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Practical Legal Problems of the Military Commander

Wilfred A. Hearn
U.S. Navy

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PRACTICAL LEGAL PROBLEMS OF THE MILITARY COMMANDER

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by

Captain Wilfred A. Hearn, U.S. Navy

In looking over the program of your study during this past week, I see that I have been preceded by a host of very distinguished speakers—the Assistant Secretary of the Navy (Personnel and Reserve Forces) and the Chief of Naval Personnel among others. In following in the wake of such outstanding authorities in the field of naval leadership, I think I can be excused for harboring the fear that perhaps these gentlemen have ruined you as an audience—that is, from my point of view.

Under the circumstances I cannot help but feel sympathetic toward the manager of one of the major league baseball teams who, in a very important game toward the end of the season when the pennant was at stake, decided to put in left field a very promising rooky in whom he had great confidence. In the first inning an easy pop fly was knocked out to left and the rooky got under it, staggered and missed it. Before the inning was over a second fly ball was knocked out to the left field—and the left fielder got under it, let it hit in his glove and bounce out. When the inning was over the rooky came back to the bench and the manager, livid with rage, said, "Give me that glove, I am going to show you how to play left field." So in the second inning the manager went out to left field and during the course of that inning another easy pop fly was knocked to left. The manager hardly had to move out of his tracks, yet he missed it. When the inning was over he went back to the bench, threw

the glove down, then turned to the rooky, and said, "You see what you've done; you've got left field so fouled up nobody can play it."

One hundred years ago, if the Commanding Officer used common sense and his experience in the ways of the world, he could generally solve the practical legal problems confronting his command. But there were exceptions. I am reminded at this point of Commander Alexander Slidell Mackenzie, Commanding Officer of the brig SOMMERS, who hung three of his crew in November 1842 for allegedly plotting mutiny. Unhappily for Commander Mackenzie, one of the three was the son of the former Secretary of the Army Spencer, and Secretary Spencer took a dim view of the Commander's solution to the problem.

Many pros and cons have since been argued over the evidence. Among the things young Spencer was accused of was reading pirate novels, of having an "odd gleam" in his eye, and of making music by squeezing his hands together. While Commander Mackenzie eventually came out on top—after a general court-martial on charges of murder for which he was "honorably acquitted"—he could have easily avoided naval immortality.

As Theodore Roscoe comments in *This is Your Navy*, published by the Naval Institute, "Looking back at the tragedy with hindsight, it might seem that some other action would have been better than the one taken by the captain. The accused mutineers could have been kept in irons under close guard until thorough investigation and dispassionate trial could have brought out every shred of evidence, and justice might have been better served."

Today, nearly 120 years after that fateful day in 1842 when Midshipman Spencer swung from the yardarm, the problems, legal and otherwise, facing modern-day Commander Mackenzies are broader in scope, technically more complicated, and often international in their implications.

In the words of J. Lewis Powell, that well-known industrial engineer and "Word Mechanic" of the Department of Defense, we have gone from "Muscles to Missiles." Those of you who have had some contact with the developments of sonar and fire control radar since World War II can appreciate what Mr. Powell means. For example, in World War II radar transmission pulse duration of five micro-seconds now has been cut to a fraction of one micro-second by using an electronic pulse generator in place of a mechanical spark gap generator. In short, a relatively simple mechanical device has been replaced by a fairly complicated piece of electronic circuitry. Why? Because more difficult electronic problems have required technically superior and oftentimes more complicated electronic equipment.

As we learned during the International Law Study, the law, both international and domestic, is not an exact science. It, too, develops and changes to meet the needs of the society in which we live. Two world wars which brought into uniform large segments of the civilian population, the advent of the airplane, automobile, radio and television, the mechanization of industry, the increased emphasis on personal liberty in a world which is threatened with enslavement by Communism, and now the penetration of space, are but simple examples of the many influences which have played an important part in developing laws which our law makers consider best suited to meet the needs of our society in this present-day world.

Notwithstanding the increased influence of the law on the administration of the military services, the vast majority of the commander's legal problems are not problems created by law; rather they are problems which he can normally prevent from arising, or which he can remedy—in part at least—by timely action, employing the legal tools made available to him by Congress and the military departments. This is not to say that the military commander does not have legal problems which are an inherent part of command

responsibility. Such problems do exist and they are important. Let me identify them under three general categories.

First, there is the problem of recognition—that is, the recognition of a problem that is capable of being solved or prevented by the effective employment of the legal tools made available to the military commander. All too often a lack of forehanded appreciation of the effectiveness of the law in a given situation deprives the commanding officer of the preventative and the remedial capabilities of the law.

If, for example, a new commanding officer at a naval air station in Florida is unaware of the problem of illegal importation of Caribbean liquor into the Florida area, he would not apply those laws which give him some ability to attack the problem from within his own command before the federal laws have been violated. After the custom agents come aboard in a well publicized move and intercept a plane filled with contraband liquor, the commanding officer would be fully aware, but painfully so, of the problem. Unhappily, however, the legal tools afforded him at this point will not enable him to completely repair the situation. I would suggest that one of the first things an officer should do upon assuming command would be to determine what major legal problems threaten the command, or have been experienced by the command.

Secondly, there is the problem of understanding and utilizing those laws which will prevent, or minimize, unlawful situations of major concern to the command.

For example, a military commander who is fully aware of the scope of, and the limitations upon, his legal power to search personnel and property aboard his command, and who effectively uses this power, has gone a long way toward preventing larcenies within his

command and unlawful traffic in such items as narcotics and black market items. These are not just risks which are remote or merely within the realm of possibility and therefore pose no threat to the command. For example, recently there have been thirteen cases tried by a DESLANT DE involving black market operations in cigarettes. A military commander who underestimates his power to search has hobbled himself just as badly as one who overestimates his power to search. The underestimator puts a self-constructed and unnecessary obstacle in the path of his efforts to cut off the flow of contraband into and from his command. The overestimator frequently seizes contraband which will not stand up in court as legally obtained evidence.

The third general category of legal problems involves a correct application of the legal tools available to the commanding officer to remedy a situation after it has developed. Referring again to the commanding officer's power to search, I am reminded of a case which arose a few years ago involving the commanding officer of the Marine Barracks at a naval training center.

It seems that Sergeant "X" had stolen a large quantity of bedding and secreted it in his public quarters on board the training center, which was under the jurisdiction of the Center Commander. Advised of the problem, the Commanding Officer illegally authorized a search of the Sergeant's quarters instead of referring the matter to the Center Commander, who could legally authorize such a search. While the Sergeant was later convicted of larceny, the conviction was ultimately reversed because of the introduction of illegally obtained evidence. So far as I know, the Sergeant has never been successfully prosecuted. In an effort to remedy the problem, the problem was instead aggravated because of the Commanding Officer's lack of understanding of his power to search. There need not have been such a lack of understanding. At

the time there were fifteen naval lawyers on duty within 100 yards of the Commanding Officer's desk, any one of whom would have been willing to give him assistance in the matter. The law specialists who will provide the legal work for your next command, or who will be available to assist you with your legal problems, will always prefer to have a crack at suggesting "how to legally do it," rather than to be called in after the fact and be asked to perform a legal "post-mortem."

There's one more thought that I would like to leave with you before we discuss briefly some of the practical legal problems you will face as military commanders. You are going to make mistakes in recognizing legal problems and in selecting and using the tools provided you, but take it all in good grace, pick up the pieces, salvage what you can, find out what you did wrong, and profit by your experiences. Lawyers, as a rule, are accustomed to being on the losing side substantially half the time, and as a consequence roll fairly well with legal knockout punches, but many non-lawyers have a difficult time accepting the fact that they are in error.

I am reminded of the case of a commanding officer who convened a special court-martial a few years ago to try a confessed thief. The court received the accused's confession in evidence over the defense counsel's objection that it was an involuntary confession. The accused was convicted. The president of the court, in the course of instructing the court, failed to give the mandatory instruction concerning the extra-judicial confessions received in evidence. Instead of exercising his power to refer the case to another court for a rehearing, the commanding officer approved the case. It was eventually reversed in Washington for prejudicial instructional error. The commanding officer then had a second opportunity to refer the case for a rehearing. Instead, the skipper fired off a dispatch to the Chief of Naval Operations

claiming that legal technicalities were creating disciplinary shambles at his command. The reply he received said, in essence, that it would have taken only a few extra moments to have tried the case properly in the first place, and that his problem was not caused by legal technicalities, but by a prejudicial error committed by the court, not noted by him in his original review, and now, after being pointed out to him, was still being minimized by him as a mere legal technicality, when in fact the error deprived the accused of a fundamental constitutional right—due process of law.

Specifically, what are the practical legal problems that the military commander must wrestle with? Generally, of course, the nature and scope of these problems will depend in a large measure on, first, the type of command; and, secondly, the area and location of operations. One major group of practical legal problems relates to violations of the Uniform Code of Military Justice. Among the offenses most frequently presented to a military commander at mast or office hours are, first, the absence offenses; that is, the short and unaggravated unauthorized absences, and the more serious absences which have their inception in missing movement, escape from custody or confinement, or breach of arrest or restriction. The military commander's only contact with desertion will probably be his forwarding of the man's record to Washington after he has been absent for a period of a month or more.

The second group involves the violation of orders, such as willful disobedience of orders, and other types of failure to obey orders and regulations, whether issued at the departmental or at a lower level, including, of course, orders and regulations promulgated by the local command.

The third group involves the assault-type cases—simple assaults, and assaults which are aggravated

because of the rank or duties of the person assaulted, or because of the nature of the weapon used, or because of the extent of the injuries inflicted.

Thief-type cases—larceny, in which the thief intends to permanently deprive the owner of his property; and wrongful appropriation, in which the thief intends only to temporarily deprive the owner of his property.

Wrongful possession type cases, such as wrongful possession of ID cards and liberty cards.

Lastly, intoxication-type cases—drunken driving, drunk on duty, incapacitating oneself from duty through improper indulgence, drunk in a public place, and drunk on board.

The drunk on board offense reminds me of a recent case tried by a destroyer in the Far East, which to my mind illustrates that the law is an important ingredient of leadership. A sailor had imbibed excessively and, fortunately for himself and the Navy, he was able to get back to his ship under his own steam without damage to life or property. Upon his return he was tried and convicted of being drunk on board. When the case reached the type commander for review, he disapproved the findings and sentence, and expressed his thoughts somewhat along this line: "When destroyer men drink too much ashore, I want them to return to their ships so that they will not get themselves in trouble."

The proper disposition of these cases at the command level includes usually one of the following: captain's mast, pretrial investigation, trial by court-martial, or hearing to vacate the suspension of a sentence of an earlier court-martial. Each of these dispositions involves enough technical procedures that the commander himself often needs, and the key personnel doing the work on his staff always need some specialized training in military justice.

Another group of practical legal problems includes the large number of incidents involving command personnel and materiel which must, according to departmental regulations, be investigated at the command level. For particular incidents there are special investigating procedures prescribed. Examples of these would be an investigation conducted by an aircraft accident board or an investigation under the Navy Personnel Claims Regulations.

For most instances which require investigation, the Navy Supplement to the Manual for Courts-Martial prescribes generally the investigating procedures. Examples of such would be a court of inquiry, convened to investigate a grounding; a formal board of investigation convened to investigate an accidental explosion; and an informal investigation convened to investigate an injury to a member of the command under circumstances which indicate that his injury might not be in line of duty. Even where there is no indication that an injury was the result of the victim's misconduct or did not occur in line of duty, the military commander must often submit an injury report to the Judge Advocate General.

I would recommend that soon after taking command an officer should review these departmental regulations to determine his investigative responsibility. Although the professionals, such as the Office of Naval Intelligence, have primary responsibility in many areas, still the bulk of all investigations conducted in the military are in fact conducted at the local command level.

A third major group of practical legal problems is a military commander's relations with the domestic civil authorities: federal, state and local. These relations must not only be good from the public relations standpoint, but must also be correct from a legal standpoint. A commander who leans too heavily in favor of accommodating local civil authorities is

likely to find himself in trouble with superior military authorities. Let me give you an example.

A few years ago the commanding officer of a naval receiving station, without secretarial authorization, permitted the delivery of a sailor to local authorities for questioning concerning an assault and battery and robbery of an old lady, who at the time was in a deserted cemetery putting flowers on her husband's grave. At the time of delivery the sailor was being held for trial by general court-martial for the same offenses. As it resulted, the sailor confessed to both crimes and was eventually tried by the civil authorities. At the time of his civilian trial, however, he repudiated his confession and was acquitted by the jury, much to the consternation of the judge and the press. Could he then be tried by court-martial for these offenses? The answer is *NO*, not without the express permission of the Secretary of the Navy. Where did the receiving station commanding officer go astray? He was simply not familiar with the provisions of the supplement giving the ground rules of his relationship with domestic civil authorities in such cases. While the Secretary of the Navy normally will authorize a command to surrender a service man awaiting trial for *minor* offenses to local authorities, such permission is not always granted when serious charges are pending. However, personnel are never surrendered to the representatives of other states unless a request has been made by the governor of the state direct to the Secretary of the Navy. If approved by the Judge Advocate General, acting for the Secretary of the Navy in such cases, and the state agrees to the conditions under which delivery is to be made, the state's representative is furnished with a letter which he is to present to the commanding officer when he appears to take custody, and the commanding officer in turn is furnished an authorization which permits him to make delivery; thus the commanding officer is fully protected. The legal aspects of the relations with domestic civil authorities can be a highly

technical area, and one in which the military commander should move with extreme caution. Rarely is time of the essence. The Litigation Division of the Office of the Judge Advocate General is engaged in handling these matters on a full-time basis. It would be my suggestion that if any such situation occurs a request for guidance be sent to the Judge Advocate General. I can assure you that you will receive a prompt reply.

Let us consider now the relationship between the law and the topic of this week—"Command Leadership." As I noted earlier, the military commander is provided with a number of tools with which to achieve the command's mission, an important category of which is essentially legal in nature. However, law is not a substitute for leadership, but rather a key weapon of leadership. One important responsibility of the Judge Advocate General is to design new legal tools for your use. Witness, for example, the pretrial agreement, a procedure which was approved by the Secretary of the Navy in 1957 for use in general court-martial cases and in special court-martial cases. The use of these agreements by one Navy command has cut courtroom hours in general court-martial cases in that command by 66%.

Another important responsibility of the Judge Advocate General is to constantly have under review the legal tools already in use in the field. If they require technical modification, then appropriate amendments are to be recommended. If they are not being used as effectively as possible, then improved procedures are recommended to those concerned with their actual administration. The Uniform Code of Military Justice certainly falls into both of these categories. The late Secretary of Defense, James Forrestal, who fathered the code, sought an all-service code which would protect the rights of the persons subject to the code without interference with appropriate military functions. He sincerely believed that the Uniform Code of Military Justice would work. As he told Congress:

> I do not know of any expert on the subject, military or civilian, who can be said to have a perfect solution. Suffice it to say, we are striving for maximum military performance and maximum justice. I believe the proposed code is the nearest approach to these ideals.

But both Secretary Forrestal and Congress appreciated that after a shakedown cruise defects would probably occur which would require amendment. In fact, Congress specifically required the Court of Military Appeals and the Judge Advocates General of the three armed services to meet annually and report to Congress any recommendations for change. Have defects occurred? The answer is *Yes*. A number of minor defects have already been repaired by Congressional amendment. But some major defects have not yet been repaired.

One of the defects of the Uniform Code which the Court of Military Appeals, the Judge Advocates General of the three armed services, the Department of Defense and the Bureau of the Budget consider to be major is the limited amount of non-judicial punishment power the military commander has at mast. Consider, for example, the navy commander's power to award confinement at mast. Under the old Articles for the Government of the Navy, the navy commander afloat or ashore could award up to ten days' confinement, or up to seven days' solitary confinement, or up to five days' confinement on bread and water. Under the Uniform Code, however, the navy commander ashore can award no confinement of any kind. At sea he can only confine up to seven days, or up to three days' confinement on bread and water. Solitary confinement has been outlawed in its entirety.

I should add that the Judge Advocate General of the Navy is actively seeking to "repair" this particular "defect." He has joined with the other Judge Advocates General of the other services in drafting

a series of amendments of the code. One of these amendments would restore part of the navy commander's former non-judicial punishment powers. Although this bill has been introduced in every Congress since 1953, it has never come to vote in either house. But notwithstanding the existence of major defects, in the overall, the code has been a vastly improved tool for the military commander, and he has been using it with success to improve discipline and good order. As General Lemnitzer, Chief of Staff, and the next Chairman of the Joint Chiefs of Staff, stated just a year ago:

> I believe that the Army and the American people can take pride in the positive strides which have been made in the administration and application of military law under the Uniform Code of Military Justice. The Army today has achieved the highest state of discipline and good order in its history.

The same can certainly be said for the Navy. As Rear Admiral Chester Ward, USN, reported to Congress early this year:

> There was a 32% reduction in the number of general court-martial cases, and a 27% reduction in the number of special court-martial cases tried throughout the Navy and the Marine Corps during the fiscal year 1959. In contrast, there was a 10% decline in the number of summary court-martial cases tried during the same period.

Numerous factors have combined to produce these unusual figures. One has been, of course, the improved efficiency with which the code has been administered, as its provisions and procedures have become a part of our military way of life. But improved leadership has also been a major factor in this improvement. Let me cite again Admiral Ward's report to the Congress:

> One of the most contributing influences in this reduction is the most effective naval leadership program instituted by the Secretary of the Navy in General Order 21. This order calls for a revitalization of traditional naval leadership, with special emphasis on the morale aspects of leadership development. A current continuing, and intensive program to carry out General Order 21 now permeates the Navy, from the youngest petty officers to our most senior leaders, a new interest is thus being directed toward the young men in the Navy as individuals. Since the beginning of this revitalization of traditional naval leadership, unauthorized absence cases have been reduced by 17.3% and desertion cases by 30%.

Although I do not mean to be talking myself out of a job, I submit that in the final analysis the answer to most of the military commander's problems is not bigger and better laws, but rather more effective leadership. The tools of example—loyalty, judgment and industry, should in the last analysis, relegate law to a less important role.

BIOGRAPHICAL SKETCH

CAPTAIN WILFRED A. HEARN, U.S. NAVY

Present Position: Commanding Officer, U.S. Naval School (Naval Justice)

Schools:

1925-27 University of Maryland.
1927-31 George Washington University Law School (LLB).
1944 U.S. Navy School of Military Government.
1955-56 U.S. Army JAG School, Advanced Course.

Career Highlights:

1931 Member of the Bar, District of Columbia.
1937 Member of the Bar, State of Tennessee.
1942-45 Aviation Ground Officer.
1945-46 BUAER Contracting Officer for Contract Terminations.
1947-49 Chief Tax Officer, JAG.
1949-50 Director, Civil Law Division, JAG.
1950-52 District Legal Officer, COM14.
1952-55 Director, Administrative Division, JAG.
1956-59 Director, International Law Division, JAG.
1959 Member, U.S. Delegation to United Nations Conference on Law of the Sea.
1959-60 Ass't Judge Advocate General of the Navy (International and Administrative Law).
1960 Member, U.S. Delegation to United Nations Conference on Law of the Sea.