IV. LACK OF MENTAL CAPACITY

A. Test (para. 120d, MCM, 1969): "No person should be brought to trial unless he possesses sufficient mental capacity to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense."

B. Never goes to merits of the case; may be raised at any time during trial. See generally, CGCM 9909, Victor, 36 CMR 814 (1966).

C. Procedure (para. 122b(3), MCM, 1969 (Rev.)).

1. Interlocutory in nature; MJ ruling is final (Art. 51(b), UCMJ; para. 57a, d, MCM, 1969 (Rev.)).

2. President of SPCM without MJ rules subject to objection by any member of the court (para. 57c, MCM, 1969 (Rev.). See U. S. v. Williams, 5 USCMA 197, 17 CMR 197 (1954).

a. Before asking if member objects, appropriate instructions in essence as follows should be given:

(1) That the issue is whether the accused possesses sufficient mental capacity to understand the nature of the proceedings against him and intelligently to conduct or cooperate in his defense;

(2) that he must be able to comprehend rightly his own status and condition in reference to such proceedings;

(3) that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires and otherwise properly and intelligently aid his counsel in making a rational defense;

(4) that his mental capacity at the time of trial is different from that involved in determining mental responsibility at the time of the commission of the offense;

(5) that lack of mental responsibility at the time of commission of the offense constitutes a defense to the crime charged, while the lack of mental capacity to stand trial does not;

(6) that once the issue is raised, the burden to establish sanity beyond a reasonable doubt is on the Government;

(7) that there is no requirement that the accused prove he lacks such mental capacity; and

(8) Depending upon the ruling, that if any member does or does not entertain a reasonable doubt as to mental capacity, he should object to the ruling.

b. If no objection, the ruling is final.

c. If objection, president should instruct:

(1) That if, in the light of all the evidence, a reasonable doubt exists as to the mental capacity of the accused to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense, the motion should be granted;

(2) that if the members are satisfied beyond a reasonable doubt that the accused has the mental capacity to understand and do the things related above, the motion should be denied;

(3) that a majority vote is controlling;

(4) that a tie vote is a determination against the accused; and

(5) that the finding should be to grant or deny the motion or the relief sought.

3. See U. S. v. Brux, 15 USCMA 597, 36 CMR 95 (1966) for a discussion of the history of who rules finally concerning mental capacity. Prior to 1 August 1969, the military judge ruled subject to objection by any member of the court.

4. If there is a determination that the accused has the requisite mental capacity, the trial continues.

5. If it is determined that a reasonable doubt exists as to the requisite mental capacity of the accused, this fact is then recorded and the record of all proceedings held in the case forwarded to the convening authority.

6. If the convening authority disagrees or determines that the disability was temporary and that the accused has recovered, he may return the case to the court with instructions to reconsider the question and, if appropriate, to proceed with the trial.

V. LACK OF MENTAL RESPONSIBILITY

A. Test (para. 120b, MCM, 1969): "A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right."

B. As an Interlocutory Matter -- Motion to Dismiss for Lack of Mental Responsibility (see paras. 57a(1), 122b(4), MCM, 1969).

1. Procedure. See Chapter 7, DA Pam 27-9.

a. MJ and president of SPCM without MJ rule subject to objection by any member of the court.

b. Court must be instructed as to what is involved. U. S. v. Williams, 5 USCMA 197, 17 CMR 197 (1954).

(1) Test for mental responsibility

(2) Burden of proof

(3) Reasonable doubt

(4) Voting procedures

Procedure

c. Para. 7-4, DA Pam 27-9

2. If motion denied (court finds accused sane)

a. Trial proceeds to findings

b. Further evidence on issue of insanity may be presented

c. Insanity issue resubmitted to court at time of findings

3. If motion granted (court finds accused insane)

a. Ruling amounts to a finding of not guilty

b. Record forwarded to C/A

c. C/A may not return ruling to court for reconsideration (para. 67f, MCM, 1969).

C. As Part of the General Issue on Findings of Guilt or Innocence

1. Generally -- See Section I, supra

2. If some evidence which could reasonably tend to show insanity, MJ must instruct sua sponte on insanity, as with any other affirmative defense (U. S. v. Burns, 2 USCMA 400, 9 CMR 30 (1953); para. 214, MCM, 1969 (Rev.)).

3. Instructions by MJ --

a. U. S. v. Williams, 5 USCMA 197, 17 CMR 197 (1954)

(1) Test for mental responsibility

(2) Burden of proof

(3) Reasonable doubt

(4) Voting procedures

b. Para. 7-4, DA Pam 27-9

c. Instructions singling out particular evidence to the exclusion of other evidence on the same issue is improper. U. S. v. Bellamy, 15 USCMA 617, 36 CMR 115 (1966).

d. U. S. v. Schlomann, 16 USCMA 414, 37 CMR 34 (1966). DC requested so-called Lyles instruction: "If the accused is acquitted by reason of insanity he will be presumed to be insane and may be confined in a hospital for the insane as long as the public safety and his welfare requires." (See Lyles v. U. S., 254 F.2d 725 (D. C. Cir. 1957), cert. denied, 356 U.S. 961 (1958)). COMA stated that this instruction is based on mandatory commitment requirements of the DC Code, which is not controlling on the military. Military procedure is controlled by AR 40-3, which provides for several alternatives in this regard. HELD: Lyles instruction not required or appropriate.

4. Voting Percentage

a. Interlocutory matter: majority vote controls

b. General issue: two-thirds vote to convict

VI. PRESENTENCE PROCEEDINGS

A. Insanity Raised as Issue for First Time After Guilty Plea. U. S. v. Trede, 2 USCMA 581, 10 CMR 79 (1953).

1. MJ should set the plea aside or permit its withdrawal.

2. Hear evidence on an interlocutory basis.

3. If he finds accused insane (no objection by any court member), the case should be dismissed.

4. If he finds the accused sane (no objection by any court member) he may permit the case to proceed.

B. Sentence

1. Any evidence with respect to the mental condition of the accused which falls short of creating a reasonable doubt as to his sanity may be considered by the court in arriving at its sentence (para. 123, MCM, 1969).

2. Error for MJ to deny requested instruction that mental condition of accused may be considered in mitigation in sentencing. U. S. v. Cook, 11 USCMA 579, 29 CMR 395 (1960).

VII. APPELLATE REVIEW

A. Para. 124, MCM, 1969. C/A or appropriate higher authority:

1. Will disprove findings of guilty if reasonable doubt exists as to sanity.

2. Will direct medical examination under para. 121, MCM, 1969, whenever it appears further inquiry is warranted in the interest of justice.

a. "Higher authority" includes a Board of Review (effective 1 Aug 69 -- Court of Military Review), U. S. v. Burns, 2 USCMA 400, 9 CMR 30 (1953).

b. B/R may dismiss charges where sanity issue fully litigated at the trial and B/R finds as a factual matter that sanity of accused not shown beyond a reasonable doubt without the necessity of directing a post-trial psychiatric examination. U. S. v. Bunting, 6 USCMA 170, 19 CMR 296 (1955); accord, CM 416213, Cleveland, 39 CMR (1968).

B. Matters Outside the Record -- Psychiatric Reports

1. "When further inquiry after trial produces new information which raises an issue concerning mental responsibility at the time of the offense, the affected charges and specifications may be dismissed and appropriate action taken on the sentence or a new trial or rehearing may be directed, as may be appropriate under the circumstances of the case." (para. 124, MCM, 1969).

2. May be used to determine if issue of sanity raised, but are not admissible as evidence, (paras. 122c, 124, MCM, 1969); U. S. v. Roland, 9 USCMA 401, 26 CMR 181 (1958).

3. May not be used to remove reasonable doubt left by trial evidence. If insanity is raised and litigated at trial, Government cannot support conviction with evidence available before trial which it did not present, or with evidence obtained after trial. U. S. v. Carey, 11 USCMA 443, 29 CMR 259 (1960).

4. If defense post-trial psychiatric reports are considered by B/R, before dismissing the charges the B/R must give the Government an opportunity to contest the psychiatric findings. If Government does not contest findings, issue may be submitted to B/R by proper means for disposition. U. S. v. Thomas, 13 USCMA 163, 32 CMR 163 (1962).

5. If B/R finds beyond reasonable doubt that post-trial psychiatric reports do not raise issue of mental responsibility or capacity, B/R may affirm findings without directing a rehearing. U. S. v. Wimberley, 16 USCMA 3, 36 CMR 159 (1966).

6. Where both Government and Defense Appellate counsel stipulated to the Board of Review's consideration of post trial psychiatric reports "as admissible evidence on the merits" the Board accepted this procedure and dismissed the charges. CM 411723, Winkler, 36 CMR 551 (1965).

7. Where a board of review utilized post-trial psychiatric reports and dismissed the charges without allowing the Government its right to cross-examination of defense witnesses and the right to offer rebuttal evidence on the issue, COMA reversed. U. S. v. Moore, 16 USCMA 332, 36 CMR 488 (1966).

8. Where post-trial psychiatric reports indicated that accused was suffering from a mental defect which rendered him able to intelligently conduct his own defense to "some degree" and "unable to intelligently cooperate in his own defense to a significant degree," ideally the matter should be returned to the trial level where "testimony can be taken, witnesses examined, and testimony offered in rebuttal." Under the peculiar circumstances of this case, including an accused no longer on active duty who would not appear voluntarily for further psychiatric examination, COMA dismissed the charges stating: "There is no place in an American judicial process for affirmance of a criminal conviction when a substantial and serious question exists as to the accused's mental capacity." U. S. v. Koch, 17 USCMA 79, 80, 37 CMR 343, 344 (1967).

C. Effect of Mental Incapacity on Appellate Review

1. General Rule -- Lack of mental capacity on the part of the accused at time of appellate review will toll review until mental capacity is regained, (para. 124, MCM, 1969). U. S. v. Korzeniewski, 7 USCMA 314, 22 CMR 104 (1956); accord, U. S. v. Bell, 7 USCMA 744, 23 CMR 208 (1957).

2. Exceptions to General Rule

a. Lack of mental capacity at time of review will not cause delay in making a determination in favor of an accused which will result in setting aside a conviction (para. 124, MCM, 1969).

b. B/R may determine whether accused lacked mental capacity at time of trial. U. S. v. Jacks, 8 USCMA 574, 25 CMR 78 (1958).

c. B/R may determine whether accused lacked mental responsibility at time of offense. U. S. v. Thomas, 13 USCMA 163, 32 CMR 163 (1962).

VIII. MISCELLANEOUS EVIDENTIARY MATTERS

A. Privileged Communications (Physician-patient).

1. Military rule: "No privilege attaches" to statements by military personnel to medical officers and civilian physicians (para. 151c(2), MCM, 1969).

2. Manual rule is not contrary to constitutional due process or UCMJ. U. S. v. Wimberley, 16 USCMA 3, 36 CMR 159 (1966).

B. Article 31 Warning -- Psychiatric Interviews.

1. Paragraph 4-4f, TM 8-240, 24 June 1968 provides: "Before starting his examination, the medical officer conducting the psychiatric examination must advise the accused of the nature of the offense of which he is accused or suspected and make clear to the accused the scope and purposes of the examination. He should also inform the accused that he is neither for him nor against him, and that he may consult with counsel prior to the examination. At the same time the medical officer will advise the accused that he need not say anything and that the medical officer may be called upon to repeat in court, as the basis for his opinion, any statements made to him by the accused."

2. Fruit of the poisonous tree doctrine. BR held results of psychiatric examination inadmissible where government did not show compliance with warning requirements (CM 418212, Hamlin, 39 CMR (1968). Babbage overrules - 40 CMR

3. No constitutional error to refuse to allow accused's counsel to be present during the psychiatric interview. U. S. v. Albright, 388 F.2d 719 (4th Cir. 1968), but cf. U. S. v. Driscol, 399 F.2d 135 (2d Cir. 1968).

4. See para. 2c(5), Ch. X, DA Pam 27-172.

5. Error to admit accused's reliance on Article 31 rights during psychiatric interview. U. S. v. Kemp, 13 USCMA 89, 32 CMR 89 (1962); accord, CM 415394, Holman, 37 CMR 711 (1967).

C. Evidence of insanity in the parents or immediate relatives of an accused is admissible only if there is independent evidence tending to show insanity in the accused. U. S. v. Murph, 13 USCMA 629, 33 CMR 161 (1963).

D. Lay testimony admissible. Competent lay testimony, as well as expert opinion may raise sanity issue, para. 122c, MCM, 1969; U. S. v. Wimberley, supra; cf., U. S. v. Carey, supra.

E. MJ's limitation of cross-exam as to basis of psychiatric opinion is prejudicial error, U. S. v. Williams, 16 USCMA 210, 36 CMR 366 (1966).

F. Psychologist may testify as an expert witness. ACM 19588, Silva, 37 CMR 803 (1966), pet. denied, 37 CMR 471.

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# CHAPTER X

# ACCIDENT

## Section 1

## General

The Manual[1] provides: "A death, injury, or other event which occurs as the result of an accident or misadventure in doing a lawful act in a lawful manner is excusable."

It further provides in the paragraph concerning assaults[2] that: "If bodily harm is inflicted unintentionally and without culpable negligence" a battery is not committed.

When viewed in light of the general principle that an offense requires a criminal intent coupled with a criminal act, there may be no need to separate "accident" as a defense, for it comes very close to being the exact opposite of an offense. An accident is the unforeseen consequence of a lawful act, done with due care, and without any criminal state of mind. Nevertheless, the United States Court of Military Appeals has treated "accident" as a separate defense[3] and the principles of law will be set forth below.

Particular attention must be paid to the exact nature of the ultimate offense charged and to all lesser included offenses within that offense to determine (1) whether there is a possible defense of accident, (2) whether that defense was reasonably raised in the particular trial, and (3) whether there is a danger that court members might be confused with various principles of law relating to accident as a defense which might be true in the abstract, but may break down when applied to a particular fact situation.

## Section 2

## The Defense Itself

The general rule is that a person is not criminally liable for an accident happening in the performance of a lawful act done with due care. The chief exception to this general principle is with regard to those "public welfare" offenses which are based upon strict liability.[4] As to those offenses, accident normally is no defense.

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1. Para. 216b, MCM, 1969.
2. Para. 207a, MCM, 1969.
3. See United States v. Tucker, 17 USCMA 551, 38 CMR 349 (1968).
4. See Chapter I, supra.

The defense of accident or misadventure generally arises in connection with a case involving a homicide or assault. However, there is no reason why the defense should be limited to death or injury. The Manual recognizes this by the words "or other event" following "death" and "injury." The word "accident" has various meanings according to the context of its use. One meaning is that the event happened without the concurrence of the will of the person by whose agency it was caused. This usage of the word may be applied to the case of a person who, while walking on the sidewalk stumbles because of an unnoticed defect, falls upon and injures another. Although the injured party did not consent to the touching of his person, the act by which the injury occurred is not a punishable battery. The word "accident" is also used to describe the situation in which a person intentionally performs an act directed against another, but does not intend the ultimate consequences of the act. An example of the latter situation is where a person shoots a gun in the direction of another intending merely to aim above his head and frighten him, but instead the bullet strikes the victim's heart and causes his death. To the extent that death was not the intended consequence of the act, the result may loosely be described as an "accident." The basic legal difference is that the second situation involves an actionable fault. In the criminal law, if the act is specifically intended and directed at another, the fact that the ultimate consequence of the act is unintended or unforeseen by the actor does not raise the defense of accident.[5]

It must be kept in mind that one of the prerequisites to the defense of accident being in issue is that the accused be engaged in a lawful act and pursuing this act in a lawful manner. In an early case[6] the accused was convicted of unpremeditated murder in violation of Article 118(2), UCMJ. The facts indicated that he discovered that his Korean girl friend was unfaithful to him and he obtained a carbine, took it to his girl friend's house, and dispatched her new lover forthwith. Accused countered evidence of intentional shooting by claiming that the carbine accidently discharged when he bumped against the door. The military judge refused the defense request for an instruction on accidental homicide. The Court held that the defense of accident was not raised in that the accused was unlawfully in possession of the carbine had unlawfully loaded the weapon, had a bad intent, and was not exercising due care under the circumstances. In an assault with a dangerous weapon case[7] where the accused was one of two guards who removed the rounds from their pistols and began practising their "fast draws," the Court held that the defense of accident was not available when the accused's weapon "accidentally" discharged and the bullet struck the other guard in the chest. Here the accused was engaged in an unlawful act and his actions were held to be culpably negligent, thereby supporting a conviction of assault with a dangerous weapon.

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5. In United States v. Femmer, 14 USCMA 358, 34 CMR 138 (1964), the accused was convicted of assault with a dangerous weapon. After a fight with one, Bradshaw, accused went and obtained a razor blade and returned to the barracks. He stated that he had the blade in his hand when he defended himself when Bradshaw attacked him. Held: Self-defense in issue but not accident. The injury resulted from an act intentionally directed at Bradshaw and accused knew he had the blade in his hand when he pushed Bradshaw away.
6. United States v. Sandoval, 4 USCMA 61, 15 CMR 61 (1954).
7. United States v. Redding, 14 USCMA 242, 34 CMR 22 (1963).

## Section 3.

### Necessity for Instructions

In the leading case concerning the defense of accident, the Court reiterated the general rule that the test whether an affirmative defense is reasonably raised is whether the record contains some evidence to which the military jury may attach credit if it so desires. It further clearly indicated that although there may be substantial evidence to discredit the accused's assertion of an affirmative defense, his unequivocal testimony is always sufficient to raise a factual issue for the court-martial's consideration and hence an instruction is necessary.[8] It is therefore incumbent upon both the military judge and the trial counsel to be alert to the possibility of the defense of accident being raised by the evidence, although not emphasized by the defense, and insuring that an instruction is given, regardless of the believeability of that evidence.[9]

## Section 4.

### Instructions

The United States Court of Military Appeals has concerned itself in several cases with the application of general "accident" instructions to specific fact situations presented. One of the major areas of difficulty is the erroneous application of the principles of accident as they apply in homicide cases to cases involving assaults. The test involved in the offense of negligent homicide is one of simple negligence, i.e., a person may be convicted of negligent homicide if, by his simple negligence, he unlawfully causes the death of a person.[10] The test involved in the offense of aggravated assault is one of culpable negligence, i.e., "a degree of carelessness greater than simple negligence . . . a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission."[11] "While a finding of guilty may be grounded on culpably negligent conduct, even though the assailant did not intend the ultimate consequences of his action, mere negligence will not support a conviction for aggravated assault"[12] Thus, in a case where the defense of accident was raised in an aggravated assault case, the following instruction was held to be erroneous:

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8. United States v. Tucker, 17 USCMA 551, 38 CMR 349 (1968).
9. See United States v. Meador, 18 USCMA 91, 39 CMR 91 (1969).
10. Para. 213f(12), MCM, 1969.
11. Para. 198b, MCM, 1969.
12. United States v. Torres-Diaz, 15 USCMA 472, 473, 35 CMR 444, 445 (1965).

> The accused, however, must have been acting with that degree of care for the safety of others that a reasonably prudent man would have exercised under the same or similar circumstances. If the assault with a dangerous weapon resulted from carelessness or fault on the part of the accused, it is not an accident in legal contemplation and, hence, is not excusable.[13]

And in a very similar case[14] the following instruction was considered erroneous:

> . . .You are advised that an assault by the force as may have been exercised here, is excusable if it was the result of an accident or misadventure by the accused in doing a lawful act in a lawful manner. If the assault resulted from fault of the accused, it is not an accident in legal contemplation and hence, is not excusable, but the burden is on the prosecution to establish the accused's guilt by legal and competent evidence beyond a reasonable doubt.

The reason behind reversal was that the term "fault" in common usage implies simple negligence, which is not the test for aggravated assault, and therefore the instruction is at best ambiguous.

In a homicide case where an accused maintains that he struck the victim without any intent to seriously injure him, but rather to ward off a blow aimed at him by the victim, the accused is entitled to an instruction (1) that he need not fear death or serious bodily injury in order to legally repel a simple fistic assault and (2) that an unintended and unanticipated death resulting from a legitimate response to a simple assault is an accident or misadventure within the meaning of paragraph 216b, MCM, 1969.[15] In effect the only question to be decided is whether, had the victim not died as a result of the encounter, the accused would be amenable to punishment for assault and battery.[16]

In United States v. Tucker[17] the accused was charged with assault with a dangerous weapon, to wit: a pistol. Despite the testimony of several witnesses that the accused pulled a pistol from his pocket and deliberately fired it at the victim, and the testimony of a firearms examiner that the weapon was fired forty inches or farther from the victim, the

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13. Id.
14. United States v. Pemberton, 16 USCMA 83, 36 CMR 239 (1966).
15. United States v. Perry, 16 USCMA 221, 36 CMR 377 (1966).
16. Id.
17. 17 USCMA 551, 38 CMR 349 (1968).

accused maintained that as he was handing the weapon to his friend, the alleged victim, the friend snatched it from him and it accidentally went off. The United States Court of Military Appeals considered that the defenses of (1) culpable negligence as opposed to intentional conduct in the firing of the pistol, (2) a possible intervening cause regarding the firing of the pistol, and (3) accident, were raised by the unequivocal testimony of the accused. The Court laid down the following guidelines concerning proper instructions in this type of case. The members must be instructed that in the event they do not believe beyond a reasonable doubt that the discharge of the weapon was intentional, they should then consider whether the alleged assault was committed through culpable negligence. If they find beyond a reasonable doubt that the accused was culpably negligent, then they must determine whether this negligence was the proximate cause of the weapon's discharge. Finally, in order to convict the accused they must find beyond a reasonable doubt that the discharge of the weapon was not the result of the alleged intervening cause of being snatched from the accused's hand.

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## CHAPTER XI

## IMPOSSIBILITY, NECESSITY, COERCION (DURESS) AND OBEDIENCE TO ORDERS

1. INTRODUCTION. It is recalled that, generally speaking, an offense requires a criminal intent combined with a voluntary act. As mentioned in Chapter VIII, criminal law is based upon the assumption that human beings for the most part, have free will and, therefore, it is not unjust to hold them accountable for their acts. It is on this basis that an insane person or an infant, lacking in the mental ability to form an intent or to act voluntarily, is not responsible for his acts. There are other situations where a person, for reasons other than insanity or infancy, may find that it is either impossible to act or that his power to act is restricted to a choice between two or more evils. Examples of such situations are as follows:

a. A soldier on pass fails to return to his post at the proper time because his illness or the occurrence of some physical force completely prevents his return.

b. The pilot of a plane is faced with the choice of either jettisoning valuable military cargo to lighten the plane, or to retain the cargo and have the plane crash.

c. A person is told by another to assist in committing a robbery or he will be killed.

d. A soldier, acting under the orders of a superior, shoots into a mob and thereby injures several persons.

In each of these examples there is a restriction on free will. Either there is an inability to act or the area of action is limited to a choice between evils. But it should be noted that the underlying circumstances causing the restriction on free will are of a different nature in each case. Because of these circumstances, the examples (in the order listed) raise the defenses of impossibility, necessity, coercion, and obedience to orders. (For a detailed discussion of these defenses, see Hall, Principles of Criminal Law (1947)).

2. IMPOSSIBILITY. The defense of impossibility arises in situations where a person is deprived of the ability to act through physical rather than mental reasons. Generally speaking, it can be regarded as a physical inability to act because of purely physical reasons. The impossibility of action may be caused by physical forces of nature or by the physical force of another human being, or it may occur because of a physical condition within the person's body, such as an illness which is incapacitating. Thus, as stated in par. 165, MCM, 1969, a man on authorized leave who is unable to return at the expiration thereof through no fault of his own has not committed the offense of absence without leave, "there being an excuse for the absence in such a case." Paragraph 216g,

MCM, 1969, provides in part:

> The inability of an accused through no fault of his own to comply with the terms of an order to perform a military duty constitutes a defense. Thus, one who has suffered an injury which incapacitates him to the extent that he is physically not able to carry out an order is not guilty of willful disobedience or failure to obey that order. . . . However, if the physical . . . inability of the accused occurred through his own fault or design after the accused had knowledge of the order or duty imposed, it will not constitute an excuse.

The following cases illustrate the defense of impossibility. (Note: See para. 6-10, DA Pam 27-9, for instructions on impossibility).

a. United States v. Amie, 7 USCMA 514, 22 CMR 304 (1957).

Charge: Absence without leave (Art. 86).

Facts: The accused testified that at the expiration of an authorized pass at home he became ill. He was unable to see his doctor, but the doctor's brother-in-law gave him some pills and recommended that he rest for a few days before returning to camp. He spent four days at home, spending about one-half of that time in bed and then surrendered to military authorities. The defense did not request an instruction on impossibility and the law officer did not give such instruction. On appeal it was contended that the law officer committed prejudicial error in failing to instruct sua sponte on the effect of physical impossibility.

Opinion. It cannot be concluded as a matter of law that the defense of incapacity was not raised. Therefore, it was prejudicial for the law officer to fail to instruct. "The Government urges that the testimony of the accused was insufficient to raise an issue of physical inability to return. In our view, for us to accept that position would be analogous to our ruling that a motion by trial counsel below to strike this testimony as irrelevant would have been proper as a matter of law, or that the prosecution could have requested the law officer to instruct the court that this testimony could not be considered as a defense to an unauthorized absence offense. We are not prepared to go that far. An accused is entitled to have presented instructions relating to any defense theory for which there is any foundation in the evidence." (7 USCMA at 517-518, 22 CMR at 307-308.)

Comment. In a concurring opinion Judge Latimer expressed grave doubts that the issue of impossibility was reasonably raised. This case, however, indicates the necessity for sua sponte instructions whenever there is a possibility that an affirmative defense is in issue.

Para. 214, MCM, 1969, provides: ". . . When any special defense is raised by the evidence, the members of the court-martial must be instructed as to the defense and that they may not find the accused guilty of the offense affected thereby unless they are convinced beyond a reasonable doubt that the basis of the special defense does not exist."

b. **United States v. Heims, 3 USCMA 418, 12 CMR 174 (1953).**

**Charge: Willful disobedience. (Art. 91).**

**Facts: The accused failed to tie certain sandbags after being ordered to do so by a sergeant. Some eight days earlier the accused had received a hand injury. There was evidence that due to the injury the accused was unable to accomplish tasks requiring manual dexterity, coordination, and precise manipulation.**

**Opinion: Physical inability to carry out a military order is a defense to a charge of willful disobedience. If a recipient of an order is in fact unable to comply therewith, he cannot be deemed to have evidenced an intentional defiance of authority. Under the circumstances, the law officer should have instructed sua sponte on the defense of physical inability.**

c. United States v. Cooley, 16 USCMA 24, 36 CMR 180 (1966).

Charge: Sleeping on post (Art. 113) and failure to obey an order of an NCO (Art. 91).

Facts: On one occasion, the accused was duly placed on duty as a sentinel, and was found asleep at his post. On another occasion he was ordered by an NCO to report to work at the motor pool. Prior to doing so, he entered his barracks to change his clothing. While lacing up his boots, accused fell asleep and did not comply with the order. The accused maintained that by reason of a narcoleptic condition, he was physically incapable of remaining awake. In support of this contention he introduced evidence of other occasions of his falling asleep for no apparent reason. He also had received medical attention, taken prescribed drugs, and a doctor testified inconclusively on the matter. The doctor did testify, however, that the accused's condition was one "which is characterized by episodes of uncontrollable drowsiness." The following instruction was given to the court:

> You are advised that if the accused was in fact physically unable to remain awake on post, his failure to remain so awake is excusable. Physical inability, however, is a matter of degree, and it does not constitute a defense unless the accused's failure to remain awake was reasonable in light of the fact and extent of the ailment, the relation of that ailment to the task imposed, and any other relevant circumstances. (Same instruction as to failure to obey charge)

Opinion: In the case of injuries, as in Heims, there must be some reasonable relationship between the extent of the accused's disabilities and his inability, because of them, to obey the orders directed to him. This case is different, where the accused's physical condition is such as actually to prevent compliance with the orders and in fact to cause the commission of the offense. The question is not one of reasonableness vis a vis willfulness, but whether the accused's illness was the proximate cause of the crime. The case is not one of balancing refusal and reason, but one of physical impossibility to maintain the strict standards required under military law. In such a situation, the accused is excused from the offense if its commission was directly caused by his condition, and the question whether he acted reasonably does not enter into the matter.

Comment: A definite instructional problem exists when the rules concerning what might be termed true impossibility (Cooley) and the rules regarding physical inability (Heims) are confused in the same case. This occurred in CM 416623, Tolle, 39 CMR (1968) and as a result the sample instructions in paragraph 6-10, DA Pam 27-9, were redrafted. The basic difference is that the element of reasonableness is involved only when there is a choice concerning whether to obey or not to obey the order in reference to the disease or injury.

d. **United States v. Latsis, 5 USCMA 596, 18 CMR 220 (1955).**

**Charge: Cowardly conduct (Art. 99), and willful disobedience (Art.90).**

**Facts: The accused was a platoon sergeant serving on the main line of resistance in Korea. On the day in question the accused and the commander were both in the command post bunker when enemy artillery and mortar fire began to drop on the company's right flank. The platoon commander left the bunker and went forward to check on the men in the front trenches. The accused remained in the bunker. Soon afterwards, the platoon commander called the bunker telephone operator and directed that he notify the accused to report to the forward trench line. The telephone operator shook the accused and repeated the order several times, but received no positive response. He informed the platoon commander who returned to the command post and asked the accused what was the matter. The accused stated "I don't care." On being informed that he was wanted on the front line, the accused replied "I can't." The battalion psychiatrist testified that it was his conclusion that the accused was able to distinguish right from wrong and to adhere to the right. However, he expressed the opinion that the accused was suffering from a combat-precipitated anxiety reaction which made adherence to the right more difficult. The stipulated testimony of a second psychiatrist was similar. In addition several lay witnesses testified as to the accused's abnormal condition. Although the law officer instructed fully on the issue of insanity, no instruction was given on physical inability to obey.**

Opinion: The law officer did not err by failing to instruct sua sponte on the defense of physical inability. According to both psychiatrists, his incapacity, if any, was chargeable to his mental condition. The defense of physical inability resulting from mental disorders is so closely related to the defense of mental irresponsibility that a submission of the latter issue is a submission of the former. When the court-martial considered the issue of mental responsibility, it, for the purposes of this case, also considered the defense of physical incapacity. Thus the instruction on insanity precluded the necessity of the law officer's instructing sua sponte on physical incapacity. If the defense counsel desired more refined or detailed instructions, he should have requested them.

e. United States v. Pinkston, 6 USCMA 700, 21 CMR 22 (1956).

Charge: Failure to obey (Art. 92).

Facts: The evidence indicated that at an inspection the accused did not have two required uniforms. He was ordered to procure this apparel by a certain date. The accused admitted that he had received the order in question and that he failed to comply with it. However, in support of his plea of not guilty, he asserted that it had been impossible for him to remedy the uniform deficiency because of his poor financial situation. It was shown that he attempted to obtain advance pay but had been unsuccessful. He also testified that he attempted to borrow money but had been unable to do so because he was universally recognized as a bad loan risk. The president's instructions to the special court-martial made no reference to the accused's defense of impossibility and no further instructions were requested.

Opinion: Since it appears that the accused was prepared to obey the order, ostensibly at least, but was prevented from doing so by the existence or intervention of an extrinsic fact over which, for the time, he could exercise no control, the necessary element of voluntariness was absent. Every conceivable incapacity cannot exonerate from criminal accountability, but here the impossibility of compliance with the order to purchase goods within an assigned time, which impossibility was brought about by financial incapacity, raised an affirmative defense to the charge, and instructions on this affirmative defense should have been given.

Comment: The reversal in the Pinkston case, as in the Helms case extracted herein, is based solely upon a failure to instruct sua sponte upon the defense when it is raised by the evidence. On rehearing, the court might legally find that it was financially possible for the accused to provide himself with the necessary uniforms.

Paragraph 216g, MCM, 1969, provides, in part:

> . . . a soldier who is given an order to purchase required uniforms but is unable to do so because of inability to obtain the necessary funds is not guilty of willful disobedience or failure to obey that order. However, if the . . . financial inability of the accused occurred through his own fault or design after the accused had knowledge of the order or duty imposed, it will not constitute an excuse.

3. NECESSITY. In contrast to impossibility, where the individual cannot voluntarily act at all, there is a related field involving limited "voluntary" conduct in the face of serious danger threatened by the impact of physical forces. In other words, if, because of pending danger brought on by physical forces beyond his control, the actor is faced with a choice between two or more harms, his decision to commit a harm and thereby prevent another harm may be legally defensible. The classic illustration of this point is that of the sea captain who is faced with the choice of either throwing valuable cargo overboard to lighten the ship, or retaining the cargo and having the ship sink with a resulting loss of lives. The generally agreed solution is that the destruction of goods is preferable to loss of life, and the captain would not be criminally liable for destroying the cargo.

a. The rule. Generally speaking, the rule seems to be that when required by necessity, a lesser value may be sacrificed to preserve a greater value. There are, then, three requirements which must be present: (a) The act must be committed under pressure of physical forces beyond the control of the actor; (b) It must have made possible the preservation of a greater value; and (c) The commission of the

lesser harm must have been the only means of conserving the greater value. It has been suggested that there need not actually be an overriding physical force so long as the actor reasonably believes it exists, but, on the other hand, the weighing of the values is based upon objective standards (Arts. 13, ALI Model Penal Code, Tentative Draft No. 8, 9 May 1958).

b. The problem of weighing lives against lives: The real difficulty arises in cases wherein lives are deliberately sacrificed in order to save other lives. The American and English views are shown in the following illustrative cases:

(1) United States v. Holmes, 26 Fed. Cas. 360, No. 15,383, (E.D. Pa. 1842).

Charge: Murder.

Facts: Holmes, a first mate in command of an overcrowded life-boat from the sinking ship, William Brown, ordered members of the crew to throw overboard all male passengers to prevent the boat from sinking. None of the crew members were thrown over. Those passengers and crew members remaining in the life boat were rescued. Subsequently, Holmes was tried for manslaughter. He defended on the ground of necessity and there was ample evidence that the boat would have sunk but for the drastic action taken.

Opinion: In charging the jury, the judge stated that passengers were to be favored over the crew, since a sailor has a duty to preserve the boat and the passengers. Then he added that those passengers whom necessity required to be cast over must be chosen by lot. Holmes was found guilty and sentenced to six months confinement. (The significance of the case is the recognition of the defense of necessity in sacrificing some lives to save others, even though the facts of this case were not sufficient to acquit Holmes, for apparently his mistake was in his method of choosing those who were to be thrown over.)

(2) Queen v. Dudley and Stephens, 14 Q.B.D. 273 (1884).

Charge: Manslaughter.

Facts: The two defendants and one other man named Brooks and a boy of seventeen were shipwrecked and drifted in a small open boat for twenty days, at which time they killed the boy and ate his body. Four days later they were rescued. At the trial, the jury found that the boy probably would have died first, and that all would have died before rescue except for killing and eating the boy.

Opinion: The court rejected the Holmes doctrine, the judges repudiating entirely the defense of "necessity." They stated that the highest duty may be to sacrifice one's own life to save another. The judges questioned how the defendants were to know that they would not be rescued immediately after the killing, and who is to judge the necessity, and how can the comparative value of each life be measured. Furthermore, they observed, permitting such a defense to stand might create a dangerous tempting precedent. The defendants were convicted and sentenced to death, but the sentences were commuted to six months confinement.

Comment: The real basis for the English view seems to be that one can never be certain that it is absolutely necessary to sacrifice some to save others. Relief may be "just around the corner." Judge Cardozo apparently agrees with the English view (see Cardozo, Law and Literature (1931), p. 113). But Professor Hall prefers the American view stating that the general rule is that "a very high probability of complete destruction by physical forces is a justification for sacrifice of some to save some, provided the method of selection is fair." (See Hall, General Principles of Criminal Law, p. 399).

4. COERCION OR DURESS: The logical support for the defense of coercion or duress is similar to that of the other affirmative defenses. Criminality does not attach to an act committed under coercion or duress because the actor has no free will and, therefore, no criminal intent. The distinguishing feature of coercion is that it is pressure brought to bear on the mind of a person rather than a physical force exerted upon his body. Furthermore, coercion is always exerted by a human. Only the most serious forms of coercion are valid defenses (See para. 6-7, DA Pam 27-9, for an instruction on duress).

a. General rule: The general rule in the United States is that a well-founded fear of immediate death (or, occasionally, serious bodily injury) is a defense to any criminal charge except murder (Hall, op. cit. supra, p. 408). Murder is a consummated act, irreparable after commission, and there is no principle of law which would justify or excuse the taking of an innocent person's life to protect one's own life (State v. Nargashian, 26 R. I. 299, 58 Atl. 953 (1904)). Professor Hall points out, however, that the cases holding coercion is no defense to murder usually rest on other grounds as well, the decisions indicating that either death was not imminent, or escape was possible, or there was no reasonable fear of death. He also states that "not a single case of conviction for murder has been found where the decision rest squarely on facts signifying a plain choice between self-sacrifice and the killing of an innocent person." Another part of the rule is that the fear must be reasonable. Cowards are not given preferred treatment. It must be such a fear as a man of ordinary fortitude and courage might justly yield to it. Furthermore, it must be imminent.

b. Illustrative cases:

(1) United States v. Fleming, 7 USCMA 543, 23 CMR 7 (1957).

Charge: Giving aid and comfort to the enemy (AW 95, 96).

Facts: The accused admitted that, while a prisoner of war in Korea, he participated in and led discussion groups and classes reflecting communist views, and that he participated in the preparation and making of communist propaganda recordings. However, he contended his acts were committed to protect the lives and well being of fellow prisoners of war. He further contended that his actions were the result of duress and coercion. In this regard he testified that his captors had threatened him with a march of 150 to 200 miles which he knew he could not make in his condition. He was also threatened with being sent to the "caves." The "caves" were places of confinement of such filth and privation that the mortality rate was extremely high and the prisoners felt that a sentence to the caves was almost tantamount to a sentence to death. The accused was taken to the caves to see a newly captured group of prisoners. Later he was taken on other visits and by his last visit all had died except one. On the other hand, there was evidence that the communist often did not carry out their threats and that many prisoners did survive confinement in the caves, and that the accused had already communicated and cooperated with his captors prior to his knowledge of the caves. With respect to the defenses of coercion or duress, the law officer instructed that in order to excuse a criminal act on the ground of coercion, compulsion, or necessity, one must have acted under a well-grounded apprehension of immediate and impending death or of immediate, serious, bodily harm. After objecting to the wording of the law officer's instruction on coercion and duress, the defense offered proposed instructions, which were refused, to the effect that the fear of mediate or a delayed, or a wasting death from starvation, deprivation or other like conditions, can just as well spell coercion and compulsion as the fear of immediate death.

Opinion: The findings of the trial court on the issue of coercion or duress will not be upset by this Court unless it can be concluded as a matter of law that the accused's actions were committed under a well grounded apprehension of immediate death or serious bodily harm. The evidence herein does not permit such a conclusion. The law officer's instructions were correct.

Concurring Opinion (Judge Quinn): The threat of confinement in the caves did constitute a sufficient threat of, at least, grievous bodily harm. Thus the evidence is sufficient to raise a defense of coercion or necessity. However, raising a defense does not mean that the court-martial was bound to accept it and, on the basis of all the evidence, the court could reject the accused's defense and find that he committed the acts charged without duress or compulsion. The instruction requested by the defense did not present the true issue.

Comment: The opinion cites with approval Winthrop, Military Law and Precedents (2d Ed., 1920 reprint) pages 297, 635.

(2) Iva Ikiko Toguri D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951).

Charge: Treason.

Facts: The defendant, known as Tokyo Rose, was convicted of treason, which arose from radio broadcasts from Japan during World War II. She raised the defense of duress and coercion, contending that the ordinary rules of coercion should not apply in the case where the accused person was in an enemy country, unable to get protection from the United States and where the compulsion is on the part of the enemy government itself.

Opinion: "We know of no rule that would permit one who is under the protection of an enemy to claim immunity from prosecution for treason merely by setting up a claim of mental fear of possible future action on the part of the enemy. We think that the citizen owing allegiance to the United States must manifest a determination to resist commands and orders until such time as he is faced with the alternative of immediate injury or death. Were any other rule to be applied, traitors in the enemy country would by that fact alone be shielded from any requirement of resistance. The person claiming the defense of coercion and duress must be a person whose resistance has brought him to the last ditch."

c. Requirement of fear of death or serious bodily harm. The problem was raised in United States v. Brookman, 7 USCMA 729, 23 CMR 193 (1957), as to whether the defense of coercion required fear of death or serious bodily harm even though the offense committed was not a severe felony. The accused in the case was charged with desertion, escape from confinement, and larceny. He contended the law officer committed error in instructing the court that the "coercion exerted upon the accused must have been of such a nature as to induce in him a well-grounded and reasonable apprehension that if he did not commit the offense, he would immediately be killed or immediately suffer serious bodily harm. (Emphasis supplied.) In response to this contention, the Court of Military Appeals stated (7 USCMA at 736, 23 CMR at 196):

> "We recently approved a similar instruction in United States v. Fleming, 7 USCMA 543, 23 CMR 7, and, indeed, the accused concedes its correctness insofar as it relates to the 'most severe forms of felonies.' However, he denies the correctness of the instruction as applied to the offenses charged. Cited in support of his argument is Commonwealth v. Reffitt, 149 Ky 300, 148 SW 48. That case was concerned with the validity of a contract, and the court simply applied the flexible test for duress which obtains in non-criminal situations. Insofar as duress is recognized as a defense to a criminal act, the Kentucky Court of Appeals follows the general

**rule that the coercion must induce a well-grounded fear of immediate death or serious bodily harm. Nall v. Commonwealth, 208 Ky 700, 271 SW 1059.**

**Our own research has uncovered no case which accepts less than the requirement of serious personal injury as a basis for the defense of duress in a criminal case. Perhaps closest to that view is Perryman v. State, 63 Ga App 819, 12 SE 2d 388, in which the threat was 'I will slap you down each time I see you.' But in light of the Georgia statute, which requires injury to 'life or member.' and the trial judge's actual charge to the jury, it is doubtful whether even that case lends support to the accused's contention. Nevertheless, the argument is not without logical appeal. At least superficially, the normal test of duress seems inappropriate when applied to a simple disorder or some other offense which carries a very minor punishment. We need not, however, decide the question. Indisputably, all the offenses charged here are serious. The permissible punishment for each includes a dishonorable discharge. Manual for Courts-Martial, United States, 1951, paragraph 127c, Section A. In United States v. Moore, 5 USCMA 687, 695-6, 18 CMR 311, we said that an offense, whether military or civilian in nature, which is 'serious enough to bear the stigma of a dishonorable discharge possesses the seriousness of felony, and. . . bears a heavy content of moral turpitude.' We hold, therefore, that the law officer's instructions on duress were legally correct."**

d. In United States v. Margelony, 14 USCMA 55, 33 CMR 267 (1963), the accused was charged with issuing three worthless checks in violation of Article 123a, UCMJ, and found guilty of the lesser included offense of dishonorably failing to maintain sufficient funds on deposit for payment of checks, in violation of Article 134, UCMJ. The accused testified that he had written the checks for the payees who had seized him and told him that if he didn't sign a couple of checks they would lay into him; that when he refused they began beating him in the stomach and face and threatened him with even worse treatment if he didn't comply. The court was instructed that duress was a defense to Article 123a specifications but not that it was also a defense to the lessor included offense under Article 134. The Court held that this was error. The evidence raised the issue of duress and this defense applied to all aspects of the transaction. The Court specifically did not decide the issue of whether in the prosecution of a minor offense, the defense of duress must be predicated upon fear of death or serious bodily harm.

e. Para. 216f, MCM, 1969:

Except when he kills an innocent person, a person cannot properly be convicted for committing an act for which he would otherwise be criminally responsible if his participation in it is caused by the degree of coercion or duress recognized in law as a defense. This degree of coercion or duress is a reasonably grounded fear on the part of the actor that he would be immediately killed or would immediately suffer serious bodily injury if he did not commit the act. The fear compelling the act must be of immediate death or serious bodily injury and not of an injury in the future or of an injury to reputation or property. The threat must continue throughout the perpetration of the act. If the accused has a reasonable opportunity to avoid committing the act without subjecting himself to the threatened danger, his act is not excusable.

5. OBEDIENCE TO ORDERS: Recognition of the peculiar necessity of discipline in the military service, and of the position in which the subordinate may find himself through no fault of his own, has led courts to regard obedience to a military order as a justification for conduct which otherwise would give rise to criminal liability. (Military Jurisprudence, p. 92) Winthrop states: "That the act charged as an offense was done in obedience to the order. . . of a military superior is, in general, a good defense at military law." (Winthrop, Military Law and Precedents, p. 296) The general rule is that an act done in obedience of orders is excusable when the order appears to be legal and the actor does not know it is illegal. The act must be duly done, that is, not in a wanton manner or in excess of the authority or discretion conferred on the subordinate by the order. The subordinate cannot use any more force than necessary to carry out the order. The order must be legal. If it is apparently regular and lawful on its face, the subordinate need not go behind it.

Paragraph 216d, MCM, 1969, provides: An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.

a. Exception: If the orders are so manifestly beyond the legal power or discretion of the superior as to admit of no rational doubt of their unlawfulness, then the defense is not adequate. Examples of unlawful orders might be: a command to violate a specific law of the land or an established custom or written law of the military service; or an arbitrary command imposing an obligation not justified by law or usage; or a command to do a thing wholly irregular and improper given by a superior who is incapacitated by intoxication or otherwise to perform his duty. However, except in such cases of palpable illegality, the inferior should presume the order to be lawful. (Winthrop, op. cit., supra, p. 296-297.)

b. Illustrative cases:

(1) ACM 10448, Whatley, 20 CMR 614 (1955).

Charge: Violating general order (Art. 92).

Facts: The accused was charged with failing to deposit certain money into the United States Treasury as required by Air Force regulations. Instead of depositing money made on the sale of scrap iron on an Air Force base, the accused used the money to purchase needed supplies for the base, at the direction of the commanding officer. Neither the accused nor the commanding officer actually knew of the Air Force regulation. The law officer refused to instruct on the defense of obedience of orders.

Opinion: The law officer should have instructed on this defense. Ordinary obedience of an order may be a defense to a charge growing out of acts done in compliance with the order, since in the usual case, a subordinate is expected to obey his superior completely and without hesitation. Notwithstanding presumption of knowledge of the Air Force regulation, the defense of obedience of orders will prevail unless there is a showing that the accused knew of the regulation and could not reasonably believe that the order of his commander was valid. Proof that the accused was acting in obedience to orders need not be established by the defense by a preponderance of the evidence. It is sufficient if reasonable doubt is created that the violation was without justification or excuse. The facts in this case establish a reasonable doubt.

(2) ACM 7321, Kinder, 14 CMR 742 (1954).

Charge: Murder (Art. 118).

Facts: In Korea, a Korean was caught trespassing near an Air Force bomb dump and was brought in to the Guard officer, a lieutenant. The Lieutenant ordered the accused, although somewhat by inference, to take the Korean out and shoot him. The accused asked if this was an order, and the Lieutenant said it was. The accused then took the Korean out and shot him. On appeal, the defense was based on a a "mistake of law," the accused contending that he thought the Lieutenant's order was legal and that he had to obey it.

Opinion: The evidence showed that the accused was aware of the unusual nature of the order, and consequently its illegality. It is unbelievable that the accused could have thought that he had to obey such an order.

(3) CM 416805, Griffen, 39 CMR (1968)

Charge: Unpremeditated Murder (Art. 118)

Facts: A patrol in Vietnam captured a VC. The platoon leader, LT Patrick, talked over radio with company CO, CPT Ogg, and SGT Griffen understood that the CO said that the prisoner would not be evacuated and that he should be shot. Accused stated that LT Patrick ordered him to take the prisoner down the hill and shoot him. This was done. LO instructed: "I tell you as a matter of law that if instructions or orders were received over that radio or were given to the accused in this case to kill the prisoner suspect who was helpless there before them, such an order would have been manifestly an illegal order. You are advised as a matter of law, any such command, if in fact there was such a command, was an illegal order. . . . Obedience to the order of a superior officer will not protect a soldier for acts committed pursuant to such illegal orders."

Opinion: We view the order as commanding an act so obviously beyond the scope of authority of the superior officer and so palpably illegal on its face as to admit of no doubt of its unlawfulness to a man of ordinary sense and understanding.

(The next page will be 1201)

## CHAPTER XII

## ENTRAPMENT

1. GENERAL: It is in the best interest of society to reduce the incidence of crime either by preventing the commission of crime or by apprehension of the criminal after the crime has been committed. Courts have uniformly held that in waging this warfare against crime the agents of law enforcement may use traps, decoys, and deception to obtain evidence of the commission, or planned commission, of crime. On the other hand, it is not in the best interest of society to permit law enforcement agents to go so far as to induce the commission of a crime that otherwise would not have been committed. The defense of entrapment results from a compromise between these two somewhat conflicting interests of society. Entrapment is defined as the conception and planning of an offense by a law enforcement agent, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the agent. (Sorrells v. United States, 287 U. S. 435, 453 (1932)).

2. THE SUPREME COURT'S VIEW OF ENTRAPMENT: It was not until 1932 that the Supreme Court, in the case of Sorrells v. United States, supra, considered the doctrine of entrapment. This case has been cited in practically every subsequent decision involving the doctrine. The facts were that Martin, a prohibition agent posing as a tourist visited the defendant's home. He was accompanied by several persons who knew the defendant. After a long conversation which disclosed that Martin and the defendant were former members of the same army division, Martin asked the defendant to get him some liquor stating that he wanted to take it home to a business partner. The defendant replied that he did not have any. Martin made a second request and received the same answer. Much later, after a third request, the defendant stated that he would try to get some. Approximately one-half an hour later the defendant returned with a half gallon of whiskey which he exchanged with Martin for five dollars. The defendant was charged with possessing and selling liquor in violation of the National Prohibition Act. He pleaded not guilty. Martin testified at the trial that he was the only one present who said anything about whiskey and that his purpose was to prosecute the defendant. The defendant introduced a number of witnesses who testified to his good character. In rebuttal, the government introduced testimony to the effect that the defendant had the general reputation of a rum runner. There was no evidence, however, that the defendant had ever possessed or sold any liquor prior to the time in question. The trial court refused to submit the issue of entrapment to the jury, holding as a matter of law, there was no entrapment and this was affirmed by the Court of Appeals. The Supreme Court granted certiorari limited to the question whether the evidence was sufficient to go to the jury. There were two opinions concurring in result but differing greatly in theory. The majority held that the issue should have been submitted to the jury. The minority took the position that entrapment was a matter of law to be ruled upon by the judge.

Chief Justice Hughes writing the majority opinion pointed out that there was sufficient evidence to warrant a finding that the offense was "instigated" by Martin; and "that it was the creature of his purpose"; that the defendant had "no previous disposition to commit it but was an industrious, law-abiding citizen"; that Martin lured the defendant, otherwise innocent, to its commission by repeated and persistent solicitation; and that he further took advantage of sentiment aroused by reminiscence of their war experiences. This conduct was denounced as reprehensible. Hughes then considered the question of whether this conduct precluded prosecution or merely afforded a ground of defense. He stated that officers may afford opportunities for the commission of crime and may employ artifice and stratagem to catch persons engaged in crime, but that a different question arises when the criminal design originates with government officers and they implant in the mind of an innocent person the disposition to commit the crime in order to prosecute. Thus, the predisposition of the defendant is relevant and when a defendant raises the issue of entrapment he cannot complain of an inquiry into his own conduct and predisposition. It follows that the conduct of the officer affords a ground for defense and does not preclude prosecution. Next the majority opinion set forth a theory to support the defense. It made no attempt at sustaining the doctrine on any theory of estoppel or public policy. Instead, while conceding that the general language of the statute under which the defendant was indicted was broad enough to encompass entrapment, the majority stated that unless specific language was used, it could not attribute Congress with an intent to bring about such an unjust result. Since no specific language was contained in the statute, the majority concluded that entrapment was not within its purview. The opinion recognized the limitations on this type of statutory interpretation by stating that the Court was dealing with a statutory prohibition and was simply called upon to determine whether in the light of public policy and of the proper administration of justice conduct resulting from entrapment should be deemed to be within the statute. It was admitted that some crimes may be so heinous as to admit no exceptions.

Finally, the majority considered the respective functions of the judge and the jury. It was concluded that the defense is available not on the ground that the accused though guilty may go free but on the ground that the accused is not guilty. Whether there was entrapment was, therefore, a question to be submitted to the jury as an element of the findings of guilty or not guilty.

Mr. Justice Roberts, writing the opinion for the minority criticized the statutory interpretation theory employed by the majority as being unwarranted and further accused it of announcing no criteria for determining when a statute should be read as excluding entrapment cases. He insisted that the doctrine should be rooted in public policy which would close the courts to the prosecution of crimes instigated by the government, stating that a court must preserve "the purity of its own temple."

This would render unnecessary any distinction based upon the nature of the offense. Also, the question of entrapment would have no connection with guilt or innocence. The defendant's bad reputation or previous transgressions are irrelevant and outside the scope of inquiry. The minority would not balance the equities between the government and the defendant as it felt that condoning entrapment because of the defendant's prior conduct would wholly disregard the reason for refusing the processes of the court to "consummate an abhorrent transaction."

There seems to be three differences between the majority and minority opinions. First, the majority adopts the "origin of criminal intent" formula for determining whether entrapment exists. If the criminal intent originates with the police officer and he implants this intent in the mind of a person who is otherwise innocent, then there is entrapment. On the other hand, if the intent originates with the accused or if the government can show that the accused was predisposed to commit crime there is no entrapment. This view emphasizes the law abiding qualities of the defendant. The government is allowed to show the predisposition of the accused by his bad reputation or previous convictions. This practice has been criticized in that in effect it allows the guilt of the defendant of the crime for which he is charged to be proved by prior convictions. If the defendant has been apprehended in what appears to be an habitual course of misconduct it would seem that the defense is never available regardless of the officer's conduct. The minority, on the other hand, would not consider the conduct of the accused but would look only to the conduct of the government agent. The opinion of the minority does not set a standard for determining what conduct to condemn. Manifestly an officer may conceal his identity and use a normal amount of persuasion but repeated and persistent appeals to sentiment created by reminiscences of war experiences is a transgression. Second, the majority felt that a liquor violation induced by entrapment was beyond the scope of the statute and that the defense is properly raised by a plea of not guilty. Thus entrapment was treated as a doctrine of procedure and judicial administration. It states that the defense may be raised at any point and if proved requires the court to quash the indictment as public policy forbids a court to lend its processes for the consummation of a wrong. The majority would evaluate the conduct of the officer against the seriousness of the offense, but the minority would apparently not consider the nature of the offense. Finally, the majority would send the issue of entrapment to the jury, while the minority would leave it to the decision of the judge.

Subsequent to the Sorrells decision the defense of entrapment had been invoked in a wide variety of instances and, while the courts nearly always cite this case, it is frequently difficult to determine whether they are following the majority or the minority opinion or portions of each. In a Supreme Court case (Sherman v. United States, 356 U.S. 369 (1958), K, a government informer met the defendant in a doctor's office where apparently both were being treated to be cured of narcotics addiction. Several accidental meetings followed. Conversation progressed to a discussion of mutual experiences and problems including

their attempts to overcome addiction to narcotics. Finally K asked the defendant if he knew a source stating that he was not responding to treatment and wanted the defendant to supply him. From the first, the defendant tried to avoid the issue. Not until after a number of repetitions predicated upon K's presumed suffering did the defendant acquiesce. Several times thereafter he obtained a quantity of narcotics which he shared with K and they split the cost. After several sales K informed the agents of the Bureau of Narcotics that he had another seller for them. On three occasions the government agents observed the defendant give narcotics to K in exchange for money supplied by the government. The defendant had been convicted of selling narcotics in 1942, and of possessing narcotics in 1946. The trial court submitted to the jury the issue of whether K had evinced an otherwise unwilling person to commit a criminal act, or whether the defendant was previously disposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade. A conviction resulted. This was affirmed by the Court of Appeals for the Second Circuit. (240 F. 2d 949).

The Supreme Court reversed, but again two opinions concurring in result presented opposing views. The majority, following the majority in the Sorrells case, concluded that from the evidence entrapment was established as a matter of law. The minority view in Sorrells was expressly rejected, the court stating that unless it can be concluded as a matter of law, the issue of whether a defendant has been entrapped is for the jury as a part of its function of determining guilt or innocence. To the government's contention that defendant's record of prior convictions indicated that he evinced a ready complaisance, the majority answered: "However, a 9-year-old sales conviction and a 5-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time Kalihinion approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time."

Mr. Justice Frankfurter, in a separate opinion, criticized the majority, saying: "The opinion . . . fails to give the doctrine of entrapment the solid foundation that decisions of lower courts and criticisms of learned writers have clearly shown is needed." As in the minority Sorrells opinion, Frankfurter suggests that the inquiry should be into the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the government cannot be countenanced."

3. VIEW OF COURT OF MILITARY APPEALS: The Court of Military Appeals follows the majority view of the Supreme Court. Entrapment is a real defense which goes to the guilt or innocence of the accused. When it is raised as an issue it is decided by the members of the Court rather than the law officer. The gist of the defense is that an agent of the Government conceives an offense and then incites a person to commit that

offense for purposes of prosecution. When that issue is raised, it may be defeated by establishing that the original suggestion or initiative to commit the offense in question came from the accused or that the agents of the Government had a reasonable belief or suspicion that the accused was engaged in the commission of the offense, or was about to do so . (U. S. v. McGlenn, 8 USCMA 286, 24 CMR 96 (1957).)

4. ILLUSTRATIVE CASES:

a. United States v. Buck, 3 USCMA 341, 12 CMR 97 (1953).

Charge: Larceny (Art. 121).

Facts: The evidence showed that the accused entered a supply office and engaged in conversation with a sergeant assigned to that office. The accused disclosed his interest in obtaining large quantities of chevrons and offered to pay the sergeant $50.00 for a specified number of chevrons of various grades. The sergeant suggested that the accused call him the following day. When the accused had departed the sergeant reported the matter to his superior, the accountable officer, the officer in charge of the section, and to the depot legal officer, and he was directed by these officers to give the accused the requested items. On the following day, the accused telephoned the sergeant and was advised that the chevrons were ready for him. Upon arrival of the accused at the supply office, the sergeant took three cartons of chevrons from stock and brought them to the door of the building. The accused took them from that location and placed them in the rear of his car parked at the door. He then re-entered the office and paid the sergeant the agreed $50.00. On appeal the defense of entrapment was raised.

Opinion: The defense of entrapment is not available, for the record does not admit of even a suspicion that the authorities planned the larceny charged. Said the Court:

> There are three situations in which persons in authority ostensibly lend their support to the commission of a crime solely to apprehend and punish another. In the first, one intent upon the commission of crime is afforded ample opportunity to rush to his own destruction, while the authorities, having set a trap to catch him, smooth his path, but do not otherwise accelerate his progress. Under these circumstances a crime is in fact committed, and the prosecution of the wrongdoer so trapped is not barred, for the law in no way prohibits the use of artifice or stratagem to catch those engaged in criminal enterprise. . . . Thus, placing the property where it can be taken by the intended thief, or signaling to the intended thief, or notifying him that the owner will be away from home, or consenting to the loan of a wagon to him to carry away the property, has been held lawful. Similarly, turning a horse loose so that it can be taken by the thief, does not negative the ultimate larceny. So too, a detective who puts

himself in a position where a thief can pick his pockets is not considered to have consented to the theft. . . .

On occasion, however, the plans to ensnare, involve an abuse, rather than simply the use of artifice and stratagem. In this situation, the individual laying the trap over-reaches himself to the point of negativing an essential element of the crime, and thus the crime itself. Specific examples of this situation are hereinafter set forth. The line separating the first two possibilities is frequently indistinct and difficult to define. So each case must be decided upon its own facts. Both have a common denominator in that the person trapped planned the intended crime. This feature distinguishes the first two situations from the third and final one, namely entrapment.

In the last classification, the plan of the crime is conceived by the authorities, who then lure an otherwise innocent man to its accomplishment. When this fact is present, the decisions hold that the Government is estopped from contending that the person so enticed is guilty, for Government officials instigated the very conduct of which they complain. . . .

. . . .

In the second classification, above referred to, are those cases involving offenses requiring that the proscribed act be "against the will" of the party injured. Hence, a prosecution for rape cannot be maintained when the victim invited the act. . . The same result obtains when an individual procures another to rob him. In such case, he is held to have consented to the assault necessarily involved in robbery, thus negativing one of its essential elements. . . . Similarly in a prosecution for burglary one who has knowingly admitted into his home a person intent upon committing larceny therein, is held to have negatived the essential element of breaking. . . . (3 USCMA at 343-344, 12 CMR at 99-100).

The Court of Military Appeals observed that the cases have held that when the owner of property delivers, or causes another to deliver, the property to one known to be intent upon stealing it, he has consented to the taking, although the owner's purpose was to catch the the thief. But the Court concluded that the authorities herein had no authority to consent to the taking of property belonging to the United States Government. Consequently, there was no entrapment or consent.

b. United States v. Hawkins, 6 USCMA 135, 19 CMR 261 (1955).

Charge: Wrongful possession of drugs (Art. 134).

Facts: The evidence showed that a Treasury Department agent and CID investigators prepared a list of the serial numbers of some money. The money was then turned over to the informant, probably one White, who was a prisoner in the camp stockade. The accused, who was a guard at the stockade, was later seen leaving the camp. On his return he was taken into custody and searched. An envelope containing the narcotic was found in his wallet. In addition, a bill, bearing the same serial as one of those recorded was found on his person. The accused later admitted that White had approached him and requested that he buy some narcotics and that he, as a favor, had done so with money furnished by White. The accused defended solely on the theory that he was the victim of entrapment. To support his theory he attempted to cross-examine several witnesses as to the name of, and the instructions given to, the informant relied on by the investigative personnel but the law officer ruled that public policy forbade the disclosure of such information. Also, immediately prior to the trial, the defense had requested the presence of White as a witness, but the request had been denied on the ground that it was not timely.

Opinion: The accused was entitled to a disclosure of the alleged informant's identity and his presence as a witness, just as he would be entitled to learn the identity and probable testimony of any other participant. Not only was a disclosure of the informant essential to the accused, but also, the evidence he could furnish. The defense was entrapment and the testimony of the informer would have been relevant and not privileged on that issue. Moreover, the Government relied on White to execute the plan with the accused and under those circumstances his lips cannot be sealed by a claim of confidentiality. White was in a position to furnish information as to what extent he was directed to and did cause or incite the accused to commit the offense. The accused was entitled to require him to tell what efforts were made by him to persuade the accused to become involved in the purchase of the drug. He was a keystone figure in the defense of entrapment and his testimony would have shed light on that issue. Judge Latimer stated:

> As a general proposition, a rule defining the course of conduct by Government officers which will constitute entrapment cannot be stated,. . . . However, it is clear that entrapment is not a defense if the accused was already engaged in an existing course of similar criminal conduct, had already formed a design to commit the crime or similar crimes, or was willing to do so as evinced by ready complaisance.

c. U. S. v. McGlenn, 8 USCMA 286, 24 CMR 96 (1957).

Charge: Wrongful possession and use of narcotics (Art. 134).

Facts: With reference to the charge of wrongful possession, the evidence established that the accused was asked by a Government informer to purchase marihuana for him. The accused refused due to the lateness of the hour but on the following day finally consented to make the purchase. The accused obtained twelve marihuana cigarettes from a peddler and delivered six of them to the informer, retaining the other six for safekeeping at the informer's request. The following morning, acting on the informer's tip, a CID agent found accused in possession of the six cigarettes and also found a marihuana butt in accused's car. The accused admitted purchase of the cigarettes and also admitted smoking several with a friend prior to returning to the base. There was no evidence tending to establish that accused was reasonably suspected of being connected with narcotics prior to being approached by the informer. Intermediate appellate authorities affirmed, and accused appealed contending that he was entrapped by the informer into possessing the marihuana involved in the charge of wrongful possession.

Opinion: Board of review reversed as to charge of wrongful possession and charge dismissed. Once the defense has introduced evidence showing inducement of the accused by one acting as a Government agent to commit an offense, the prosecution is then required to show that excuse--reasonable grounds or suspicion to believe that the accused was dealing in narcotics--existed to justify the inducement (citing Spring Drug Co. v. United States, 12 F. 2d 852 (8th Cir., 1926); United States v. Mitchell, 143 F. 2d 953 (10th Cir., 1944); and Heath v. United States, 169 F. 2d 1007 (19th Cir., 1948)).

"By no means are we to be understood as saying that lack of probable cause to believe that accused was dealing in narcotics or lack of suspicion in the mind of an agent or informer who makes a pretended purchase, alone constitutes entrapment. . .. All we hold is that when a showing of inducement by a Government agent is made, the prosecution must prove that its agents acted under a reasonable belief that the law was being violated by the accused. The gist of the defense of illegal entrapment is that an agent conceives an offense against the law and then incites a person to commit that offense for the purpose of prosecution." In order to defeat this defense, there must be "'(1) reasonable suspicion on the part of the officers that the party is engaged in the commission of a crime or is about to do so; or (2) the original suggestion or initiative must have come from the perpetrator.'" As the record here establishes that the "original suggestion or initiative" came from the informer rather than the accused, the Government was required to show that a reasonable belief

or suspicion existed that the accused was engaged in the narcotics traffic. It failed to do so and reversal is therefore required.

The Court noted that "reasonable suspicion or belief" could be established through evidence of accused's prior convictions for narcotic offenses; evidence that he engaged in similar acts at approximately the same time he committed the alleged offense; and evidence that the accused had made statements relative to previous similar acts. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred without opinion.)

Judge Latimer, dissenting, stated that the evidence did not establish entrapment and, moreover, that reasonable grounds existed for the informer to believe that the accused was trafficking in narcotics. (Note: See para.6-8, DA Pam 27-9, for an instruction on entrapment).

d. See U. S. v. Wolf, 9 USCMA 137, 25 CMR 399 (1958), which holds that an entraper is not considered to be an agent of the Government merely because he is a member of the armed services.

e. Where uncharged acts of misconduct are used to rebut possible entrapment claim, the military judge must give limiting instructions sua sponte as to both findings and sentence. U. S. v. Turner, 16 USCMA 80, 36 CMR 236 (1966).

f. See U. S. v. Fenstermaker, 17 USCMA 578, 38 CMR 376 (1968) where the court found as a matter of law that the government did not sustain its burden of proving beyond a reasonable doubt that the accused was not entrapped.