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Absence without Leave - The Nature of the Offense

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Of all the varied punitive articles within the UCMJ, Article 86, AWOL, seems to be the mainstay of the military lawyer's practice. Curiously enough this appears to have also been true in other eras [1] and nations [2] as well. Indeed, AWOL as an offense dates back at least to the Articles of War of Richard II promulgated in 1385.[3] Despite this long hallowed tradition, counsel frequently consider AWOL prosecutions uninteresting and professionally unrewarding. While this may be easily understandable (AWOL does lack the "glamor" and challenge presented by other equally traditional offenses such as pillage, looting, and

rapine) it may unfortunately result in counsel taking the offense for granted. The numerous appellate decisions defining the offense of AWOL—(Article 86(3))—in simplistic but highly misleading terms, compounded the problem. Consequently, an analysis of the offense with particular attention to the Court of Military Appeals' latest pronouncement in this area in *United States v. Lynch* [4] appears merited.

Absent without leave has been said to be committed on the day of the inception of the absence.[5] All time subsequent to the initial absence is said to constitute only aggravation, important only for considerations of maximum sentence.[6] Numerous authorities, thus have recited the statement that "AWOL is not a continuing offense." This has led to the occasional use of the term "instantaneous" to describe the nature of the offense. If AWOL is viewed in this fashion—as complete upon the soldier's unauthorized departure from his unit —certain *logical* consequences would seem to follow. First, consider this hypothetical. If the accused is charged with AWOL from his unit from on or about 1 January 1974 until on or about 30 June 1974, it is logical to presume that the offense charged is AWOL on or about 1 January 1974. Thus if AWOL is "instantaneous" and the prosecution, due to failure of proof, can prove only the termination date, the accused should be acquitted since the termination date, although part of the aggravating period, is a *different* offense than the inception date. Second, if AWOL is complete upon the actual inception, the statute of limitations should run from the actual (as against the date the prosecution may choose to prove) inception date. Third, for former jeopardy purposes acquittal at trial of an inception date should not bar retrial for a new inception date subsequent to the first date—although within that date's period of aggravation.

Unfortunately the *Manual for Courts-Martial* and the appellate courts have indicated that only the second conclusion dealing with the statute of limitations [8] is correct. In other words, the "instantaneous" model for AWOL is not consistent fact situations. We must, therefore, continue the search for a description of the nature of the AWOL offense. The rules of pleading for Article 86(3) are well known and need not be discussed at length. It suffices to point out that *some* inception date must be pleaded. Matters of proof are somewhat more complicated. If the government is unable to prove the pleaded inception date, but can prove either the pleaded termination date or *any* other date within the *single* pleaded period of the specification,[9] the accused may be convicted (by exceptions and substitutions) of an AWOL with a new inception date. This is true not only where the usual failure of proof occurs but also for the extremely rare case in which the accused establishes a defense of mental irresponsibility to the initial part of the charged AWOL period.[10] While the prosecution may prove any date within the pleaded time period, it may not create a second offense from the same period. In other words, if the evidence shows that the accused returned to military control during the charged period and again absented himself, the court may not find him guilty of the second absence either alone or in conjunction with the first.[11]

These rules further undermine the "instantaneous" model of AWOL. Since an accused may be convicted of any inception date within the charged period—despite its even extreme length and despite defense objections claiming fatal variance from the pleaded inception date—AWOL cannot be considered as an "instantaneous" offense. Rather it appears more correct to describe the offense as a course of conduct. While the offense is complete upon the absence for purposes of proof, it is incorrect to say that the rest of the time period is important only for aggravation. At the same time AWOL is not what has been called a "renewed" [12] offense because every day of the alleged period cannot be a separate chargeable offense for statute of limitations and former jeopardy purposes.

The *Manual for Courts-Martial* states clearly that the statute of limitations runs from the inception date of the absence because AWOL is not a "continuing" offense and is "committed, respectively, on the date the person absents himself." [13] This language raises the possibility that the defense can affirmatively prove an earlier inception date to raise the defense of statute of limitations. If PVT Doe is charged on 28 December 1973 with AWOL from 1 January 1972 until 15 December 1973, the statute of limitations would bar prosecution for an AWOL beginning prior to 28 December 1971. It would appear perfectly proper for the defense to prove that the AWOL actually began on 1 December 1971—it could then argue that prosecution for the entire period was barred by the statute of limitations. It is important to note that despite the Manual's language, this result is consistent with a conception of AWOL as a course of conduct. The inception date is vital, for it defines the offense in its most basic sense. However, the offense includes the remainder of the period for proper definition, otherwise every individual day would constitute an offense and the prosecution could select any date within the period. If that date were not barred by the statute, a successful prosecution would result despite the date of the actual inception.

For purposes of former jeopardy, AWOL is also treated as a course of conduct. In *United States v. Hayes,*[14] the accused was charged with desertion from 1 May 1952 until 11 June 1953. At trial the defense showed that the accused had earlier been convicted [15] of AWOL from 1 May 1953 until 11 June 1953. Hayes was then convicted of desertion from 1 May 1952 until 30 April 1953. On appeal, the Navy Board of Review held that it had been error for the trial court to simply exempt the period covered by the AWOL offense. The Board stated that "within the *same period of unauthorized absence* any lesser period of unauthorized absence is the *same offense* but of lesser gravity." [16] The court argued that this result followed necessarily from the fact that AWOL is not a continuing offense. The recent Court of Military Appeals decision, *United States v. Lynch,*[17] appears to follow *Hayes.* In *Lynch,* the accused was initially charged with AWOL from Special Processing Company, Special Troops, Fort Leonard Wood, from on or about 7 November 1969, until on or about 7 January 1971. At trial at Fort Sill, the defense showed that the accused had been apprehended by civilian authorities on 7 November 1969, and ultimately returned to military authority. The military judge acquitted the accused.[18] Within the week, Lynch was charged with AWOL from Special Processing Detachment, Fort Sill, from on or about 27 November 1969, until on or about 7 January 1971. At the second trial, the military judge denied the defense's motion to dismiss the charge and specification on grounds of former jeopardy because the "offense of unauthorized absence is not a 'continuing one'." [19] On appeal the Government claimed that former jeopardy did not apply because Lynch had been prosecuted for a different offense each time. Two theories were urged—firstly, that different units were involved each time, and secondly, that AWOL is not a continuing offense and that, therefore the acquittal was irrelevant to the second set of charges which, dealing with a new inception date, dealt with a new offense.

The Court of Review reversed the conviction, stating that the apparent variance between units was inconsequential because at the time of the second trial, Lynch, while attached to Fort Sill, remained assigned to Fort Leonard Wood and his alleged absence could have been prosecuted for AWOL from either unit.[20] Turning to the claim that different offenses were involved because different inception dates were charged, the court stated that the first trial apparently involved an AWOL running from 7 November until return of Lynch to military authorities on 24 November 1969, and that the holding of *United States v. Reeder* [21] preventing the carving out of a second AWOL from a single period was applicable. Using *Reeder* as precedent and finding that the doctrine of AWOL as a completed offense on the date of inception had the effect of

benefiting the accused via the statute of limitations, the court held that acquittal of an AWOL period barred prosecution at "a subsequent trial for a lesser period of unauthorized absence contained within the dates of the period of which he was acquitted." [22]

Upon certification by The Judge Advocate General, the Court of Military Appeals affirmed the decision of the Court of Review.[23] Its opinion was somewhat more expansive, however. It indicated that "the Government's insistence that the court's decision is 'inconsistent' with our iterated pronouncement that 'absence without leave is not a continuing offense,' . . . impels a separate statement." [24] A continuous offense, said the court, had been defined as "a continuous unlawful act or series of acts set on foot (*sic*) by a single impulse and operated by an unintermittent force, however long a time it may occupy." [25] AWOL is not a continuing offense in the sense that the offense was complete upon unauthorized departure from the unit. However, the length of the offense is essential, according to Judge Quinn's opinion, not only for determining the maximum legal punishment but also in that the single charged time period may not be fragmented into two or more periods for jeopardy purposes. Because one "cannot be prosecuted and punished for an act which is 'part and parcel' of an offense for which he was previously convicted and punished," [26] the first acquittal barred retrial for any time period contained within the first set of charges.[27]

Unfortunately, the Army Court of Military Review decision in *United States v. Espinosa* [28] shows that *Lynch* has not settled this area of law. *Espinosa* concerned an accused charged with AWOL from 15 May 1971 until 26 February 1973. At trial the defense proved that the accused had terminated the absence on 31 July 1971 and had then again absented himself. Apparently to save the longer period, the trial judge found *Espinosa* guilty by exceptions and substitutions of the second period beginning on 31 July, and acquitted him of the 15 May 1971 to 31 July period. On appeal the Court of Review set aside the findings of guilty, holding that the judge could have convicted Espinosa only of the first period and that the second period constituted an "uncharged offense" which could be the subject of a retrial. Retrial of the first period was barred by the acquittal. As written, the Court of Review's opinion is difficult to understand. Despite its statement that the trial judge "was not obliged to make any findings as to the uncharged offense commencing on 31 July," it would appear that current procedure would indeed require the trial judge to acquit an accused of the second period. While *Lynch* discussed the two absences within one specification problem,[29] it did so within the context of an outright acquittal for the entire period. Thus, while *Lynch* may not be dispositive of the issue generally, until a new form of procedure is devised that does not result in an acquittal of the second absence during the first trial, it would appear that *Lynch* would bar retrial for the second absence.

Lynch and *Espinosa* are illustrative of the weaknesses of the simplistic "instantaneous" definitions of AWOL. AWOL is an "instantaneous" offense for some purposes and a "continuous" [30] one for others. Obviously, what is involved is a question of semantics. It would be best if, rather than analyzing AWOL issues by means of a single multi-purpose model of the offense's nature, counsel focused directly on the result the decided cases have reached on the pleading, proof, statute of limitations and former jeopardy problems presented by AWOL cases. One improvement in the conceptual framework can be suggested, however. If AWOL is viewed as an offense which included duration as a basic part of the offense, all of the cases appear consistent. The inception date will indicate the beginning of the period—the critical date for statute of limitations purposes and the first date for which the accused may be convicted. The duration will allow the government within the single charged period to prove (as if by election) any "inception date," because while

each day is not a new offense,[31] the government may prove the accused was in an AWOL status beginning on any date within the charged period. However, having done so, the accused at a second trial will have a plea of former jeopardy as to any period included in the period originally charged regardless of the final outcome at the first trial. Thus to the extent that any catchphrase can be used to describe AWOL, it might be well to describe AWOL as a "course of conduct." [32] Using a course of conduct as a model, counsel will be better able to predict the legal consequences of any given set of AWOL facts while escaping the erroneous conclusions that follow from use of misleading labels.

Footnotes

1. *See e.g.* A. AVINS, THE LAW OF AWOL 33-38 (1957), [hereinafter cited as AVINS], indicating that slightly under one half of all Army prosecutions in World War I involved AWOL and that more than half of all Army offenses during World War II were unauthorized absences. Avins reports that 70% of all Naval courts-martial during the Second World War involved unauthorized absences other than desertion.
2. *See e.g.*, AVINS at 33.
3. W. WINTHROP, MILITARY LAW AND PRECEDENTS 905 (2d ed. 1896).
4. 22 U.S.C.M.A. 457, 47 C.M.R. 498 (1973) digested in 73-12 JALS 2 (DA Pam 27-73-12).
5. *See e.g.*, L. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 205 para. 27 (Revised ed. 1949) discussing Article of War 61; United States v. Emerson, 1 U.S.C.M.A. 43, 1 C.M.R. 43, 46 (1951); United States v. Lovell, 7 U.S.C.M.A. 445, 22 C.M.R. 235 (1956); United States v. Krutsinger, 15 U.S.C.M.A. 235, 35 C.M.R. 207 (1965); United States v. Frye, 36 C.M.R. 556, 558 (ABR 1965) Judge Wilkinson dissenting; United States v. Reeder, 22 U.S.C.M.A. 11, 46 C.M.R. 11, 13 (1972). *See also* AVINS 69-70.
6. *See e.g.*, United States v. Emerson, 1 U.S.C.M.A. 43, 1 C.M.R. 43 (1951); United States v. Frye, 36 C.M.R. 556, 558 (ABR 1965) Judge Wilkinson dissenting; United States v. Harris, 21 U.S.C.M.A. 590, 45 C.M.R. 364 (1972).
7. *See* footnote 5. *See also* MCM 1969 (REV) para. 215(d).
8. *See* MCM 1969 (REV) para. 215(d); United States v. Buskin, 7 U.S.C.M.A. 661, 23 C.M.R. 125 (1957).
9. *See e.g.*, United States v. McNabb, 34 C.M.R. 619 (ABR 1964); United States v. Harris, 21 U.S.C.M.A. 590, 45 C.M.R. 364 (1972; *cf.* United States v. Madro, 7 C.M.R. 690 (AFBR 1952).
10. United States v. McNabb, 34 C.M.R. 619 (ABR 1964).
11. *See e.g.* United States v. Reeder, 22 U.S.C.M.A. 11, 46 C.M.R. 11 (1972) hereinafter cited as Reeder; United States v. Hayward, 43 C.M.R. 777 (ACMR 1971); United States v. Espinosa, SPCM 9038 (ACMR 30 Nov 1973).
12. A term used by Avins in his AWOL text to indicate an offense where a new offense is committed every "day, hour, minute, or second" the accused remains AWOL. AVINS 69; see also page 277.
13. MCM 1969 (REV) para 215(d).
14. 14 C.M.R. 445 (NBR 1953).
15. Apparently the charges had used 1 May 1953 by error and the proper year was 1952. The convening authority, upon notice of the mistake, disapproved the sentence and dismissed the charges so that Hayes could be retried on the correct dates. The court found that the dismissal notwithstanding, the first trial had to be considered a "conviction."
16. 14 C.M.R. at 449 (Court's italics).
17. 47 C.M.R. 143 (ACMR), *affirmed*, 22 U.S.C.M.A. 457, 47 C.M.R. 498 (1973).
18. 47 C.M.R. at 144.
19. 47 C.M.R. at 499.
20. 47 C.M.R. at 145.
21. *See* note 11 *supra.*
22. 47 C.M.R. at 147.
23. 22 U.S.C.M.A. 457, 47 C.M.R. 298 (1973) digested at 73-12 JALS 2 (DA Pam 27-73-12).
24. *Id.* at 500.
25. *Id.* at 501, citing Armour Packing Co. v. United States, 153 F. 56 (8th Cir. 1907) *aff'd* 209 U.S. 56 (1908).
26. 47 C.M.R. at 501 citing United States v. Maynazarian, 12 U.S.C.M.A. 484, 485, 31 C.M.R. 70, 71 (1961).
27. Judge Quinn continues to say that the court cannot conceive how an accused, already AWOL from a unit can absent himself a second time. "By reason of the hierarchical nature of a military command, an individual's absence from his assigned unit will also constitute him an absentee from superior organizations in the same command or his armed force." 47 C.M.R. 501. Judge Quinn adds that prosecution by one unit in the chain will bar prosecution for the same absence by another unit in the chain and, similarly, while either the unit an accused is assigned to or attached to can be the unit the accused is prosecuted for leaving, he cannot be prosecuted twice for the same basic offense.

28. SPCM 9038 (ACMR 30 November 1973) digested at 74-2 JALS 12 (DA Pam 27-74-2).
29. The Court of Military Appeals in Lynch points out that while the Government urged that two separate offenses took place in the time period charged at the first trial, the judge at the first trial acquitted Lynch of the entire period and did not, pursuant to Harris, convict him of a lesser period. From the facts as set forth in the Court of Review and Court of Military Appeals opinions, it seems possible that, lacking the trial counsel's concession at the first trial, Lynch could have been convicted of a short AWOL.
30. *See* United States v. Skipper, 1 C.M.R. 58 (CGBR 1951) describing AWOL as an offense of "continuing duration" to prevent the period from being endlessly divided up into separate offenses.
31. *Id. See also* Avins 69-70, 277-79.
32. It appears that it was in this sense that Colonel Winthrop described AWOL as a continuing offense. W. WINTHROP, MILITARY LAW AND PRECEDENTS 255 (2d ed. 1896).