispelled when the accused voluntarily returns during the pendency of the duty he is charged with seeking to avoid.[85] Thus, one case relied upon the fact that accused "returned of his own volition while the possibility of combat continued,"[86] while another declared:

The probability of a submarine attack appears to have been equally

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[81] Urban, 12 E.T.O. 1, 5-6 (1944).

[82] United States v. Shull, 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952); *cf.* Goulet v. The Queen, 1 Can. Ct. Mar. App. Rep. 19 (1952). See also United States v. Logas, 2 U.S.C.M.A. 489, 9 C.M.R. 119 (1953); United States v. Perry, 10 C.M.R. 387 (1953).

[83] United States v. Gendron, 3 C.M.R. 212, 215 (1952).

[84] See Pratt, 12 B.R. 365, 367 (1942), where the Board said:

There is no evidence in the record that accused quit his organization with intent to shirk any service, nor are there any circumstances in evidence from which such an inference may be drawn. On the contrary . . . accused intended to return to camp after buying some Christmas presents and seeing a girl. The accused had gone from Fort Hancock, Texas, within one mile of his duty station, to the place where he was taken into custody in a little over two hours. It may reasonably be inferred that the return trip to camp would take no longer. The accused had no duty of any character to perform until six o'clock on the morning of December 22nd, when he again was to go on a twelve hour patrol. These circumstances are consistent with an intention on the part of accused to return to his organization in time to perform the next duty required of him, and entirely fail to show that the accused quit his organization with intent to shirk important service.

[85] Brown, 16 E.T.O. 89, 92-3 (1945):

The record as a whole strongly tends to negative the inference of an intent to avoid hazardous duty. It is uncontroverted that when he left regimental headquarters he was on his way back voluntarily, to his unit following the completion of his assigned mission. He had discharged his share of the burden of combat prior to his absence, he voluntarily surrendered at the end thereof and was immediately restored to his own squad with which he performed creditably in further extensive combat operations. Accused's denial of an intention to avoid hazardous duty is consistent with the evidence.

[86] Frank, 13 B.R. 109, 110 (1942).

> as great at the time the accused returned to his organization as during the time of his absence. Furthermore, there is no evidence that the accused had showed any fear of such an attack or any desire to avoid his duties in connection therewith. On the contrary, the fact that permission was given to seven men at a time to be on pass in the town, together with the fact that the commanding officer was engaged in activities incident to the relief of the organization, indicates that the organization was probably under less apprehension of an attack on March 2nd, than when it assumed the defense of Bandon. This fact in turn tends to repudiate the existence of fear on the part of the accused of an impending, hazardous military duty or the existence of an intent to avoid such duty.[87]

As noted above, timing of an absence so that it results in evasion of duty is significant circumstantial evidence that this was the purpose of the absentee. By a parity of reasoning, timing of the absence so that it occurs after the hazardous duty terminates should be strong evidence that the defendant did not go AWOL to avoid combat. This issue was raised in one case where accused went absent without leave from his unit after it had been withdrawn from combat on the front line for reorganization in a rear assembly area. The board noted that if accused's intent was to avoid combat "it seems strange, at first glance, that he would have chosen the very moment when the hazards appeared to be on the decrease rather than on the increase," but sustained the finding of intent to avoid hazardous duty on the ground that the respite was only temporary, and combat loomed ahead once again.[88] Were it not for the fact that accused knew he would shortly have to face hazardous duty once again, it would seem this inference would be unsupportable, but as it is, the decision is not an unreasonable one, because the imminence of recurrent duty deprives the respite of probative significance it would otherwise have.

SIGNIFICANCE OF EVASION OF EMBARKATION

The legislative history of short desertion shows clearly that while embarkation as such was not considered to be within the ambit of the statute, evasion of embarkation was considered as evidence from which a court-martial could infer that an accused intended to avoid hazardous duty or shirk important service if he had reasonable grounds to believe that such duties would fall to him upon arrival at the overseas destination. Viewed from this angle, intent to evade embarkation is of much significance in the law of short desertion. But, as will be demonstrated below, this significance lies in its evidentiary value, rather than as an element of the substantive crime.

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[87] Calvin, 13 B.R. 113, 116 (1942).
[88] Martin, 19 E.T.O. 395, 396 (1945).

The earliest draft of the short desertion statute, Article 55 of the Ansell-Chamberlain Bill of 1919, punished as a deserter one who absented himself from his unit or place of duty "with intent to avoid hazardous duty."[89] General Crowder commended this section of the bill during his testimony before the Senate Subcommittee considering revision of the Articles of War and said that it provided for "creation of what the British call short-time desertion."[90] He declared that "if we had had a statute of that kind, these more than 14,000 men that were absent at Hoboken at the time they were expected to embark could have been tried for short desertion, or an abandonment of the command at a time of perilous duty."[91] Since the 1920 Articles of War reflect General Crowder's views,[92] it is clear that the above statement must be taken to reflect the policy of the statute.

This statement shows that mere embarkation itself was not the object of the statute. There was nothing perilous about embarking at Hoboken in 1918. Nor were sea voyages themselves considered dangerous. The statute would never have been proposed or passed to punish with death soldiers adverse to taking ocean trips; it is absurd to believe that Ansell, with his well-known tenderness toward absentees, could have drafted such a provision, or Crowder could have approved it.

It is clear that General Crowder was concerned with the special circumstances under which embarkation was being evaded,[93] and these special circumstances were that the troops were being sent overseas into combat. It was not the embarkation as such that was perilous, it was the fighting in France. By the same token, it was not the embarkation that was important, it was the combat activity and service imminently connected therewith and in support thereof in France. General Crowder was not concerned with those troops who

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[89] *Hearings Before a Subcommittee of the Senate Committee on Military Affairs*, 66th Con., 1st Sess., on S. 64, *A Bill to Establish Military Justice*, 14 (1919).

[90] *Id.*, at 1162.

[91] *Ibid.*

[92] Memorandum of General E. H. Crowder, Judge Advocate General of the Army, August 2, 1920, p. 3, to be found in the Crowder Papers, Western Historical Manuscripts Collection, General Library of the University of Missouri, Columbia, which states that the Senate amended the Ansell-Chamberlain Bill by "striking out *the entire measure following the enacting clause* and substituting therefor the text substantially as it appears in the law as passed, a text prepared very largely in my office, reflecting my own views and recommendations and rejecting the vitals of Senator Chamberlain's proposed revision."

[93] Letter from General E. H. Crowder, Judge Advocate General of the Army, to Congressman Julius Kahn, Chairman of the House Armed Services Committee, July 7, 1919, p. 2, found in the Crowder Papers, *supra*, note 92, stating:

> Absence without leave at a Port of Embarkation or immediately prior to embarkation operates to disintegrate an army and might lose a campaign; while absence without leave from a training camp might be, comparatively speaking, a trivial offense. . . . Would not these limits of punishment prove most inadequate and invite disintegration of the Army under the special circumstances prevailing at our Ports of Embarkation during this war?

objected to being tourists, but with those who would not fight on foreign soil and who found evasion of embarkation the most effective means of effectuating such intent. For it has been rightly observed: "The fact is that the best way for a serviceman to avoid the hazards of duty in a combat zone is to absent himself from the service before he is sent overseas to that zone."[94]

World War I, it must be remembered, was the first major overseas war America fought. Prior to that, soldiers who desired to avoid fighting could not do so by evading transportation with their unit to a combat area because the fighting areas were so close by that they could have been sent forward at any time.[95] However, once it became necessary to ship men overseas, if a soldier missed a shipment he was assured of a substantial delay until the next shipment was made. Each such delay caused by unauthorized absence delayed the period of time when the soldier could be sent into combat, and consequently reduced both the time he would spend in combat and the probability that he would see combat or any overseas duty at all since the war might end before he was shipped. Accordingly, evasin of embarkation became the most efficient means of avoiding hazardous duty.

Moreover, there was another incentive to evade embarkation. Until a soldier is definitely scheduled for embarkation, he does not know that he is going to be sent into combat; it may be that he will spend all of his time in the United States. Once, however, he is so scheduled, he knows he is going into a combat zone, and his chances of seeing actual fighting are much enhanced. Hence, if he desires to avoid combat, he must choose between evasion of embarkation and going AWOL once he arrives overseas. Of the two alternatives, evasion of embarkation is much more likely to effectuate his plan. If the soldier goes AWOL in a foreign country, he can easily be identified by his accent, and if the people there do not speak English, or are of a different race, it will be difficult for him to obtain a job to support himself, or conceal himself in the general civilian population. However, if he goes absent without leave and avoids embarkation, he can fade into the civilian populace, find his way around, get work, and otherwise prevent detection. Accordingly, as a means for avoiding overseas duty, evasion of embarkation is undoubtedly the most effective scheme. As one board of review has declared:

The specification describes the "hazardous" duty which the ac-

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[94] United States v. Olson, 11 C.M.R. 613, 617 (1953).

[95] See LONN, DESERTION DURING THE CIVIL WAR 165-79 (1928). *But see* 163-4: "So determined were [bounty-jumpers] never to face the enemy's guns, that some of them would make the attempt after they had seen their comrades actually shot as they broke the ranks while being marched from the station to the wharf at some terminal."

cused sought to avoid as "entrainment for a port of embarkation." Although such an entrainment, as a separate incident, cannot reasonably be regarded as hazardous, as the first step toward embarkation for foreign service, it obviously did involve hazardous service. Since . . . the service which was actually avoided by the absence of the accused [actual landing operations] was hazardous, the deficiency in the specification is immaterial.[96]

Numerous cases illustrate how evasion of embarkation to a combat area has been used to avoid participation in combat.[97] In one, for example, accused was charged with absence without leave with intent to avoid hazardous duty as part of a landing team. Accused with his unit had helped to load waterproofed equipment on shipboard and had eaten and slept on the ship to which he was assigned. Less than a day before the ship sailed, accused absented himself. It was held that "although the destination of the organization . . . had not been revealed to the accused, he must have known that the organization was preparing to depart . . . for some type of hazardous duty," and hence the inference was justified that the accused's purpose was to evade such duty.[98] Likewise, in another case, where a rifleman went AWOL from a unit after company vehicles had been waterproofed and loaded on shipboard and "when it was obviously preparing for an amphibious operation and embarkation was imminent," a board of review held the inference warranted that at the time accused absented himself he "knew hazardous duty in the form of combat with the enemy was imminent" and that he intended to avoid such combat.[99]

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[96] Sapp, 15 B.R. 379, 381 (1943).

[97] Domingos, 25 E.T.O. 221 (1945); Roberts, 23 E.T.O. 63 (1945); Brigriglio, 19 E.T.O. 283 (1945); Russo, 19 E.T.O. 71 (1945); Giombetti, 17 E.T.O. 345 (1945); Carey, 11 E.T.O. 293 (1944); Heppding, 5 E.T.O. 77 (1944); Boros, 4 N.A.T.O.-M.T.O. 415 (1944); Becerra, 4 N.A.T.O.-M.T.O. 393 (1944); Kemmerer, 4 N.A.T.O.-M.T.O. 171 (1944); Hanson, 4 N.A.T.O.-M.T.O. 39 (1944); Frain, 3 N.A.T.O.-M.T.O. 335 (1944); Clementi, 3 N.A.T.O.-M.T.O. 23 (1944); Wilson, 3 N.A.T.O.-M.T.O. 5 (1944); Garner, 3 N.A.T.O.-M.T.O. 1 (1944); Librandi, 3 A.-P. 201 (1945); Olson, 1 A.-P. 141 (1943); Valdes, 1 A.-P. 51 (1942).

[98] Hammock, 16 B.R. 275, 277 (1943). See also Rehm, 4 N.A.T.O.-M.T.O. 131, 133 (1944):

There was evidence that at the times alleged . . . accused's company was in a staging area on a status of alert, where its vehicles were being waterproofed and preparations were under way for trans-shipment by water to a new combat zone, the Anzio Beachhead. It was commonly known among the men that amphibious landings had been made by American troops at nearby Anzio and that engagements with the enemy were in progress there. It was shown that accused did not voluntarily return to his command after his first absence but was apprehended and returned to his unit where he again absented himself without leave before the organization sailed.

[99] Martin, 4 N.A.T.O.-M.T.O. 421 (1944). And in Boggs, 33 E.T.O. 321, 323 (1945), the board of review declared:

The court was . . . justified in inferring that he . . . departed to avoid hazardous duty. . . . He had disappeared a few days previously when about to be taken from England to France during war time when actual combat was taking place in France. On 5 January he knew he was again to be taken to France. He was under arrest. His unexplained absence extended over a period of 6 months.

Where an accused has been informed that he is being shipped overseas to perform particular hazardous or important service, there is no problem of finding an intent to evade such service from the evasion of embarkation. A more difficult problem is presented when the accused's destination and duties are secret, and therefore not revealed to him, as so often happens in the military,[100] or where he has as yet not been assigned to specific duties. In such situations, were it necessary to prove that the accused in fact was going to be assigned to hazardous or important service, and that he went absent with knowledge of such duties, many clear cases of intent to evade embarkation could not be charged as short desertion because neither accused nor the court-martial trying him knows as a fact precisely where the accused is going or what he is going to be doing when he gets there. Indeed, in a sense one can never know since it is always possible that although the accused seems clearly destined for important service, the exigencies of the service will divert his activities at his destination point from hazardous or important duty to routine activity. However, this problem is not presented because proof of intent to avoid such service, as distinguished from proof that such service was in fact avoided, is all that is required. And in the typical case of evasion of embarkation, intent to avoid embarkation forms the basis for inferring intent to avoid such service.

United States v. Clancy[101] serves as good illustration of this point. There, accused was placed on a transfer list for shipment to a "tropical climate" and orders were issued directing him to proceed to Camp Stoneman, California, a staging area for shipment to the South Pacific. In addition, his unit received an A.P.O. number, indicating shipment overseas. The accused likewise was orally told of this. He then went AWOL once, was picked up, and again immediately thereafter absented himself, thus indicating an intent to avoid embarkation.

The board, of course, did not know precisely where accused was destined for, and neither did he. But both did undoubtedly know that many American troops were being sent to the South Pacific for combat and other important service, and when a soldier evades embarkation for a theater where there is a reasonable chance that he is going to be ordered to perform important service, in the absence of a cogent and compelling explanation of some other intent, it is reasonable to infer that the accused had as his purpose for evading embarkation the further intent to avoid hazardous or important service which he feared he might be ordered to engage in. Indeed, unless it can be assumed that the soldier does not like being in a foreign

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[100] See Pennington, 6 E.T.O. 351, 355-56 (1944).
[101] Clancy, 29 B.R. 215 (1943).

country at all, an explanation sufficiently unlikely in the average case to warrant rejection without strong supporting evidence, and unless another explanation can be given, intent to avoid unpleasant important or hazardous duty would seem to be the only motive which could reasonably be inferred. Accordingly, intent to avoid hazardous or important service can logically be inferred in the typical embarkation evasion case from intent to avoid embarkation.

The rule that evasion of embarkation is evidence of intent to avoid service ultimately to be performed on arrival rather than the shirking of important service in itself results in obviating another problem, that of a mere delay in overseas movement. Obviously, if the taking of a sea voyage is the important service avoided, then if the accused will but evidence his intent to take the trip two years later, he cannot be convicted of short desertion because at no time did he ever intend to avoid the trip, but merely to postpone it.

An Air Force board of review was faced with this problem in *United States v. Gorringe.*[102] There, an airman went AWOL with intent to delay or postpone his shipment to Europe, but with the ultimate intent to go. The board, faced with the problem of detecting an intent to shirk the important service of shipment, when the evidence indicated that accused did in fact intend ultimately to go overseas, and merely wanted a postponement, twisted and distorted the word "shirk" until it no longer meant "avoid" but was stretched to mean "delay." After relying on two inapplicable cases, in one of which the sailors shirked work by doing less of it, and in the other the soldier avoided seven days of combat, the board declared: "Temporary delaying tactics cannot be permitted. The delayed performance of such important service may result in losses vital to the nation."[103] Based on this rationale, the board affirmed the conviction for desertion.

If the important service shirked is deemed to be the sea voyage, the result is patently absurd. It can be of no consequence to anyone, (except for space availability factors) whether the accused takes his ocean trip at the time he is scheduled for it or three years later. Such duty is of no more consequence than a routine medical examination, or the completion of routine forms, or a host of other routine duties. Indeed, a sea voyage per se is most closely analogous to a mere training mission, which has never been considered "important." Accordingly, by postponing a cruise the defendant is neither shirking duty, nor is the duty important.

If, however, it is the duty to be performed overseas which is important, then the result makes sense. By postponing the voyage ac-

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[102] 15 C.M.R. 882 (1953).
[103] *Id.*, at 893.

cused misses, pro tanto, the duty to be performed at his destination. A soldier who arrives at the scene of battle after his comrades have won the war is not exculpated from a charge of avoiding important service merely because he eventually puts in an appearance. And if he intentionally arrives after half the battle is over, he has shirked the first half of the engagement. Moreover, since the statute proscribes shirking service, and does not provide for any minimum quantity or time of duty shirked, any postponement whereby accused misses some duty is desertion. Accordingly, if a soldier intentionally seeks to postpone shipment so as to avoid some important service overseas, he is guilty of short desertion.

The inference of intent to avoid ultimate duty through evasion of embarkation must be predicated on a reasonable possibility that the accused will be required at his destination to engage in important or hazardous service. The mere fact that someone at the overseas station can be found who engages in such duty does not mean that it may be assumed that there is sufficient likelihood that accused will be doing so to warrant the inference that accused intended to avoid this duty by stateside absence. Most people seek to avoid duty only when the possibility that they will be called upon to perform it is substantial. In addition, where the accused knows what his duty is, if the duty is not hazardous or important, intent to evade the duty or embarkation generally will not be short desertion. But if there is a significant possibility that the absentee will be required to perform important or hazardous duty at his destination, and he evades transportation thereto, the inference that he intended to avoid such ultimate duty by evading transportation to the place where it was to be performed is warranted.

INTENT TO AVOID EMBARKATION

Proof of intent to avoid embarkation through circumstantial evidence involves many of the same steps as proof of intent to avoid combat. The two basic elements on which the inference generally rests are imminence of overseas duty and knowledge of such imminence, so that the accused knew that his absence would result in avoiding the duty.[104]

To be imminent, overseas shipment must be more than merely probable. It must be threatening to occur immediately. It is not sufficient that such shipment is more likely than not to happen; it is also requisite that the likelihood is impending at the time of ab-

[104] Hodge, 43 B.R. 41 (1944). See Walkup, 19 B.R. 49 (1943). The knowledge required is, of course, actual knowledge. United States v. Stubler, 4 U.S.C.M.A. 125, 15 C.M.R. 125 (1954).

sence.[105] The reason for the rule is that where an accused is at a replacement depot or staging area and faced with reasonable prospects of going overseas in the not too distant future, he may absent himself for any number of reasons other than to avoid embarkation; it is only when he has reason to believe that his embarkation is imminent that it can reasonably be inferred that his absence was with the specific intent to avoid it.[106]

The major issue as to imminence of embarkation has arisen in cases where a soldier has been transferred to an overseas replacement depot or staging area and has thereafter gone AWOL either before or upon arrival at the area. It has been uniformly held that such transfer, or entrainment therefor, is not sufficient in itself to show that overseas embarkation was imminent.[107] The reason for the rule is that the accused might have remained at the replacement depot for an indefinite period of time before he, or the unit to which he was eventually assigned, was selected for transfer to a port of embarkation. Accordingly, such transfer would be, in the absence of any additional showing of imminence, merely "preparatory" and not sufficiently probative to support an inference of intent to avoid embarkation.[108]

Of course, additional facts may support a finding of imminence of embarkation even at a preparatory stage of movement. Thus, rapid preparations for shipment will be probative of this fact.[109] For example, in one case new equipment appropriate for combat landing was issued to accused's unit; it made practice combat landings; and it worked night and day to receive and ship its equipment so that it would be fully equipped for combat within 48 hours. It was held that this showed that embarkation was imminent, and accordingly that accused, who went AWOL just prior to embarkation, did so to avoid such embarkation.[110] Likewise, where the circumstances surrounding the entrainment indicate a substantially continuous movement through a port of embarkation and on to an overseas destination, evasion of such entrainment will indicate intent to avoid embarkation.[111]

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[105] Rose, 43 B.R. 377, 378 (1944).

[106] Uyechi, 45 B.R. 233, 237 (1945).

[107] Moore, 41 B.R. 43 (1944); United States v. O'Connor, 1 (A.F.) C.M.R. 436 (1949); Kallenberger, 4 J.C. 441 (1949); Johnson, 67 B.R. 325 (1947); Mugan, 43 B.R. 231 (1944); Hodge, 43 B.R. 41 (1944); Lewis, 42 B.R. 19 (1944).

[108] Closson, 44 B.R. 235, 238 (1944); Pattillo, 42 B.R. 41, 42-3 (1944).

[109] Cantwell, 7 E.T.O. 55, 57 (1944); McElroy, 16 B.R. 161, 163-64 (1943).

[110] Sapp, 15 B.R. 379 (1943).

[111] Green, 47 B.R. 191, 193 (1945), where the board of review declared: "The movement was not preparatory, but a part of the actual progression of movement overseas, after preparation was completed at the Replacement Depot. The circumstances were sufficient to apprise the accused that embarkation for overseas service was imminent and that his absence would avoid it. The case is thus sharply distinguished from recent cases involving movements to Replacement Depot "Preparatory for Overseas Replacements."

To prove an intent to avoid embarkation through circumstantial evidence, it is also necessary to show knowledge on the part of the accused of the imminence of embarkation.[112] Such knowledge cannot be inferred from the fact, standing alone, that accused was placed on orders for embarkation, even when the order contains a distribution code which would normally include him,[113] for "while such special orders expressly provided for distribution thereof to the accused, there was no showing that such distribution had been actually effected or that the accused had knowledge of such orders."[114] Nor can such knowledge be inferred from the fact that accused was a member of an organization which was scheduled to move overseas,[115] for a soldier is generally not "informed of the normally secret detailed plans and orders for the movement."[116]

In several cases attempts have been made to cure this deficiency by alerting accused's unit and reading them a so-called "desertion letter." For example, in one typical case,[117] accused went AWOL for 6 days in England after having been read a letter which stated that his unit was alerted and under orders to participate in the invasion of Europe, that this operation would be both hazardous and important, within the meaning of Article of War 28, and that any AWOL would be deemed desertion. He stated that he knew his unit was going but "did not look for them to move for quite a while" and "figured that if they moved they'd move" at a later date. He stayed in a nearby town and intended to return to his unit.

The board of review rejected the prosecution's "argumentative inference" that since the accused had received actual notice of the status of his unit as under orders for invasion and then went AWOL on the day following this notice, it could be inferred that he did so to avoid invasion. It declared:

> In the instant case the accused's unit was under invasion orders and was alerted for such purpose, but it remained at its station during accused's absence and accused did not miss any engagement or important duty. The record does not indicate any preparations for forward movements which put the accused on notice

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[112] United States v. Vick, 3 U.S.C.M.A. 288, 12 C.M.R. 44 (1953); United States v. Yoshikama, 14 C.M.R. 465 (1953); United States v. Johnson, 11 C.M.R. 844 (1953); United States v. Begshaw, 9 C.M.R. 383 (1953); United States v. Hensley, 8 C.M.R. 197 (1953); United States v. Hunton, 7 C.M.R. 110 (1952); United States v. Hutton, 6 C.M.R. 442 (1952); United States v. Walling, 1 C.M.R. 145 (1951); Nigg, 2 E.T.O. 1 (1943); Thomas, 34 B.R. 141 (1944); Webster, 16 B.R. 167 (1943); Wicklund, 15 B.R. 299 (1942); Henning, 14 B.R. 281 (1942).

[113] United States v. Knapp, 13 C.M.R. 744 (1953); United States v. Hobson, 12 C.M.R. 824 (1953).

[114] United States v. Hooper, 7 C.M.R. 148, 149-50 (1952).

[115] McGrath, 18 B.R. 53, 55 (1943).

[116] Collins, 49 B.R. 217, 219 (1942).

[117] Newton, 7 E.T.O. 65 (1944).

> that it was imminent and the time of such movements remained indefinite and uncertain. The relevancy of these facts cannot be ignored in searching for accused's intent.[118]

And several other cases have overturned a conviction for short desertion based on the attempt by the accused's unit to establish its case in advance by reading the accused a "desertion letter,"[119] especially when the accused demonstrated another motive for his absence, such as a desire to visit a girl friend,[120] or fear of being sent to a mental hospital,[121] or indicated an intent to return shortly, such as by leaving money with a fellow soldier for safe-keeping.[122]

Knowledge of the imminence of embarkation on the part of the absentee cannot be proved by showing that this was "common knowledge" in his unit,[123] that there were "recurrent rumors of departure" in his organization,[124] or that departure "was the subject of much dis-

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[118] *Id.*, at 74.

[119] Armas, 46 B.R. 319 (1945); Hodge, 43 B.R. 41, 45 (1944); Moran, 34 B.R. 265 (1944); Pennington, 6 E.T.O. 351, 357 (1944). Compare Clancy, 29 B.R. 215, 221-22 (1943), where under the circumstances the reading of a "desertion notice" was held to be an incriminating factor.

[120] Gray, 9 E.T.O. 119, 127 (1944).

[121] De Carlo, 18 E.T.O. 125, 129 (1945):

> Proof that he absented himself without leave on 2 May after he received notice from the reading of the letter dated 21 April that his organization was under orders to participate at some indefinite future time in the invasion of the continent, was alerted for that operation, and that the operation would constitute hazardous duty and important service, does not, without more, furnish the necessary probative basis from which may be inferred the ultimate fact of intent to avoid such duty or service . . . [Accused] stated that he did so to avoid being sent to a mental hospital for treatment and gave a factual basis for believing he was about to be sent to such hospital. This was introduced by the prosecution and was neither inherently improbable nor refuted by the other facts in evidence. The prosecution, therefore, failed to prove one of the essential elements of the offense charged, namely, the specific intent to avoid hazardous duty or to shirk important service.

[122] Durie, 6 E.T.O. 379 (1944), where the board of review declared at p. 385: "Proof that accused went absent without leave when his battery was on an alert status after he received notice that at some indefinite future time it was intended that it should participate in a continental European invasion, without more, does not furnish the required probative basis from which may be inferred the ultimate fact of intent."

[123] Barfield, 30 E.T.O. 183, 185-86 (1945). See also United States v. Marcum, 2 (A.F.) C.M.R. 855, 861 (1950).

[124] Sfer, 44 B.R. 317, 319 (1944); Crowley, 14 B.R. 9, 12 (1942); *cf.* Fragassi, 13 B.R. 329, 331 (1942). In *Sfer*, the board declared:

> Although Camp Anya, where the organization of which the accused is a member was formed, and Camp Ross, where it completed its training, are both in the area of Los Angeles Port of Embarkation at Wilmington, California, the organization had been there in training from April to August. It is not shown that its embarkation was in fact then imminent, or that it ever did embark. Still less is knowledge thereof imputed to accused. An announcement in April that the organization would train for overseas duty and then have a last furlough followed by a required reading of the Articles of War, some time in July and furlough notices posted on the bulletin boards the last of July, along with recurrent rumors of departure over an indefinite period of time, do not, either in law or in fact, so charge the accused with notice of imminent embarkation as to render unreasonable any hypothesis explaining his absence except that of intention to avoid overseas service.

cussion" in his group[125] without showing that he partook of this information. Likewise, it is not sufficient to show that the absentee's organization had been restricted to short term passes,[126] that it was making routine dispositions preparatory to departure overseas at some future time,[127] or that accused "supposed" his organization was going to move "at some time."[128] As a board of review declared in one case:

> There is nothing in the evidence from which it may reasonably be inferred that accused knew that the embarkation of his organization for overseas duty was imminent, or that his absence would result in his avoiding embarkation. It was not proved that accused was present on any of the occasions when the members of his company were informed, at formation, that they were to depart for overseas duty, or when the communication was read to the company as to the effect of absence without leave at the time of embarkation. In fact, accused, because he was a cook, did not ordinarily stand formation. There was no evidence that the warning that the company was about to leave for overseas duty, and the fact that an order had been issued directing that one barracks bag should be kept packed for embarkation, was ever brought to the attention of accused. The mere fact that accused was then a member of the organization concerned is not sufficient to provide a reasonable inference that he knew of the contemplated movement, nor was the fact that he absented himself approximately one week prior to the embarkation . . . sufficient to establish such an inference of knowledge by accused that embarkation was imminent. The company had been alerted three times before. The alert had been terminated and passes were then issued. It was not established in evidence that this particular alert was more likely to result in actual embarkation than those which had previously occurred. This alert was also terminated, and accused was then granted a pass.[129]

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[125] Sheffler, 18 B.R. 59, 62 (1943).
[126] Fragassi, 13 B.R. 329 (1942); *cf.* Neville, 2 E.T.O. 135 (1943).
[127] Collins, 49 B.R. 217, 219 (1942).
[128] Sinclair, 18 B.R. 153, 157 (1943).
[129] *Id.*, at 156-57. And in Armas, 46 B.R. 319, 324 (1945), the board of review declared:

> It is apparent that, in the absence of direct evidence of the accused's intent, the evidence must leave no reasonable doubt that the departure is actually immediately impending and that the accused knew, or had reason to know and accordingly believed, this to be the situation, in order to justify an inference that his absence was designed to avoid overseas movement.
>
> The facts of this case fail to measure up to this standard. The evidence leaves no doubt that the purpose of the crew's presence at Hunter Field, a staging wing, was to prepare to proceed overseas, and that early movement was contemplated, and that these facts were made known to the accused. However, it was equally clear that there would be some delay in actual departure and that such departure would not occur immediately upon the expiration of the seven days' furlough granted the accused. He knew that the dental work required by the bombardier was expected to take eleven days. It was not unreasonable for him to assume that final preparations thereafter would consume some brief period before actual departure. No orders fixing the time for the movement had been issued, and a tone of uncertainty as to the actual time pervaded the circumstances of the case. Furloughs were granted for travel to distant points, including California. The accused was told to

Where knowledge of imminent embarkation on the absentee's part is lacking, other circumstances which might indicate an intent to avoid overseas service will generally not be held to be sufficient to warrant this inference. Thus, an attempt to commit suicide,[130] a dislike of the military service,[131] or the theft of an automobile to get away in were all held to be "as consistent with innocence of the offense charged in this specification as with guilt thereof."[132] As the board declared in the last-mentioned case: "Any inference that he . . . intended to shirk important service, by subjecting himself to the possibilities of confinement for his larceny, is at best a suspicion, conjecture or speculation upon which we cannot premise a finding of guilt of the offense charged."[133] This result is also reached when the accused goes AWOL after the shipment has already left.[134]

Knowledge of the imminence of overseas shipment may be shown by the fact that the accused was given copies of his orders sending him overseas,[135] was informed that his unit was "hot for combat,"[136] saw his name on a particular shipping list in embarkation orders or his unit's combat equipment being loaded on shipboard,[137] witnessed feverish preparatory activities prior to departure,[138] or drew supplies immediately preparatory to departure.[139] The inference of intent to avoid embarkation may be based on such knowledge of imminent de-

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apply for an extension of his furlough if he should need it, and then told not to do so, as it would not be granted, but rather for reasons of policy than for any disclosed specific purpose. He was required, along with all his crew mates, to sign a mimeographed statement that he understood that his furlough would not be extended and he would be ordered out on hazardous duty and important service practically immediately upon his return, and that failure to return might be held a violation of the 28th Article of War. However, outside of any consideration of the unconvincing and inconclusive character of such routine and stereotyped warnings, however seriously intended by their authors, the signing of this document preceded the actual discussion of a possible extension of the furloughs, as the pilot found it necessary to refer thereto after the furloughs were issued and after the bombardier had suggested such extensions. The effect of the certificate was offset by other circumstances, and rendered inconclusive.

[130] Moran, 34 B.R. 265, 268 (1944).

[131] United States v. Marcum, 2 (A.F.) C.M.R. 855, 862 (1950).

[132] United States v. Mathis, 12 C.M.R. 590, 592 (1953).

[133] *Ibid.*

[134] *Ibid.;* United States v. Priest, 10 C.M.R. 486 (1953).

[135] United States v. Vick, 3 U.S.C.M.A. 44, 12 C.M.R. 44 (1953); United States v. Thomason, 3 C.M.R. 797 (1952). See also United States v. Willingham, 2 U.S.C.M.A. 590, 10 C.M.R. 88 (1953), where it was held that circumstantial evidence showed that accused received a copy of his transfer orders.

[136] Murphy, 10 J.C. 130, 132 (1950), reversing Murphy, 10 J.C. 125 (1950).

[137] Armas, 46 .R. 319, 323-24 (1945); Cantwell, 7 E.T.O. 55 (1944).

[138] Sapp, 15 B.R. 379 (1943); McElroy, 16 B.R. 161 (1943).

[139] United States v. Cannon, 3 C.M.R. 281, 284 (1952); Cantwell, 7 E.T.O. 55 (1944).

parture and an unauthorized absence which results in accused's avoidance of the shipment.[140]

Of course, the inference of intent to avoid embarkation from an absence without leave right before a known shipment can be strengthened by other circumstantial evidence. For example, in one case accused's desire "to avoid going overseas with the shipment to which he was assigned and which he knew was about to depart is fully evidenced by his insistence . . . that he was physically disqualified and the persistence with which he endeavored to obtain medical support for his contention."[141] And in another case, where the accused had gone AWOL after being notified that his efforts to gain exemption from overseas duty had failed and he was to be sent to Korea, the Canadian Court Martial Appeal Board found the inference of intent to avoid shipment to Canadian combat forces in Korea sustained by the following circumstances:

> He hears the warning of the Officer Commanding . . . ; he refuses to sign the warning order because he could have been charged as a deserter in case of absence; he takes advantage of the leave privileges granted only to those who are about to leave; he refrains to draw the necessary equipment at the Quartermaster stores; he tries to avoid medical preparations; he absents himself when he knows that the whole detachment must stay in barracks on the eve of the departure; he knows about the departure of the detachment and misses it; he admits not to have notified anybody for fear of one coming to pick him up.[142]

A defendant may, of course, rebut the inference of intent to evade embarkation through a timely absence. He may show that he did not believe he would go at once,[143] and that he had other motives, such as assisting a sick relative,[144] or visiting friends.[145] It has also been held that the fact that accused believes he is in a "hold" status will overthrow any inference from such circumstantial evidence,[146] as will the fact that the absentee volunteered for the overseas duty he is charged with shirking.[147]

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[140] United States v. Hemp, 1 U.S.C.M.A. 280, 3 C.M.R. 14 (1952); United States v. Justice, 14 C.M.R. 669 (1953); United States v. Mischke, 8 C.M.R. 481 (1952); United States v. Aikman, 8 C.M.R. 199 (1953); United States v. Vestal, 3 C.M.R. 769 (1952).

[141] Parmelee, 41 B.R. 159, 166 (1944).

[142] Goulet v. The Queen, 1 Can. Ct. Mar. App. Rep. 19, 23 (1952).

[143] Nigg, 2 E.T.O. 1 (1943).

[144] United States v. Peregrina, 8 C.M.R. 293 (1953).

[145] Neville, 2 E.T.O. 135 (1943).

[146] United States v. Bryant, 13 C.M.R. 867 (1953). See also United States v. Emery, 14 C.M.R. 296, 300 (1954).

[147] United States v. Logas, 2 U.S.C.M.A. 489, 9 C.M.R. 119 (1953); United States v. Perry, 10 C.M.R. 387 (1953). *But see* United States v. Daniels, 10 C.M.R. 918, 925 (1953).

[148] MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶164a at 314-15.

CONCLUSION

The discussion of proof of intent to avoid harzardous duty and shirk important service in the present Manual for Courts-Martial places undue emphasis on only a few of the factors from which such intent may be inferred while ignoring many others. For example, the Manual requires a showing that accused was "personally warned of the imminence of the duty" or that his organization was so warned "at a formation at which the roll was called and the accused was present."[148] Nothing so formal is required. It is enough that accused knew that the duty was imminent, even though such information was obtained through second-hand sources, and that with such knowledge he absented himself without other apparent reason knowing that the unauthorized absence would cause him to miss the duty. His knowledge of imminence may be obtained from such a formal warning as the Manual lists, or it may be obtained from observation of circumstances which import imminence of duty.

Moreover, the Manual's requirement 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" is not as all-embracing a necessity as its provisions would seem to require. Proof of intent to avoid duty may rest on accused's admissions or other actions which independently of imminent service permit a sound basis for deducing his intent. The factors mentioned in this article will serve as such a basis.