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New Light on the Legislative History of Desertion Through Fraudulent Enlistment: The Decline of the United States Court of Military Appeals

In this Article, Professor Avins, the author of several penetrating articles in the field of military law, takes to task the United States Court of Military Appeals. He does so by analyzing two recent decisions of that judicial body which the author feels are typical of its work product. The cases involve the offense commonly referred to as fraudulent re-enlistment. Whether such offense, under the Uniform Code of Military Justice, is an offense separate from general desertion and whether the intent to remain absent permanently is required to constitute such offense are questions which call for thorough historical and legal analysis. Professor Avins, as you will soon discover, treats them accordingly.

Alfred Avins*

I. THE WORK PRODUCT OF THE COURT OF MILITARY APPEALS

Substantive military law is the domain of the specialist. Few civilian attorneys practice it; and even a considerable number of officers in the several Judge Advocate General's branches of the armed services are occupied with legal work of a quasi-civil nature, such as claims, contracts, or legal assistance. Among judge advocates who are concerned with court-martial work, many find that a large proportion of their most important cases are civil-type crimes such as murder, larceny, or similar offenses found in

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civil codes. Even when, in time of peace, a military law offense does come before a court-martial where lawyers are present, it is apt to be a clear-cut case presenting few legal questions, such as a lengthy absence without leave. It is therefore not surprising that only minimal attention has been paid to military law in legal periodicals. Indeed, out of 57 articles appearing in the first 11 numbers of the Military Law Review, only 3 dealt with substantive military offenses.

The malfunctioning of an important federal agency, on the other hand, is of concern to all lawyers. The mere fact that only a relative handful of practitioners ever appear before the Federal Power Commission or the Federal Communications Commission, and the fact that these agencies deal with a highly specialized area of law and regulate a very narrow area of the economy, properly did not deter lawyers, as well as the general public, from taking a keen interest in the performance of these agencies in the last several years when their inadequacies were laid bare. The interest on the part of lawyers in general, though they may never appear before a regulatory agency, in the broad plans of the new administration for the reorganization of these agencies is a proper reflection of the concern which lawyers ought to feel for the adequate performance of the work of such tribunals even though they do not directly affect their law practice.

As the "G.I.'s Supreme Court," the Court of Military Appeals' work product affects far more people, both lawyers and non-lawyers, than do the activities of the regulatory agencies which have been in the public limelight so often. Accordingly, lawyers generally should not eschew examination of the activity of the court merely because its products are made for specialized consumption.

Should lawyers in general, and those in the new administration in particular, examine the work of the Court of Military Appeals with care, it would become painfully obvious that this tribunal is badly in need of urgent rejuvenation. For the past several years, students of the court's work could not help but notice that the quality of its judicial product has been going downhill at an increasingly accelerated rate. The symptoms of this progressively inferior work performance have been criticized from a number of angles. Commentators have attacked the court for reading its own notions into the Uniform Code of Military Justice,\(^1\) for discarding its own decisions without adequate consideration or cause,\(^2\) for

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overturning, with almost reckless abandon, provisions of the *Manual for Courts-Martial*, and substantive military law rules of the most ancient vintage, for creating instability in the administration of the military law, and even for abuse of power. Indeed, one writer suggested that appellate counsel appearing before the court be closely controlled and supervised as a last desperate measure to prevent the court's complete demise as a useful institution. Thus, it is clear that instead of contributing to the professionalization of military lawyers by setting a high standard of excellence, the Court of Military Appeals threatens not only the destruction of its own utility, but also the impairment of the efficiency of the Judge Advocate General's departments as well.

The above-mentioned attacks on the court, in this writer's estimation, treat only of the symptoms of the court's decline. Moreover, by so doing, they invite a point-by-point refutation by the court's apologists which tends to obscure the major defect in a mire of details and side controversies. These controversies are only tangential to the main affliction of the Court of Military Appeals which is that the court is turning out a second-rate work product substantially below the minimum norm, in both learning and analysis, which should be required of every judicial tribunal, especially the court of last resort working in a specialized field.

A demonstration of the above statement by analyzing every case decided by the Court of Military Appeals in the last several years would take a shelf full of volumes of sizeable proportions. Moreover, such an inquiry would serve no useful purpose. In many cases the court pretends that Congress gave it a blank check to start from scratch, and to ignore prior learning and reasoning in the military law, and hence an inquiry into the prior military law

5. Report to the Secretary of the Army, dated January 18, 1960, by the ad hoc Committee to Study the Uniform Code of Military Justice 193–95 (1960).
7. Ibid.
would no doubt be met by the argument that Congress has swept away such law. In others, decisions are often premised on supposed policy considerations which, however dubious they may be, do not readily lend themselves to an analysis of the court's work product.\(^{10}\)

The quality of a judicial tribunal's work often can best be examined by dissecting a single decision. It is true, of course, that one case can hardly establish the record of an institution. However, it often happens that a case can be found which illustrates, in microcosm, the way in which the body is performing generally. An examination of such a case in detail is more profitable than an at-large, spot-check survey of the body's work in general. Given the proper case, the deficiencies of the Court of Military Appeals can be laid bare.

Article 85 of the *Uniform Code of Military Justice* provides, in part, that a member of the armed forces who "without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States, is guilty of desertion."\(^{11}\) The *Manual for Courts-Martial* indicates that this form of desertion does not necessarily require an intent to remain away permanently from the initial status,\(^{12}\) a result which would clearly appear to follow from the plain language of the statute. Nevertheless, in two companion cases, the United States Court of Military Appeals held that this statutory provision does not create an offense separate from straight desertion,\(^{13}\) and that an intent to remain permanently absent is required for this offense.\(^{14}\)

These companion cases are useful for dissection for a number of reasons. First, both of them were decided unanimously, unlike a number of recent controversial opinions which divided the court. Moreover, each one was written by a different member of the court, and the one judge who did not author one of the opinions has, in addition to his concurrence, more recently cited these hold-
ings with approval. Hence, these cases are in every sense institutional decisions. Second, these cases purport to be based solely on the historical pedigree of the applicable statute. Therefore, there is no problem of disagreement about policy considerations or whether Congress intended to change the statute. Third, the first decision by the court provoked a thoughtful rebuttal by a board of review. Thus, the court had a second opportunity to give careful consideration to its holding. Fourth, this is one of the cases which a careful scholar in this field criticizes for overturning a Manual provision without justification. This should have caused the court to act with special care, and its failure to do so is symptomatic of other cases overturning Manual provisions without good cause. Finally, a special Army board recently recommended that fraudulent re-enlistment be made desertion. This would tend to indicate the importance of the area generally.

There are other reasons why these cases are useful for analysis. These reasons will be discussed in conjunction with the analysis itself. Suffice it to say here that the court deserves a Pulitzer Prize for historical fiction-writing, and that any relation between the court's decision and actual history is purely coincidental. It might be added that the coincidence, at best, is tenuous indeed.

II. PRE-WORLD WAR I HISTORY OF FRAUDULENT ENLISTMENT DESERTION

The statute making the act of fraudulent enlistment by one presently in the army desertion came from the British Articles of War and has been part of the American Articles of War since 1776. This statute is open to three possible interpretations: (1) that one who re-enlists ipso facto becomes a deserter, regardless of his state of mind as to permanent absence from his first unit, and that such desertion is a separate and distinct offense from that which might be committed by an absence without leave with intent to remain away permanently committed at the same time; (2) that one who re-enlists ipso facto becomes a deserter, also without regard to his state of mind as to permanent absence from his first unit, but that the statutory rule creates a rule of evidence which serves as a statutory substitute for the normal elements of desertion, and hence where the accused goes absent without leave with intent to remain

17. Fratcher, supra note 3, at 873–74.
18. Report to the Secretary of the Army, supra note 5, at 180.
away from his first unit permanently, and also re-enlists, only one desertion is committed; (3) re-enlistment is only evidence of intent to remain away permanently. This author has already discussed the historical origins of the statute as the anti-"bounty-jumping" law, and it is sufficient to say that nothing in its early history could lead one to doubt that it was meant as an offense separate and distinct from straight desertion, and not requiring any intent beyond the intent to enlist.

The earliest American textwriter to discuss the substantive military law in detail was O'Brien. He notes, quite properly, that if a soldier "should enlist, or offer to enlist, in a new service," this serves as evidence of intent to desert under the general desertion section. He then cautions: "There is, however, one case where the court is precluded from entering into the question of intention, the law having positively pronounced the enlisting in another corps, without a lawful discharge from the first, to be an act of desertion." O'Brien adds: "the very act of making the second enlistment is made to constitute a desertion from the first." Thus, O'Brien recognized that a second enlistment in any other service, including the naval or marine service, or an attempt to enlist therein, constitutes evidence of straight desertion. However, actual, completed re-enlistment in the army is a statutory constructive desertion, which does not require any intention. This difference constantly recurs in consideration of the relation between straight desertion and constructive desertion.

Reinforcing this view is O'Brien's discussion of the specifications under the two articles. Under the 20th Article of War of 1806, the general desertion Article, the model specification reads: "That private A. B. of —— regt., U.S. army, having been duly enlisted at ——, in the service of the U.S., * * * did desert the same on or about the — day of —— from ——. The model specification under the 22d Article of War, the constructive desertion article, contains entirely different elements. It states: "that the prisoner having been duly enlisted, etc., did again enlist himself in ——, at on or about the — day of ——, 18—, without a regular discharge from the —— regiment in which he last served." Thus, where the accused has left his unit and re-en-

22. Id. at 98.
24. O'BRIEN, op. cit. supra note 21, at 304.
25. Ibid.
listed in another, a specification might be laid under both the 20th and 22d Articles of War, with a charge for each.

Additional support for this view, that constructive desertion by re-enlistment was separately chargeable from the desertion which occurred when the accused left his unit, is found in the uniform practice during the Civil War and thereafter. In a leading case, *Private James Burnell's* case, the accused was charged as follows:

Charge I—Desertion.  
Specification: [Accused] did absent himself without leave, from the service of the United States, his said Company and Regiment then and there being in constant expectation of a battle [from Dec. 29, 1862 to July 9, 1863].

Charge II—Violation of the 22nd Article of War.  
Specification: In this, that the said James Burnell, a private in Company "F", 10th Regiment Kentucky Volunteer Infantry, on or about the 4th day of April, 1863, being a member of [said Company] . . . having been duly enlisted in the service of the United States, did enlist himself in Company "H", 34th Regiment, Kentucky Volunteer Infantry.26

The accused was found guilty, and his sentence to be shot to death was approved by the War Department. There are other cases of a similar nature both in War Department orders and in field department orders.27

Moreover, the opinions of General Holt, Lincoln's Judge Advocate General, are to the same effect. Thus, where a soldier went absent without leave from his command and enlisted in another regiment without a regular discharge, General Holt held:

The case appears to be precisely such a one as is contemplated by the 22nd Article of War. It is the enlistment in the second regiment without a proper discharge from the first which constitutes the gist of the offence and the crime is consumated by such enlistment whether the

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27. For example, in the case of Private William Cobb, G.O. 35, War Dept. (1864), also a death sentence case, the accused, in addition to being charged with straight desertion under the 20th Article of War, was also charged as follows:  
Charge II—Violation of the 22nd Article of War.  
Specification: In this, that he, the said Private William Cobb, Company 'E', 8th U.S. Infantry, did, on or about the 15th day of August, 1863, enlist himself as a substitute.  
See also G.O. 83, Dept. of Washington (1864), where the accused was charged with 17 violations of the 22d Article of War.

The practice of dual charges continued uninterrupted after the Civil War. See, e.g., G.C.M.O. 63, War Dept. (1879), where the accused was charged with desertion from June 17, 1878 to October 4, 1879, and with, as a separate charge, violation of Article of War 50, by enlisting on September 20, 1879 under another name. See also G.C.M.O. 35. War Dept. (1878). And see the cases cited in note 43 infra.
soldier has left his former regiment as a deserter or only as an absentee without leave.28

In another opinion it was held that where a soldier, under sentence of imprisonment for a term not longer than his term of enlistment, escapes and is not arrested until his term of enlistment expires, he may not be reincarcerated. However, if he re-enlists in a new regiment without a formal discharge from the old, although after expiration of the prior term of enlistment, he may be tried, not for straight desertion, but for constructive desertion under the 22d Article of War.29 In still a third opinion, which is significant because General Lieber was later to hold to the contrary, General Holt held that where a soldier left one regiment and enlisted in another and subsequently lost his life in the line of duty, no valid claim existed against the government for either arrears of pay or bounty, in either service, on the grounds that the pay and bounty in the first enlistment were forfeited by desertion, and that the second enlistment was a fraud which rendered the contract invalid.30

One final piece of evidence will complete the mosaic. In a standard formbook published in 1877, there is a form for “Enlisting in another Company without a regular discharge, in violation of the 50th Article of War.” The form reads: “In this, That —— did enlist himself in Company —, of ——, without a regular discharge from the ——[regiment, troop, or company] in which he last served.”31 This form is in addition to the form for desertion.


The gist of the offense specified in the first paragraph of the article is the leaving one regiment, etc., and enlisting in another without a due discharge from the former; and the offense is consumated whether the soldier re-enlisting had, in leaving or staying away from his proper regiment, etc., been guilty either of a technical desertion or of an absence without leave.

29. Dig. Ops. JAG 141 (3d ed. 1868). And see 14 Ops. Att’y Gen. 265, 267 (1873): “Article 22 makes provision for the punishment of a person for reenlistment in a company or a regiment without a regular discharge from another.”


31. REGAN, THE JUDGE ADVOCATE RECORDER’S GUIDE 42 (1877). See also CMO 23—1910 [pp. 7–13], reprinted in part in NAVAL DIG. 253 (1916), where it is stated
Thus, it is clear that prior to 1880 the War Department consistently interpreted constructive desertion by fraudulent enlistment to be a separate and distinct offense, separately chargeable, and with different elements, from straight desertion.

Of course, during the early history of the Articles of War, the fact that one could charge a fraudulent re-enlistee with both straight desertion and constructive desertion was of little practical significance. Since in eighteenth century England the penalty for straight desertion was death, and since “it was made death for a poor soldier, let him be ever so ill-used by his captain, to leave the company or regiment he belonged to, and list in any other company or regiment in his majesty’s service,” it would present practical difficulties to attempt to carry out both sentences. Likewise, since there was no authorization for a table of maximum punishments in the United States Army before 1890, the court-martial could impose the maximum punishment for each specification of desertion (death in wartime, life imprisonment otherwise), and hence a double charge of desertion had no effect on the punishment. Such considerations make the above evidence regarding the use of more than one charge all the more persuasive.

In 1879, there occurred an event which completely altered this consistent interpretation of the constructive desertion statute by the Judge Advocate General’s office. This event did not occur in the United States, but rather in Great Britain, and it consisted of the passage of the Army Discipline and Regulation Act of 1879. A century earlier, there existed serious controversy over the question of how far acts of the Imperial Parliament bound the American colonies, but by 1879 the problem may be deemed to have been settled. Nevertheless, the failure of Congress to follow the British enactment did not prevent the British law from making deep inroads into the thinking of the Judge Advocates General.

For a quarter of a century prior to 1879, the annual mutiny acts contained provisions very similar to the American constructive desertion statute. In 1879, the definition of desertion was re-
stricted by eliminating constructive desertion, and inserting in lieu thereof a fraudulent enlistment section. Notwithstanding some rationalizations for the change that "a man cannot be deemed to have permanently abandoned the service who rejoins it, however unlawfully," the reason for the elimination of constructive desertion in British law was not doctrinal difficulty at all. Rather, it was the feeling that fraudulent re-enlistment was more serious than desertion and the desire of the Secretary of State for War to penalize this offense more heavily than had been done before. The actual reason for the change, as told to the House of Commons, was as follows:

[From the circumstance that the punishment of the crime of desertion... was in our Service death, there had grown up a popular feeling in favour of the deserter. But that crime was not included in the present use of the word "desertion," which simply implied a fraudulent breach of contract entered into with the Service; an act, in itself, essentially and notoriously disgraceful. He was, therefore, sure that when this was clearly understood by the public there would not remain a shadow of sympathy for a man who had committed this crime, who would thenceforward be regarded as a thoroughly disgraceful and fraudulent person.]

1878, 41 & 42 Vict., ch. 10, § 15. This provision had originally been inserted in the Mutiny Act of 1781, 22 Geo. 3, ch. 4, § 2, and remained until the Mutiny Act of 1811, 51 Geo. 3, ch. 8. Prior to 1781, the provision in the Mutiny Acts was not connected with desertion at all. See Mutiny Act of 1688, 1 W. & M., Sess. 2, ch. 4; Mutiny Act of 1780, 21 Geo. 3, ch. 8.

39. See 247 Parl. Deb. (3d Ser.) 737 (1879):
   Take the case of a man under a non-commissioned officer, who treated him with brutality and bullied him; such cases were by no means uncommon, and many a man had been morally compelled to desert by the pressure put upon him in that way. Was that to be ranked with the crime of fraudulent enlistment, which had ever been, and must always be, a much more voluntary act than desertion?
40. 247 Parl. Deb. (3d Ser.) 734 (1879), where the Secretary of State for War declared:
   He had already pointed out how great a blot upon the Army was desertion; while fraudulent enlistment amounted to a regular trade; and he quite admitted that the Government wanted to deal with those crimes more severely than had been the case hitherto; and it was felt necessary, while relieving the soldier of the consequences of some minor offenses, to hit him harder for crimes committed not only against the State, but against his comrades. As the matter stood, a soldier guilty of desertion from Her Majesty's Service, or of fraudulent enlistment, ipso facto, would forfeit his service; he chose to break his engagement and incur this penalty, and the State was right in considering him as entering into an engagement de novo.
41. 246 Parl. Deb. (3d Ser.) 441-42 (1879).
Thus, it is clear that the change was effected in British law in order to stigmatize the re-enlistee as a fraud, undeserving of public sympathy. The failure to understand the reasons for the change, however, produced a gross distortion of its significance among Americans.

The earliest opinion of the Judge Advocate General after the enactment of the Army Discipline and Regulation Act of 1879 and which directed its attention to the British statute was written in May, 1880. That opinion dealt with a case in which a soldier deserted from an infantry regiment in June, 1878, and re-enlisted in the General Service in September, 1879. A few days later he deserted from the General Service, and was subsequently arrested. When brought to trial he was charged with and convicted of three separate desertions, the third charge being the act of re-enlisting in the General Service without a discharge from his prior unit, in violation of the 50th Article of War. The Judge Advocate General said:

This Article, in its first clause, does not create a specific offence, or one distinct from the desertion made punishable in the 47th Article, but declares in effect that a soldier who abandons his regiment shall be deemed none the less a deserter although he may forthwith re-enlist in a new regiment. It does not render the act of re-enlistment a desertion, but simply makes the re-enlistment, under the circumstances indicated, prima facie evidence of a desertion from the previous enlistment from which the soldier has not been discharged, or, more accurately, evidence of an intent not to return to the same. The object of the provision, as it originally appears in the British Code, apparently was to preclude the notion, that might otherwise have been entertained, that a soldier would be excused from repudiating or departing from his original contract of enlistment, provided he presently renewed his obligation in a different portion of the military force.

As authority, the opinion cites Samuel's Military Law—a book used as indiscriminately then as Winthrop's text is used today. Indeed, much of the opinion is copied, with only stylistic changes, from Samuel. In a moment, we shall point up the significance of this fact.

Six years later, Acting Judge Advocate General Lieber declared as follows:

42. Op. JAG, R. XLII–642 (May 17, 1880) (TJAGA Lib.).
43. This opinion is reprinted in Dig. Ops. JAG 44–45 (1891). It must be noted, however, that the practice of charging desertion under Article of War 47 and adding an additional charge and specification under Article of War 50 continued after Dunn's opinion. See, e.g., G.C.M.O. 6, War Dept. (1881); G.C.M.O. 50, War Dept. (1881); G.C.M.O. 31, War Dept. (1882); G.C.M.O. 2, War Dept. (1884); G.C.M.O. 7, War Dept. (1884).
44. Dig. Ops. JAG 24 n.2 (1880).
On 24th Sept. last, in an endorsement in the case of Private William E. Vanderworken, I expressed the opinion that the first clause of that article does not create a distinct offense. This has been the opinion heretofore held by this office, though not always by department commanders (see G.C.M.O. 72, Dept. Dakota, 1885). That it is the correct view will, I think, appear from the history of the article in the British service from which it has come down to us, having been incorporated in our Military Code of 1776.

Referring to the article covering desertion, Samuel, in his "History of the British Army," says: [Here Lieber quotes from Samuel.]

It is a perversion of language to call an enlistment into the service a desertion from it. The enlistment of a soldier already in the service into another regiment or other military organization, without having been previously and lawfully discharged, may, under certain circumstances be a very grave offense, but it is not desertion, and he cannot, therefore, for such offense, be reputed a deserter. Hence in the present British Army Act, it is classed as "fraudulent enlistment" and punished as such. We retain the article in its original form causing occasional conflicts of opinion and action.45

General Lieber also quotes Samuel as the authoritative interpreter of the article in question. The result is a most egregious blunder.

A close reading of the cited pages of Samuel's text shows that he was discussing the second clause of the then current Mutiny Act.46 But this provision which Samuel was discussing had nothing whatsoever to do with the provision of the Article of War which was copied into the American code from the British. The provisions involved are wholly different in every respect.47 The re-

45. Op. JAG 10–4 (May, 1886) (TJAGA Lib.). This opinion is mentioned, although not digested, in Dig. Ops. JAG 30 (1901). Subsequent to General Lieber's opinion, it became the practice to charge the re-enlistee with desertion under Article of War 47 and with a second charge under Article of War 62 (general article) alleging the fraudulent enlistment. See G.C.M.O. 20, War Dept. (1887); G.C.M.O. 27, War Dept. (1887). This practice was made service-wide in G.O. 57, A.G.O., War Dept. (1892). See note 68 infra.

46. SAMUEL, MILITARY LAW 330–31 (1816).

47. The provision which Samuel was discussing had been first enacted only four years before in the Mutiny Act of 1812, 52 Geo. 3, ch. 22 and reads:

No non-commissioned officer or soldier who shall desert His Majesty's service, shall be exempt from the pains and penalties imposed by this Act for such offense by again inlisting into His Majesty's service; but any such soldier shall, notwithstanding such subsequent inlistment, be deemed to have deserted His Majesty's service, and shall in like manner suffer death, or such other punishment as by a court-martial shall be awarded.

The British article of war from which the American article was copied verbatim is § 6, Art. III of the British Articles of War of 1774, and states:

No Non-commissioned Officer or Soldier shall inlist himself in any other Regiment, Troop, or Company without a regular Discharge from the Regiment, Troop, or Company, in which he has last served,
sult of the above two opinions, therefore, is to distort entirely the meaning of the American statute by using Samuel's discussion of a wholly unrelated provision of the Mutiny Act as the key to the interpretation of an Article of War different in all respects from the Mutiny Act clause.

The result of the above attempts to fit a British interpretation of a statute to an American statute of an entirely different character was to throw the application of an Article of War, previously uniform and rational, into utter chaos. When there was added to this chaos the hostility displayed, by the Judge Advocate General's office, because of the new British rule, toward the article in question, as illustrated by General Lieber's opinion, and the consequent desire to confine it to as few cases as possible, a sort of hydraulic pressure was exerted on the article which squeezed it into the narrowest possible compass.

However, a counter-pressure was exerted from the field. This movement was sustained first, by the importance of the 50th Article in punishing soldiers who repeatedly deserted and re-enlisted, and second, by the knowledge, some first-hand, some handed down, that by immemorial custom the 50th Article had been interpreted as a separate constructive desertion provision, violation of which was chargeable in addition to regular desertion. These currents and cross-currents of opinion spawned a half-century of confusion in the Judge Advocate General's Corps on the meaning of the article.

For example, as noted previously, General Holt had held the fraudulent re-enlistment void, and one which therefore conferred no rights on the re-enlistee. But General Lieber, in a later opinion, held that time served under the new enlistment was creditable service toward retirement, on the theory that "the man who was a deserter before he enlisted the last time does not again commit the crime of desertion by enlisting, and there is no law making such an enlistment void." However, he also held that the re-enlistment was made "conclusive proof" of desertion by the 50th Article.

on the Penalty of being reputed as a Deserter, and suffering accordingly . . . .

This provision is reprinted in Davis, Military Law 585 (3d ed. 1915).

It might be noted that the clause with which Samuel dealt had replaced a section of the Mutiny Act similar to the Article of War. See Mutiny Act of 1781, 22 Geo. 3, ch. 4, § 2. This serves to emphasize the difference between the provisions and the inapplicability of Samuel's commentary.


49. Letter 355, Sept. 18, 1894 (TJAGA Lib.). This opinion is referred to, but not digested, in Dig. Ops. JAG 30 (1901). In his opinion, General Lieber states:

It is clear from the language of the brief that the opinion that the
thus differing from Judge Advocate General Dunn's opinion of 1880, set forth above,\textsuperscript{50} that such re-enlistment was only \textit{prima facie} evidence of intent to abandon the prior enlistment.

Later, General Davis followed the previous reliance on Samuel for interpretation of the statute.\textsuperscript{51} Moreover, he reverted to General Dunn's position. Thus, he declared that a soldier who re-enlisted without a discharge "by statute . . . became \textit{prima facie} a deserter" because the re-enlistment without discharge "under the 50th Article of War is proof of the intent" to abandon the prior organization permanently.\textsuperscript{52}

Of course, the effect of General Davis' construction is to read Article of War 50 out of the Code. General Davis had himself held that a soldier who goes absent without leave with intent to report at a post other than his own was guilty of desertion.\textsuperscript{53} This hold-

\begin{quote}
\textsuperscript{50} Wilson, \textit{op. cit. supra} note 30.
\textsuperscript{51} For example, in Op. C. 902 (Jan. 18, 1895) (TJAGA Lib.), noted but not digested in \textit{Dig. Ops. JAG} 30 (1901), and approved by General Lieber, General Davis declared:

The article is properly to be regarded as having been declaratory of existing law, and to have been intended to remove a doubt which existed (when it was enacted in England) whether a soldier who left one command, and did not remain absent from the service, but enlisted in another command could be regarded as having the same status as to his first enlistment as the man who remained absent. It was to remove a doubt. The law already was that such a second enlistment did not absolve the soldier from the obligations of the first. Samuel in his work on Military Law says: [Here quoting Samuel]

The enactment in question is therefore not to be regarded as establishing a new principle of law, but as being in aid of an existing one. It was already unlawful to abandon one contract of enlistment and enter into another. And under this principle it could make no difference whether the deserter enlisted again in the regiment from which he deserted or another. Either was a violation of his first obligation. Likewise, in Op. C. 23644 (July 23, 1908) (TJAGA Lib.), General Davis declared:

The 50th Article of War was taken from the English Articles of War and the purpose of its adoption was to prevent enlisted men from separating themselves from one branch or regiment of the service, enlisting in another branch or regiment of the service and when charged with desertion setting up a want of intent to desert as indicated by a return to the service. This had frequently been done and this Article was adopted so as to establish an intent to desert upon a subsequent enlistment.

\textsuperscript{52} Op. C. 23644 (July 23, 1908) (TJAGA Lib.).
\textsuperscript{53} Op. C. 24722 (April 5, 1909) (TJAGA Lib.).
\end{quote}
FRAUDULENT RE-ENLISTMENT

ing is fully in accord with well-accepted law. Accordingly, the act of re-enlistment at the new post would, under General Davis' interpretation, add nothing because reporting at the new post and concealment of status would be evidence of intent to abandon the old post regardless of whether the soldier re-enlisted.

In addition, without benefit of a provision such as Article 50, the Navy had held that fraudulent re-enlistment, either in the naval service or in the army, was evidence of intent to desert from the previous contract of enlistment. This also shows that Davis' interpretation would render the statute superfluous.

The real problem in assaying the effect of the special statute lies in the failure to distinguish between the law without the statute and the added effect of the provision. Unauthorized absence with intent to abandon the prior contract of enlistment constitutes straight desertion. Such intent is evidenced not only by enlistment in another army unit, but also by attachment to another unit without re-enlisting, if done in a clandestine manner, or by enlistment in the naval service, or by numerous other acts. Hence, singling out enlistment in another army unit only is inexplicable, unless the statute is designed to have a special effect. This effect can only be that the elements mentioned in the provision itself are enough to constitute the offense. The failure to distinguish between the natural propensity of the elements of constructive desertion to establish straight desertion, and the added special effect of the constructive desertion statute, is a dominant flaw in the opinions which so often have misinterpreted the law.

Three textwriters of the period remain to be examined. Davis simply repeats his own opinions and those of General Dunn, relying heavily on Samuel. Dudley does likewise. Winthrop, however, does not. In the first edition, published in 1886, before Lieber's opinion previously mentioned, Winthrop declares:

[Article 50] is to be construed, however, not as creating an offence distinct from the desertion made punishable by Art. 47, but as indicating a specific form of such offence, or rather as declaring that the act of reenlisting under the circumstances described shall constitute proof of desertion on the part of the soldier.

55. Naval Courts and Boards, 56–57 (1937); Forms of Procedure for Courts and Boards in the Navy and Marine Corps 98 (1910); NAVAL DIG. 168 (1916); CMO 23—1910 [p. 8].
56. DAVIS, MILITARY LAW 432 (2d ed. 1911).
57. DUDLEY, MILITARY LAW 380 (1907).
58. 1 WINTHROP, MILITARY LAW 933 (1886).
To support this proposition, Winthrop cites Dunn's opinion, as
digested in his 1880 digest, and several department court-martial orders. He then proceeds to add a sentence on the supposed
object of the provision, copied from Samuel and citing him as
authority. Winthrop, in his forms of charges in the appendix,
however, has a form under Article of War 50 which simply
alleges in the model specification that the accused, a private in one
regiment, "did, without having been regularly discharged from
said company and regiment, enlist himself in" another regi-
ment.

That Winthrop did not agree with the Dunn-Davis position that
Article of War 50 was merely evidence of intent, but in fact be-
lieved that this Article created a form of constructive desertion, so
that proof of the elements of the statute was proof of the whole of
the crime, is adequately illustrated not only by the above-quot-
ed language but by a comparison of his second edition with the
first edition. Winthrop added to the second edition a section on
proof and defense in which he states:

The previous voluntary enlistment or service, and the absence of any
discharge therefrom, together with the deliberate enlistment in the
"other" regiment or company, being shown by the evidence of the
proper commanding officer, adjutant, recruiting officer, etc., the act
of desertion defined in the Article is proved, and there can be no
valid defense.

This is in sharp contrast to his extensive discussion of defenses
in respect to regular desertion. Second, Winthrop dropped the
citation to General Dunn's opinion in the footnote previously men-
tioned, although a citation to another opinion of General Holt re-
mains in the footnote immediately preceding it. Thirdly, he
has retained, in unaltered form, the specimen charge for violation
of Article of War 50. Finally, and unquestionably the most re-
markable of all, Winthrop has added a paragraph advising his

59. Supra note 44.
60. WINTHROP, op. cit. supra note 58, at 933 n.3.
61. Id. at 933–34, n.1.
62. 2 WINTHROP, MILITARY LAW 334 (1886).
63. WINTHROP, MILITARY LAW AND PRECEDENTS 652–53 (Reprint 2d
ed. 1920).
64. Id. at 642–43.
65. Id. at 652, nn. 28 & 29.
66. Id. at 1017. A Coast Guard board of review noticed the charge in
    United States v. Huff, 19 C.M.R. 603, 607 (1955). Davis, it might be not-
ed, has no specimen charge for desertion under the 50th Article, although
    he has two for other forms of violation of the 47th Article. DAVIS, op. cit.
supra note 56, at 663.
readers to charge the desertion under the 50th Article of War,\textsuperscript{67} notwithstanding the fact that three years before, the Adjutant-General's office had issued a most explicit order requiring the desertion to be charged under the 47th Article, the general desertion article.\textsuperscript{68}

From all of the above, it could hardly be clearer that while Winthrop did not believe that there should be two charges of desertion laid in a case of fraudulent re-enlistment, he did believe that proof of the re-enlistment is proof of the whole of the offense of desertion, and that the crime should be laid under the 50th Article of War. Thus, Winthrop in effect takes the same position as General Lieber, namely, that the 50th Article of War creates a species of constructive desertion.

Of course, Winthrop's positive statement that there is no defense once the re-enlistment is proven is not, strictly speaking, correct. For example, a re-enlistment entered into because of necessity would be a good defense.\textsuperscript{69} Likewise, duress could also be shown as a defense.\textsuperscript{70} Further a mistake of fact of authority—

\textsuperscript{67} Id. at 652. It would appear, at least, that Op. C. 21422 (April 23, 1907) (TJAGA Lib.) is in accord with this view.

\textsuperscript{68} G.O. 57, A.G.O., War Dept. (1892). This order is noted in Davis, \textit{op. cit. supra} note 56, at 662 n.2, 678 n.2; and in \textit{Manual for Courts-Martial, U.S. Army} 1898, at 104.

\textsuperscript{69} See Hersey and Avins, \textit{Compulsion as a Defense to Criminal Prosecution}, 11 Okla. L. Rev. 283, 293 (1958), which contains the opinion of Judge Advocate General Holt that Union prisoners who enlisted in Confederate ranks during the Civil War to avoid death were not to be considered as deserters. We are told in Wilson, \textit{op. cit. supra} note 30, at 26, that 3,416 Union soldiers enlisted in the Confederate army during the Civil War while prisoners of war. In one such case, the Judge Advocate General declared:

In the claim of a soldier for commutation of rations while prisoner of war, and who, while in such condition enlisted in the rebel army in order to facilitate his escape, did escape, and rejoined his proper regiment, \textit{held}, that the charge of desertion involved in his enlistment with the enemy should be removed, on the ground that he proved his motive by accomplishing it. \textit{Id.} at 26, No. 42.

\textsuperscript{70} Pratt, \textit{Military Law} 127 (1884) recounts a case where an English corporal serving in Canada was virtually kidnapped and made to serve as a Union soldier during the Civil War, and was unable to return to his regiment until after the close of the war. In the Report of the Select Committee, House of Commons, on the Army and Air Force Act (1954), Minutes of Evidence, 278, Assistant Judge Advocate General C. M. Cahn described the following case:

a soldier came over here from Erie and enlisted. During his leave he went back to Erie and got picked up by the Erie Army and was compelled to serve in the Erie Army and possibly might be sentenced to detention as a deserter from the Erie Army. He was not guilty of absence without leave.

But compare the opinion in Avins, \textit{op. cit. supra} note 54, at 149–50, and the commentary thereon.
which as applied to this statute would be a good motive outside of one of the evils sought to be guarded against by the law—would serve as a defense. Mistake of fact by the accused would also be a defense. But all of these defenses go to the elements of the special statutory crime. None of them concern whether the accused intended to return to his first enlistment. This, under the Lieber-Winthrop view, would be irrelevant.

Ten years after Winthrop wrote the second edition of his book, Davis made a strained and unpersuasive attempt to reconcile the two positions, the sole effect of which is really to highlight the differences. In reality, Winthrop and Davis change places as nimbly as a quadrille on the issue of whether the 49th and 50th Articles of War, the two special desertion articles, constitute merely proof of intent or constitute constructive desertion. Davis states that the 49th Article of War, punishing officer-resignation desertion, creates a constructive desertion, while Winthrop says it is merely declaratory of existing law. Winthrop's position as to the 50th Article is the reverse, and so is that of Davis. However, running through both of those opinions is the same funda-

71. Id. at 188-206. A soldier who, for example, re-enlisted as part of a plan to uncover and expose treasonous superior officers, or a dangerous spy ring, would undoubtedly not be considered a deserter. See, in accord with this, CMO 30-1910 [pp. 4-5], reprinted in NAVAL DIG. 252 (1916), where it was held that an accused in the Navy who re-enlisted as the only means available to return to his post was not a deserter.

72. Id. at 183-87. In Digest. Ops. JAG 30 (1901), it was held that where a soldier was notified that he had been discharged from a previous enlistment, and believed this, he was not guilty of desertion for enlisting in a new regiment, although through mistake or accident the discharge certificate was not issued.

73. Op. C. 18801 (Nov. 2, 1905) (TJAG Lib.). General Davis says in part:
The soldier who deserts and afterwards re-enlists commits two offenses—desertion and fraudulent enlistment, both of which he is properly triable by court-martial for. The fact of reenlistment, while absent in desertion, constitutes proof of the intent not to return to the organization from which he deserted which is an essential ingredient of the offense of desertion. The only difference between Winthrop and the Digest, in this regard, is that the former holds such reenlistment to be proof of desertion; and the Digest declares it to be prima facie evidence of desertion. These statements do not differ in any material respect; they describe, in different words, the probative force of an act committed by the accused which is calculated to throw light upon the question of criminal intent in a particular act of desertion.

74. Davis, op. cit. supra note 56, at 431. This author has already demonstrated that the 49th Article also creates a constructive desertion. See Avins, Right of Military Officers to Resign—A Civil War Footnote (unpublished manuscript in University of Chicago Law Library).

75. Winthrop, op. cit. supra note 63, at 652.

76. Ibid.

77. Davis, op. cit. supra note 56, at 432.
mental vice, a defect which has permeated and colored the entire view of the statute since 1880. That vice is the basic reliance on Samuel's discussion of an entirely different British provision. It is through these distorted glasses that writers of that period have viewed the statute. Accordingly, all of the opinions of the half-dozen Judge Advocates General on this statute written between 1880 and 1908, and the discussion of the three textwriters, Winthrop, Davis and Dudley, as to its derivation, intent and meaning, are wholly worthless.

In 1908, the War Department finally decided to end this confusion in the Judge Advocate General's office. By service-wide order, it required that when charges were preferred against a soldier who left one unit and enlisted in another without a discharge, one specification would be laid under the 47th Article of War for straight desertion, and a second specification would be laid under the same article. The latter specification would allege that the accused "did desert . . . by enlisting" in the new unit "without a regular discharge" from his old unit. A third specification for fraudulent enlistment would be laid under the 62d (general) Article. The situation remained thus until Judge Advocate General Enoch H. Crowder assumed office and commenced work on the World War I revision of the American military law.

When we turn to find out what the Court of Military Appeals has to say about all of this, we find, amazingly enough, that it says nothing at all. All it does is cite a passage noted above from Winthrop's second edition, and even at that fails to cite the further sentence that proof of enlistment proves the offense and that there is no defense. To heighten the fantasy, it cites Winthrop in support of the Dunn-Davis position.

Here we pause to note the first grave defect in the performance of the Court of Military Appeals—its utter lack of the most elementary familiarity with sources of military law. This void is so vast that an attorney would not believe it unless he knew it to be the truth. Yet it is in fact the case. The court is not only ignoring the most fundamental sources of military law in its own

78. Cir. 76, War Dept. (1908). These new provisions are noted in MANUAL FOR COURTS-MARTIAL, U.S. ARMY 1908, 17, 136; and in MANUAL FOR COURTS-MARTIAL, U.S. ARMY 1910, 17, 138. The last edition of Dudley's work, while retaining the same text, has a footnote reference to this new order. See DUDLEY, MILITARY LAW 380, n.1 (3d ed. 1912). Interestingly enough, Davis' last edition contains no reference to it. See DAVIS, MILITARY LAW 432 (3d ed. 1915). In Op. C. 23644 (July 23, 1908) (TJAGA Lib.), it was held that War Dept. Circular 76 required a second specification, but not a second charge.

opinions, but what is far graver, under its constant example, young military lawyers are "growing up" in the service ignorant of the basic source material of military law. Indeed, some of them apparently think it is a virtue to know so little.  

In the ten years that the Court of Military Appeals has been in operation, this author cannot remember the court citing any source for authority before 1916 except Winthrop. To the court, Winthrop seems to be the beginning and end of all legal research before World War I; if it wasn't in Winthrop, it did not exist. Winthrop seems to have become an excuse for the court not to do its own independent work. He has been turned into a panacea which cures all legal problems.

This author would be the last to dispute the fact that Winthrop's text is very useful, and deserves the high reputation it has attained. Nor will a quarrel be made with General Green's statement that the book will never become obsolete. But it does not follow that the book may be used without proper discrimination. Like any text, some errors creep in, only one of which is noted here. Careful students of military law, considering the then available material, have noticed that in a number of areas the book is not comprehensive. For example, in his section on desertion Winthrop has not noted the British development in regard to short desertion. This is to be expected. An author devotes most of his attention to the problems which are important in his day, and tends to slight other areas. He cannot be expected to see ahead and predict what will be important three-quarters of a century later. Finally, like all other authors, this one not excepted, Winthrop has particular views and special prejudices which color his argument and presentation and sometimes even his use of materials. This must also be taken into consideration.

85. For one example, see WINTHROP, op. cit. supra note 63, at 735, wherein he declares that the re-enlistment of a soldier without a prior discharge should not be charged as fraudulent enlistment. Winthrop fails to mention G.O. 57, A.G.O., War Dept. (1892), which requires that in all such cases, in addition to the charge of desertion, the accused be charged with fraudulent enlistment, in violation of the 62d (general) Article. See MANUAL FOR COURTS-MARTIAL, U.S. ARMY 1898, 104. Judge Ferguson's indiscriminate use of Winthrop in United States v. LaRue, 11 U.S.C.M.A.
The Court of Military Appeals, however, has never done this, and the Johnson case is an excellent illustration. Instead of going to original sources, the court uses Winthrop, who relies on opinions of the Judge Advocate General, who in turn rely on Samuel. Unfortunately, the latter was discussing a provision of the Mutiny Act entirely different from that in the Articles of War. Thus, the court swallows whole a fourth-hand source and, notwithstanding the gross and palpable error which stood out like a neon sign, it makes not the slightest pretense at independent analysis.

When the Court of Military Appeals stops using Winthrop as a crutch its opinions will begin to reflect the actual background of military law instead of reading like a cross between Ivanhoe and The Red Badge of Courage. Until then, its opinions will continue to be substandard.

III. CROWDER'S CHANGES DURING WORLD WAR I

On February 15, 1911, Brig. General Enoch H. Crowder became Judge Advocate General of the Army. Crowder was a strict disciplinarian, a careful lawyer and a precise draftsman. These personal traits play no small part in the legislative history of the statute.

Revision of the Articles of War had long been a pet project with Crowder. As early as 1903, when he was Assistant Judge Advocate General, Crowder proposed a draft of new articles, in which Articles 47 and 49 (straight desertion and officer-resignation desertion) as well as Article 50, remained unaltered as new Articles 30, 31, and 34, respectively.\(^6\) Shortly thereafter, however, he changed Article 50, renumbered as Article 33, to read:

Any soldier who shall quit the organization or corps to which he properly belongs and enlist himself or join and be voluntarily enlisted or mustered into any other organization or corps of the Army (or militia when in service of the United States) or into the Navy or Marine Corps of the United States, without having first received a regular discharge, shall be deemed to have fraudulently enlisted therein and to be a deserter from the organization or corps to which he properly belongs.\(^7\)

470, 477-78, 29 C.M.R. 286, 293-94 (1960), has again led into error on this issue.

86. CROWDER, PRINT OF REVISED ARTICLES OF WAR—PROPOSED REVISION OF 1903 at 9 (TJA Lib.).

87. CROWDER, PRINT OF REVISED ARTICLES OF WAR—PROPOSED REVISION OF 1903-04, 10 (1904) (TJA Lib.). It is worthy of note that the revised article still appears under a section labeled Desertion and Fraudulent Enlistment.
The reason for the change from the prior statute is explained as follows:

The scope of this article has been broadened so as to apply to enlistments in the militia when in active service of the United States and in the Navy and Marine Corps, and the offense is declared to be fraudulent enlistment as well as establishing desertion. . . . As the word soldier is defined to include non-commissioned officers (Article 1), the latter term is omitted.\(^88\)

While the project met with favor from the General Staff,\(^89\) the revised articles were not enacted, and nothing more seems to have been accomplished until Crowder became Judge Advocate General.

Early in 1912, Crowder revived his revision of the Articles of War and, with the approval of the Secretary of War, the new code was introduced in Congress.\(^90\) By this time, Article of War 50 had been renumbered as Article 29, and placed under a section labeled “Courts-Martial” and a subsection labeled “procedure.”\(^91\) The reason for this was that, in Crowder’s opinion, the article constituted a “rule of evidence” which declared that “the

\(^88\) Ibid. General Davis stated that General Crowder’s proposed revision of Article 50 contemplates no change except to add the language of the Act of July 27, 1892, ch. 272, 27 Stat. 278, in respect to fraudulent enlistment. Memorandum by the Judge Advocate General on Modification of the Verbiage of the Articles of War 11 (1904) (TJAGA Lib.).

\(^89\) See Memorandum of Maj. Gen. J. Franklin Bell, Chief of Staff, and a Board of Officers, dated February 20, 1904 (TJAGA Lib.), recommending the revision. In a letter from Maj. Gen. E. S. Otis to Col. Crowder, Feb. 5, 1904 (TJAGA Lib.), the former recommended that the proposed revised article be changed to read: “Any soldier who quits the organization or corps to which he properly belongs and procures enlistment into any other organization or corps of the army . . . .”

\(^90\) See typed draft of Proposed Articles of War by the Judge Advocate General, dated April 12, 1912, with letter from Crowder to the Secretary of War bearing the same date, requesting submission of the code to Congress. See also letters of Sec. of War Henry L. Stimson, enclosing copies of the draft, dated April 19, 1912, to Congressman James Hay, Chairman of the House Military Affairs Committee, and to Senator Henry A. Du Pont, Chairman of the Senate Military Affairs Committee, approving the draft. (TJAGA Lib.). Senator Du Pont introduced the code as S. 6550 on April 25, 1912, 48 CONG. REC. 5316 (1912), while Congressman Hay introduced it as H.R. 23628 on April 22, 1912. 48 CONG. REC. 5162 (1912).

\(^91\) The new article reads:

**Enlistment without discharge.** Any soldier who quits the organization to which he properly belongs and, without having first received a regular discharge from such organization, enlists in or joins any other organization of the Army, or militia when in the service of the United States, or the Navy or Marine Corps of the United States, shall be deemed to have deserted from the former and to have fraudulently enlisted in the latter organization.
act of re-enlisting shall constitute a proof of desertion.\(^9\) Crowder told the House Military Affairs Committee that the Article was "administrative,"\(^9\) and that punitive effect was to be given to the prohibition by the general desertion section.\(^9\)

The 1912 revision never got past the hearing stage. Two years later, however, the Senate passed the code, but it died in the House of Representatives.\(^9\) The only change made in Article 30, the re-enlistment-desertion section, was the provision that the re-enlistee "shall be deemed to have deserted the service of the United States and to have fraudulently enlisted," rather than the prior provision that he would be deemed to have deserted from his prior organization and to have enlisted fraudulently in the new organization.\(^9\) Thus, the concept of constructive desertion was clearly introduced into the new article.

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92. A Comparison of the Proposed New Articles of War (H.R. 23628) With the Present Articles of War and Other Related Statutes 22 (1912). In Crowder's own copy, in TJAGA Lib., the following explanation is typewritten opposite the printed article:

Art. 29. The first sentence of Article 50 of the existing code, which this article substitutes, is according to accepted construction a rule of evidence. In effect it declares that the act of reenlisting shall constitute a proof of desertion from the old organization to which the soldier reenlisting belonged. It did not create an offense distinct from desertion made punishable by the 47th Article, and was not therefore punitive in character.

93. Hearings on H.R. 23628, Revision of the Articles of War, Before the House Committee on Military Affairs, 62d Cong., 2d Sess. 36 (1912):

Article 29, like article 28, is substantially a rule of evidence and substitutes that part of existing article 50 which is in its character administrative. The punitive part of said article 50 is transferred to the penal provisions of this revision, viz., to article 59 of the revision. The underscored language of new article 29 shows that the existing law has been considerably broadened. The existing law took cognizance of abandonments of one organization of the Army and enlistment in another, while the new article covers not only the abandonment of an organization of the Army, but engaging for service in any other branch of the Army, or militia when in the service of the United States, or the Navy or Marine Corps of the United States, and lays down the rule that the offender shall be deemed to have fraudulently enlisted in the new organization in which he fraudulently enlists. There can be no difference of opinion, I think, about the necessity of expanding the article in this regard.

94. "Article 59 is simply a repetition of so much of existing article 50 as was punitive in character. The administrative part of the latter article has been placed elsewhere." Id. at 53–54.

95. S. 1032, introduced April 15, 1913, referred to and reported by the Senate Committee on Military Affairs (S. Rep. No. 229) on February 6, 1914, debated, and passed February 9, 1914. 51 Cong. Rec. 3022, 3211–13 (1914). The bill was re-introduced as H.R. 7291 on August 5, 1913, and referred to the House Committee on Military Affairs on February 12, 1914, but no further action was taken. 51 Cong. Rec. 3415 (1914).

96. Revision of the Articles of War, S. 1032, S. Rep. No. 229, 63d
Finally in 1916, the revision of the Articles of War was again introduced and passed by the Senate, and when favorable House action was not forthcoming, it was tacked on to the Army Appropriations Bill and passed as an amendment thereto. \(^7\) Crowder's difficulty in securing even the limited revision was reflected in a letter wherein he wrote: "What I do know for certain is that, at the time I secured the 1916 revision, I couldn't have gone another step further than I did without imperiling the whole revision." \(^8\)

In some material prepared for the Senate Committee, Crowder again characterized the article as a "rule of evidence." \(^9\) He also told the committee:

\(^{97}\) The amended articles were introduced as S. 3191 by Senator Chamberlain on January 6, 1916, referred to the Senate Military Affairs Committee and favorably reported on February 11, 1916, (S. REP. No. 130, 64th Cong., 1st Sess.), and passed on March 9, 1916. On July 24, 1916, S. 3191 was added to H.R. 16460, the Army Appropriations Bill, which passed both houses. After the President vetoed the bill because it excluded retired officers from military jurisdiction, both houses re-passed it without this objectionable feature. It became law on August 29, 1916. 53 CONG. REC. 572, 2396, 3828-30, 3979, 11384-92, 11435-63, 11474, 12384-92, 12395, 12400, 12844-45, 12991-93, 13036-42, 13203-08; 39 Stat. 650.

\(^{98}\) Letter from Major General Enoch H. Crowder to Colonel William Rand, April 30, 1919, on file in the Crowder Papers, Western Historical Manuscripts Collection, University of Missouri Library, Columbia, Mo. (hereinafter referred to as Crowder Papers).

\(^{99}\) Comparative Print, Showing S. 3191 with Present Articles of War, printed for use of Senate Committee on Military Affairs, 64th Cong., 1st Sess. 20 (1916). The discussion under the new Article 29 declares:

"Article 29 substitutes present article 50. The latter article is, according to accepted construction, nothing more than a rule of evidence. In effect it declares that the act of reenlistment shall constitute proof of desertion from the old organization to which the soldier reenlisting belonged. It does not create a substantive offense distinct from the offense of desertion made punishable in existing article 47 (article 58 of the revision), and should therefore not be drawn so as to appear to be punitive in character. The subject matter of the second sentence of existing article 50 has been carried to article 60 of the revision, where it properly belongs.

This explanation is taken from a project of revision of the articles of war, photostatic copy of the typed manuscript, pp. 6-7 (1916) (TJAGA
The effect of the new article is to establish his character as a deserter so that he can be handled under the punitive articles dealing with desertion; so I have transferred this last article to another part of the code.

This article is very useful. It occasionally happens that a man dislikes his organization, and he quits in a moment of petulance and goes to another distant post and enlists there; and he can repeat that performance indefinitely, without much consequence to himself unless the law fixes upon his act of leaving the organization to which he regularly belongs, and enlisting in another organization at another place, the character of desertion. The words "in a foreign army" are inserted to reach the case of reservists who have left the United States and enlisted in one or another of the belligerent armies.100

The above statements clearly show that Crowder intended the revised article to be a statutory rule of evidence by which the whole of the offense would be proved. It thus created a form of constructive desertion. Crowder thereby was adopting the Lieber-Winthrop position rather than the Dunn-Davis position. All of the other available evidence points to the same conclusion.

Of such evidence, the Manual for Courts-Martial is the most significant. The 1916 Manual contains three provisions dealing with re-enlistment desertion. First, in respect to pleading, in cases where an undischarged soldier re-enlists, the Manual requires that only the one specification of desertion be preferred.101 The emphasis, by way of italics and reference to the 1908 War Department circular previously discussed, makes it clear that Crowder intended to change the 8-year-old rule. The Manual notes that the Article "constitutes a rule of evidence and is not a punitive article."102

Second, after a lengthy discussion of evidence of intent to remain away permanently,103 the Manual states that "it shall be sufficient proof of desertion" that an undischarged soldier has re-

Lib.). On the manuscript copy, in General Crowder's handwriting, is the following: "Gen. Tunston recommended placing Art. 28 among articles dealing with miscellaneous crimes and offenses. So as to Art. 29."

100. Hearings on S. 3191, Revision of the Articles of War, Before the Senate Subcommittee on Military Affairs, 64th Cong., 1st Sess. 56 (1916). Crowder also declared:

The existing article 50 seems to have contemplated a man leaving his organization in the Regular Army to enlist in another organization in the Regular Army. It consists of two parts, one of which is a rule of evidence, and the other punitive. I have preserved only the first part of article 50 in new article 29, and have broadened its application to include the militia when in the service of the United States, the Navy, or the Marine Corps, or in a foreign army. Id. at 55.


102. Ibid.

103. Id. at 133–34.
enlisted.\textsuperscript{104} The paragraph heading is labeled "statutory rules of evidence."\textsuperscript{105} While the authority of this provision is somewhat lessened by the fact that it was written by Dean John H. Wigmore of Northwestern University Law School,\textsuperscript{106} Crowder's close personal friend and "father confessor"\textsuperscript{107} when the latter was a civilian,\textsuperscript{108} nevertheless it undoubtedly reflected Crowder's views, and can be taken as authoritative.

Finally, and of the most significance, is the discussion of the offense under the punitive articles. The \textit{Manual} clearly states that re-enlistment without discharge:

\begin{quote}
is, by the twenty-ninth article, made sufficient evidence of desertion. In such a case, proof of the intent permanently to stay away from his former place of service and of the status of absence without leave therefrom are unnecessary.\textsuperscript{109}
\end{quote}

The \textit{Manual}, under the section discussing proof and after setting forth the elements of the statute, declares: "In this case proof of the absence without leave and of the intention not to return become unnecessary."\textsuperscript{110} The status of re-enlistment desertion as a species of constructive desertion, not dependent upon the accused's intent to return, could hardly be made clearer.

In connection with the above passages, it must be remembered that Crowder was a precise draftsman and careful lawyer, not given to loose thinking or writing. Moreover, Article 29 was of great importance to his department. At the time of the statutory revision, one quarter of all of the inmates of the army disciplinary barracks were serving sentences for fraudulent enlistment or re-enlistment. This is the reason the offense was constituted separately from the general article.\textsuperscript{111} Under these circumstances, it

\begin{footnotes}
\item[104] Id. at 135.
\item[105] Id. at 134.
\item[106] Id. at xiv. Brown, \textit{Administration of Justice in the Army}, 3 CORNELL L.Q. 178, 202 (1918).
\item[107] \textsc{Lochmiller}, \textsc{Enoch H. Crowder, Soldier, Lawyer, and Statesman} 136, 181 (University of Missouri Studies No. 27, 1955).
\item[108] \textsc{Bull.}, Northwestern University Law School 1916–1917 (April 14, 1916) and 1917–1918 (March 17, 1917) show Dean Wigmore as an active member of the faculty. \textsc{Bull.}, Northwestern University Law School 1918–1919 (May 4, 1918), lists Dean Wigmore on leave as a Lieutenant Colonel in the Provost-Marshal General's Department. In addition, an undated draft, in Dean Wigmore's handwriting, of a speech obviously prepared, from the contents, after 1919, found among the Crowder papers, states: "In September and October, 1916, I had shared in the preparation of the revised edition of the Manual for Courts-Martial, Major Blanton Winship having come to Chicago for the purpose. I was called to active duty on July 13, 1917."
\item[110] Id. at 202.
\item[111] Comparative Print, \textit{supra} note 99, at 33.
\end{footnotes}
hardly can be supposed that Crowder overlooked the significance of this language.

Moreover, contemporaneous construction by the Judge Advocate General's office during World War I reinforces the above view. For example, one opinion held that where "a soldier in the United States Army Reserve enlisted in the Canadian Army in 1916" he "thereby became guilty of desertion." Likewise, it was held that the testimony of the post adjutant that the accused "was reported as being absent," together with his counsel's statement in argument that "he [the accused] deserted the land service and entered the marine service" was sufficient to sustain a conviction of desertion. Another opinion held that a soldier who enlisted in the naval reserve "violated the twenty-ninth article of war." Textwriters of the period also agreed with the view that "a soldier who, without having received a discharge, again enlists, is ipso facto guilty of desertion and no proof of intention is necessary." Thus, Professor Edmund M. Morgan, a lieutenant colonel in the Judge Advocate General's office during World War I, declared that "in the 29th Article of War, desertion is consummated only by actual enlistment in some other branch of the United States service or in a foreign army." Here again, it is clear that the contemporary understanding was that re-enlistment

112. Op. JAG 014.33 (Feb. 11, 1919) (TJAGA Lib.). In Op. JAG 251.29 (Jan. 20, 1919) (TJAGA Lib.), it was held:

Former members of the United States military service who deserted therefrom and enlisted and served honorably in the forces of Governments associated with this country in the prosecution of the war, are guilty of desertion under the twenty-ninth article of war. Honorable service with an ally does not excuse the offense of desertion. Prosecutions in such cases are largely a question of policy for the War Department . . . . There is no doubt that as a matter of law these men are guilty of desertion under the twenty-ninth article of war.

113. CM 120354 (1918), Dig. Ops. JAG (1912–40) § 416(6), at 267.


115. Scott, HANDBOOK OF MILITARY LAW (1918). See also Mac Chesney, The Punitive Articles of War, 61 J. MILITARY SERVICE INST. OF U.S. 265, 266 (1917): "If an undischarged soldier again enlists in the military service of the United States this establishes a desertion as from the former place of service."

116. Hawley, MILITARY LAW DIGEST 106 (1918): "reenlistment without a regular discharge is sufficient proof" of desertion. Id. at 157: "In this case proof of the absence without leave and of the intention not to return become unnecessary." See Munson, MILITARY LAW 37 (1923).

117. Morgan, NOTES ON MILITARY LAW 18 (1920) (mimeographed copy TJAGA Lib.).
desertion constitutes a form of constructive desertion in which the intent of the accused was immaterial.

In the Articles of War of 1920, former Article 29, the re-enlistment desertion section, was combined with Article 28, the officer-resignation desertion section, and added to a new section denouncing absence without leave with intent to avoid hazardous duty or shirk important service, (known as "short desertion") to form a new Article 28. The text of the re-enlistment desertion section was not changed, but the new title of the article read: "Certain acts to constitute desertion." In light of the legislative history of the 1920 revision, discussed below, the failure to make any changes is of great significance.

When analyzing the importance of the legislative history, we first must remember that according to the then current Manual for Courts-Martial, a soldier who absented himself without leave with intent to report at another post was considered guilty of desertion even though he did not re-enlist or conceal his status or identity. This was entirely aside from the special constructive desertion statute. As Morgan, close friend and confidant of the then Acting Judge Advocate General Samuel T. Ansell, declared: "An unauthorized absence coupled with the intention to dissolve or terminate the existing military status also constitutes desertion." He likewise noted that the manual definition makes "unauthorized absence with the intention of terminating and dissolving the military status and obligation constitute desertion whether the intention to reenlist in another branch of the service or in a foreign army is actually consummated or not." We can hardly suppose that Ansell was unaware of this provision, inasmuch as he signed all of the opinions of the Judge Advocate General during 1917 and 1918 while Crowder was on leave as Provost Marshal General.

The re-enlistment desertion section became embroiled in the famous Ansell-Chamberlain-Crowder controversy of 1919 when Senator Chamberlain introduced the Ansell articles which dropped the statute and only punished re-enlistment of an undischarged soldier as fraudulent enlistment. The purpose of Ansell's in-

117. 41 Stat. 787.
118. Manual for Courts-Martial, U.S. Army 1916, at 201. See also Munson, Military Law 37 (1923): "Nor is it a defense that the deserter at the time of departure intended to report for duty elsewhere."
120. Confidential memorandum from Lt. Col. Frederic G. Bauer to the Judge Advocate General, July 7, 1920, Crowder Papers.
121. Hearings on S. 64, a Bill to Establish Military Justice, Before a Subcommittee of the Senate Military Affairs Committee, 66th Cong., 1st Sess. 10, 14 (1919).
novation was to change "the harsh rule (art. 29) which punishes as a deserter a man who quits one organization to enter another, and [to make] the offense one of fraudulent enlistment only." The Kernan-O'Ryan-Ogden Board, set up by Crowder to "study" military justice so as to allay widespread criticisms of courts-martial, and which heavily influenced the drafting of the 1920 Articles of War, took a dim view of Ansell's proposal. They declared:

The change proposed by article 53 of the Chamberlain bill would enable a soldier in time of war, who sought to avoid battle, to desert his organization in the face of the enemy and protect himself from the consequences of such desertion by fraudulently enlisting in an organization not serving at the front.

In light of the fact that Crowder gives the Kernan Board's view as the reason for not adopting the Ansell proposal, the latter merits a moment of careful analysis.

As noted above, it was well-settled at the time that a soldier who quit his unit with the intent not to return, although he may have intended to report to another unit, was guilty of desertion regardless of whether he re-enlisted. Ansell does not seem to have dissented from this proposition; rather, he used it as the basis for an interpretative extension of desertion to cover absence without leave with intent to avoid hazardous duty. Indeed, he told a Senate Subcommittee which was considering the 1920 Articles of War that the re-enlistment desertion article was "an extension of the definition of desertion." Hence, its elimination could not help a soldier who intended to transfer himself permanently, but only one whose intended transfer was temporary. That this was

122. Army Articles—Comparative Print Showing the Bill (S. 64) to Establish Military Justice, as Introduced by Mr. Chamberlain, Together with the Present Articles of War, 66th Cong., 1st Sess. 26 (1919).
124. PROCEEDINGS AND REPORT OF SPECIAL WAR DEPARTMENT BOARD ON COURTS-MARTIAL AND THEIR PROCEDURE 31 (1919). It is interesting to note that the situation envisaged is the precise opposite of that set forth by Mr. Justice Brennan in his interpretation of the statute in Trop v. Dulles, 356 U.S. 86, 113 (1958).
125. Comparative Print (Articles of War), Showing Changes Proposed by the Judge Advocate General as Compared with the Changes Proposed by the Kernan-O'Ryan-Ogden Board and with Existing Law, for Senate Committee on Military Affairs, 66th Cong., 2d Sess. 19–20, 32 (1919).
126. Avins, supra note 84, at 154–55. See also Morgan, The Existing Court-Martial System and the Ansell Army Articles, 29 YALE L.J. 52, n.2 (1919): "The formerly accepted definition of desertion has been broadened by interpretation during the late war."
127. Hearings, supra note 121, at 251.
the object of the Kernan Board's remarks is further shown by the Board's attention to the case of a soldier attempting to avoid a battle. His object would be realized by but a temporary absence from his unit; and if he were in a combat zone, like France, he risked detection and apprehension unless he could attach himself to another unit. Re-enlistment for a temporary period might well serve to hide him until combat ceased. Accordingly, the controversy over this article stemmed from the Kernan Board's desire to punish temporary re-enlistees as deserters.

Crowder's rejection of Ansell's proposal to drop the re-enlistment-desertion article is not surprising. While Crowder had at one time entertained a high opinion of Ansell's ability, though always with reservations concerning his ambition, by 1919 Ansell's attacks on his erstwhile mentor had embittered the latter not only towards Ansell himself but also towards Ansell's friends and supporters. Although Crowder adopted some of his former

128. In a letter from Gen. Crowder to Maj. Gen. J. Franklin Bell, Chief of Staff of the Army, June 20, 1913, located in the Crowder Papers, the former stated: "In Ansell I have a man of such transcendent ability in the law as would make him formidable in the civil practice in any court, State or Federal—a man who is capable of standing on the same plane with Elihu Root."

129. Letter to Colonel H. C. Carbaugh, March 6, 1912, found in the Crowder Papers, in which Crowder declared: "In Captain Ansell we have a strong man, whose usefulness is impaired only by an excessive ego, which causes him to think of himself twice when he thinks of the Government once. I am compelled to overlook this personal defect."

130. Letter to Congressman Julius Kahn, Chairman of the House Military Affairs Committee, July 7, 1919, in the Crowder Papers, in which Crowder wrote that Ansell was "a man intent upon revenge and imbued with Bolshevistic characteristics which have kept him detached from other officers of the Army in looking about for betterments to the Code."

131. In a letter of April 5, 1920, in the Crowder Papers, Crowder wrote to former Secretary of War Henry L. Stimson:

The Bolshevists in the Senate and the House both know that they are licked already on the court-martial controversy.

The Republican smelling committee, an important member of which is Royal C. Johnson of South Dakota, friend of Ansell, and who is also a member of the Rules Committee, purchased Ansell's treason to the military establishment and made him an attorney for that smelling committee.

Crowder also became embittered at Professor Edmund M. Morgan of Yale Law School, the evidence expert, for his support of Ansell in his article, supra note 126. In writing to William Marshall Bullett, in a letter of November 4, 1919, to ask whether he would write a rebuttal to Morgan, Crowder said:

Morgan must have some mental aptitude but he is primarily a school man with no practical sense. I have no hesitation in saying that he is the smallest man from the standpoint of character that I have ever come into contact with and three minutes conversation with him shows this littleness of his soul. He is the kind of man who is absolutely under another man's domination and leadership.
FRAUDULENT RE-ENLISTMENT

protege's innovations which strengthened the articles of war. His rejection of changes looking towards leniency reflected his character as a strong disciplinarian and firm upholder of the powers of field commanders. Accordingly, he recommended that Congress not change the re-enlistment desertion provision.

The Ansell-Chamberlain bill, tacked on to the Army Reorganization Bill when the latter was nearing passage in the Senate, was ultimately discarded. The Senate amended the bill, as Crowder notes, "by striking out the entire measure following the enacting clause and substituting therefor the text substantially as it appears in the law as passed, a text prepared very largely in my office, reflecting my own views and recommendations and rejecting the vitals of Senator Chamberlain's proposed revision." In urging the passage of new Article of War 28, Crowder told the Senate Subcommittee that the re-enlistment and officer resignation provisions "define two acts constituting desertion."

Crowder's meaning that the provisions of Article of War 28, which declare "certain acts to constitute desertion," are statutory rules of evidence, may be gleaned from some of Wigmore's contemporary writings. Wigmore recognized that statutes which make a species of evidence sufficient to prove a proposition are really rules of substantive law, and he does not dispute the power of the legislature to thus redefine crimes. The whole sum of Crowder's actions towards re-enlistment desertion shows that he is treating it as a species of constructive desertion, in the Holt-

132. The provision in respect to short desertion originated with Ansell. See Avins, supra note 84, at 162.
133. Comparative Print, supra note 125.
135. Comparative Print, supra note 125.
136. 2 Wigmore, Evidence § 1344 (2d ed. 1923):
May not the apparent cases of conclusive preference be explainable as in truth results of other independent principles of substantive law, sometimes loosely dealt with in terms of "conclusive evidence"? No doubt this is the true explanation of most of the instances in which such a term is employed, and it remains to ascertain whether, after all such explanations, there exist any instances of conclusive preference in the shape of genuine rules of evidence.
See also § 1353(1), where Wigmore declares:
On the one hand, so far as a so-called rule of conclusive evidence is not a rule of Evidence at all, but a rule of substantive law, it is clear that the Legislature is not infringing upon the prerogative of the judiciary to determine the truth of a fact in issue.
137. Id. at § 1354.
Winthrop tradition, and not as proof of intent, as the Dunn-Davis group espouses.

If the label of "rule of evidence" on Article 28 of 1920 proves anything more, it proves too much. If it demonstrates, as the Court of Military Appeals believes, that the re-enlistment desertion section was meant only as a way of proving intent to leave the first organization permanently, then by the same token the short desertion provision must likewise be evidence only of straight desertion. But the Court of Military Appeals has always held that straight desertion is quite different from short desertion and, although there was some authority to support the contrary view when the statute was first enacted in 1920, the overwhelming weight of authority favors the court's position. Accordingly, the presence of short desertion in Article 28 at least demonstrates the negative proposition that the physical location of re-enlistment desertion in the statutory scheme proves nothing as to its meaning, and hence other evidence must be deemed controlling.

Upon passage of the 1920 Articles of War, Crowder set about to revise the Manual for Courts-Martial. In this endeavor, he once again had the assistance of Dean Wigmore, who was shortly to call him a "genius." The portions of the Manual relevant to

139. Avins, supra note 84, at 156-65.
140. The Crowder Papers contain two letters from Crowder to Wigmore, dated June 11, 1920 and June 14, 1920, in reference to a particular case and the applicability of the manual. Included is Wigmore's reply of June 18, 1920 wherein he suggested changes in the manual. In addition, a letter from Crowder to Secretary of War Newton D. Baker dated June 1, 1920, states:

As you are aware, the Army Reorganization Bill carries a revision of the Articles of War. Immediately upon its signature by the President, the work of revising the Manual of Procedure must be commenced and be vigorously prosecuted. I wish very much to consult with Professor Wigmore of the Northwestern University and obtain his expression as a Reserve officer in the preparation of the Revised Manual, particularly the chapter on Evidence, and to discuss with him certain modifications of the Chapter on Evidence now in order that he may have time to study the important changes which I wish to bring to his attention.

By order of the same date, the Secretary provided:

1. You [Crowder] are hereby directed to proceed from Washington, D.C., to Chicago, Illinois, and return . . . to consult with Professor Wigmore of the Northwestern Law University, respecting his cooperation as a Reserve Officer in the preparation of the revised Manual for Court Martial Procedure under the new Articles of War, particularly the chapter on Evidence.

141. 1 WIGMORE, EVIDENCE § 4d(2) (2d ed. 1923).
re-enlistment desertion were not altered.\textsuperscript{142} However, forms for violation of the various provisions of Article of War 28, including one for re-enlistment desertion,\textsuperscript{143} were added to the specimen forms for charges and specifications in the appendix to the Manual. The form for violation of this provision, charged under the general desertion article, contains nothing more than an allegation of the statutory language, and does not mention intent. This is one more item of evidence which shows that the provision constituted constructive desertion.\textsuperscript{144}

In discussing the statutory revisions of 1916 and 1920, the research of the Court of Military Appeals is once again grossly deficient.\textsuperscript{145} However, the court does set forth the two most relevant provisions of the 1916 Manual, one indeed in italics. Notwithstanding the fact, as discussed above, that these two provisions indelibly stamp the re-enlistment desertion article as constructive desertion, making "proof . . . of the intention not to return . . . unnecessary," the court concludes that the article is merely designed to prove intention to remain absent permanently.

Here we come to an apt illustration of another great weakness of the Court of Military Appeals—its repeated inability to appreciate the significance of important material which it actually finds. The material in the 1916 Manual is in pari materia with the statutory revision and hence is of great significance in interpreting the revision of the Articles of War. Nevertheless, the court by-passes this with hardly a word of analysis.

In many recent opinions, the court has failed to grasp the importance and true meaning of material presented to it. It seems to lack a sufficient background in military law to enable it to properly use such material. Time and again it has misinterpreted relevant authority because of an utter failure to discern the proper relationship between the precedent and the body of military law as a whole. The result has been to distort not only the meaning and significance of the authority itself, but also to twist the body of the military law completely out of shape. This in turn prevents the military law from performing its proper function of deterrence.

\textsuperscript{143} \textit{Id.} at 570–71.
\textsuperscript{144} See also Crowder’s opinion in \textit{Op. JAG 300.7} (Feb. 17, 1922) (TJAGA Lib.) which holds that a soldier who leaves his post with the intention of going to another post to re-enlist is a deserter.
IV. HOW CROWDER’S INTENTION IN RESPECT TO RE-ENLISTMENT DESERTION WAS FORGOTTEN AFTER WORLD WAR I

In 1923, General Crowder retired. He was succeeded as Judge Advocate General by Brigadier General Walter A. Bethel, who had worked closely under Crowder as the latter’s assistant for the American Expeditionary Forces.146 Under Bethel’s administration, which lasted less than two years, the re-enlistment desertion section continued to be treated as constructive desertion. Thus, a board of review declared that “Article 28 makes the fraudulent enlistment . . . conclusive of such intent” not to return to the prior enlistment.147 And in an opinion, General Bethel said that Article of War 28 creates

a presumption of law that one who reenlists without a regular discharge does not intend to return to the service within the meaning of the definitions of desertion. It was plainly within the power of the Congress in enacting the Articles of War to create this presumption. In the opinion of this office the effect of the statute has been salutary.148

General Bethel was succeeded in 1924 as Judge Advocate General by Colonel John A. Hull, who had served as judge advocate of a subordinate American force in France during World War I, and thus was not intimately connected with the Ansell-Chamberlain-Crowder controversy or the several revisions of the Articles of War and the Manual for Courts-Martial.149 Early the following year, General Hull was required to pass on a case which was to

147. CM 155157, Burgess, (March 29, 1923) (TJAGA Lib.). See also CM 160766 (1924), Drg. Ops. JAG (1912–40), § 416(15): “Accused was found guilty of desertion in that without having received a regular discharge he again enlisted in the Army.”
149. Fratcher, supra note 146, at 105. In Hearings, supra note 121, at 1121–22, Hull himself declared:
Since last November I have been on special duty as finance officer of the American Expeditionary Forces . . . so that I have not had an opportunity . . . either to read the bill or study the reports mentioned. . . . Senator Warren. You will find in this print, in parallel columns, the present Articles of War and Senator Chamberlain’s suggested substitute as contained in the bill.

Col. Hull. I am sorry to say that this is the first time I have seen that. I tried to get a copy of that in France, but it was not available; and since then, as I have said, I have not had the time.

Compare this with the intimate correspondence between Bethel and Crowder on court-martial reform. Id. at 973–74.
have a profound effect on the interpretation of the re-enlistment desertion section.

In Connover's case,\(^{150}\) the staff judge advocate of the command from which the case arose, Colonel Moreland, wrote a memorandum to the Judge Advocate General setting forth his views as to the correct interpretation of the re-enlistment desertion section.\(^{151}\) He first contended that the Manual for Courts-Martial was incorrect in stating that Article 28 created a rule of evidence, rather than defining an offense, and that violation of it should be punished under Article 58, the punitive desertion article, rather than under Article 96, the general article. He said:

But it is to be observed that the 28th Article of War does not require, to constitute the desertion therein set out, that there be a misrepresentation or concealment of any kind with respect to a prior enlistment. Such desertion would be consummated even though the soldier fully disclosed his prior enlistment to the recruiting officer and openly declared that it was still subsisting, provided, of course, that he was enlisted despite such disclosure. Moreover, such an enlistment with such a disclosure, would be, under said Article of War 28, not only a desertion but a fraudulent enlistment also. It is, of course, hardly conceivable that a man would be again enlisted after such a disclosure; but he might be, and if he were, his act of enlistment would constitute under Article of War 28 both desertion and fraudulent enlistment. Observe, now, that in such case, there would be a fraudulent enlistment without any misrepresentation or concealment, and without the element of receiving 'pay or allowances under such enlistment'; and a desertion without absence without leave and without an intent to desert, it being possible that a soldier might reenlist while on furlough and return to his proper station and organization in a few hours and before the expiration thereof. * * * Thus, the act of charging under Article of War 58 the offense made desertion by Article of War 28 is arbitrary to the last degree since there is a charge under an Article of War which defines an offense containing precisely and only two elements, (a) AWOL and (b) the *animo non revertendi*, neither one of which, concededly, needs to be proved to establish the offense actually charged. That is to say, the strange spectacle is thus presented of charging an offense under a penal clause which *in no wise defines the offense charged*. This is a thing unheard of. Persons are charged under statutes *which define the offenses they are alleged to have committed*. That is the only possible reason for charging them under or in violation of statutes.\(^{152}\)

Colonel Moreland went on to contend that because Article of War 58 punishes one kind of desertion, there is no reason "for

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150. CM 164528, Connover, (Feb. 17, 1925) (TJAGA Lib.).
151. Memorandum of Colonel Moreland, Staff Judge Advocate, Canal Zone, dated February 4, 1925 (TJAGA Lib.).
152. Ibid.
charging under that article the offense defined in Article of War 28, which is an entirely different kind of desertion.” He contended that offenses should be charged under statutes which define them, and not under those which punish them. Moreover, he argued that the general desertion article does not punish re-enlistment desertion merely because it punishes desertion, which by military common law means AWOL with intent not to return, and the offense under that article is as well defined as if set forth in the article in detail. The colonel, using an inapt analogy, also disagreed with the theory that Article of War 28 enlarges the definition of desertion, thereby permitting re-enlistment to be charged as desertion.

Colonel Moreland disagreed with the concept of Article 28 as a rule of evidence because “no rule of evidence theretofore known is changed in the slightest degree” and because the article does not state that it is such a rule. He further stated:

If it is a rule of evidence it must be a rule which governs or, at least, deals with the proof or establishment of some offense. . . . But with respect to what offense is it a rule of evidence? If it is a rule of evidence it cannot refer to an offense which it itself defines, since if it was (1) it would not be a rule of evidence any more than the definition of larceny is a rule of evidence as to larceny, and (2) such a theory would be contrary to the basic assumption that the Article is a rule of evidence, since, in such a case, it would constitute a definition of an offense and not a rule of evidence. The definition of an offense can never be a rule of evidence because, while the mere definition of the offense informs as to what is necessary to be proved to establish the offense, it itself lays down no rules as to how to prove the offense, or what the weight or effect of any given piece of evidence will be.

The Colonel declared, in addition, that the facts found in Article 28 have no relation to desertion. He then said that if the re-enlistment section was a rule of evidence as to the elements of desertion, it must be a conclusive rule, and accordingly unconsti-

153. Moreland wrote:

Having already seen that it is not a rule of evidence as to the offense which the Article itself defines and denounces, it must, if it is a rule of evidence at all, be such with reference to an offense created by some other Article of War. What is that Article? Note that the Article in question deals directly with only two acts, (1) the attempt to avoid the results of one enlistment and (2) the entering into another. Now, with relation to what offense can these two facts possibly be evidence? The answer is, and must of necessity be, ‘None.’ These facts cannot, of course, be pertinent to larceny, perjury, murder, etc. No more can they be pertinent to desertion as found in the 58th Article of War, since the facts to be established under that Article are (1) absence without leave, and (2) intent not to return to the service.
tutional. Therefore, he concluded that "Article of War 28 defines a new offense which it calls desertion," basing this both on the fact that it employs the form and language used in statutes to define offenses, and on the language of the 1921 Manual.

The validity of this thesis—that Article 28 defined new offenses with elements different from desertion—can hardly be disputed in light of the legislative history of the article. This article is a rule of evidence only in the very special sense that proof of the elements therein are proof of the whole of the crime. This, as noted above, amounts to a redefinition of the crime in question. There is nothing to prevent the legislature from thus redefining crimes. Should Congress provide that all persons who shall sign their names on enlistment blanks with red ink instead of blue ink shall be deemed to be guilty of fraudulent enlistment, and be punished accordingly, no one would suppose that such a statute could be construed as making a signature in red ink evidence of intent to conceal a material fact or to falsify any statement in the application. The only possible construction would be that signing in red ink is made criminal, and there now would be two species of the offense instead of one.

The mere fact that re-enlistment is evidence of intent to abandon the prior enlistment does not warrant any change in this rule. Intent to avoid hazardous duty or shirk important service is evidence of intent to remain away permanently, but it has never been supposed that because of this short desertion was merely evidence of straight desertion. The fact that Congress could logically and constitutionally have made any of the three sets of acts in Article of War 28 evidence of intent to remain away permanently does not prove that it did so. Yet this fallacy has been indulged in repeatedly.

Moreover, there is no reason why Congress could not label as desertion, the acts denounced in Article of War 28, or any other criminal acts, and require that they be punished as such. If it is arbitrary to label fraudulent re-enlistment as desertion, it is no less arbitrary to label the other two offenses under the article as desertion. But as Mr. Justice Holmes once observed, "upon this point a page of history is worth a volume of logic."

Historically,


each of these offenses has had a close affinity with desertion. Tradition makes the absurd seem rational, and the arbitrary seem logical.

General Hull, in his reply to Colonel Moreland's memorandum, correctly points out that for at least 40 years re-enlistment desertion has been punished under the general desertion article, and that it is clear that General Crowder intended this in his revisions of the statute. However, he then declares that: "Irrespective of any legislation on the subject, proof that a soldier was absent from his organization and had re-enlisted in another organization without a discharge from his first organization, would be complete proof under the 58th Article of War of absence without leave and of an intention not to return." He arrives at this conclusion by assuming the latter completely, and saying, as to the former, that even though the soldier is on leave when he re-enlists, the "permission to be absent cannot extend to authorize a re-enlistment," and accordingly, at such time, the soldier's leave is constructively withdrawn. He then concludes that the acts denounced in re-enlistment desertion prove straight desertion, and that there is nothing objectionable in using the form for straight desertion in the Manual and proving it through the re-enlistment of the undischarged soldier.

From that point, however, General Hull takes a broad leap and reasons that since re-enlistment tends to prove straight desertion, that is all it was meant to do. He thus takes issue with the several key statements in Crowder's own 1921 Manual. He says:

The statement in our existing Manual (page 345) that in case of a soldier enlisting without a discharge "proof of the absence without leave and of the intention not to return become unnecessary" is misleading for the reason that these two elements are essential to the offense of desertion. * * * the phrase quoted from page 345 standing by itself is incorrect and undoubtedly should be changed if the Manual is revised.

* * * I think my discussion has demonstrated that both in theory and practice the acts described in the 28th Article of War fall completely and accurately within the centuries old definition of what constitutes desertion, namely, absence without leave from a soldier's organization or post or other duty with the intent not to return thereto. Such being the case, the executive order fully covers the act of desertion being discussed. I wish again to emphasize that in my opinion there is only one kind of desertion, the desertion described in the 58th Article of War, and the fact of reenlistment without a discharge is merely evidence of the elements of the offense denounced in the 58th Arti-

157. Avins, supra notes 20, 74, 84.
158. Memorandum of The Judge Advocate General, February 17, 1925 (TJAGA Lib.).
I think the prescribed form of specification for the offense is misleading in that it seems to be based upon the theory that the act of reenlistment constitutes practically the beginning and the end of the desertion. As I have indicated above and as I here repeat the act of reenlistment is merely proof of absence without leave and of the intent not to return.

Shortly thereafter, Hull assigned Lt. Col. Arthur W. Brown, later to be the Judge Advocate General, to make a further investigation of the point. Brown's initial conclusion that, as a result of the Moreland-Hull exchange, this area was in a state of confusion, and that contradictory rulings had recently been made by the Judge Advocate General's office, can hardly be questioned.¹⁵⁹

Brown took the position that if Article of War 28 defined the offense of desertion, it must be exclusive, thus eliminating from Article 58 absence without leave with intent never to return. Why the definitions had to be exclusive, rather than additional, thereby producing this absurd result, he did not explain. Rather, he jumped to the next point, that if the re-enlistment desertion section was considered as making re-enlistment without discharge conclusive evidence of the elements of straight desertion, thus precluding the defendant from offering any evidence that he was not AWOL or that he intended to return, it was "undoubtedly unconstitutional."¹⁶⁰ Indeed, he asserts that the statute is probably unconstitutional if the clause makes such re-enlistment only prima facie proof of the elements of straight desertion.

Brown then declared that "the most easily defended construction" of the whole article is that its clauses are "merely declaratory or interpretative." This forces him into taking the position that Article of War 58 may be proved with an intent not only to remain absent permanently, but also to avoid hazardous duty or shirk important service, a doctrine which is surely novel from any standpoint. Brown declared that officer-resignation desertion is declaratory, and the other two clauses are interpretation clauses. He concluded that re-enlistment without discharge is evidence of an intent permanently to abandon the prior unit "but proof of the isolated fact of such reenlistment does not establish absence without leave or fraudulent enlistment," thereby contradicting not only Crowder, but also Hull.

To shore up his conclusion, Brown declared that re-enlistment without discharge was never "generally construed in practice as creating a distinct offense in the sense that a soldier who

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¹⁵⁹ Memorandum to Gen. Hull from Lt. Col. A.W. Brown, Judge Advocate, May 11, 1925 (TJAGA Lib.).
¹⁶⁰ He cites the same cases as Moreland, supra note 154.
deserts (i.e., quits the service and returns to civil life) and five years later re-enlists has committed two desertions." As previously noted, prior to 1880 it was almost invariably so construed. Thus, his analysis is riddled both with inconsistencies and historical inaccuracies, and his conclusions collapse with the premises on which they are based.

In 1927, while General Hull was still Judge Advocate General, the Manual for Courts-Martial was revised. The material contained in the 1921 Manual about intent and AWOL being unnecessary in a re-enlistment case, was removed. The following was substituted in its place:

Such enlistment is not only no defense to a charge of desertion but is prima facie proof of it. ... In a case of a soldier enlisting without discharge, the specification charging desertion should follow the usual form, the desertion being alleged as having occurred on the date accused absented himself without leave. If not absent without leave before he again enlisted, he becomes so absent at that time.\footnote{161}

The special form for re-enlistment desertion was also removed from the collection of model specifications for desertion in the appendix to the Manual.\footnote{162} The 1949 Manual copies this wording without substantive change.\footnote{163}

The reported cases are not very helpful. One case says, by way of obiter dictum, that a specific intent is not necessary where an undischarged soldier re-enlists,\footnote{164} while another states, also in dictum, that the re-enlistment constitutes "prima facie proof of desertion."\footnote{165} Most cases of this character, however, simply hold the evidence of desertion sufficient without detailed analysis.\footnote{166}

Thus it came about that General Crowder's intention in respect to re-enlistment desertion was forgotten, and the fact that re-enlistment was evidence of an intent not to return to the prior enlistment was confused with the act of re-enlistment as constructive

\footnote{161. \textit{Manual for Courts-Martial, U.S. Army} 1928, at 142. The Manual also stated: Where a soldier during one enlistment again enlists or attempts to enlist while on a duty status or while on pass or furlough, he by that act abandons such status of duty, pass, or furlough, and from that moment becomes absent without leave with respect to the former enlistment. \textit{Id.} at 143.}

\footnote{162. \textit{Id.} at 240.}


\footnote{164. CM 245568, Clancy, 29 B.R. 215, 219 (1943).}


\footnote{166. United States v. Bainbridge, 4 (AF) C.M.R. 102 (ACM 1950); CM 233833, Parihus, 20 B.R. 165 (1943); CM 187542, Lanier, 1 B.R. 49, 52 (1929); CM 187252, Hudson, 1 B.R. 19 (1929).}
desertion itself. This error, which constituted the discarded Dunn-Davis position, was revived by General Hull and, as a result of his opinion, was written into the 1928 and 1949 Manuals. Accordingly, insofar as these Manuals purport to interpret the re-enlistment clause of Article of War 28, they are wholly worthless.

The Court of Military Appeals, notwithstanding the patent conflict between the 1921 Manual and the 1928 and 1949 Manuals, however, relies heavily on the latter two to support its opinion that Article 28 was meant merely to set forth a way of proving the elements of straight desertion. Here we come to another major deficiency which the court has repeatedly exhibited—an utter lack of any sense of discrimination. It should be plain that if there is a conflict between the 1921 Manual and the 1928 or 1949 Manual, the former must be given greater weight. The reason for this is that the 1921 Manual was a contemporaneous exposition of the 1920 Articles of War, which was written under the direction of General Crowder, who drafted the 1920 Articles, and hence more accurately reflects the true intent of the statute. Thus, even if the court did not care to track down the source of the difference in wording, and thus find the error, it still should not have changed the result. Nevertheless, the court ignored the 1921 Manual and dwelt at length on the 1928 and 1949 Manuals.

This lack of discrimination is not an isolated instance. On repeated occasions, the court has tended to treat all authorities as though they were of equal weight, when some should have been preferred to others. This failure has resulted in numerous errors, and it has lowered the reliability of the court's analysis and conclusions.

V. THE STATUTORY REVISION IN THE UNIFORM CODE OF MILITARY JUSTICE

As previously noted, the re-enlistment desertion section of Article of War 28 of 1920 provided:

Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States.

The current provision, Article 85(a)(3), states that:

Any member of the armed forces who . . . without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion.169

From a comparison of the two statutory provisions on their face, it is apparent at once that the statute has been changed in a number of respects. It has been broadened to include officers and warrant officers; to include foreign armed services other than army forces, and to include American armed services other than those previously enumerated. On the other hand, it has been changed to permit the government to authorize entry into a foreign armed service. In addition, re-entry into an American armed force is no longer penalized unless accompanied without full disclosure.

The reason for a number of these changes is apparent. The common-place nature of inter-service transfer makes it undesirable to require a discharge before allowing re-enlistment. The full disclosure requirement will fully prevent fraudulent re-enlistments. Likewise, it is undesirable that all entry into foreign military units be barred because policy reasons may require Americans to enter foreign service. For example, American officers may be required to serve in foreign units as military advisors; or Americans may have to enter foreign guerilla units operating behind enemy lines, as was done during World War II. The creation of the Air Force and the designation of the Coast Guard as an armed force made it necessary to broaden the statute in respect to the American services covered.

The inclusion of officers undoubtedly stems from two pre-Code cases involving officers who enlisted without a prior separation, one to escape other criminal charges,170 and the other without apparent reason.171 While Article of War 28 was not violated in such cases, the re-enlistment is considered evidence of intent to abandon the service permanently, hence findings of straight desertion were upheld.172

172. Although the provisions of Article of War 28 are not expressly applicable to officers who may enlist without discharge, the circumstances of this case, including accused's enlistment in another armed service, raise the inescapable inference that accused intended to quit his place of service with the Army. Desertion in violation of Article of War 58 is thus established.

Id. at 318.
A like result was reached in an interesting World War II case which arose in the European Theater of Operations, and undoubtedly influenced the drafters of the statute to broaden the prohibition against entry into foreign military service. The accused there was a Norwegian citizen and a former seaman in the Norwegian Merchant Marine. In 1942 he registered for the draft in the United States in order to become an American citizen and was inducted into the Army. He was sent to England where, after two months, he applied for naturalization. When action on his application was delayed indefinitely, he applied unsuccessfully to American authorities for transfer back to the Norwegian Navy. Frustrated again, he wrote to the Royal Norwegian Conscription Board in London requesting its assistance, but they replied that, while his services were urgently needed because of an acute shortage of seamen, the accused had to get a discharge from the American service. Accused then forged a discharge certificate, escaped from the guardhouse where he was held, and in civilian clothes applied to the Norwegian Conscription Board for enlistment in the Norwegian Merchant Marine. However, the authorities became suspicious because the discharge certificate was not in proper form, and advised accused that they would have to make an investigation. While the investigation was proceeding, he surrendered to United States Army authorities.

Accused testified that if he had succeeded in enlisting in the Norwegian service, he intended to write to United States Army authorities, explain the situation, and return to American service if he was wanted. He also stated that he thought he deserved to be a citizen if he were going into combat and was dissatisfied because he had not been naturalized. He stated that he would not fight well for a country of which he was not a citizen. "I will stay in the Army if I can get my citizen papers, but if not I want to go back to the Merchant Marine," he testified.

A board of review upheld a finding of desertion under Article of War 58, the straight desertion article. It quoted Article of War 28 and then said:

In view of the clear and obvious purpose, spirit and intent of this particular Article, accused's undertaking to enlist in the Norwegian Merchant Marine, while undischarged as a soldier in the United States Army, would appear to be sufficient to support the inference of requisite intent to remain permanently absent, which is the essential element of the offense of desertion. When there is taken into consideration his escape from confinement, his wearing civilian clothes contrary to regulations in wartime, his forgery of a discharge certificate, and

attempted fraudulent deception by the use of it and his testimony in explanation of his plans, intention and attitude with reference to his service in the United States Army, no doubt remains that the court's inference was correctly drawn.\textsuperscript{174}

The board did not discuss the fact that accused did not actually enlist, but merely attempted to enlist, and the further fact that the Norwegian Merchant Marine was not a "foreign army." The use it makes of Article 28 is ambiguous. The best inference to be drawn is that the board is holding that attempted enlistment into a foreign service other than an army is equally probative of intent to remain away permanently as actual enlistment in a foreign army, the latter being specifically covered by Article 28. Thus, we see once again that the facts which underlie a charge of unauthorized re-enlistment play a dual role, first as constituting the basis for a charge of constructive desertion, and second, as evidence in some instances of intent to remain away permanently. This case also illustrates the fact that acts not precisely constituting constructive desertion under the statute, but analogous thereto, are equally probative of the intent necessary for straight desertion.

When Article 85 of the \textit{Uniform Code of Military Justice} was drafted by enlarging on Articles of War 58 and 28,\textsuperscript{175} the dual nature of re-enlistment desertion was not overlooked. After commenting on the fact that the Navy punished re-enlistment on the part of an undischarged sailor by using the fact of re-enlistment as proof of intent to abandon the prior contract of service,\textsuperscript{176} the drafters of the Code declared:

Under either system, an attempt by a man to enlist without first having received a regular discharge from a prior enlistment is probably chargeable as desertion rather than attempted desertion. The attempt, though unsuccessful, could be used as evidence of an intent to abandon the first contract of enlistment permanently. This, plus absence without leave, constitutes desertion.\textsuperscript{177}

\textsuperscript{174} \textit{Id.} at 286–87.
\textsuperscript{175} \textit{Hearings on H.R. 2498 (U.C.M.J.) Before a Subcommittee of the House Armed Services Committee}, 81st Cong., 1st Sess. 605, 1225 (1949).
\textsuperscript{176} Larkin, \textit{Comparative Studies Notebook—Office of the Secretary of Defense, Committee on a Uniform Code of Military Justice} 4–5 (unpublished mimeograph, Jan. 6, 1949, TJAGA Lib.). The Committee said: A.G.N. does not have a specific provision making it an offense of desertion to enlist again in a military organization without having first received a regular discharge from a prior enlistment. In practice, however, the Navy treats such an act as a violation of its articles making desertion an offense. Section 76, NC & B, defines desertion in part as the intent to abandon permanently the pending contract of enlistment plus A.W.O.L. or A.O.L. Proof of this is absence and subsequent fraudulent enlistment.
\textsuperscript{177} \textit{Id.} at 5.
The Manual for Courts-Martial is somewhat more conservative. After setting forth the elements of constructive desertion, the Manual declares that a serviceman who, while AWOL, enlists or accepts another appointment in the manner forbidden by Article 85(a)(3) may be guilty of straight desertion because the entry into the new service may be evidence of intent to abandon the old permanently. The Manual is silent on the probative effect of an attempt to enter a new service, although surely it would seem that this action is of no less significance as far as straight desertion is concerned.

On the next page, the Manual goes on to copy, from prior Manuals, the statement originally made by General Hull, that a serviceman who even attempts to re-enlist becomes ipso facto AWOL. There is a serious question whether such a rule would be true if it were not stated in the Manual. However, the statement in the Manual, a valid presidential order, must be taken as a limitation on all leaves of absence, which therefore makes the leave terminate upon a condition subsequent. Accordingly, by a most interesting bootstraps operation, the Manual makes binding a rule of substantive law which it creates within itself. Under the peculiar circumstances, this result appears to be valid.

However, if a serviceman goes AWOL, as soon as he attempts to re-enlist, desertion under Article 85(a)(1) is complete at that point if the man intended not to return. Accordingly, the Manual’s limitation of such cases to those where the accused is already AWOL seems unjustified, if by doing so the Manual is referring to cases where there is a pre-existing unauthorized absence. If the Manual, however, is also referring to cases where the unauthorized absence commences at the moment of re-enlistment, then

179. Id. at 313. Legal and Legislative Basis, Manual for Courts-Martial, U.S., 1951, at 253, states: Under the Uniform Code a member of an armed force who is absent without proper authority, and who then enlists or accepts an appointment in the same or another armed force, may be guilty of committing desertion under Subdivision (a) (1) of Article 85, that is, by being absent without authority with intent to remain away permanently, the intent being evidenced by his act of enlisting or accepting an appointment or entering a foreign armed service. Subdivision (a)(3) covers the situation where an unauthorized absence is not necessarily involved; the accused could be on an authorized leave or liberty and his wrongful act of enlisting or accepting an appointment, or entry into the service of a foreign armed service, without more would complete the offense of desertion.
the limitation is meaningless, since all possible individuals are encompassed within its folds. Thus, the Manual states that if an absentee re-enlists, he may become a deserter under Article 85(a) (1). However, if all who re-enlist become absentees, then it is meaningless to limit the group to absentees. This redundancy is a reflection of the hodge-podge created in the Manual for Courts-Martial by attempting to fit the Hull interpretation of re-enlistment desertion into a statutory framework based on the Holt-Lieber-Winthrop-Crowder tradition.

There has been a paucity of reported cases on desertion by re-enlistment since the Code was passed. In one case, where the accused joined a communist guerilla unit fighting in the Philippines, it was held that this was enough to establish an intent to desert permanently even without reference to the statute.\(^{182}\) However, in another case, a board of review held that Article 85(a)(3) punished constructive desertion by re-enlistment, intent to remain away permanently being unnecessary, and that such offense was different from straight desertion, although the re-enlistment could be used as evidence of intent to be absent permanently.\(^{183}\)

In United States v. Johnson,\(^{184}\) the Court of Military Appeals said: "No change of substance was made by Article 85. The present Article is substantially a restatement of previous provisions."\(^{185}\) However true this may be in respect to the other forms of desertion, it is patently erroneous as applied to re-enlistment desertion. The changes in the statute are so plain on their face that a conclusion such as this can only be the result of gross carelessness.

Here again, we come to another example of a major defect in the work product of the court. It has a tendency, at times, to become inexcusably sloppy, both in research and in analysis. Unfortunately, this tendency has increased of late, and no small proportion of errors in the court's opinions can be attributed to it.

The court, in United States v. Johnson, concluded that the re-enlistment desertion provision was only a statutory means for proving intent to remain away permanently, and it pointed to the Manual provision that re-enlistment could serve as evidence of such intent.\(^{186}\) In United States v. Huff,\(^{187}\) the court reaffirmed this holding over a board of review protest,\(^{188}\) and added that since the statute merely prescribed that re-enlistment would constitute

185. Id. at 301.
186. Id. at 304.
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evidence of intent, the accused could escape conviction by showing that he intended to return to the first enlistment. The court did not take up the seemingly tantalizing question why Congress should single out re-enlistment for special statutory treatment when there were numerous other indicia of intent to desert which were equally strong.

Thus, we find that the Court of Military Appeals, by a misguided exercise in "interpretation," has managed to succeed where even Ansell failed, by simply reading Article 85(a)(3) out of the Code. It can hardly be doubted that this is the effect of the court's extraordinary feat, as the law is now the same with or without the statute. The court's opinion opens a number of gaping holes in the military law.

For example, synthesizing the court's recently enunciated rule that a serviceman who has a contingent intent to return is not a deserter,189 and the rule that one cannot "abandon" leave,190 with the rule resulting from the court's interpretation of Article 85(a)(3), a soldier on leave could enlist over and over in different units and not be guilty of either desertion or AWOL, but only of fraudulent enlistment, provided he revealed his status before his leave expired and expressed a contingent intent to return to that unit which he liked best. Indeed, one judge of the court has expressed the opinion that the serviceman is not even guilty of fraudulent enlistment.191 Crowder's skeleton must be rattling in its grave when such a result is read into the bounty-jumping statute.

Moreover, a serviceman on leave could, with absolute impunity, serve during his furlough in Castro's army, provided he returned at the end thereof. Indeed, should the man be retained by Castro for five years after his leave expired, he would commit no offense provided he eventually intended to return, since the serviceman would be under duress and constraint when his leave expired and hence, under well-settled principles of military law, be innocent not only of desertion, but of AWOL as well.192 Fortunately, one scholar's dire warnings of the effect of the court's decisions on military discipline193 have not materialized, although only because so

192. See Avins, op. cit. supra note 180, at 141–71.
few servicemen are aware of their full scope. One shudders to think of what would happen to discipline in the services if servicemen generally were regular readers of the court's advance sheets. If a choice had to be made between Communist propaganda, pornographic material, or the decisions of the United States Court of Military Appeals, as to which ought to be kept under lock and key as most injurious to troop discipline and morale, this author would be hardpressed to make a decision.

CONCLUSION

The decisions of the Court of Military Appeals in respect to re-enlistment desertion are, admittedly, egregious and somewhat extreme examples of the court's deficiency as an institution. This fact is hardly surprising; it takes quite a series of errors to judicially repeal a statute, and there are not enough of them in the Code for this to be done every day. However, these two cases do exhibit the major weaknesses of the court's performance. These weaknesses, in the aggregate, seriously jeopardize the usefulness of the court itself.

A discriminating and knowledgeable investigation of the court's functioning, without sensationalism and with close attention to detail, is definitely called for by the new administration. Public policy in the interpretation and administration of the military law requires that a delicate balance be maintained between the rights and needs of the individual and that of the military forces as a whole. If the individual's rights are invaded, morale and efficiency will suffer under a sense of injustice. If the needs of the service are neglected, discipline and efficiency will suffer. In addition, commanders may be tempted to use extra-legal means to enforce discipline, resulting in lawlessness in law enforcement. Neither the individual nor the service as a whole can afford second-rate military justice.