"IMPORTANT SERVICE" IN MILITARY LAW

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The Uniform Code of Military Justice authorizes punishment by court-martial of any member of the armed forces who absents himself without authority from his place of duty.[1] Although AWOL can be a serious infraction,[2] it is relatively minor when viewed in the light of the possible consequences of desertion—death during wartime,[3] dishonorable discharge and up to five years' imprisonment during peacetime.[4] Ordinarily, one thinks of desertion as abandoning one's place of duty "with intent to remain away therefrom permanently," and it is so defined in article 85(a)(1) of the Code.[5] But article 85(a)(2)—the "short desertion" statute—punishes as a deserter anyone who quits his unit or place of duty with intent to shirk "important service," regardless of whether he intends to stay away permanently or how long he is actually absent.[6] Military courts have recognized the gravity of this offense; indeed, the only American serviceman executed during World War II for a purely military offense was shot by a firing squad for this crime.[7]

Although the Code does not define "important service," and neither its prior derivation[8] nor the *Manual for Courts-Martial*[9] does

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1 Uniform Code of Military Justice art. 86, 10 U.S.C. § 886 (1958).

2 Maximum punishment, permissible only for the most extended absences, may include dishonorable discharge and confinement at hard labor for up to one year. Punishment for short AWOL's not under aggravating circumstances may not exceed one month's confinement and forfeiture of pay. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 127(c), Exec. Order No. 10214, 16 Fed. Reg. 1303, 1366 (1951), as amended, Exec. Order No. 10565, 19 Fed. Reg. 6299 (1954).

3 Uniform Code of Military Justice art. 85(c), 10 U.S.C. § 885(c) (1958).

4 MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 127(c), Exec. Order No. 10214, 16 Fed. Reg. 1303, 1366 (1951), as amended, Exec. Order No. 10565, 19 Fed. Reg. 6299 (1954).

5 10 U.S.C. § 885(a)(1) (1958).

6 10 U.S.C. § 885(a)(2) (1958). The same consequences attend anyone who quits his unit or place of duty with intent to avoid "hazardous duty." See generally note 10 *infra*.

7 Slovik, 15 E.T.O. 151 (ETO No. 5555, 1945).

8 See Avins, *A History of Short Desertion*, Military L. Rev., July, 1961, p. 143, at 163-64. The 1914 British *Manual of Military Law* branded as a deserter one who went AWOL with the intention of "shirking some important service" and gave as examples evasion of embarkation for overseas duty and duty in aid of the civil power. WAR OFFICE, MANUAL OF MILITARY LAW 18-19 (1914). See also *id.* at 665 for a specimen charge.

9 See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 164(a), Exec. Order No. 10214, 16 Fed. Reg. 1303, 1391 (1951).

much to remedy this deficiency, the basic purpose for including the important service provision in the short desertion statute seems clear: certain duties assigned to servicemen are so vital to the mission of the armed forces that their avoidance, even through a temporary absence, must be prevented; the use of the extreme penalties incident to desertion has been chosen as the means of deterrence.

Because the intent to avoid "important service" is the principal difference between this offense and the less serious AWOL infraction, the interpretation of these two words is crucial. This Comment will discuss some of the standards by which the presence of important service ought and ought not to be tested. In arriving at the proper test for this concept, some standards in current use will first be examined. A clearer picture of what "important service" ought to mean can be obtained from a view of the distortions to which the concept has been and is currently being subjected.[10]

I. Combat and Related Duties

There is general agreement that the core of "important service" is "actual service designed to protect or promote, in a manner direct and immediate, the national or public interest or welfare . . . which is the ultimate object of maintaining an army." [11] Preeminent among

[10] Typical of the confusion surrounding the meaning of "important service" is the *Manual for Courts-Martial*'s failure to make any distinction between "important service" and "hazardous duty." *Ibid.* It is axiomatic that service can be important without being hazardous; few servicemen perform services of more importance than the missile officer who must push "the button" in case of attack, yet this is—at least in time of peace—one of the least hazardous of military duties. Similarly, important strategic strokes, such as Admiral Dewey's decisive victory in the Battle of Manila Bay (which successfully determined a major segment of the Spanish-American War), may be rendered far from hazardous by the weakness of opposing forces. Yet the military courts have been willingly misled by the language of the *Manual*. See, *e.g.*, United States v. Cheney, 3 C.M.R. 173, 176 (1952) ("the accused could not have shirked important service without at the same time avoiding hazardous duty"). It is perhaps more plausible to suggest, as did the court in United States v. McIntyre, 2 U.S.C.M.A. 559, 562, 10 C.M.R. 57, 60 (1953), that "any duty which is hazardous must of necessity be important." Why, one may ask, would a person be assigned a hazardous duty unless it was also important? Even when the hazard involved is inherent in the duty, it is possible that bad judgment rather than the importance of the task is the explanation of the hazardous assignment. But when, as is commonly the case, the hazard inheres in the place of duty rather than in the duty itself, the question becomes meaningless. Kitchen police within range of enemy guns or enemy planes may be extremely hazardous, yet is seems absurd to label this duty anything more than "necessary," and important service implies, in view of the extreme punishment for its avoidance, peculiarly vital tasks. Even the reasons for including the avoidance of both hazardous duty and important service within the short desertion statute seem to be different. AWOL to avoid hazardous duty is severely punished because a counterdeterrent is needed to balance natural reluctance to endanger oneself; AWOL to avoid important service is severely punished because of the special need that the duty be performed. Thus, "important service" and "hazardous duty" can be distinguished; the problems which are discussed in the remainder of this Comment arise in part from the failure of the military courts to do so. See, *e.g.*, text accompanying notes 27-28 and 46-48 *infra*.

[11] CM 151672 (1922), Dig. Ops. JAG of the Army, 1912-40 § 385 (1942).

these duties is the destruction or neutralization of or defense against enemy military power. Hence it follows that combat with enemy forces is always important service within the meaning of the statute.[12]

In addition to actual combat, work proximately in support of combat operations is also important service. For example, it has been held that a combat engineer company supporting combat units by clearing and laying mines is engaged in important service.[13] Likewise, an armored engineer unit supporting two combat infantry commands by repairing gaps made in the "dragon's teeth," constructing bridges, and maintaining road blocks as defensive measures against enemy counterattacks is engaged in important service.[14] So too, it would appear that artillery or antiaircraft units, medical aid personnel, and communications and intelligence groups operating in support of combat forces are all engaging in important service,[15] for in each of these cases the success of actual combat forces is immediately and directly dependent upon the activities of individuals in these units.

For the same reason, transportation proximately in support of combat units is important service. The transportation of fighting men to the scene of battle to engage the enemy is indispensible; otherwise the troops would not be where they are needed.[16] Likewise, "carrying supplies to equip and sustain the army is a very important military operation in time of war." [17]

Beyond these obvious classifications, it becomes a matter of case-by-case analysis to determine whether a duty is routine or important. This is true whether or not the duty is to be performed in the combat area; importance must be determined by weighing the consequences of a failure to perform a duty, not by considering the place where it is to be performed.[18]

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[12] *E.g.*, Bragalone, 26 E.T.O. 207 (ETO No. 13253, 1945); Diedrickson, 24 E.T.O. 135 (ETO No. 11402, 1945). See also United States v. Anderson, 2 C.M.R. 238 (1951).

[13] Pagano, 31 E.T.O. 127, 129 (ETO No. 16655, 1945).

[14] Bartoloni, 13 E.T.O. 363 (ETO No. 4931, 1945).

[15] *Cf.* Jennings, 17 E.T.O. 309 (ETO No. 6997, 1945). The court here—improperly, in my opinion—characterized the duty as "hazardous" rather than "important."

[16] McCune v. Kilpatrick, 53 F. Supp. 80, 84-85 (E.D. Va. 1943).

[17] *Ex parte* Falls, 251 Fed. 415, 416 (D.N.J. 1918); see United States v. Shepard, 1 U.S.C.M.A. 487, 491, 4 C.M.R. 79, 83 (1952).

[18] This point would not merit the attention which is here devoted to it were it not for the existence of a considerable number of dicta to the contrary. See, *e.g.*, United States v. Williams, 1 U.S.C.M.A. 186, 2 C.M.R. 92 (1952); United States v. White, 2 C.M.R. 511, 514 (1952). In the former case, the court declared that "it is likely that this Court would take judicial notice that all duty in a theater of operations, if not actually hazardous, would certainly involve important service." 1 U.S. C.M.A. at 188, 2 C.M.R. at 94.

The better view may be seen in one of the earliest cases to consider the effect of absence without leave in a combat theatre.[19] The accused went AWOL from his unit in New Guinea and stowed away in a transport returning to the United States. He was charged with desertion with intent to shirk important service as aid man in a rifle company in a theatre of operations. Notwithstanding the fact that the work of an aid man with troops actually engaged in combat is incontestably important, the board of review held the evidence insufficient to show that this accused was so engaged; it refused to find important service in the combat zone assignment alone.[20]

This case was criticized in a subsequent decision in Washington as "an extreme example . . . [whose authority] as a precedent is open to some question." [21] In justification of this criticism, it may be suggested that the accused was attempting to avoid service for the remainder of the war, some of which would probably have included service in close support of combat troops. Not only is this stretching the relationship between the absence and the important service, but even if this particular case was decided incorrectly on its facts, it illustrates the possibility of situations in which AWOL in a combat zone does not entail the avoidance of important service.

A similar case arose in the European Theater of Operations in April 1945.[22] The accused's unit was in Germany engaged in "mopping-up operations" and the taking of German prisoners. The accused had just returned from a period of AWOL and was restricted to the rear area and told to work in and around the unit's kitchen until it could be determined what was to be done with him. He informed his first sergeant that "he did not see any reason for working as he was going to get court-martialed anyway," [23] went AWOL again, and was

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[19] Evers, 1 A-P 437 (CM No. A-1142, 1944).

[20] Although accused's organization was in a theater of operations when he absented himself, there is no evidence that it was in proximity to the enemy nor had it been alerted for movement to a forward area. There is no evidence of the nature of the duties accused was then performing. Apparently, such duties were only the routine duties of an aid man in a medical detachment. . . . The mere absence of a soldier from his organization, even though it is then within a theater of operations, in a foreign country, does not, without other proof, establish *prima facie* that he intended to shirk important service.

Id. at 439.

[21] Hodge, 43 B.R. 41, 46 (CM No. 265447, 1944). The heart of the court's criticism, however, lay in comparing *Evers* with Marquez, 16 B.R. 41 (CM No. 228022, 1943). Yet the *Marquez* case is clearly distinguishable, since in it the accused's unit was located in Unalaska, Alaska, under Japanese attack at the time of his AWOL, and, moreover, a specification that he avoided hazardous duty was joined to the specification that he shirked important service.

[22] Murtha, 28 E.T.O. 259 (ETO No. 14905, 1945).

[23] *Id.* at 262.

convicted of desertion with intent to shirk important service. In reversing, the board held that "the record failed to disclose accused was aware that any 'important service' as contemplated by Article of War 28, was expected of him." [24]

Here the accused's work was directly in support of a unit engaged in combat operations. Nevertheless, it was held not to be "important" within the meaning of the short desertion statute. While it cannot be gainsaid that the work was necessary—combat troops must be fed if they are to fight—, yet, because the accused's activities were not shown to be absolutely necessary to feeding the unit, his assignment was found not proximately vital to the success of the combat troops; hence the tasks which he had deliberately foresaken were held not to be "important" within the meaning of the statute.

In the light of these cases, the rule seems clearly to be that even tasks in a combat area must be shown to be important before one who shirks them can be punished as a deserter. Policy clearly supports this rule: The object of the short desertion statute is to penalize more harshly those who jeopardize military success by their AWOL and hence to bind them to their tasks with a special deterrent. It is immaterial whether they are physically located in combat areas or outside them; geographical location is equally immaterial if the absentee falls outside the reason for the rule.[25]

II. Transportation, Embarkation, and Overseas Service

If the application of the short desertion statute's "important service" provision to combat situations has resulted in few difficulties, its application to transportation, embarkation, and overseas service presents a picture of loose talk compounded with looser thinking resulting in an all-encompassing confusion.

A. Is Transportation "Important" in Itself?

The initial answer to this question is that receiving transportation is *not* of itself important service. A military person being transported

[24] *Id.* at 264. *Cf.* Shearer, 19 E.T.O. 17 (ETO No. 8104, 1945).

[25] Otherwise, all absentees in combat zones would be ipso facto deserters, a result which was hardly contemplated by the framers of the statute. *Cf.* Burns, 17 E.T.O. 195, 199 (ETO No. 6751, 1945). A recent British manual specifically requires that the duty shirked be important, even if the accused is located in an area of active military operations. 1 War Office, Manual of Military Law 212 (1951):

> The intention must be to avoid some important particular service, and not merely some routine duty or duty only applicable to the accused. Even on active service, a routine patrol not in the forward area or fire piquet duty for which the accused was detailed would not amount to an important particular service, the intention of avoiding which would constitute desertion under this section.

not only does not render important service, he does not render any service at all. If anything, the act of being transported is a service to him rather than by him. This conclusion is supported by the cases which deal with movement to an undisclosed destination. In such cases, where only the fact of movement can be considered, the authorities are uniform in holding that such movement does not constitute important service.[26]

The question becomes more complex when the destination of the avoided transportation is known. Here there are a number of factors whose possible relevance must be considered: Is the shipment to an overseas area or—perhaps more important—to a combat zone? Is the duty to be performed upon the completion of transportation "important service"? In avoiding transportation, is the avoider seeking to escape the final duty to which he will be assigned after transportation, or is his AWOL based on a distaste for travel or, even more typically, a general distaste for military life?

The source of confusion in this entire area is a loosely drafted enumeration in the *Manual for Courts-Martial* and a number of cases which have blindly followed it. After confusing "hazardous duty" and "important service" in a single section, the *Manual* tells us that these terms (jointly or severally?) "*may* include . . . embarkation for foreign duty . . .; movement to a port of embarkation for that purpose; [or] entrainment for duty on the border or coast in time of war." [27] Of course, any of the enumerated movements *may* be hazardous; enemy submarines may be sinking our convoys, as they were early in World War II, or enemy planes may be bombing our railroads, as has fortunately not yet happened. But any justification for the enumeration based on the hazardous nature of the transportation fails to explain either the cases which describe transportation as "important service" or the applicability of the short desertion statute to servicemen who have avoided nonhazardous transportation.[28]

Nevertheless, the cases continue to misapply the statute. Thus a board of review declared: "Embarkation for overseas was, of course, important service." [29] Another stated: "Embarkation for foreign duty

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[26] *E.g.*, Loss, 14 B.R. 307 (CM No. 225638, 1942); Townsend, 14 B.R. 277 (CM No. 225505, 1942); Southern, 14 B.R. 229 (CM No. 225128, 1942). Missing any troop movement "through neglect or design" is, however, an independent offense, less harshly punished than desertion. Uniform Code of Military Justice art. 87, 10 U.S.C. § 887 (1958).

[27] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 164(a)(2), Exec. Order No. 10214, 16 Fed. Reg. 1303, 1391 (1951). (Emphasis added.)

[28] This is the prime example of the difficulties caused by the haphazard intermingling of "hazardous duty" and "important service" in the *Manual*. See note 10 *supra*.

[29] Wicklund, 15 B.R. 299, 301 (CM No. 227459, 1942).

is 'important service' within the meaning of the 28th Article." [30] And still a third said: "Embarkation for foreign duty or duty beyond the continental limits of the United States, or transfers or movements directly related to immediate embarkation for foreign duty has been consistently recognized in the opinions of the Board of Review as constituting 'important service' within the purview of Article of War 28." [31] And there are many more cases where this rationale is not specifically set forth but which implicitly assume the rule to be correct and applicable.[32]

Moreover, the cases have read the words "may" out of the *Manual*, converting a tentative enumeration into a rigid classification. Thus all overseas voyages are now ipso facto important, although not an iota of service is rendered on them and little of importance may be done at the destination. Seldom has a rule of law been so stood on its head.

B. The "Importance" of Foreign Duty

If the act of being transported should not of itself be considered "important service," it is equally clear that not all foreign duty deserves that label.[33] Not only do the combat zone cases discussed above [34] illustrate this point, but the Court of Military Appeals has declared:

> Undoubtedly, service beyond the continental limits of the United States may, under certain circumstances, be considered "important service," but we believe that phrase as used in the Article of War and as explained in the Manual denotes something more than the ordinary everyday service of every member of the armed forces stationed overseas. If it does not, then absence without leave and desertion outside the continental limits of the United States would be synonymous.[35]

Moreover, in a case where domestic reassignment was in issue, it was held that the importance of the service upon arrival at a destination is not enhanced by the fact that a serviceman must travel to get there.[36] This result is consonant with both logic and experience, since routine

[30] Green, 47 B.R. 191, 192 (CM No. 274478, 1945).

[31] Parmelee, 41 B.R. 159, 165 (CM No. 262836, 1944). See also Moran, 34 B.R. 265, 267 (CM No. 253070, 1944).

[32] See, *e.g.*, Hodge, 43 B.R. 41 (CM No. 265477, 1944); Clancy, 29 B.R. 215 (CM No. 245568, 1943); Walkup, 19 B.R. 49 (CM No. 232342, 1943).

[33] United States v. Hyatt, 8 U.S.C.M.A. 67, 23 C.M.R. 291 (1957); United States v. Barrett, 22 C.M.R. 550 (1956).

[34] See notes 19-24 *supra* and accompanying text.

[35] United States v. Boone, 1 U.S.C.M.A. 381, 384, 3 C.M.R. 115, 118 (1952). *But see* United States v. Herring, 1 C.M.R. 264, 267 (1951) (dictum), which has apparently not been followed.

[36] Morel, 41 B.R. 61, 64 (CM No. 262416, 1944).

duty does not change its character merely because it is carried out in a different place.

Nevertheless, once a geographical area has been denominated as important to American defense, the result of the cases concerning absence in order to avoid transportation changes radically. Thus, in *United States v. Shull*,[37] Judge Brosman said: "We are not concerned here with whether . . . movement to a staging area constitute[s] important service. . . . Certainly—and this is amply supported by the military cases—foreign service during time of war or under emergency conditions and in or near a combat area is important service . . . ." [38] While the court dismissed the charge because of the insufficiency of the evidence, it is clear from the language of the opinion that it believed that the place to which transfer was ordered and not the duty to be performed there was the proper basis for finding an evasion of "important service." In *United States v. Taylor*,[39] the same court accepted the *Shull* dictum and dismissed without difficulty the contention that not "all duty in the Far East Command is . . . important service and that shipment to a port of embarkation for overseas assignment is too far removed from the combat area to be considered as encompassed within the phrase," [40] citing the broad enumeration of the *Manual for Courts-Martial*, discussed above.[41] Other cases have held that shipment to the Far East Command during the Korean War [42] and even presence at a point of embarkation for such shipment [43] was important service.

These cases ignore reality. Thousands of servicemen spent their tours in the Far East during the Korean War doing work which was routine by any standards. Many of them were stationed in Japan and had a work schedule and duty not dissimilar to those of GI's in the United States or in foreign countries thousands of miles from the scene of battle. Even in Korea itself, many troops in noncombat units never saw battle or engaged in activity proximately related to the combat troops. Many of the functions performed by men in the United States more directly aided the actual fighting men than did the duties of some of the servicemen in the Far East. Foreign soil in a combat theater has no Midas touch which automatically turns all work

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[37] 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952).

[38] *Id.* at 181, 2 C.M.R. at 87.

[39] 2 U.S.C.M.A. 389, 9 C.M.R. 19 (1953).

[40] *Id.* at 391, 9 C.M.R. at 21. See United States v. Herring, 1 C.M.R. 264, 267 (1951).

[41] See text accompanying notes 27-28 *supra*.

[42] United States v. Vick, 3 U.S.C.M.A. 288, 12 C.M.R. 44 (1953).

[43] United States v. Willingham, 2 U.S.C.M.A. 590, 10 C.M.R. 88 (1953).

into important service. Overseas duty may be important;[44] a greater proportion of military personnel in an overseas theater of operations may be—and probably are—engaging in important service than in the United States or a foreign country outside the combat zone.[45] But the mere presence of a soldier in such a theater does not in and of itself promote the success of American arms. Something more must be shown than simple geographical location before it can be said that a serviceman is doing tasks vital to the war effort, and unless it can be shown that his work is in fact important, he cannot be deemed to be within the intendment of the statute.

The creation of whole areas to which shipment is "important service" has not been limited to combat zones; similar conclusions have been drawn concerning broad areas solely because they are deemed "important" to American defense. In one case, for example, it was held that all service in Alaska was important—where avoidance of embarkation was concerned—because Alaska constituted the northernmost "anchor" of the Pacific defense perimeter;[46] a similar case held service in Europe in 1953 to be important![47] In neither case was any effort made to explain in what way the service itself was important; it was sufficient to the courts that the areas were considered significant in defense planning.[48]

But this consideration cannot convert routine duty into something more. If it is clear that not all duty in a combat area is important, it is all the clearer when defense perimeters and like areas are considered.

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[44] United States v. Daniels, 10 C.M.R. 918 (1953).

[45] *Cf.* Donohue, 3 N.A.T.O.-M.T.O. 151, 154 (NATO No. 1566, 1944).

[46] United States v. Poper, 13 C.M.R. 786 (1953). The court declined to be influenced by the fact that Alaska was American territory, stressing the importance of Alaska in support of the United Nations operations in Korea and as an anchor of the Pacific defense perimeter. Yet it failed to consider at all what duties the accused was to perform in Alaska. *Id.* at 788.

[47] United States v. Gorringe, 15 C.M.R. 882, 888 (1953).

[48] Moreover, once an area is labeled "important," service there remains important forever after. Thus, in United States v. Emery, 14 C.M.R. 296 (1954), service in Alaska was held to be important although the board of review, citing United States v. Boone, 1 U.S.C.M.A. 381, 3 C.M.R. 115 (1952), showed an awareness that not all overseas service was important. See also United States v. Smith, 17 C.M.R. 406, 407 (1954). The only explanation for the holding in *Emery* is that Alaska had previously been held to be important. This sort of reasoning, although not articulated, also seems to be an explanation for the decisions which continued to find European service important as recently as 1953. See United States v. Gorringe, *supra* note 47, where the board based its finding that European service was important on earlier cases which in turn had been based on still earlier cases stretching back to 1944. *E.g.*, United States v. Mathis, 12 C.M.R. 590 (1953); United States v. Priest, 10 C.M.R. 486 (1953). The incongruity of these cases is magnified by the fact that between 1944 and 1953 both an era of good feeling and a change of "enemies" had occurred. Could similar reasoning be applied to make Guadalcanal, Gettysburg, and even Valley Forge sites of important service? Surely there must be a greater connection with the national defense than the fact that at some time in the past the area was important, although the bones of those who made it so have long since turned to dust and even the memory of what they did there has faded with time.

Is American defense jeopardized because a post exchange clerk misses a shipment to Germany? Is American security endangered by the fact that an army base in Alaska is short one file clerk? This country's armed might depends in only a secondary way on potato-peelers, personnel clerks, and the myriad of other service troops whose activities are necessary without falling into the special classification of "important." And the contributions of such servicemen are the same in Alaska or Europe as they are in the United States; overseas service cannot alter their status.[49]

We have established that, as a matter of logic, transportation is not in itself "important service." We have similarly shown that it is impossible to explain the cases which have held transportation to foreign areas to be "important" by the fact that the service at the destination, if not the transportation itself, is always "important," since, except when the destination is the front lines in time of war, it is impossible to say that service within any area is always "important." It is a tribute to the mesmerizing language of the *Manual for Courts-Martial* that the military courts have had less trouble recognizing that service in a combat zone may not be important than that transportation to foreign service may be a routine activity leading to still other routine assignments.

C. Transportation Leading to Important Service

It is still necessary to examine the application of the short desertion statute to the avoidance of transportation, embarkation, and overseas duty when the final duty to be performed upon the completion of transportation, if not the act of being transported itself, is properly defined as "important service." Two factors are important in this discussion: the degree to which transportation can ever be considered important service and the degree to which Congress intended to include any avoidance of transportation within the scope of the short desertion statute.

It may be argued with some plausibility that receiving transportation can never be described as performing a service, important or unimportant. A serviceman must be transported, as he must eat, if he is to perform those services which are his primary duty. Yet trans-

[49] Lest the reader be confused by this stress on what is rational, it must be repeated that avoidance of embarkation for foreign service has been held to fall within the short desertion statute even when absence from the same service, once transportation is completed, clearly would not. *Compare* United States v. Flowers, 1 A.F.C.M.R. 603 (1949) (permanent KP avoiding foreign transfer is under statute), *with* Murtha, 28 E.T.O. 259, 264 (ETO No. 14905, 1945) (avoiding combat unit KP in Germany is outside statute). It is hard to find a rationale for a statute which is thus made to declare that a soldier who avoids a duty by absence before shipment is a deserter but one who waits until after shipment is not.

portation, like food, is a service provided for him to increase his value as a fighting man. On the other hand, should a serviceman refuse transportation into actual combat, it may be presumed that his true intention is to avoid a combat mission which is quite properly described as "important service." This seems to be the clue to the proper interpretation of the place of "embarkation for foreign duty" language in the *Manual*.

The legislative history supports this interpretation.[50] Far from suggesting that it was the intention of Congress to penalize servicemen adverse to ocean voyages or duty far from home, it seems clearly to indicate that the concern of Generals Crowder and Ansell and of Congress itself was with soldiers who would not fight or closely support fighting units in France and who found that evasion of embarkation was the most effective means to that end.[51] This is consistent with the tentative "may" of the *Manual*; it suggests that the avoidance of "important service" need not take place at the very moment when the service is to begin but may take place as far in advance of the service as the time of embarkation and still be sufficiently closely related to the duty at the end of transportation to fall within the purview of the short desertion statute. Similarly, the *Manual*'s exclusion of such services as "drill, target practice, maneuvers, and practice marches" [52] is a judgment that these activities are normally not so closely related to the eventual "important service" as to fall within the statute.

Thus explained, the "overseas embarkation" language of the *Manual* fits into a rational scheme of the short desertion statute. But the military courts have so consistently misapplied this language as to make it doubtful that we can ever hope to see it limited to those cases in which avoidance of embarkation is in fact avoidance of the important service which would follow the transportation. In view of the inconsistency and rank absurdity spawned by this rule, its early demise would be a boon to military law.

III. To a Proper Definition of "Important Service"

It is possible to summarize some of the contentions made in this Comment in order to form a sounder definition of "important service." In so doing, it is important to remember that the term cannot simply be equated with the hazards of the task [53] nor compressed into neat

[50] See *Hearings on S. 64 [A Bill to Establish Military Justice] Before a Subcommittee of the Senate Committee on Military Affairs*, 66th Cong., 1st Sess. 416, 1158-59, 1162 (1919).

[51] *Id.* at 1158-59, 1162.

[52] Manual for Courts-Martial, United States, 1951, ¶ 164(a)(2), Exec. Order No. 10214, 16 Fed. Reg. 1303, 1391 (1951).

[53] See note 10 *supra*.

compartments by labeling certain forms of activity, such as embarkation, overseas duty, or service in a combat zone, "important" without regard to their actual contribution to military success. We must remember that "important service" requires a limited and rational application consistent with its position as defining a capital crime.

As has been suggested, the proper place to begin is with an orientation toward a concept revolving around the duties for which an armed force is primarily maintained. Preeminent among the functions of any military force is the defense against and neutralization and destruction of enemy military power. Accordingly, combat with enemy forces, which is necessary to that end, must always be important service within the meaning of the statute. For the same reason, activity proximately in support of combat units, on which they immediately depend for their effectiveness in actual operations, should likewise be deemed important service. In addition to combat duty as such, other duties immediately connected with and in support of national defense must be considered to be important service in military law. Thus the duty of guarding our coasts during a time of threatened invasion [54] or of patrolling strategic waters to prevent the infiltration of hostile shipping during time of war [55] are properly considered to be important service. Similarly, providing transportation which is proximately related to the performance of these vital duties must fall within the purview of the statute.

On the other hand, the performance of routine duties, such as kitchen police, maintaining files, or attending to the host of administrative details common to all large organizations should never be considered important service. Nor should training,[56] even training for combat,[57] be included within the concept. Similarly, transportation to these duties cannot properly be described as "important service." Punishment for quitting these duties can safely be left to other, noncapital articles of the Code.[58]

In the light of the cases, it seems clear that the proper rationale for "important service" is grounded in the need to penalize most strongly those servicemen who actually jeopardize military success by

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[54] Calvin, 13 B.R. 113 (CM No. 220947, 1942); Frank, 13 B.R. 109 (CM No. 220946, 1942).

[55] United States v. Wimp, 4 C.M.R. 509 (1952).

[56] See note 52 *supra* and accompanying text.

[57] Conlon, 14 B.R. 191 (CM No. 224805, 1942). *But cf.* United States v. Deller, 3 U.S.C.M.A. 409, 412-13, 12 C.M.R. 165, 168-69 (1953), in which the court announced a dubious exception that where the training is a statutory prerequisite for important service, the training itself becomes important.

[58] See, *e.g.*, Uniform Code of Military Justice arts. 86 (absence without leave), 87 (missing movement), 92 (failure to obey order or regulation), 10 U.S.C. §§ 886, 887, 892 (1958).

their unauthorized absence—to keep them at their tasks by means of a special deterrent when their absence constitutes an attempt to evade duty which is intimately related to the success of the military arms. There is no foolproof test for what duty is of immediate importance to military success. It is clear that no arbitrary standard will serve.

To label any particular duty "important," one must determine that, from a view of the overall military situation, the duty to be performed by the absentee would be such as to aid the success of the military power proximately and immediately. Of course, since the absentee never entered upon the performance of his duties, it cannot be known whether his particular performance would have made a significant contribution. Thus, for example, we cannot know whether an infantry soldier on the front line who had absented himself would have been in a position to kill or capture enemy soldiers, or whether he would have done his duty had he been present. We can, however, discover the importance of the activities he was to perform and thus determine with sufficient exactitude for military law whether his service was "important" within the contemplation of that law.