

Military Leadership and the Law

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The concept of leadership has always played a major role in military life. Recently, the Navy Department has even undertaken the initiation and conduct of a "leadership drive." Military lawyers, however, seem to have been remarkably silent on this subject and have failed to delineate the extent to which the law is concerned with military leadership. The author hopes that this Article will remedy the situation. Its thesis is that military leadership is, in its ultimate analysis, subject to and enforced by law. The Article will analyze the nature and scope of the legal requirement on military personnel to lead.

I

WHO IS A LEADER

Before commencing an analysis of the manner in which the military law enforces leadership responsibility, it might be well to consider the question of whom the military law denominates as a leader. The first class of persons whom the law makes leaders are commissioned officers. Their command responsibilities are very generally defined by applicable regulations, directives, and orders, but even when undefined it requires no elaborate argument to show that they fall within the ambit of those whom the law considers leaders. The same situation is true in the case of warrant officers and non-commissioned officers.¹

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The following abbreviations are used in citing military reports, orders, and laws: *ACM(S)*, Air Force Board of Review, review of general (special) court martial; *AGN*, Act for the Government of the Navy; *A.-P.*, Army Board of Review Reports, South & Southwest Pacific, 1943-45; *B.R.*, Army Board of Review Reports, Washington, D.C.; *C.B.I.-I.B.T.*, Army Board of Review Reports, China-Burma-India & India-Burma Theatres of Operations, 1943-45; *CGCM(S)*, Coast Guard Board of Review, review of general (special) court martial; *CM(S)*, Army Board of Review, review of general (special) court martial; *CMO*, U.S. Judge-Advocate-General (Navy) Court Martial Order; *C.M.R.*, Court Martial Reports; *E.T.O.*, Army Board of Review Reports, European Theater of Operations, 1943-45; *GCMO*, General Court Martial Order (Army, unless otherwise indicated); *G.O.*, General Order; *J.C.*, Army Board of Review and Judicial Council Reports, 1949-51; *NCM(S)*, Navy Board of Review, review of general (special) court martial; *U.S.C.M.A.*, Court of Military Appeals Reports.

¹ See *CMO 6-1915 [P.5]*, declaring that a warrant officer may command a vessel in the Navy; *United States v. Kukola*, 7 C.M.R. 112 (CM 1952), recognizing an Army warrant officer's responsibility as commander of an Army boat; and *United States v. Moore*, 21 C.M.R. 544 (NCM 1956), holding a petty officer in charge of a landing craft to be a person "in authority" within the meaning of a naval regulation requiring "all commanding officers and others in authority" to exercise command responsibility.

When, however, we get to the case of enlisted persons below the rank of non-commissioned officer we find servicemen who have no inherent leadership responsibility. But it does not follow that such personnel will never have leadership responsibility under any circumstances. Indeed, there is a clearly defined situation in which such duties have been traditionally imposed, where an enlisted person below the rank of non-commissioned officer is appointed to a supervisory post or ordered to perform supervisory duties.²

Thus, in one case,³ the accused, a basic airman, was assigned to a work detail under the supervision of an airman first class, who, although a superior airman, was not a non-commissioned officer. When the accused's supervisor instructed the members of the work detail to take certain action, the accused remarked that he was in no hurry. The airman first class replied that he was in a hurry as there was much work to be done, whereupon accused uttered an obscene expression towards his supervisor. The Board of Review held that this incident would support a charge of disrespect to a superior airman in the performance of his duty under the general article,^{3a} declaring: "It is difficult to imagine an act more directly prejudicial to good order and discipline."

The Board admittedly, in the above case, modeled this charge after those articles penalizing disrespect to a superior officer or non-commissioned officer while in the execution of his office,⁴ offenses traditionally designed to bolster command authority and hence coterminous with leadership responsibility.⁵ In light of this fact, it is clear that such a supervisor has, by virtue of his duties or position, leadership responsibility for the men under his charge.

As noted above, the fixing of leadership responsibility for men in organized, pre-arranged military units, no matter how small the size or how low on the totem pole-like hierarchy of military organizations, is generally easy. A more difficult problem is posed when a unit loses its leaders; and the problem becomes most acute when troops find themselves thrown together without regard to organization, and without any prearranged leadership at all.

Military law has devised the rather simple expedient for solving this problem by casting command responsibility on the highest ranking officer or non-commissioned officer present, without regard to prior duties or

² In such a case, of course, these enlisted personnel, who cannot otherwise give orders, may then do so. See AVINS, *THE LAW OF AWOL* 228-29 (1957).

³ *United States v. Spigner*, 16 C.M.R. 604, 607 (ACMS 1954).

^{3a} UCMJ art. 134, 10 U.S.C. § 934 (1958).

⁴ UCMJ arts. 89, 91, 10 U.S.C. §§ 889, 891 (1958).

⁵ Thus, for example, one of a rank equal or superior to another and yet under the latter's command would not be his superior. U.S. DEPT OF DEFENSE, *MANUAL FOR COURTS-MARTIAL UNITED STATES* ¶ 168 (1951) [hereinafter cited as *MANUAL FOR COURTS-MARTIAL*].

organization;⁶ and this rule has been most recently reaffirmed in connection with organization of American prisoners of war in North Korean prison camps.⁷ Notwithstanding the apparent advantages of this rule, there are, in some situations, disadvantages. Thus, a junior officer, such as a line officer, in the group may be better qualified to cope with the situation than the senior officer if, for example, he is a staff officer. Presumably, the latter will avail himself of the former's expertise, but there is no guarantee of this, and such a hope may, in some situations, be inadequate insurance against blundering by the senior.

This tug in the other direction has produced an exception to the rule discussed above. This exception, sometimes produced by regulation⁸ and sometimes only by custom,⁹ is that where there is a group of persons traveling on a means of transportation which is difficult to operate, the senior operator present is the commander of the group, an exception induced by the basically sound notion that if expertise were here subordinated to rank, an irreparable disaster might occur because of unwise command decisions. This exception has even been applied to hold that accused, a lieutenant colonel and squadron commander, who was a passenger on board an airplane of which the pilot was a captain and officer in accused's squadron, was not guilty of allowing unauthorized passengers to ride in the aircraft since the accused had no control over the aircraft inasmuch as the pilot is the aircraft commander regardless of rank. Thus, although the accused, himself a pilot, was the pilot's commander generally, for this trip the pilot was accused's commander.¹⁰

This brings up the very interesting question of what would constitute a form of conveyance difficult to operate. Thus, Judge Latimer says of an automobile:

[M]ilitary law recognizes no principle which is more firmly fixed than the rule that a military superior is responsible for the proper performance by his subordinates of their duties. Thus, if a Government vehicle is involved,

⁶ CMO 40-1915 [P. 22]; Michalowski, 1 A.-P. 99 (CM 1943). When two officers hold the same grade, the one with the earliest date of rank is superior. *United States v. Chavers*, 23 C.M.R. 701 (CGCMS 1957). See also HOWLAND, *DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY (1862-1912)* 149 (1912) where an officer was charged under the general article for "neglecting, by a senior officer 'present for duty' with his regiment, to assume the command of the same when properly devolved upon him, and allowing such command to be exercised by a junior."

⁷ *United States v. Floyd*, 18 C.M.R. 362 (CM 1955).

⁸ See, e.g., U.S.A.F. Reg. 60-16 para. 5 (13 Feb. 1953), applied in *United States v. Anderson*, 15 C.M.R. 919 (ACM 1954).

⁹ CMO 6-1921 [P.11], reprinted in part in AVINS, *THE LAW OF AWOL* 223-24 (1957). In this case it was held that a Navy medical officer who was senior officer and commander of the unit on a hospital ship could not issue orders to accused, a lower-ranking line officer, who was, as the senior line officer, in command of the vessel's operations.

¹⁰ *United States v. Anderson*, 15 C.M.R. 919 (ACM 1954).

if the passenger is superior in command and rank or grade to the driver, and if the trip has an aura of officiality about it, the passenger in command has a duty to see to it that the driver operates the vehicle carefully.¹¹

Yet, in cases where the senior officer or non-commissioned officer on a vehicle does not know how to drive, his giving of directions could only cause confusion to the driver and danger to the passengers.¹² Thus, one might have to define "difficult to operate" in subjective terms, *i.e.*, whether the senior officer knew how to operate the vehicle.

Furthermore, there is rapidly coming into existence all manner of new transportation devices on which military personnel will find themselves. In addition to the ones, such as interplanetary rockets, which can be labeled as "difficult to operate" without much discussion there will be a number of doubtful devices such as the Army's latest flying platform. The question is, are we to accord to this technological advance, and its brethren, the distinction of not only being able to fly over hedges, but also over traditional methods of determining who shall exercise command thereon?

To the above exception, moreover, there is an exception which reinstates the original rule. Where the pilot of an aircraft (and presumably of any other conveyance which falls within the above exception) is a student pilot, and the senior person on board is his instructor, the latter commands the plane. Thus, in one World War II case, where an accused pilot was charged with permitting "a student (pilot) under his supervision and command . . . to fly a plane lower than regulations permitted,"¹³ the Board of Review held that "whoever was piloting, it was accused's duty himself to have maintained . . . [the prescribed altitude] or to have ordered his student to do so."¹⁴ In addition, the Board held:

It was not specifically shown that Whippy was under accused's direct supervision and command. This was properly inferable from their admitted relationships as officer and enlisted man, and instructor and student.¹⁵

¹¹ *United States v. Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46, 55 (1956).

¹² This the Board of Review rightly pointed out in *United States v. Flaherty*, 12 C.M.R. 466 (CM 1953).

¹³ *United States v. Arthur*, 39 B.R. 381 (1944) (charge III, spec. 2, under the 96th Article of War (general article)).

¹⁴ *Id.* at 389.

¹⁵ *Id.* at 391. See also *United States v. Leonard*, 42 B.R. 105 (1945). And in *United States v. Brown*, 35 B.R. 31 (1944), the Army Board of Review declared: "Accused contended that in view of the fact that Lieutenant Stevens occupied the pilot's seat, and was at the controls at all times he was not responsible for the offenses . . . [of low flying] . . . It was shown, however, that accused was senior to Lieutenant Stevens in rank, that the applicable Army Air Force Regulations place responsibility for acts and omissions of crew members upon the senior officer, that accused and Stevens agreed upon the route to be followed, and that accused remonstrated with Stevens only when Stevens fell asleep at the controls. . . . The Board of Review holds accused equally guilty with the principal pilot, Lieutenant Stevens." *Id.* at 41.

We thus, in allocating leadership responsibility, find two conflicting policies competing for control. One policy, the traditional one, is that command devolves strictly according to rank. This policy was easily justified in the days of yore when all officers were proficient in all major branches of the service, and hence the senior officer was presumably, absent personal qualities, most proficient in all military matters. The second policy, that leadership in particular situations should devolve on the most expert officer in the particular field, is only beginning to gain ground. However, with the likelihood of an increasing specialization on the part of service personnel, pressure for, and inroads by, the second policy are bound to become progressively greater. Concededly, it is far more difficult to allocate command on the basis of expertise in particular situations than it is to have it devolve solely on the basis of rank, for determination as to who is of higher rank has an ease and precision stemming from a mere mathematical computation, while a determination of who is the most expert person in the group to cope with the situation facing it involves an evaluation of so many variables, known and unknown, not to mention subjective factors, that determination as to who should have leadership responsibility becomes inordinately difficult of solution.

The solution of this problem may lie in an ancient American custom, now fallen into disuse, of electing military leaders.¹⁶ In addition to using this in the relatively infrequent case where men of different rank, without predetermined organization or leadership, are thrown together under situations requiring leaders possessing peculiar expertise, it may also solve the somewhat more frequent, although still comparatively rare, problem where an isolated group of men, all of the same rank, find themselves together. While leadership duties would devolve, where no commissioned or non-commissioned officers are present, on the senior ranking enlisted man, where all personnel, as in a group of recruits, are of the same rank, election of group leader would seem to be the most logical method of insuring group leadership and direction.

At any rate, at least two things are clear from this analysis. One is that everyone in the armed services is either presently, or potentially, a leader. The other is that new technological advances in the military, now following one another head-over-heels, will create so many leadership problems that military lawyers should be kept busy for at least the next hundred years.

¹⁶ See, e.g., *Mathews v. Bowman*, 25 Me. 157 (1845); *Opinion of Justices*, 132 Mass. 600 (1882); *Gleason v. Sloper*, 41 Mass. (24 Pick.) 181 (1837); *People v. Sampson*, 25 Barb. 254 (N.Y. 1857); *Commonwealth v. Small*, 26 Pa. 31 (1856); *In re Contested Election*, 1 Strob. 190 (S.C.L. 1847).

II

IS THE DUTY TO LEAD LEGALLY ENFORCEABLE?

In commencing our analysis of the relationship between military leadership and the law, we must start with a fundamental question induced by the fact that the Uniform Code of Military Justice nowhere specifically provides for the punishment of leaders who fail to lead, as it does for followers who fail to follow. Such omission gives rise to the question of whether command responsibility is a legally enforceable obligation at all, or whether it is merely a quasi-moral obligation. In other words, is there a duty to lead?

In determining whether there is a duty to lead, the first subject of inquiry is, what is meant by the word "duty" in this context. Underlying analysis of the area indicates that the conceptual connotation of the word as normally viewed in the law at large breaks down when applied to military situations.

For example, Hohfeld defines duty in terms of a two-party relationship, analyzing the word in such a way that a duty in one person becomes the correlative right in one or more other persons.¹⁷ Such persons must, of course, be identifiable with a reasonable degree of certainty; otherwise, there is no one to enforce the so-called "duty," and it becomes illusory. In the military law, however, Hohfeldian analysis becomes a positively misleading working tool.

It is true, of course, that there are many instances in which those to whom a leader owes a duty, or, to be more precise, in which those who suffer because of a dereliction of command responsibility, are easily ascertainable.¹⁸ But in many more, if not in the majority of instances, those suffering detriment by virtue of such dereliction are impossible of ascertainment, and so the question of to whom the duty is owed, if anyone, can no longer serve as a criterion for testing whether the duty exists at all.

For example, in one World War II case,¹⁹ the accused, a major, caused the transfer and reassignment of a private, his brother-in-law, to his own unit, made the latter accused's personal assistant, and caused him to be promoted to the grade of Staff Sergeant, although this relative lacked sufficient experience and qualification for either this grade or position.

¹⁷ Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913). "Duty" is "the lowest common denominator of the law." *Id.* at 58-59.

¹⁸ See, e.g., CMO 23-1913, where accused, a commissary officer, failed to properly supervise a subordinate, as a result of which the subordinate fed reduced rations of food to men on the ship and defrauded the government out of the value of the difference. The Secretary of the Navy declared: "His injury in this case was not so much to the Government as to the hundreds of enlisted men on the Louisiana, the injustice to whom can never be rectified." It is clear in this case that the group injured can be identified with the precision which any civil suit would require.

¹⁹ *United States v. Mayers*, 18 B.R. 65 (1943).

Accused was convicted under the general article; and it seems crystal-clear that this brand of nepotism is prejudicial to effective military leadership. Nevertheless, to whom did accused violate a duty? Surely he breached no duty to his brother-in-law, who was benefited by his acts. We can be equally certain that he breached no duty, or at least legally recognizable duty, to himself, for such a breach would be a slender reed indeed upon which to predicate criminal liability. And finally, to say that he breached a duty to the Government generally is to deprive the right-duty analysis traditionally used in civil law of a meaningful context, and so to leave the shadow while removing the substance. Hence, it is clear that the word "duty," in military law, is not used in the same way it would be used in civil law, but rather means any act or omission enjoined by the punitive sanctions of the military law.

From the above analysis, it is clear, therefore, that to find a duty to assume command responsibility we must, at least initially, find punitive sanctions for enforcement of that duty. The most likely candidate from the articles of the Code is that one denouncing dereliction of duty,²⁰ and, as we shall later see, such a charge was typically brought under this article or its predecessors.²¹ However, when we look at the exposition of this article as found in the *Manual for Courts-Martial*, we find no specific reference to neglect of command duties, or even an indication that an enforceable leadership duty exists under this article, for the *Manual* contains only the following generalized statement: "A duty may be imposed by regulation, lawful order, or custom of the service."²² Since, therefore, an accused may only be charged with neglect of duty when a duty was in fact imposed upon him,²³ to answer the question posed above it is necessary to analyze a leader's legal position further.

Such analysis may be pursued, it is suggested, more profitably from another angle. The Uniform Code of Military Justice, by which Congress re-enacted in unaltered form centuries of military law, gives a military leader great power over his subordinates. They are severely punished for disrespect to him,²⁴ disobedience of his orders,²⁵ attempting to strike him

²⁰ UCMJ art. 92(3), 10 U.S.C. § 892 (1958), denouncing anyone subject to the Code who "is derelict in the performance of his duties."

²¹ This article was derived from AGN of 1862 art. 8(9), REV. STAT. § 1624 (1875). Similar offenses in the Army were punished under the 96th (general) Article of War. *Hearings Before a Subcommittee of the House Committee on Armed Services on H.R. 2498, a Bill to Unify, Consolidate, Revise, and Codify the Articles of War, Articles for the Government of the Navy, and Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice*, 81st Cong., 1st Sess. 1227 (1949).

²² MANUAL FOR COURTS-MARTIAL ¶ 171c.

²³ CMO 1-1951 [P.28]; CMO 6-1946 [P.228]; CMO 3-1931 [P.13]; CMO 6-1929 [P.8].

²⁴ UCMJ arts. 89, 91(3), 10 U.S.C. §§ 889, 891 (1958).

²⁵ UCMJ arts. 90(2), 91(2), 10 U.S.C. §§ 890, 891 (1958).

while in the execution of his office,²⁶ or otherwise, even by peaceful means, opposing the exercise of his authority.²⁷ To assume that Congress gave a commander such a panoply of power to be exercised at his sole whim, just as one may exercise or refrain from exercising private rights and personal privileges, is fundamentally inconsistent with the basic premise in our society that public power is delegated for public purposes alone.²⁸ Likewise, to assume that leaders have unlimited discretion as to whether they will assume leadership duties or not is to maintain the equally unsound position that Congress intended to permit military leaders to leave their commands bereft of direction at the leader's sole whim regardless of how imperative the need for the unifying command of the superior may be. The evident unsoundness of such alternative must necessarily compel the conclusion that when "proper discipline and administration of the military forces demand that the orders and authority of superior authority be enforced and maintained . . . such power and authority is not an unbalanced, one-sided proposition. It must necessarily be accompanied by responsibility."²⁹ As an old naval case declared:

The power conferred carries with it a corresponding degree of responsibility, and the officer who, while entrusted with it, fails in its proper exercise, either in giving the necessary order, or seeing it obeyed, must be held responsible for the consequence of his neglect.³⁰

Notwithstanding the general rule that "the officer in command . . . in all military organizations is credited with success and held responsible for failure,"³¹ there are a number of defenses, both negative as well as affirmative, to a charge of dereliction of leadership duties. Thus, for example, the duty must be an official one.³² So, too, an error in judgment will not con-

²⁶ UCMJ arts. 90(1), 91(1), 10 U.S.C. §§ 890, 891 (1958).

²⁷ *United States v. Leslie*, 37 B.R. 149 (1944); *United States v. Roach*, 26 B.R. 353 (1943); CM 168771, *DIGEST OF THE OPINIONS OF THE JUDGE ADVOCATE GENERAL* (1912-40) § 454(27) (1940).

²⁸ An outgrowth of this attitude is the long-time punishment in the military of persons who abuse their authority by giving orders for private purposes. See Avins, *The Joker in Jester—The Parris Island Death March Case*, 53 NW. U.L. REV. 33, 45 nn.81-84 (1958). Likewise, orders given for private purposes are illegal, and hence not obligatory. See *Queen v. Dixon*, 2 Buch. E.D. Cape G.H. 380 (1882), and other cases cited in AVINS, *THE LAW OF AWOL* 239 (1957). See also LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT*, ch. 11, para. 139 (1690).

²⁹ *United States v. Hulett*, 24 E.T.O. 163, 177 (1945).

³⁰ GCMO 44 (1883), cited in CMO 4-1914 [P.9]. See also CMO 9-1929 [P.16] declaring: "The very foundation of the absolute authority of a commanding officer is that he shall so administer his command and shall exact from his subordinates such a standard of efficiency that the lives of his officers and men and the ship and all the public property therein shall not be put in jeopardy or lost."

³¹ CMO 9-1893.

³² *United States v. Garrison*, 14 C.M.R. 359 (CM 1954).

stitute this offense.³³ Likewise, impossibility of performance generally is a defense,³⁴ as is the fact that the duties accused had to shoulder were impossible to perform because he was not qualified for the job.³⁵ Indeed, the similarities of defenses to this offense to those defenses to other military offenses, such as disobedience of orders or AWOL, is so striking as to clearly show the interrelation of the offenses of the substantive military law.

One final area of leadership responsibility remains to be analyzed, and the problems posed by this area can best be considered within the context of an actual incident arising in the Navy shortly before World War I which gave rise to two courts-martial. A certain Lieutenant Oak was the senior engineering officer of the *U.S.S. San Diego*, in charge of the engine rooms and firerooms during a full-speed trial of that vessel. A Lieutenant (j.g.) Hill, Oak's subordinate, specially in charge of the firerooms and boilers, noticed that water in the boilers was abnormally low. Hill notified Oak, who went to the feed-pumps to supervise their operation, where he learned that they were defective. As water continued to drop below the danger point in the boilers, Hill informed Oak of this fact and requested permission to put out the fires, but the latter informed his subordinate that the trial would soon be over and ordered him not to put out the fires. When water passed out of sight a few minutes later, Hill went to see his superior to get permission to put out the fires. By that time it was too late; the boilers exploded, killing nine men.

There can be little doubt that the Judge Advocate General and Secretary were right in holding that Oak was guilty of culpable neglect of duty in failing to take measures to safeguard the ship and its personnel and to order that measures be taken to avert the emergency,³⁶ for if there is any situation in which command responsibility exists, it forbids the taking of unjustified risks by a commander without ascertaining the true facts. Here, Oak was in close proximity to, and had means of immediate communication with the fireroom; he had due notice that a situation existed which was

³³ CMO 87-1917 [P.1]; JAMES, A COLLECTION OF THE CHARGES, OPINIONS, AND SENTENCES OF GENERAL COURTS-MARTIAL (1795-1820) 658 (Lt. Gen. Sir John Murray, Bart., 1815) (1820).

³⁴ CMO 5-1932 [P.5].

³⁵ CMO 3-1938 [P.12]. See also GCMO 9 (1897), wherein the Judge Advocate General of the Navy held that the imposition of important and onerous duties on an accused in poor health, who lacked full facilities normally accorded to one in that position, constituted an extenuating circumstance. And in GCMO 101 (1903), the Secretary of the Navy held: "However good his intentions may be an officer is inefficient in the performance of his duties who does not bring to their performance the care, skill, knowledge, and capacity which they reasonably demand. If he is ordered to the performance of duties not appropriate to his rank, and for which he has not the knowledge, training and capacity, the inefficiency may be his, but the culpability lies with those who are responsible for his assignment. To be culpable the inefficiency must be in such duties as from his rank, age, knowledge, and training, he might be expected to perform properly." *Id.* at 7.

³⁶ CMO 38-1915.

likely to become dangerous at almost any moment; and he failed, as was his duty, to inform himself fully of the true state of the situation. Hence, his liability for breach of duty presents little of a problem.³⁷

On the other hand, the approval of the conviction of Oak's subordinate for culpable neglect of duty raises a far more serious problem of allocation of leadership responsibility, for it was held that Hill was under a duty to *disobey* Oak's order almost as soon as it was given and to put out the fires.³⁸ This duty was predicated on the fact that Oak was not aware (through his own neglect) of the true situation, and the nature of the emergency made it impossible for Hill to apprise Oak of all of the facts in time to avert the danger, as shown by the fact that Hill's attempt to do this failed.

Such holding, moreover, is on the surface contrary to a World War II Army case,³⁹ in which accused, a lieutenant in charge of a battalion stockade, stood by and did nothing while his commander, a lieutenant colonel commanding the battalion, ordered accused's subordinates to maltreat prisoners. A Board of Review held that he had violated no duty in light of the fact that his superior was present and in charge.

³⁷ *Id.* at P.P. 3-4, where the Secretary of the Navy declared: "Numerous and repeated urgent calls for water were made over the voice tube to the engine-room and also frequent requests by personal messenger came from the fireroom to urge that more water be supplied to the boilers; that Oak during this period of twenty-five minutes elapsing before the explosion was present in the engine-room and in supreme control; that these messages were too numerous to record; that excitement was prevalent in the engine-rooms on account of the low condition of water and that until the officers in charge of the fire-room came personally to protest, that Oak took no steps to preclude the possibility of an explosion, except the ineffectual effort at the feed pumps, and though present in the engineer department and cognizant of a situation which he could have remedied by a word, he continued in his inaction, directing his efforts to obtaining suction for the pumps, and when urgent personal appeals were made by his subordinates, he, even then, merely authorized them to haul fires, *if necessary*, which permission was too late to prevent an explosion, with consequent damage to government property and the loss of nine lives.... The senior engineer officer is in supreme command of the engine room; ... he cannot escape from the responsibility of his failure to take necessary steps to safeguard the lives and property under his charge.... [I]t is ... incumbent upon a senior engineer officer ... to take the initiative in an emergency."

³⁸ CMO 37-1915, wherein it is stated: "the disaster was not due to ignorance on his part of the proper action to be taken in order to have prevented such disaster, but to ignorance of military discipline, which required him to take the initiative, in an emergency which did not permit of delay, without waiting for orders, and even in disregard of orders previously issued."

³⁹ *United States v. Mudd*, 36 B.R. 105 (1944). But see the approved conviction in CMO 19-1914, charge II, "Neglect of duty," and its specification, as follows: "In that Lieutenant Winfield Liggett, Junior, U.S.N., while the second line officer in rank attached to and serving at the United States Naval Station, Guantanamo, Cuba, being present on board the U.S. Ship *Cumberland*, Station Ship at the said United States Naval Station, . . . while Lieutenant Merritt S. Corning, U.S.N., the Commandant of the said United States Station, was under the influence of intoxicating liquor and was directing the issue of intoxicating liquor to certain enlisted men . . . did, well knowing that the issue of intoxicating liquor to such enlisted men . . . [violated Navy Regulations], fail to take proper and lawful steps to prevent the violation of the said lawful Regulation. . . ."

This author has previously analyzed and synthesized a number of heretofore apparently unrelated cases, each of which had no rationale other than the *sui generis* nature of its own fact pattern which imperatively demanded the result, to formulate a defense arising from the converse of this problem, *i.e.*, the defense of mistake of fact of authority.⁴⁰ It is clear beyond cavil that Hill had this defense. Acute analysis of the Army case, however, shows that this defense would not be available to the lieutenant since his superior was in possession of all the facts. Therefore, the Army case above noted presents the bald issue as to whether a subordinate leader has a duty to try to prevent his superior from having an illegal order executed; and refusal to impose this duty was rightly predicated on the conflict of duties which would present itself to enlisted personnel.⁴¹ On the other hand, the additional element of ignorance of the true facts by superior authority, and knowledge of this by the subordinate leader, justifies, in a situation where serious consequences would otherwise ensue, the imposition of a positive duty on the latter to disregard superior orders as a part of his general leadership responsibility.

Of course, it is true that a situation giving rise to a defense of mistake of fact of authority normally confers merely a privilege on the subordinate to disobey an order, and hence does not impose any duty on him to do so. But, as this author has heretofore pointed out, there are extraordinary situations in which such a duty may be, and in fact is, imposed on the accused.⁴² Such an imposition of duty does not arise, of course, from the superior's *mistake* of fact, but from the underlying fact situation of which the accused has knowledge. When a subordinate has knowledge of facts creating an obligation to act, orders normally subordinate that obligation to the extent that they are inconsistent with it. With a defense to a charge of disobedience of orders, the obligation, no longer subordinated, has binding

⁴⁰ AVINS, *THE LAW OF AWOL* 188 (1957). This defense would confer a privilege to disobey or vary an order if it is reasonably believed that the superior is laboring under a mistake of fact.

⁴¹ *United States v. Mudd*, 36 B.R. 105, 115 (1944): "A subordinate need not obey an order that is palpably illegal, but he disobeys any order of his superior at his own risk. It would tend to the creation of a chaotic condition if a soldier, who had received an order from an officer, would then be compelled additionally to determine whether he should obey that order or a contradictory one prohibiting him from doing so issued by another officer superior to him but subordinate to the officer issuing the original order. To hold that the accused in the present case was compelled to prevent the execution of an illegal order given directly by his commanding officer to a prison guard, the commanding officer being actually present while the guard was carrying out the order, would be to recognize an obligation on the part of a subordinate that would tend further to create this undesirable situation." See also, generally as to conflict of orders, AVINS, *THE LAW OF AWOL* 250 (1957).

⁴² *Id.* at 192. The two reviewers who commented on this proposition had mixed reactions to it as a defense. Prugh, Book Review, 62 DICK. L. REV. 364, 365 (1958); Pasley, Book Review, 46 KY. L.J. 642, 644-45 (1958). Prof. Pasley, who apparently opposed it as a defense, can be expected to be even more horrified by the suggestion that it opens the door to imposition of a duty to act contrary to the order.

force as if the inconsistent order did not exist. Such an obligation to act is present only if it would exist absent the supervening order; and such obligation is of the same origin, kind, and extent as it would be absent the supervening order,⁴³ so that if no obligation would exist in the absence of the order, no obligation exists with the existence of the order deprived of its obligatory effect by a defense of mistake of fact of authority.

In the *Hill* case, above discussed, absent Oak's order there would, because of the emergency, be a duty imposed upon Hill to order the fires put out, such duty arising from his general duty to exercise leadership. Oak's supervening order was deprived of its obligatory effect by the defense of mistake of fact of authority, a fact which the Secretary rightly lays great stress on, and there remained in effect the duty to order the fires put out. Hence Hill was rightly convicted of neglect of his leadership duties.

In sum, therefore, it may be laid down that an order to a leader from a superior which is inconsistent with or otherwise relieves the leader of his leadership duties, general or particular, constitutes a defense to a charge of failing to perform such duties to the extent of the inconsistency or relief. However, to the extent that the leader has a defense to the non-observance of that order, the leadership duty revives and is binding.

III

DUTY TO BE PRESENT WITH COMMAND

Having examined the general duty of leadership, we turn to a look at several specific leadership duties. The first, and perhaps most basic, is to be present when needed with the unit the leader is to command. This is one of the oldest leadership duties specifically recognized and enjoined by law,⁴⁴ and the breach of this duty has traditionally been charged as a neglect of duty.⁴⁵

⁴³ Of course, the same analysis would apply where the supervening order was illegal. Thus, in CM 118423 (1918), *DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL* (1912-40) § 454(10), at 348 (1940), it was held that where an officer's superior ordered him to allow and encourage guards under him to maltreat prisoners, the order was plainly illegal, and not only was the officer required to, as a matter of personal conduct, disobey it, but he was also, notwithstanding the order, required to perform his duty of protection towards the prisoners by affirmatively ordering his guards not to maltreat prisoners.

⁴⁴ WINTHROP, *MILITARY LAW AND PRECEDENTS* 726 (2d ed. reprint 1920) listing as a violation of the general article, "failure by a commanding officer to be present and properly exercise command," and citing to support this, under note 96, GCMO 38, 39, 58 (1877).

⁴⁵ See, e.g., CMO 12-1912, where it was charged that accused, in command of a grounded ship's boat, and knowing that the men under him were needed to refloat it, "and it being the duty of said Boatswain Drummond to repair speedily on board said ship to supervise said operation, did . . . keep said boat and boat's crew waiting for him at the landing on shore for . . . three hours, and [he] . . . did . . . thereby neglect his duty as commanding officer of said ship." It was likewise charged that accused did "neglect and fail to supervise the operations of hauling off and refloating said ship, as it was his duty to do," and that he did "proceed to his

Breach of this leadership duty should in no wise be confused with the offense of absence without leave. The two offenses are entirely separate and distinct.⁴⁶ Absence without leave, of course, involves, as necessary ingredients, both absence from military control and lack of proper authority.⁴⁷ Failure to be present with one's command, on the other hand, involves neither ingredient, and is, in fact, perfectly consistent with the total absence of either element. Thus, for example, a commander may be absent from his command by virtue of the fact that he is visiting a superior officer, and so be clearly under military control. In addition, he may have given himself leave, and so be not lacking in proper authority.⁴⁸ Nevertheless, where exercise of proper leadership functions would require a commander to be with his unit, he has breached his duty if he is not present.

A good illustration of a breach of leadership duty by failing to be present with one's command is found in an old naval case where an accused executive officer of a vessel in port, in the absence of his commanding officer, left the ship and remained away over night, knowing that only one line officer would remain on board. Also tried was the commanding officer of the ship on a charge of "neglect of duty," for remaining away over night, and giving permission to his executive officer to be so absent, knowing that at most two line officers would be on board. The commander gave his executive officer permission to be absent, without it having been asked, while both were attending an evening party together in the port; the latter accepted knowing that only one line officer would remain on the ship, having himself given permission to one officer to be absent. As a result eight men deserted the ship. In approving the convictions, the Secretary of the Navy said: "That a regular officer of the rank and experience which Lieutenant Commander Stilwell has should . . . manifest so little regard for the security of his men and the discipline of his ship, as to suffer the escape of eight men in one night, and this, too, the night after the escape of two men belonging to his vessel, indicates a degree of neglect of duty and careless indifference deserving the severest censure. . . . That acting Volunteer Lieutenant Wetmore should have accepted such permission with the knowledge he possessed, and without intimating the true state of the case to his commanding

cabin and turn in for the night" and thus neglected his duty as commanding officer. In approving the conviction, the Secretary of the Navy declared: "The conduct of Boatswain Drummond showed gross neglect of duty and a remarkable lack of appreciation of his responsibility as commanding officer." Likewise, see CMO 4-1938 [P.2] (failure of engineer officer to be present and personally supervise safety test).

⁴⁶ The old Articles for the Government of the Navy even listed this as a separate offense, (AGN of 1862, arts. 1, 9), entirely separate from absence without leave or absence over leave. (AGN of 1862, art. 8(19)).

⁴⁷ *MANUAL FOR COURTS-MARTIAL* ¶ 165.

⁴⁸ A leader, in fact, is the person in the unit most likely to have authority to give himself leave. *AVINS, THE LAW OF AWOL* 90 (1957).

officer, is a culpable omission of a plain moral duty which must prevent that confidence in him which ought always to be placed implicitly in a naval officer."⁴⁹ Thus, in this case, notwithstanding the fact that the executive officer was both under the eye of his superior and that he had authority to be absent, the state of discipline on the ship imposed upon him a duty as a leader to see to it, by his presence, that more men did not go AWOL, or at least to otherwise make adequate arrangements to prevent a repetition of prior absences. Hence, his failure to do so was held to be a breach of duty.

Among the earliest types of situations wherein it has been held that a leader should be present with his command is where the unit faces peril or where an emergency arises. In one such early naval case, a captain commanding the Navy Yard at Pensacola, Florida, placed a subordinate officer in command of the yard and left for the North at a time when yellow fever was prevailing in Pensacola and when officers residing in the yard were apprehensive of the spread of the disease. His conviction of a charge of "conduct unbecoming an officer" and dismissal was approved,⁵⁰ the Secretary of the Navy remarking:

[T]his commanding officer, at the naval station at Pensacola, containing about 1,800 inhabitants, under his control and supervision, at a time of peril and panic from approaching pestilence, intended to fly from his post of duty to Cleveland, Ohio, without authority from the Navy Department. . . . No regulation allows a commanding officer, of his own motion, to leave his station for a single moment, in any emergency or time of danger.⁵¹

The above case is, of course, an extreme one even in this area; indeed, the captain's actions verged on cowardice. Much more typical is the situation where the leader's sins are those of omission rather than commission. For example, where a ship's commander stays in his cabin upon learning that the vessel faces adverse weather conditions,⁵² or where an officer in charge of an engine room stays in his quarters with knowledge that the ship faces an emergency which requires maximum performance from his department,⁵³ it has been held that this constitutes a neglect of duty. In all

⁴⁹ G.O. (Navy) 69, Dec. 12, 1865.

⁵⁰ GCMO (Navy) 50 (1882).

⁵¹ GCMO (Navy) 59 (1882) (a companion case).

⁵² CMO 8-1915. And in CMO 7-1893 [P.3]), a conviction is approved because "more than an hour before the vessel struck, land on an unexpected bearing was reported to Commander Johnson, and . . . the officer-of-the-deck subsequently reported to him that 'the engines had been slowed to ease the strain on the topsails,' which reports, under the conditions then existing, should have made him aware that his presence on deck was imperatively required. In consequence of the absence from his post of duty as her commander, the orders for the management of the vessel were not promptly or clearly given, the sails were not promptly handled, the engines were stopped, and after nearly three quarters of an hour had been consumed in the attempt to change the course of the vessel, she drifted upon the rocks. During all this time Commander Johnson remained in his cabin, and did not appear on deck until the vessel struck."

⁵³ CMO 9-1915. See also the trial of an engineer in charge for absenting himself from the engineroom after ship struck a rock and all hands were called to save ship until the call "abandon ship," in GCMO (Navy) 21 (1883).

of these cases, since the superior's personal direction was necessary due to the emergency, his absence constituted a failure to perform his duties as a leader.

Another situation in which a leader is expected to be present with his command is where there is a substantial risk that members of his unit will commit crimes or other breaches of military discipline.⁵⁴ In such an event, of course, the leader's presence is required, not so much for the benefit of members of the unit, as for the purpose of being on hand to immediately suppress the offenses. Thus, in a World War II case,⁵⁵ an Army officer had charge of a boat-unloading detail, the members of which pilfered substantial quantities of rations they were unloading from the barge. The accused was convicted of neglect of duty for not being present aboard the ship where the main part of the unloading operation was taking place, and so permitting cargo to be pilfered.

Since a leader must be on hand when there is a substantial risk that his subordinates will breach military discipline, it is without doubt an *a fortiori* proposition to contend that he must return to his unit when such risk becomes an actual fact. This conclusion, too, is supported by authority. In a recent case,⁵⁶ accused returned to the landing craft of which he was officer-in-charge, and having been informed that intelligence agents were aboard and had caught one of his subordinates, he exclaimed, "Let me out of here," and drove off. Characterizing his so turning-tail as dereliction of duty, a Board of Review declared that should a commander be "in close proximity to his ship upon receiving information indicating involvement of his personnel as the subject of an inquiry by naval agents, . . . conducting such inquiry on board his ship," he must proceed "as quickly as possible to his ship and conduct proper inquiry into the affair. He is duty bound to take

⁵⁴ In CMO 9-1893, under a charge of "neglect of duty," the first specification was: "Edward P. Meeker, a captain in the United States Marine Corps, and serving as such in the United States Ship Chicago, then lying in the harbor of La Guayra, Venezuela, having been sent by proper authority on shore in command of a detachment of marines to guard and protect the United States consulate in the said city . . . , Venezuela being then in a state of war and disturbance, and the said city of La Guayra being in a state of disorder, its inhabitants having cause to fear plunder and maltreatment at the hands of an armed mob of defeated soldiers, abandoned by their principal officers, all of which facts rendered advisable the presence of armed guards at the foreign consulates, and all of which facts were matters of common report and knowledge, did, upon his arrival with his detachment at the . . . consulate . . . neglect to establish or cause to be established the posts and sentinels necessary to insure proper vigilance against possible surprise and attack of the building in which the consulate was situated, and which it was his duty to efficiently guard and protect; and did, soon after his said arrival at the said consulate, turn over the command of his detachment for the time being to a non-commissioned officer, to whom he gave instructions of a general character only, and did go personally to a hotel or restaurant, situated at some distance from the said consulate, and did remain absent from his command for a period of forty-five minutes."

⁵⁵ *United States v. Shipley*, 22 E.T.O. 257 (1945).

⁵⁶ *United States v. Moore*, 21 C.M.R. 544 (NCM 1956).

affirmative official action, appropriate under the circumstances, . . . and cannot relieve himself of responsibility by quitting the scene."^{56a}

From a superficial examination of the above cases, the conclusion might be drawn that the military law requires a leader to be with his unit substantially all of the time if he would avoid liability for leadership neglect should faults in his operations, policies, or personnel, be found. Such a conclusion cannot stand close scrutiny. The mere fact that a leader is not to be found with his command at a particular time raises no presumption that his duties are being neglected.⁵⁷ The duty to be present with one's unit is not an absolute command, one whose applicability is varied neither by time nor place.⁵⁸ The military law does not view the exercise of a reasonable leader's discretion with a captious eye nor weigh the relative considerations which produce his decision with an apothecary's scale. A leader has a wide discretion in the eye of the law as to whether he must personally be present to see that the unit's mission is accomplished, or may safely discharge his command responsibilities from a more distant vantage point; and modern means of communication, of course, are to be weighed in the balance when the exercise of this discretion is called into question. As in so many other fields, it is only the abuse of discretion which becomes the subject of inquiry by military law. The obligation to be with one's unit is only a requirement ancillary to the exercise of other leadership functions; if they are performed, the requirements of the law are satisfied.⁵⁹ Hence, the military law looks to the end product of leadership, performance of the function and mission of the unit. If this can be accomplished better by the leader's being elsewhere, such choice is a permissible one. It is only when the leader's presence is necessary for him to lead that the law enjoins this.

IV

DUTY TO FORMULATE PLANS AND PROCEDURES

A. Contingencies for Which Planning Is Required

If precedent of long vintage has any meaning in the military at all, and there can be no doubt that it does, then one of the most important duties of

^{56a} *Id.* at 546-47.

⁵⁷ CMO 12-1947 [P.414].

⁵⁸ *United States v. Ferguson*, 12 C.M.R. 570 (CM 1953).

⁵⁹ "Certainly it could not be contended that a company commander is required to restate completely any and all instructions to the junior officer assuming command each and every time he leaves the company area. Neither could it be argued that, in the absence of contrary orders, it is improper for a company commander to leave the unit in the command of a junior officer. Customs of the service and ordinary common sense would reject such a doctrine. The accused did no wrong when he turned the command over to Lieutenant Deiss and departed from the training area with the avowed purpose of obtaining all the transportation possible. Here the accused was in fact seeking to aid his men by obtaining additional transportation in order to avoid requiring the men to undergo a five-mile march at the end of a 19-hour training day." *Id.* at 575.

a military leader is to formulate and promulgate proper and adequate plans, procedures, and directives to insure both that the unit accomplishes its function and that the men and matériel thereof are properly safeguarded. Indeed, the earliest reported trials of officers contain as the most frequent offense against military law failure to properly perform this duty.⁶⁰ The over-all perspective of a commander makes this function one which only he can perform.

As in the case of duty to be present with command, the most compelling situation in which the leadership duty to formulate effective plans for action exists is where the leader's unit faces an emergency or other dangerous situation requiring effective action to avert disaster to the unit.⁶¹ However, the duty to safeguard one's charge is broader than a mere requirement that calamities be averted; it extends throughout the entire ambit of situations wherein members of the command are subject to adverse or unfavorable conditions; it arises from events both novel and mundane. For example, in one recent case,⁶² the accused was a special services athletic officer in charge of a camp athletic team sent to another base to play in a tournament. Prior to departure, his superior specially enjoined him to insure that adequate return transportation for the team was arranged, and he received sufficient government funds for this purpose. Instead, he merely turned over a part of this money to a private on the team, who could, with this sum, only buy train tickets; and the team did not fly back as they were supposed to. Indeed, so little money remained that the team had to subsist on sandwiches. An Army Board of Review held that "his turning over \$160 in San Francisco to his companion of the evening, one of the enlisted men on the team, with the instructions to 'see that the fellows get home,' clearly establishes the accused's failure to fulfill his duties to arrange for transportation, food and lodging for the enlisted men under his control. Such action on the accused's part was clearly intentional and constituted at least negligent failure to perform his duties if not a willful abandonment thereof."^{62a}

⁶⁰ JAMES, A COLLECTION OF THE CHARGES, OPINIONS AND SENTENCES OF GENERAL COURTS-MARTIAL (1795-1820) (1820) contains a report of the following convictions: At 50, Col. John Colby (1800) (failure to see that serjeants were furnished with swords); at 101, Surgeon J. Stanton (1802) (failing to have hospital fumigated and walls whitewashed); at 521, Dep't Asst. Commissary General Peter Bernard (1813) (failure of supply officer to arrange to have necessary supplies kept on hand and transportation in operating order); at 645, Col. George Quentin (1814) (failure of commander to issue necessary battle orders, whereby some men were taken prisoner, and the safety of subordinate units hazarded).

⁶¹ CMO 15-1912 (failure to take precautions to safeguard vessel in storm); GCMO (Navy) 20 (1883) (failure to order ship to be kept at slow speed and position ascertained in dangerous area); GCMO (Navy) 41, 44 (1883) (failure to issue orders necessary to avert collision).

⁶² United States v. Voelker, 7 C.M.R. 102 (CM 1952). See also CMO 7-1915, in which a superior commander was convicted of neglect of duty for failing to prevent a junior leader from hazarding his vessel.

^{62a} United States v. Voelker, *supra* note 62, at 104.

In addition to imposing on a leader the duty to preserve his unit itself, the military law also requires that the leader formulate plans and issue orders to preserve the unit's military effectiveness. Thus, he must take care to see that the unit is properly equipped, and if repairs are needed on unit equipment he is required to initiate procedures to have the equipment repaired.⁶³ This includes the duty to request a change in instructions from superiors where necessary or to make appropriate suggestions and recommendations.⁶⁴

A military leader must, of course, formulate necessary plans to insure that his unit accomplishes its mission.⁶⁵ For example, a Marine captain in command of a detachment sent to protect an American consulate was convicted of neglect of duty for failing to establish proper posts and sentinels, examine the building in which the consulate was situated to determine how it could best be defended, and issue "definite and clearly understood orders covering the usual contingencies of such duty."⁶⁶ So too an accused company commander was convicted of dereliction of duty where he, having been instructed by superior authority to maintain an alert duty officer on a 24-hour basis for an indefinite period, went away for a weekend, and the duty roster ran out because he had neglected to assign such duty prior to his departure.⁶⁷ In each of these cases, the function of the unit required that its commander formulate appropriate plans for his subordinates to carry out its mission. Admittedly, the plans required were of the most mundane and simple sort. Indeed, in the latter case, the task of assigning an officer to alert duty by jotting his name down on a duty roster hardly merits the dignity of being called planning at all. Nevertheless, however complicated or elementary the formulation of procedures required to perform the unit's mission are, it is the duty of the leader to discharge this task so that his unit may perform the work assigned to it.

B. Nature of the Leader's Planning

Having outlined above the various situations for which a leader in the military is required to plan, we shall now examine the nature of the planning required of that leader. Because such analysis can best be undertaken within the framework of an actual situation, this study will center around the leading case⁶⁸ involving Lieutenant Colonel Clarence T. Hulett, decided

⁶³ CMO 3-1912.

⁶⁴ GCMO (Navy) 3 (1884).

⁶⁵ See CMO 4-1946 [P.133], wherein a PX officer was convicted of neglect of duty for failing to require exchange accounts to be kept in such form and detail as would permit them to be properly audited.

⁶⁶ CMO 9-1893.

⁶⁷ United States v. Lambert, 10 C.M.R. 294 (CM 1953).

⁶⁸ United States v. Hulett, 24 E.T.O. 163 (1945).

in the European Theater of Operations during World War II. By using the facts of this case, which is the most outstanding example of a failure to properly exercise leadership planning functions, to illustrate the basic principles involved in the analysis, the discussion of such principles can be made clearer and more meaningful.

The accused, in the first of two specifications laid under the general article, was charged with wrongfully and negligently failing "to prescribe and properly supervise the enforcement of an adequate standard operating procedure for the security of secret cryptographic devices and codes used at Headquarters, 28th Infantry Division." From this specification, it can be seen that the accused was charged with a failure to exercise an over-all planning function, a function involving not the duty to see that present policies are currently being carried out in specific instances, but rather the duty to set out policies generally and see that they are generally made known. While this specification would tend to indicate that a duty to plan is only enforceable as to present existing situations, as will be later seen such duty is much more extensive.

The dereliction of duty herein involved was uncovered, as it so often is in military service, by the occurrence of a serious accident due to the faulty planning. Of course, such an accident does not always indicate faulty planning; neither does absence of such an accident necessarily show that planning was incontestably adequate. Since, however, poor planning is a major contributing factor to such an occurrence it tends to show that planning was not up to the required standard.⁶⁹

The accused in this case was the division signal officer, and part of the equipment of his staff section for use by the division was top secret cryptographic devices and codes, which message center equipment was transported in a truck. This equipment was of such highly secret nature and of such critical importance in the operation of the communications system of the Army that special detailed security instructions had been promulgated by the Secretary of War and the Chief Signal Officer of the European Theater of Operations with respect to protecting and safeguarding it. In particular, the latter by letter had required that the equipment be transported under armed guard only, and the accused knew this.

The events of the night which gave rise to this case occurred in a combat zone in France from which the enemy had been only recently expelled, and which was therefore subject to the disorders and lawlessness which characterize newly liberated territory. The truck containing the equip-

⁶⁹ The Board noted: "Accused was charged in Specification 1 with failing to implement the mandates of higher authority with respect to safeguarding the equipment by prescribing and supervising a proper procedural method for security. Proof of this offense was complete without evidence of the loss of this specific equipment. The incident served only to reveal the fact that he had not performed his duty." *Id.* at 175.

ment on this night was parked on a public street in a town and left unguarded and unprotected although there was no ignition lock on the truck and the motor could be started by simply turning the starter switch. As a result, both the truck and its top secret equipment were stolen by unknown persons. As the Board of Review noted, "the failure to post proper guards to secure the truck and contents against loss presents a picture of gross carelessness and neglect which is inexcusable and deserves most severe condemnation."⁷⁰

The fact that the picture shows gross neglect, however, does not, *ipso facto*, make accused a part of that picture. If this were not true, then every superior above the accused would likewise become a part of the picture. Such is obviously not the fact. A leader is not chargeable for failure to properly perform his planning functions merely because a unit below him in the command echelon neglects to act in a certain way, and this is not changed because such action could have been secured had the leader specifically directed it. A military leader cannot be expected to plan the minutiae of all the layers of organizations under his own, for he has neither the time nor facilities, nor can he know their exact situations as well as can his subordinate commanders. Indeed, such attempt can only result in placing the leaders below him in a strait-jacket because orders from above have not taken into account local variations. Hence, a military leader must necessarily plan generally and issue directives to subordinate echelons in generalizations. Subordinate commanders must then fill in the blanks by adapting those directives to their own units in more specific terms, while commanders below them will make directives even more specific, and so forth, until general policy and planning formulated at high levels become specific orders to do particular acts in the field. Hence, the problem of whether a military leader has sufficiently discharged his planning functions becomes a question of how specific his directives should have been in relation to how remote in point of organization he was from the operating level.

In the instant case, the accused's subordinate, a lieutenant, was the divisional cryptographic security officer, and immediately in charge of the security of the equipment.⁷¹ Since the accused had discussed the security directives of the Chief Signal Officer with his subordinate, to find that he had neglected his planning function, it is necessary to hold that he had a

⁷⁰ *Id.* at 170-71.

⁷¹ In this regard, the Board noted: "Lieutenant Viets was cryptographic security officer of the division. He was the custodian of cryptographic material and was responsible for all measures necessary to insure cryptographic security and physical security of the material.... The duty was therefore imposed upon him to provide immediate and physical safeguards for the equipment. He failed in the performance of this duty in that on the night of 5 February 1944 he did not post security guards to protect it when he knew it was contained in a truck parked on a public street. This dereliction of the security officer, however, did not excuse accused's nonfeasance." *Id.* at 174-75.

specific duty to pinpoint these general directions to the operations of his subordinates.

To demonstrate that accused himself had a duty to formulate the requisite procedures, the Board of Review cited Army Regulation 105-5, WD, 1 Dec. 1942, whereby he was charged with "Preparation of signal operation instructions, signal annexes, special signal operation procedure, and other signal orders, and instructions pertaining to the command," and noted that his authority covered the "exercise of tactical and technical supervision of signal communications for the entire command." From this set of vaguely defined duties the Board concluded "that upon accused . . . was imposed the ultimate duty of devising, promulgating, and enforcing methods of safeguarding and protecting the cryptographic equipment," and that "it was his duty and obligation to see" that the directives of the Chief Signal Officer "were carried into execution."⁷²

The trouble with the above analysis, if it can be so dignified, is that it begs the very question at issue. The duties of military personnel, and especially leaders, are defined in military personnel manuals or regulations in generalities which are often so vague as to be of little or no value in determining the specificity with which the leader must formulate plans and procedures. To postulate a duty to make plans in particular instances on such a slippery basis without more is to seriously call into question the foreseeability of the legal consequences of a leader's failure to act, and thus to destroy the rational foundation for punishment of such omission. Personnel manual definitions are useful for guideposts only and for nothing more.

A more solid foundation for punitive liability is found in the Board's discussion of the course of conduct which accused's subordinates had engaged in over a period of time:

[A]ccused issued no formal written orders to his command embracing the pertinent security provisions of the directives received by him from his superior. In particular there were no instructions issued by him covering

⁷² *Id.* at 172. And a late expression of this view is to be found in *United States v. Moore*, 21 C.M.R. 544, 548 (NCM 1956), wherein a Navy Board of Review declared: "The Board cannot subscribe to the theory that the law demands that regulations governing the armed services, in order to impose a duty upon a service member, must spell out in every instance, with specificity, each and every action the individual is duty bound to perform under all imaginable factual situations. The numerous and varied duties arising from any military status must necessarily be promulgated, in great part, by regulations pronouncing broad concepts of acceptable conduct from which flows the inherent responsibility to perform those specific acts which are reasonable, proper, and sufficient under the existing circumstances. It is inconceivable that had a fire broken out, a shooting taken place or a mutiny instigated on board his ship, known to the accused, and he was then at the dock side he could with impunity flee the scene, thus escaping the onus of failure to take affirmative action in a manner reasonably demanded by the circumstances." See also CMO 22-1918 [P.1], CMO 6-1930 [P.6], holding that in a charge of neglect of duty, the duty need not be imposed by law, regulation, or instruction, but may arise out of a situation with which the accused is faced..

the safeguarding of cryptographic equipment during course of transportation. In lieu thereof an informal "standard operating procedure" came into existence while accused's organization was stationed in England which was perpetuated in France. Accused . . . knew of such procedure and did nothing to alter or change it. This informal practice wholly ignored the mandates of the Chief Signal Officer, European Theater of Operations . . . [and] no formal orders were issued by accused as Division Signal Officer covering the safeguarding of cryptographic equipment while in transit. In lieu thereof accused knowingly allowed and permitted the informal procedure to be followed, which procedure did not in substance conform with the directions of higher authority. The facts of the instant case clearly demonstrate the inadequacy of such informal procedure to afford the necessary security for the equipment.⁷³

The above discussion, initially, is predicated on accused's failure to issue formal written orders specifying a particular security procedure. It is clear that the question of whether orders are in writing or not cannot generally affect a case of this kind, for oral orders are just as obligatory as written ones,⁷⁴ and failure to issue orders in writing could only be a dereliction under special circumstances such as a need for widespread distribution or permanence. Likewise, so long as the order is mandatory, and not a request, it is binding notwithstanding its lack of formality.⁷⁵ Indeed, in the instant case, the issuance of a formal written order by a staff officer to his immediate subordinate in a small staff section would smack of extreme artificiality. Surely command dereliction cannot be predicated on omission of such a useless ritual.

More to the point is the fact that accused's subordinates had devised a standard operating procedure which did not conform to the policy laid down by over-all directives. Had such procedure conformed to and implemented superior policy it is clear that accused would in fact have had no planning function at all, for surely superiors were interested in implementation of authorized procedures and not in who implemented them or at what level. Accused therefore had a duty to implement superior policy by establishment of correct procedures only if his subordinates were unwilling, as here, or unable to do so.

Correct analysis of the duty to plan indicates that planning and establishment of procedures should be carried on at the lowest level possible so that plans and procedures are tailor-made to fit local needs. Only where local plans cannot fill the needs or local procedures cannot implement the policies of high level superiors does it become incumbent on a higher leader to do the planning. Thus, for example, uniformity of operation over a number of units would require that planning be done at a sufficiently high level

⁷³ *United States v. Hulett*, 24 E.T.O. 163, 172-73 (1945).

⁷⁴ *AVINS, THE LAW OF AWOL* 106 (1957).

⁷⁵ *Id.* at 110-13.

to insure that uniformity. So too, coordination of units requires over-all planning. The function of planning by a military leader is to translate his over-all view of subordinate groups into procedures by which they can accomplish the mission of the superior command. Planning must take place for situations which are known and which may in the future be reasonably anticipated. A military leader is justified in leaving planning to subordinate leaders or individuals where they do not require his centralized direction to accomplish their function. Where coordination is required, or where the subordinates have not in fact adequately planned themselves, it becomes incumbent upon the leader to plan and direct procedures for them.

V

DUTY TO SUPERVISE

A. Extent of Duty

Another duty which military leaders have is the duty to supervise. As a rule, it becomes more important as one gets down to the lower echelon levels of military organizations, for subordinate leaders and enlisted personnel usually need more supervision than higher-ranking leaders. As in the case of failure to perform other leadership duties, a failure to properly supervise one's subordinates is chargeable as neglect of duty.⁷⁶

In analyzing the extent of this duty, the framework of actual fact patterns will again be used. Two cases will be dissected for this purpose. The first will be the case of the hapless Lieutenant Colonel Hulett^{76a} which was considered above.

In the second specification of a charge under the general article, Hulett was charged with wrongfully and negligently failing "to exercise and direct adequate measures for the security and safekeeping of secret cryptographic devices, codes, and division message center equipment, stored and transported in a 2½-ton truck, as a result of which the truck and contents were lost through theft by persons unknown." The Board of Review, while concluding that "it was the duty of some responsible officer to post or cause to be posted security guards to protect the truck,"⁷⁷ was equally certain that "the primary duty of posting such guards was upon Lieutenant Viets as cryptographic security officer."⁷⁸ Therefore, as to the duty to supervise, the issue became whether accused himself had a duty to post or cause to be posted guards on the truck. "Stated otherwise," the Board declared, "the

⁷⁶ CMO 4-1946 [P.133]; *United States v. Cox*, 50 B.R. 179 (1944); *United States v. Greulich* 50 B.R. 121 (1944); CMO 7-1893.

^{76a} *United States v. Hulett*, 24 E.T.O. 163 (1945).

⁷⁷ *Id.* at 172.

⁷⁸ *Id.* at 176.

question is whether accused is answerable for Lieutenant Viet's defaults and derelictions."⁷⁹

The Board's rationale for upholding the conviction is as follows:

[A]ccused had full knowledge that the mandate of the theater signal officer that "Under no circumstances will the SigRINO be transported *without an authorized armed officer courier and an armed guard*. The SigRINO will *never* be left unattended while in transit" was not observed. . . . With such state of the evidence it is not unreasonable to impute Lieutenant Viet's default in the performance of his duty, at the time and place alleged, to his superior operational and tactical officer, the accused. What the result would have been had accused specifically ordered Lieutenant Viets to carry out the procedure directed by superior authority and thereafter, without his knowledge, there had been continued violation of the same, need not be decided because such situation was not here involved. It is enough that accused was fully apprised of the "*unwritten SOP [standard operating procedure]*" (as characterized by Lieutenant Viets), which violated superior orders and that he did not intervene and order Lieutenant Viets to post guards under circumstances here revealed. The fault of his subordinate became his fault.⁸⁰

What the Board has apparently done in this case is to hold that the superior leader is liable for failure of the subordinate leader to perform his duties. Surface examination would, indeed, appear to indicate that the Board's holding is that the accused is liable for his subordinate's negligence as a matter of absolute vicarious liability. Such a rule, strikingly similar to *respondeat superior* as found in tort law, would be predicated not on the fault of the superior but on the mere relationship of superior and subordinate.

There is something to be said for the application of *respondeat superior* to military law. It would surely tend to enforce on superiors their duty to supervise their subordinates. It would tend to encourage them to train their subordinates properly, pick proper men for available tasks, and enforce a high standard of performance.

But whatever there is to be said for such a rule, it pales into insignificance when compared to what there is to be said against such rule. Most basic is the proposition that strict vicarious liability cannot be imposed on a superior officer because application of criminal sanctions in the military is based on fault,⁸¹ and no change in this can be expected notwithstanding the rapid expansion of strict liability in tort law.⁸² The reason for this is that tort law is basically designed to compensate, while military law is designed to deter.⁸³ In addition, *respondeat superior* is predicated upon the fact that

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ AVINS, *THE LAW OF AWOL* 123 (1957).

⁸² James, *Practical Changes in the Field of Negligence*, *Prac. Law.*, Dec. 1954, p. 11.

⁸³ *Ibid.*

an employer can pick and fire his employees at will,⁸⁴ and so can get competent ones at his own option; military commanders, on the other hand, are very generally assigned subordinates and have no choice in the matter; they must make do with what they have as best they can. Finally, such a drastic rule would deter no more than one predicated on fault, and would in fact dilute the deterrence value of its punitive sanctions by making them in part dependent on chance.⁸⁵

A good illustration of the limitations on the duty to supervise is found in a Navy case⁸⁶ where an accused PX officer was charged with neglect of duty arising out of a delay in the preparation of an invoice by his subordinate. In testing for neglect of duty, the Judge Advocate General first noted that it was accused's duty "to establish and maintain an adequate system for the receipt of merchandise and the recording of invoices." This, of course, represented accused's duty as leader to formulate plans and procedures, but this, it was conceded, accused did. However, it was further noted that "it was the duty of the accused to supervise the work of Lieutenant O." In light of this duty of supervision, had the rule of *respondeat superior* been applied, the negligence of the lieutenant would have been imputed to accused and his conviction below would have been affirmed. Hence, the holding on review that the record was legally insufficient negates the application of this doctrine. Furthermore, the Judge Advocate General declared:

The Marine Corps Manual does not require and the prosecution did not contend that the accused was required to check personally the handling of each step of the receipt of merchandise and the recording of invoices. Indeed, in view of the volume of work handled by this post exchange, any such contention would be frivolous. . . . [H]e was not charged with the duty of personally checking each individual detail of Lieutenant O's work. The evidence showed that the duty to prepare invoices devolved upon Lieutenant O. There was no showing that the accused was aware of the delay in the preparation of the invoice to cover the receipt of the paintings, and the accused at no time relieved Lieutenant O of this portion of her duties or otherwise indicated that he meant to assume responsibility for the preparation of this invoice. Under these circumstance the accused had not neglected his duty because one out of thousands of invoices handled by Lieutenant O was delayed in preparation.⁸⁷

It is clear from the above case that a superior is not required to super-

⁸⁴ 35 AM. JUR. *Master & Servant* §§ 539, 544 (1941); 57 C.J.S. *Master & Servant* §§ 559, 563(b) (1948). But an alternative theory now more generally accepted among commentators is that this places liability on the one most able to bear the risk. PROSSER, *TORTS* 351 (2d ed. 1955); 2 HARPER & JAMES, *TORTS* § 26.5 (1956). Such a rationale is even more inapplicable to military law.

⁸⁵ Cf. AVINS, *THE LAW OF AWOL* 160 (1957).

⁸⁶ CMO 3-1946 [P.85].

⁸⁷ *Id.*, PP. 90-91.

vise the minutiae of his subordinate's work. A superior must make such checks as a reasonable allotment of time would demand, taking all factors into consideration, including the importance of the work supervised, the number and relative importance of his other duties, the number of subordinates he has, his facilities for supervision, and the competence and position of his subordinate. He must generally enforce the duties of his subordinates, but need not oversee every petty detail to discharge his obligation.

A superior neglects his duty if he fails to make such checks on his subordinates as would be reasonable under the circumstances. Since he has a duty to acquire information about his subordinates' derelictions by checking on them, failure to check when required imputes to the accused such information about their derelictions as the accused would have obtained had he performed his duty to so check; this proceeds on the familiar principles of constructive communication and knowledge.⁸⁸ If the accused actually checks and so acquires actual knowledge of their neglects, he has a duty to take appropriate steps to correct their conduct, and failure to do so constitutes dereliction of duty. If he has constructive knowledge of their neglects, he is still chargeable with dereliction of duty in failing to correct those neglects, on the equally obvious principle that "the duty neglected (neglect of duty in failing to correct subordinates) is not so far greater in fault than failure to acquire the necessary knowledge (also a neglect of duty) as to make it fortuitous to punish the one fault for the other with the same penalty,"⁸⁹ for here in fact the penalty for each fault is absolutely identical.

Of course, it may be contended that *United States v. Curtin*⁹⁰ constitutes a further limitation on enforcement of the duty to supervise in particular and leadership duties in general. While this author can find no adequate rationale to sustain that case, even as applied by the Court of Military Appeals to a failure to obey orders,⁹¹ and believes the case to be

⁸⁸ AVINS, *THE LAW OF AWOL* 99 (1957).

⁸⁹ *Id.* at 102.

⁹⁰ 9 U.S.C.M.A. 427, 26 C.M.R. 207 (1958). In this case, accused was charged with disobedience of an order of which he had knowledge. The law officer instructed that "constructive knowledge" was sufficient to make out the offense. Although this was apparently in conformity with the *Manual* rule, *MANUAL FOR COURTS-MARTIAL* ¶ 171, the court held that such an instruction changed the thrust of the offense charged from knowing disobedience to negligence.

⁹¹ UCMJ art. 92(2), 10 U.S.C. § 892 (1958). This is not to say that the prior *Manual* rule was any more correct. It defined constructive knowledge as being present when "the order was so published that the accused would in the ordinary course of events, or by the exercise of ordinary care, have secured knowledge of the order." *MANUAL FOR COURTS-MARTIAL* ¶ 171b. The first part of the *Manual* definition, dealing with knowledge which would have been secured in the ordinary course of events, is not, of course, a definition of constructive knowledge at all, but rather a rule of evidence which permits an inference of actual knowledge from circumstantial evidence, and so is correct but placed in a confusing context.

The second part, dealing with knowledge which would have been secured by exercise of

unsound, it would surely be ludicrous to extend its doctrine into the field of dereliction of duty.⁹²

Constructive communication is based on two legal phenomena. The first is the identical nature of the fault involved in failing to acquire knowledge and the fault involved in failing to take action demanded by such knowledge, resulting in justification for imposition of vicarious liability; the second is the almost inevitable inability to prove which fault was involved, while being able to prove that one or the other of the two was present.

If *Curtin* were applied to this offense, then all the prosecution would need to do would be to lay a single charge of neglect of duty with two specifications:

Spec. 1.—Failure to perform duty to check on subordinates.

Spec. 2.—Having performed duty to check on subordinates, failure to perform duty to take corrective action.

ordinary care, is a true definition of imputed knowledge, but is much too broad and vague. It appears to include the case where accused had a duty to obtain knowledge in a certain way and neglected that duty, but, unless the duty to obtain knowledge in that way was imposed by an order, the imputation of knowledge of the other order so as to justify a charge of failure to obey orders would not exist. If the duty to obtain knowledge in that way was imposed by a custom, for example, the actual fault could only be charged as dereliction of duty, while the fault vicariously imputed would be charged as a failure to obey orders. Hence, the duty neglected would be so far greater in fault than the failure to acquire the necessary knowledge as to make it fortuitous to punish the one fault for the other with the same penalty. Clearly the insubordination involved in failure to obey orders constitutes greater fault than does mere neglect of duty. See AVINS, *THE LAW OF AWOL* 44-46, 102 (1957), and cases cited therein. Hence, the old *Manual* rule would have permitted a punishment more severe than accused's fault deserved.

A hypothetical will make this clearer. Airman Jones is the base "bulletin-board sweeper." His daily duties, as defined in the base table of organization, which he read a year ago, are to go around and read everything on every bulletin board and remove all obsolete material. One morning, Lieutenant Smith, knowing of Jones' duties, places an order on Bulletin Board No. 14 requiring Jones to submit AF Form 10,000 to Lieutenant Smith that day. Jones does not submit the form by the end of the day. Unknown to anyone but himself, he has not looked at Bulletin Board No. 14. The facts necessary to impute constructive knowledge of the order under the *Manual* rule are clearly present, *viz.*, duty to read the bulletin board where performance of that duty would have resulted in actual knowledge. Under the *Manual* rule the accused could be convicted of failure to obey the order which carries a maximum penalty of a bad-conduct discharge (BCD) and 6 months' confinement. *MANUAL FOR COURTS-MARTIAL* ¶ 127c. However, his actual fault was dereliction of duty, for clearly the definition of duties in the table of organization was so non-personalized an imposition of duties as not to involve insubordination; hence, his fault should involve only a maximum penalty of 3 months' confinement. *Ibid.* A proper definition of constructive knowledge requiring the offense to be reduced to the lesser of the two faults, would result in a charge of dereliction of duty.

Thus, it can be seen that while the *Manual* definition of constructive knowledge was correct for dereliction of duty, in charges of failure to obey orders it imposed too great a liability on an accused. The trouble with the *Curtin* case is that it caused the pendulum to swing too far in the other direction, and it imposes too small a liability.

⁹² UCMJ art. 92(3), 10 U.S.C. § 892 (1958).

Assume that the prosecution then proves the elements of constructive knowledge as part of failure to take corrective action, by proving, (1) that accused had a duty to check on subordinates, (2) that checking on subordinates would have revealed the need for corrective action which accused as a leader would be duty-bound to take, and (3) that no corrective action was taken. The prosecution then rests, leaving still unproved which of the two possible neglects accused is guilty of. Yet by the above proof it has demonstrated to an absolute and positive mathematical and logical certainty that one of the two possible neglects must, it is repeated, *must* have been committed. The accused either checked or he did not check. If he failed to check, he is guilty of specification 1; if he did check, he acquired knowledge of the neglects of his subordinates and he is guilty of specification 2. Thus proof of constructive communication proves a neglect of duty, and the accused is in an inescapable dilemma in trying to avoid the showing of his guilt.

A superb example of this result is shown in a naval case⁹³ in which accused was the commissary officer of the *U.S.S. Louisiana*. His immediate subordinate, an enlisted man, defrauded the Government by depriving the enlisted men of that ship of quantities of food to which they were entitled by law by serving smaller portions at messes over a 15-month period and pocketing the money saved. Accused was convicted of failing to properly supervise his subordinate. He contended that he did not know of the frauds, but the Judge Advocate General declared:

Conceding, as represented by the accused, that he had not the slightest knowledge that such a condition existed in the general mess of which he was in charge, it is evident that he failed absolutely in the discharge of the duties with which he had been intrusted. When Paymaster Arms was ordered to duty as commissary officer of the *Louisiana*, it was not the Department's intention that he should be a mere figurehead or dummy in that position, leaving the actual discharge of the duties incident thereto entirely in the hands of an enlisted man without any supervision worthy of the name. If such had been the case, it would not have been necessary to order the accused to duty as commissary officer of the *Louisiana*, but an enlisted man might just as well have been placed in charge of the general mess at the outset. There was actually recovered from the chief commissary steward of the *Louisiana* a sum of \$6,580.00 which he had obtained at the expense of the general mess, during the period covered by the charge in this case. That frauds of such magnitude could be perpetrated by an enlisted man in the very presence of the commissary officer in charge of his work, without even arousing the latter's suspicions, is difficult to comprehend and is sufficient evidence that the commissary officer managed to keep himself absolutely uninformed of the work of his office.⁹⁴

⁹³ CMO 23-1913.

⁹⁴ *Id.*, p.13.

In the above case, the accused attempted to exculpate himself from the charge of neglect of duty to stop his subordinate from stealing by saying that he knew naught of the thefts. Since proper checking would have revealed his subordinate's thefts, it necessarily follows, as the Judge Advocate General observed, that he failed to check. Thus, he proved his own neglect of duty.

It follows from the above discussion that a military leader is never liable for the neglects of his subordinates as such, and that the rule of *respondeat superior* does not apply in the military. He is liable, however, for his own neglect to supervise and to correct the derelictions of his subordinates. The derelictions of a leader's subordinates may be an element of proof in demonstrating his own derelictions, but otherwise his liability is always personal and not imputed.

B. Delegation of Authority

A second problem in connection with military leadership responsibility arises in regard to delegation of authority. The oft-repeated statement that "the responsibility of the commanding officer for his command is absolute [and] at his discretion he may delegate authority, . . . but such delegation shall in no way relieve him of his continued responsibility for the safety, well-being, and efficiency of his entire command,"⁹⁵ must be taken with a number of important qualifications. Indeed, to declare not only that all aspects of military command are a commander's responsibility, but also to hold him liable *ipso facto* for all of the neglects of subordinates to whom he has delegated authority, would impose so great a risk of criminal liability on him that no sane person would assume command responsibilities. It may be true that when a commander delegates authority to subordinates to issue routine orders, their orders are his orders although issued without his knowledge,⁹⁶ but such fact alone surely cannot result in charging him with their misuse of authority. Thus, here too military courts talk in terms of *respondeat superior*, but act only when personal dereliction is present.

It may be noted at the outset that a leader is liable for excessive reliance on subordinates.⁹⁷ He may not completely abdicate or delegate his authority,⁹⁸ or "permit himself to be represented in his important duties or responsibilities" by a subordinate without adequate cause.⁹⁹ This, of course, is all the more true when an emergency is impending.¹⁰⁰

⁹⁵ United States v. Day, 23 C.M.R. 651, 657 (NCM 1957); CMO 3-1926 [P.3].

⁹⁶ United States v. Haimson, 5 U.S.C.M.A. 208, 17 C.M.R. 208, 215 (1954).

⁹⁷ CMO 5-1918.

⁹⁸ GCMO (Navy) 41 (1892). See also note 6 *supra*.

⁹⁹ GCMO (Navy) 49 (1884), in which the chief engineer remained in bed away from his post while his ship was preparing to get underway and allowed a junior engineer officer to supervise engineering preparations.

¹⁰⁰ GCMO (Navy) 50 (1882).

The chief duty in this regard, however, comes in actual delegation of authority, which every busy leader must do to a great extent. A military leader is required to take reasonable steps to see that subordinates to whom he delegates authority are competent for the tasks assigned.¹⁰¹ "The Commanding Officer must be charged with full knowledge of these capabilities, experience, and possible shortcomings."¹⁰² He must assign experienced subordinates to perform difficult tasks,¹⁰³ station proper officers in subordinate command positions,¹⁰⁴ and otherwise see that available personnel are assigned necessary duties.¹⁰⁵

For improper delegation of authority, or for delegating authority to an incompetent subordinate, when the leader has actual or constructive knowledge of such incompetence, and others are reasonably available for the task, the leader is personally liable. While a military leader does not have a complete free hand in selection of subordinates, and must perform the unit's mission with such personnel and equipment as he is assigned to the best of his ability, making do with what he has, he nevertheless has a duty to assign subordinates to those tasks for which they are best suited, taking into consideration their prior training, natural aptitudes, civilian positions, likes and dislikes, and other relevant factors. If he does this, he has discharged his duty, and their neglects and failures are not imputed to him.

C. Duty to Inspect

The duty to supervise subordinates as a part of leadership duties in general also includes the duty to adequately inspect their activities.¹⁰⁶ Failure to make proper inspections has long been considered a neglect of duty under a wide variety of circumstances,¹⁰⁷ and this is particularly so where there is a substantial danger that a failure to properly inspect will result in serious detriment to the leader's unit or mission.¹⁰⁸ The duty to inspect also, of course, includes the duty to make proper tests.¹⁰⁹

¹⁰¹ CMO 19-1910 [P.2]. WINTHROP, *MILITARY LAW AND PRECEDENTS* 726 (2d ed. reprint 1920) lists as a violation of the general article "neglect of official duty in devolving important work upon an inadequate subordinate," citing, in footnote 95, GCMO (Army) 10 (1878).

¹⁰² *United States v. Day*, 23 C.M.R. 651, 659 (NCM 1957) (where a commanding officer was convicted of placing inexperienced officers on deck as officer of the deck during worsening night weather conditions and going to sleep).

¹⁰³ *Ibid.*; CMO 12-1929 [P.4].

¹⁰⁴ JAMES, *A COLLECTION OF CHARGES, OPINIONS, AND SENTENCES OF GENERAL COURTS-MARTIAL* (1795-1820) 31 (Col. B. Leighton, 1798) (1820).

¹⁰⁵ CMO 3-1931 [P.7] (failure to station proper lookouts).

¹⁰⁶ *United States v. Ford*, 1 C.B.I.-I.B.T. 287 (1944); CMO 7-1936 [P.14]; CMO 36-1915 (negligent inspection as culpable inefficiency); CMO 16-1911 (neglect to inspect kitchen).

¹⁰⁷ JAMES, *op. cit. supra* note 104, at 187 (Lt. Watkin R. Jones, 1805) (failure to examine company accounts); *id.* at 375 (Lt. Robert Irvine, 1811) (failure to inspect guard); *id.* at 382 (Capt. F. Forbes, 1811) (failure to inspect detachment under his command); *id.* at 841 (Lt. Wm. Manning, 1820) (failure of adjutant to inspect and correct deficiencies in guard).

¹⁰⁸ GCMO (Navy) 43 (1895) (failure to inspect guns for safety).

¹⁰⁹ CMO 4-1932 [P.9]; CMO 3-1926 [P.5].

The duty to inspect has been of particular importance in the prevention and arresting of frauds against the Government.¹¹⁰ Thus, in approving the conviction of the Chief of the Bureau of Medicine and Surgery of the Navy Department (the Surgeon-General of the Navy) for approving the payment of bills for goods purportedly purchased by his Bureau without checking to see whether they had been in fact bought or received,¹¹¹ the Secretary declared:

[T]he exercise of ordinary care on the part of Dr. Wales, as Chief of the Bureau, would have been sufficient to have arrested at an early date, if it could not have wholly prevented, the fraudulent acts of his subordinates in the Bureau. When he assumed charge of the Bureau, as Chief, he became officially bound to enforce, so far as practicable, an honest as well as diligent performance of duty by his subordinates, and also became responsible for a proper supervision of their conduct.¹¹²

Since inspections are designed to enforce on military personnel the conduct and action required of them,¹¹³ by not only revealing deficiencies, but also giving superiors an opportunity to correct them, it is just as much a neglect of duty to fail to forward the results of such inspections, tests, or observations, to proper authority, as it is not to make them at all.¹¹⁴ A military leader has a duty not only to inspect, but also to correct. Inspections are aids to supervision; they reveal where a leader's attention is needed. Thus inspection is a prerequisite to adequate supervision, and so falls within the ambit of leadership duties.

D. Duty to Enforce Orders

In addition to the specific duties mentioned above, a military leader has, as a part of the duty to supervise, the general duty to enforce on his

¹¹⁰ See CMO 23-1913; CMO 14-1912.

¹¹¹ GCMO (Navy) 21 (1885).

¹¹² *Id.* at 12.

¹¹³ The Board of Review declared in *United States v. Hulett*, 24 E.T.O. 163, 175 (1945), the facts of which are stated in text notes 68-75 *supra*: "periodic divisional inspections were made of the message center and cryptographic operations; . . . at no time were any criticisms or adverse reports made concerning the procedure followed in safeguarding the equipment during transportation thereof and in particular the attention of neither the accused nor Lieutenant Viets was invited to their failure to observe the procedure prescribed by higher authority with respect to intransit security requirements. The failure or oversight of the inspectors to discover the derelictions here involved afford accused no defense. The process of inspections in the Army is not for the purpose of absolving personnel from responsibility for the non-performance of their duties; rather it is to insure that they perform their duties and observe the requirements of the law and rules and regulations governing the administration and discipline of the military organization."

¹¹⁴ See *United States v. Neville*, 7 C.M.R. 180 (CM 1952) (failure to complete and forward efficiency reports about subordinate officers under his command as dereliction of duty); CMO 41-1915 (failure of rear-admiral and chief inspector to report result of inspections as neglect of duty).

subordinates laws, regulations, directives, and orders which pertain to them.¹¹⁵ The duty to see that subordinates do their duty is not limited to duties imposed by others; it extends equally to the enforcement of one's own order.¹¹⁶ This duty is particularly incumbent on a leader when he has reason to believe that his subordinates are neglecting their duties.¹¹⁷

The duty to enforce appropriate orders, including one's own, is especially required of military leaders in the face of an emergency.¹¹⁸ Thus, in one case,¹¹⁹ when accused's ship was dragging towards shore, accused, its commanding officer, "having given an order to get up steam and get the ship underway [failed] to see his order promptly carried out, and did not use due diligence in getting underway," and likewise failed "after a sufficient time had elapsed for carrying out the said order, to use his utmost endeavors to hasten its execution in a manner consistent with the emergency," as a result of which the ship stranded. It was held that a conviction of culpable inefficiency was warranted.

So too, the duty to enforce correct procedures on subordinates is particularly required when necessary to protect public funds.¹²⁰ Even the highest ranking military officers are not exempt from such duty, as shown by the conviction of the Paymaster General of the Navy for such offense.¹²¹

Even without such special circumstances, however, military leaders have an obligation to enforce the wide variety of miscellaneous duties which are imposed on their subordinates. Thus, commanders have been convicted of neglect of duty for failing to cause proper soundings to be made,¹²² for failure to require that his men remove unexploded shells from a target

¹¹⁵ CMO 16-1906 (failure to enforce Naval Regulations requiring machinery to be efficiently operated and properly cleaned); CMO 10-1906.

¹¹⁶ CMO 1-1926 [P.3] (own orders for safeguarding public funds not enforced).

¹¹⁷ See CMO 10-1906, Specification 6: "Failing to give such orders and precautionary instructions and to make such inspections as would be appropriate and necessary to insure the efficient condition of the engineer department of the Bennington, when he knew that the boilers of the ship had been frequently reported as in poor condition, by reason of which failure, inattention and neglect on the part of Commander Young, a lax condition of discipline existed in that part of the engineer force engaged in attendance on boiler B on July 21, 1905." See also CMO 16-1906, specification 7, under a charge of neglect of duty, as follows: "Having assigned an oiler with little experience as water tender to perform the duties of water tender, did fail to supervise properly the discharge of their duties by said oiler and other men engaged in attendance on boiler 'B'."

¹¹⁸ CMO 9-1915 (failure of engineer officer, knowing that his ship was then dragging its anchor, "to take any steps to see that the department under his charge was prepared to meet the emergency"); GCMO (Navy) 20 (1883) (failure to make certain that order to abandon ship was carried out promptly).

¹¹⁹ CMO 8-1915.

¹²⁰ HOWLAND, DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY (1862-1912) 149 (1912) (such neglect is charged under the general article); GCMO (Navy) 56 (1880) (surgeon's failure to have proper entries made as to expenditure of medical supplies).

¹²¹ GCMO (Navy) 8 (1886).

¹²² CMO 3-1915.

area,¹²³ for failing to require that target rafts be well secured,¹²⁴ and for failure "to cause all of the officers of [his] vessel to be at their stations when getting underway in accordance with the usages and customs of the Naval Service."¹²⁵ As the Commandant of Marines declared in a case where a lieutenant was punished for "neglect of duty as officer of the day in permitting bugle calls to be sounded in a slovenly manner:"

[T]he officer of the day, under the direction of the commanding officer, is responsible for the perfect execution of the post routine. The supervision of such minor details as the position of the colors on the flagstaff, and the proper sounding of the bugle calls are as much a part of his military duties as the inspection of reliefs of the guard, and are no more beneath his dignity. Moreover, it is the attention to or neglect of such small details, as well as the more important ones, that marks the difference between an efficient and an inefficient post.¹²⁶

A military leader is also required to enforce leadership duties on his subordinate leaders.¹²⁷ This would include, of course, the enforcement on such subordinates of the duties described generally in this Article. It should be said, in qualification of the above rule, that it does not require a leader to interfere with the exercise of a reasonable discretion on the part of his subordinate leaders.

The duty to supervise, while very broad, is not without its limits. A leader neglects this duty only when supervision is required by law, regulation, order, custom, or the evident necessity of the situation.¹²⁸ Such duty does not require a leader to so far interfere in the affairs or activities of his subordinates as to make a pest of himself,¹²⁹ much less by his officious overseeing to neglect his more important duties.¹³⁰ Subordinates, like leaders, have a reasonable discretion in devising the manner in which they will perform their duties, and so long as their performance is satisfactory, a leader ought not to interfere, for a minimum of supervision is not only consistent

¹²³ GCMO (Navy) 41 (1888).

¹²⁴ CMO 11-1911.

¹²⁵ CMO 82-1905.

¹²⁶ CMO 4-1911.

¹²⁷ CMO 7-1915 (failure of commander of naval station in the Philippines to ascertain weather conditions in neighboring port although typhoon signal was up and weather unsettled, and failure to order an ensign, commanding a tug, not to tow a Navy coal barge to the other port until the weather cleared, as a result of which he proceeded with the barge in tow, which capsized on the trip due to heavy seas); CMO 6-1929 [P. 16] (failure to cause subordinate to make proper inspections).

¹²⁸ CMO 6-1945 [P. 237].

¹²⁹ Cf. CMO 10-1908 (countermanding orders of subordinate and thereby disrupting arrangements).

¹³⁰ In CMO 9-1913, it was held: "A zealous performance of duty is enjoined on all; but an excess of zeal, which appears to have led Ensign Emmett to neglect his paramount duties while getting underway, is misdirected and cannot fail of censure."

with but is in fact the very hallmark of good military leadership. A military superior should save his reservoir of authority for use when the situation demands. If it is at that time used effectively, the requirements of the duty to supervise are fully met.

VI

DUTY TO ENFORCE LAW AND DISCIPLINE

A. Preservation of Discipline Generally

The commanding officer present with the regiment is responsible for the discipline and good order of the corps in every particular; and that whether the battalion is actually under arms or otherwise, his Majesty considers every officer and individual belonging to it equally accountable for the maintenance and preservation of good order and the rules and discipline of war, according to the powers granted to them by their respective commissions and situation.¹³¹

The duty to preserve discipline among one's subordinates is, as the above quotation shows, one of the oldest of leadership responsibilities.¹³² No neglect has been more criticized nor failure castigated in a military commander than allowing a relaxed state of discipline in one's unit. Such a state is not only a product of poor leadership, but is totally incompatible with the effective exercise of leadership functions at all. Such breakdown of recognition by subordinates of their military duties and obligations is the surest road to the disintegration of the group as an effective military unit or its utility as an organization for the accomplishment of its mission.

A superb example of this is found in one case¹³³ where a detachment of Marines under the command of a captain was landed to protect an American consulate against a destructive mob. The captain left the detachment for a while, and in the interim its members broke into the consulate, obtained and drank liquor until drunk, quarreled and fought among themselves, and left

¹³¹ HOUGH, PRECEDENTS IN MILITARY LAW 283 (1855) (G. O. Horse Guards [Old Gr. Brit. War Office], 10 Oct. 1808). And where a colonel's conviction "for allowing a relaxed state of discipline in the regiment" was approved, it was stated: "The spirit of party, which has in a great measure affected the whole corps, has been allowed to gain ground under an extreme want of firmness and consistency on the part of the commanding officer . . . [T]he imposition of a proper authority, enforced by that steady line of conduct which is required of a commanding officer, would have checked and eradicated, if not have entirely prevented, the existence of the evil." *Id.* at 284, case 9 (1814).

¹³² JAMES, *op. cit. supra* note 104, at 448 (Capt. J. F. L'Estrange, 1810) (failure to attend to good order of company); *id.* at 645 (Col. G. Quentin, 1814) (allowing a relaxed state of discipline). In WINTHROP, *op. cit. supra* note 101, at 726, is given as an example of convictions under the general article, "failure to maintain discipline in his command by the suppression of disorders," and in footnote 97 is cited G. O. 3, Dep't & Army of the Tenn. (1877); G. O. 5, Dep't of the Mo. (1864); and GCMO 82 (H. Q. Army) (1891). And see, for a later expression of this policy, note 164 *infra*.

¹³³ CMO 9-1893.

their posts to obtain more liquor. The captain was tried under a charge of neglect of duty, both for failure "to maintain order and discipline in his command," as a result of which "the men of his command obtained liquor, and there was drunkenness and disorder among them," and for failure after his men had become intoxicated "to take proper military measures to suppress disorder, enforce his authority, and to maintain discipline and efficiency in his command." In approving the conviction, the Secretary of the Navy declared:

Captain Meeker was sent on shore in La Guayra during a time of revolutionary disorder and turbulence, in command of a detachment of marines for the protection of the United States consulate. He should have been active, alert, vigilant, and zealous in the performance of his duty. He was negligent and inefficient. In consequence of such negligence and inefficiency a number of the men of his command procured liquor and became intoxicated and disorderly to the great scandal of the Marine Corps and the Navy, and to the serious weakening of his command for the purpose for which it was landed.¹³⁴

Since it is clear from the above case, as well as similar ones,¹³⁵ that unless discipline in a unit is maintained, the unit will rapidly disintegrate into merely an armed mob of men, more intent on pursuing their own ends than on performing their duty, it is necessary that someone be charged with the responsibility of insuring that discipline is at all times enforced. The uniform rule that a commander is "the officer responsible for the proper observance of the law by all persons under his command"¹³⁶ makes it appropriate that the duty to preserve discipline be, and it therefore is, part and parcel of a commander's leadership duties in general. The two sections which follow will deal with more specific aspects of this obligation.

¹³⁴ *Id.* at P. 7.

¹³⁵ In CMO 6-1938 [P. 9], a petty officer in charge of a picnic party ashore was convicted of neglect of duty for failing "to use his lawful authority and utmost endeavor to govern the conduct of the said picnic party, as a result of which the said picnic party became drunk and disorderly, thereby bringing disgrace upon the naval service." In a similar case, CMO 89-1901, a boatswain in charge of a draft of men proceeding under orders from Rhode Island to the Naval Academy failed, in Baltimore, "to exercise proper supervision over said draft, allowing its members to straggle and become intoxicated, and did therein and thereby neglect his duty as commanding officer of said draft." After the draft reached the Naval Academy, he again failed "to exercise proper supervision over" it and again its members straggled. Finally, having reported with the draft on a ship at the Academy, "and being, immediately after so reporting, temporarily in command of said vessel," the accused for the third time failed "to exercise his authority as commanding officer for the suppression of disorder and the maintenance of discipline, and did suffer certain members of the aforesaid draft who were under the influence of intoxicating liquor, and in consequence unfit for duty, to go at large among the crew of said vessel; and . . . [he] did thereby neglect his duty as commanding officer" of the ship. For these derelictions, he was convicted both under charges of "neglect of duty" and "culpable inefficiency in the performance of duty." See also the failure to stop the showing of movies in a dangerous part of the ship charged as neglect of duty, in CMO 12-1946 [P. 389].

¹³⁶ CMO 31-1915 [P. 16].

B. Duty to Prevent Offenses

As a part of the general duty of a military leader to preserve discipline in his command, there exists, and always has existed, the duty to prevent members of his unit from committing offenses against military law.¹³⁷ Such duty is not discharged unless the leader takes all reasonable steps to prevent these breaches of discipline.

While military leaders are, by and large, cognizant of the necessity of preventing their subordinates from committing serious crimes, they are too often prone to "wink at" indulgences in petty vices by their subordinates, undoubtedly on the theory that such activities are harmless diversions and not worth the effort it would take to suppress them. However, such indulgence has a demoralizing effect on members of the armed services, and military courts have for a long time recognized this fact. Thus, commanding officers and other officers and non-commissioned officers in charge of groups of men have been court-martialed for permitting their subordinates to gamble,¹³⁸ to drink liquor under prohibited circumstances,¹³⁹ and to engage in immoral sexual conduct.¹⁴⁰ So, too, toleration of other minor offenses has been forbidden. For example, superiors have been court-mar-

¹³⁷ See JAMES, *op. cit. supra* note 104, at 31 (Col. B. Leighton, 1798) (failure to stop impending duel); *id.* at 328 (Lt. Col. P. T. Robertson, 1819) (neglect of commanding officer to stop failure of subordinates to follow regulations). WINTHROP, *op. cit. supra* note 101, at 726, gives as an example of a conviction under the general article, "allowing illegal or irregular practices within his command," citing G. O. 42, Dep't of Wash. (1866); GCMO 1, Dep't of the Mo. (1885). And HUGH, *op. cit. supra* note 131, at 287 (case 10) (1854), recounts the conviction and cashiering of a lieutenant colonel, "for gross dereliction of duty, when commanding officer of the 15th native infantry, in having . . . countenanced intemperate and unbecoming conduct among the officers of the regiment under his command, by permitting, unchecked and unpunished . . . instances of drunkenness and impropriety, degrading to gentlemen and injurious to discipline."

¹³⁸ United States v. Di Giovanni, 6 C.M.R. 325 (CM 1952) (failure of detachment commander to suppress gambling in organization dayroom conducted in violation of post directive); United States v. Trimble, 2 C.M.R. 718 (ACMS 1951) (prison sergeant in charge of base stockade allowing prisoner to gamble); CMO 36-1914 (neglect of duty—"failure to have lights extinguished and gambling suppressed"); WINTHROP, *op. cit. supra* note 101, at 730, citing in footnote 69, GCMO 30, Dep't of the Platte (1886).

¹³⁹ CMO 19-1914; CMO 1-1914 [P.3] (liquor brought on ship); CMO 1-1912 [P.2] (members of guard and prisoners); CMO 23-1912 [P.2] (members of guard).

¹⁴⁰ CMO 4-1946 [P.127]. In United States v. Davis, 71 B.R. 295 (1947), a conviction under the general article was sustained because accused, a master sergeant, "having been assigned Government billets for the accommodation of dependents, . . . permitted the use of rooms therein to be used for immoral purposes; to wit: . . . for a haven for couples carrying on sexual relations." Likewise, in United States v. McMillen, 69 B.R. 113, 115 (1947), the Board of Review declared: "It is alleged that accused did neglect his duty by permitting Sergeant Stone to sleep with a woman in his bedroom and presence. . . . Even though it were conceded that the conditions under which accused lived might be considered somewhat antagonistic to accepted standards of social and moral behavior, a proper regard for the military status and responsibility of platoon leader to platoon sergeant does not permit of such a relationship."

tialled for permitting a soldier to go on duty while drunk,¹⁴¹ to impersonate an officer,¹⁴² to unlawfully use a government vehicle,¹⁴³ and to spend the night in WAC officer quarters.¹⁴⁴ In each of these cases, although the offense was minor, allowing it to occur at all had the tendency to weaken good order and military discipline, and hence was repugnant to the proper exercise of leadership responsibility incumbent on a superior.

If tolerance of minor offenses is punishable, *a fortiori* failure to prevent more serious offenses is dereliction of duty, and for this too superiors have been court-martialed. Thus, military leaders have been punished for countenancing thefts and frauds against the Government,¹⁴⁵ for failing to prevent subordinates from arousing the religious animosities of other troops,¹⁴⁶ for sanctioning discreditable business transactions with prisoners of war,¹⁴⁷ and for failing to take action to prevent a soldier from committing assault with intent to rape.¹⁴⁸

A good example of the duty of a military leader is found in one World War II case¹⁴⁹ from the European Theater of Operations. Accused second lieutenant was in a cafe with a number of men from his company. Two master sergeants, Healy and Sutton, were standing at the bar when a group of men formed around them, and two soldiers threatened in loud tones to throw Sutton out of the cafe. Although accused was the only officer present, and could clearly see and hear the whole affair, he made no attempt to intervene, even after Healy warned him to control his men in order to avert a "lot of trouble." "Accused's attitude was shown in his reply that Healy had better mind his 'own god-damn business.' " Healy's fears were proved

¹⁴¹ WINTHROP, *MILITARY LAW AND PRECEDENTS* 727 (2d ed. reprint 1920), citing in footnote 4, GCMO 29, Dep't of Texas (1881).

¹⁴² *United States v. Parker*, 2 A.-P. 33 (1944); *United States v. Granosky*, 17 B.R. 193 (1943).

¹⁴³ *United States v. Christ*, 31 B.R. 377 (1944).

¹⁴⁴ *United States v. Futrell*, 47 B.R. 339 (1945), wherein accused, a WAC captain, was found guilty under the general article of permitting "enlisted men of the United States Navy to enter into and remain over night in said [WAC Officer] quarters at said Army Post, while said quarters were occupied by female commissioned officers . . . [accused] being then and there present and being then and there the senior officer assigned to said quarters."

¹⁴⁵ *United States v. McLeod*, 18 C.M.R. 814 (ACM 1955) (commissary officer allowing the purchase of food at prices lower than authorized); *United States v. Shipley*, 22 E.T.O. 257 (1945).

¹⁴⁶ *HOUGH, op. cit. supra* note 131, at 299 (case 19, 1820), where an NCO was convicted of having failed to stop his troops from killing a cow on base, which regulations forbade because it would excite the religious feelings of Hindus.

¹⁴⁷ *United States v. Schinhan*, 22 E.T.O. 215 (1945), where accused, while in command of a prisoner interrogation team engaged in interrogating German prisoners of war, did "sanction, condone, and permit" a lieutenant and other team members "to traffic in cigarettes, candy, gun and matches" with the prisoners, resulting in their sale at "unreasonable, unconscionable, and disproportionate prices."

¹⁴⁸ *United States v. Boger*, 31 E.T.O. 341 (1945).

¹⁴⁹ *United States v. Guy*, 17 E.T.O. 323 (1945).

justified by the fist blows which Sutton then received from one soldier who had threatened him. When the fight, which concentrated upon Sutton, moved outdoors, accused followed the group and was the last to leave the cafe. "Even after Healy, standing directly in front of accused, grasped Sutton who was bleeding from face and head injuries and asked that 'he take a good look at what his men did,' accused took no steps to quell the disorder or to arrest the participants, but merely argued and mumbled."

Accused was convicted under the general article of failing "to use his utmost endeavor" to stop his men from fighting and to "restore them to discipline." The Board of Review, in affirming, declared:

The obvious analogy between the position of an officer of the Army and a civilian peace officer with respect to the duty of maintaining good order in their respective spheres is indicated by Winthrop. . . . In the opinion of the Board of Review the failure of an officer to endeavor to the utmost by reasonable means to stop a fight between soldiers, at which he is present, to quell the disorder and to separate and arrest the participants is a neglect to the prejudice of good order and military discipline¹⁵⁰

In the above case, the Board of Review analyzes the duty of an officer to prevent offenses as analogous to the duty of a civilian policeman. Such analysis would indeed be warranted if the accused were a military policeman or provost marshal, but it can hardly serve to explain the duty on the part of a superior who occupies no special law-enforcement position, for the latter is much more analogous in the military community to an ordinary citizen who has no special law-enforcement responsibilities. If it is not incumbent on the ordinary bystander to break up a fight, the donning of a uniform, in and of itself, does not impose this duty. Indeed, the Uniform Code itself gives the power to quell quarrels and frays to officers and non-commissioned officers exclusively.¹⁵¹ In light of this fact it can hardly be contended that all servicemen have not only the right, but the legally enforceable duty to do so.

A more adequate analysis would appear to indicate that the duty imposed on accused in this case stemmed from his leadership responsibility rather than any general law-enforcement powers. Accused, as the only officer present, had both the power and duty to stop the fight because, as a military leader, he was charged with the task of keeping discipline among his subordinates. Such obligation is not limited by time, location, or circumstances, and the fact that the men were off-duty did not detract from the necessity of preserving their military effectiveness and keeping them from violating the law. This being a continuing leadership obligation, failure to discharge it was properly held to be punishable.

¹⁵⁰ *Id.* at 327.

¹⁵¹ UCMJ art. 7(c), 10 U.S.C. § 807 (1958).

C. Duty to Apprehend and Punish Offenders

The obligation of a military leader to preserve discipline does not end with attempting to prevent offenses. Should offenses be committed without his knowledge, or in spite of his efforts, a leader is required to take appropriate action when he obtains knowledge and is able to do so to uphold the law. While in two isolated cases under special circumstances, servicemen have been punished for failing to report offenses committed by their superiors,¹⁵² the general rule is that the function of apprehending offenders is a leadership responsibility.

Military leaders have an obligation to detect offenses committed by their subordinates,¹⁵³ and to ascertain the identity of the offenders.¹⁵⁴ They are further required to take action appropriate under the circumstances. If the leader is one of lower rank, as for example a non-commissioned officer or junior officer in charge of a unit which constitutes an integral part of a larger organization, and has no disciplinary authority, his obligation may consist merely in the requirement that he report offenders to higher authority for such measures as it deems necessary.¹⁵⁵ Thus, for example, one company censor, second in command of the company, was court-martialed for failing to disclose to the commanding officer that 40 enlisted men of the company habitually violated a company order prohibiting them from sending home large sums of money.¹⁵⁶ Likewise, a lieutenant who discovered that a private with whom he was rooming was AWOL from his organization, was court-martialed for failing to inform the private's commander of the soldier's whereabouts,¹⁵⁷ a most disagreeable and inhospitable task to impose on anyone, and one not likely to be often performed, courts-martial *vel non*.

¹⁵² CMO 30-1911 (failure to report embezzlement of government funds by superior officer); GCMO (Navy) 30 (1882) (failure of officer of the day to report offender of higher rank).

¹⁵³ CMO 8-1946 [P. 297] (theft).

¹⁵⁴ United States v. Conway, 69 B.R. 139 (1947) (Accused, "being present during the commission of an affray and riot by military personnel, did . . . fail to do his duty as an officer by not taking immediate steps to ascertain identification of all the military personnel involved."). See also JAMES, A COLLECTION OF CHARGES, OPINIONS, AND SENTENCES OF GENERAL COURTS-MARTIAL (1795-1820) 31 (Col. B. Leighton, 1798) (1820) (failure to apprehend offenders).

¹⁵⁵ WINTEROP, *op. cit. supra* note 141, at 730, gives as an example of a conviction under the general article, "neglect by a non-commissioned officer to cause to be punished or tried soldiers under his command who have destroyed or appropriated property of civilians," citing in footnote 77, GCMO 16, Dep't of the Mo. (1891). To the same effect are CMO 174-1918 [P. 18] (NCO); CMO 37-1909 (watching enlisted men committing offense and not preventing or reporting them); CMO 27-1911 (deficiency in funds); JAMES, *op. cit. supra* note 154, at 47 (Lt. John Read, 1799) (failing to report offenses by guard).

¹⁵⁶ United States v. Barfield, 18 E.T.O. 313, 316 (1945), wherein the Board of Review declared that this "showed an intentional and calculated evasion by accused of duties required of him."

¹⁵⁷ United States v. Titus, 28 B.R. 89 (1943).

Higher ranking commanders are required to actually bring the offending inferiors to punishment.¹⁵⁸ This is especially true when a subordinate commits a serious crime, such as a homicide,¹⁵⁹ or theft.¹⁶⁰ It also applies, however, in the case of lesser offenses.¹⁶¹

Careful analysis indicates that the duty to take "appropriate" action is not a strait-jacket which inexorably demands that for every offense of every kind committed under any circumstances a commander must punish a subordinate. Such a duty would be as intolerable a burden on leaders as it would be an intolerable oppression on subordinates. There are many cases where punishment for one reason or another would serve no useful purpose, or where other considerations outweigh the desirability of visiting derelictions with punitive action. This does not happen very often in the case of civilian-type crimes, especially of a more serious nature, such as unlawful homicide, rape, burglary, etc. In the case of such major crimes, failure to take punitive action would very generally be an abuse of discretion, absent a showing of peculiar circumstances warranting non-action.

Very different is the case with military offenses. In such cases, a subordinate commander is often in the best position to assess the need for punitive action and the desirability of condoning the dereliction.¹⁶² Particularly is this true in the case of minor offenses, which are in reality offenses against accused's immediate unit discipline or commander's authority. In such situations, the accused's commander is in the best position to evaluate the effect of condoning the offense on accused and on his unit. Where minor offenses are concerned, a determination that accused will not repeat his dereliction even if punishment is withheld, and that the discipline of the unit will not suffer from clemency, ought not to be overturned except on the clearest showing of error. As one Board of Review declared:

Moreover, it is incumbent upon the commanding officer to whom charges are forwarded to "take such action with respect to each offense charged as is within his authority and is *deemed by him best in the interest of justice and discipline*" (Emphasis by BR) (Par 30c, MCM, 1928). We are of the opinion that accused had this same discretionary power with reference to the preferring of charges in the first instance. Accused's failure to prefer charges

¹⁵⁸ WINTEROP, *op. cit. supra* note 141, at 726, citing in footnote 100, GCMO 8 (1890); G. O. 88, Army of the Potomac (1862).

¹⁵⁹ United States v. Williams, 20 E.T.O. 307 (1945) (failure of commander to take action against subordinate member of command who had committed unlawful homicide).

¹⁶⁰ United States v. Humm, 78 B.R. 151, 157 (1948): "The accused, on learning that government property of considerable value had wrongfully been taken by members of his organization, failed to initiate the appropriate preliminary investigative and disciplinary measures contemplated by the customs of the service and the provisions of the *Manual for Courts-Martial*, and so patently required by the circumstances."

¹⁶¹ CMO 4-1911, wherein it was stated, "The commanding officer will . . . see to it that any and all offenders against minor points of discipline are reported and promptly punished."

¹⁶² Cf. AVINS, *THE LAW OF AWOL* 273 (1957).

would not, therefore, constitute an offense in the absence of a showing of abuse of his discretionary authority.¹⁶³

CONCLUSION

From the material set forth above, it can be seen that military law imposes a wide variety of specific duties and obligations on leaders. The number and variety of duties is, indeed, so large and apparently all embracing, that after wading through them one might think that they in themselves, either singly or *en masse*, constituted leadership itself. This, however, is not the case.

There is no question but that the specific duties are an important element of leadership itself.¹⁶⁴ But they are not all by any means. The law recognizes that leadership is primarily an inner characteristic. It is cognizant that leadership, in its last analysis, is an exertion of moral force,¹⁶⁵ and not merely of legal force, since military leaders, more than leaders in any other branch of life, are called upon to exercise leadership in situations where the sheer physical force of legal powers, and the deterrent otherwise exercised by punitive sanctions, have lost their vitality as effective moderators of the conduct of subordinates. It is clear that the punitive sanctions of the military law, or of any other system of law yet devised, are incapable alone of making a soldier face certain death and yet continue to do his duty.

Since military leadership is based on moral force, it is obvious that proper leadership demands that the leader set an example of the qualities which he would have his subordinates exhibit.¹⁶⁶ It is clear beyond dispute that the moral authority of a military leader is eroded when he demands

¹⁶³ *United States v. Humm*, 78 B.R. 151, 155 (1948).

¹⁶⁴ See U.S. NAVY REGULATIONS art. 0702A (1952), reprinted in *United States v. Moore*, 21 C.M.R. 544, 546 (NCM 1956): "All commanding officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well being, and the general welfare of the officers and enlisted persons under their command or charge."

¹⁶⁵ "The relationship should be that of teacher and scholar, and partake of the nature of father and son. The spirit of comradeship and brotherhood in arms traditional in a military organization such as the Marine Corps does not require that the officer demean himself in a manner which will put himself on a social parity with the enlisted man, but rather that he exhibit those qualities of leadership to which right thinking American youth will readily respond. An officer is always responsible for the physical, moral, and mental welfare of the enlisted men as well as for their discipline and military training. It is only through the constant exhibition of justness, self-control, honor, and courage that this can be accomplished." *United States v. Free*, 14 C.M.R. 466, 471 (NCM 1953).

¹⁶⁶ CMO 29-1908 [P.P. 2, 3] (failing to show in himself as a petty officer a good example of subordination, zeal, and attention to duty); CMO 19-1908 (same); GCMO (Navy) 29 (1882) (duty of officer to impress others with a sense of discipline by his own behavior).

from those under him performance which he himself is unwilling to give.

It is recognition of the fact that leadership depends in its final analysis on the moral force of the leader that has led military law and immemorial military custom to maintain a gulf between leaders and their subordinates. The aloofness required of leaders has its genesis in the desire of the law to shield those human faults in the leader which would tend to debase his moral authority in the eyes of his men. Thus, officers may not commit acts of sexual immorality in the presence or company of their subordinates.¹⁶⁷ They are similarly forbidden to gamble with their subordinates.¹⁶⁸ A veritable multitude of authorities forbids their drinking with enlisted men, at least on socially intimate terms.¹⁶⁹ And there is even a considerable body of authority which forbids officers to socialize or fraternize generally with

¹⁶⁷ *United States v. Rice*, 14 C.M.R. 316 (CM 1954) (visit house of prostitution with enlisted man); CMO 4-1946 [P.127] (same); *United States v. Wicks*, 4 A.-P. 171 (1945) (immoral acts in presence of enlisted men); *United States v. Clark*, 2 A.-P. 343 (1945) (acts with WACs in presence of enlisted man suggesting immoral conduct); *United States v. Desjardins*, 1 A.-P. 207 (1943) (visit house of prostitution with enlisted man); WINTHROP, *op. cit. supra* note 141, at 716.

¹⁶⁸ *United States v. Atkinson*, 10 C.M.R. 443 (CM 1953); *United States v. Reed*, 9 C.M.R. 269 (CM 1953); *United States v. Pryor*, 2 C.M.R. 365 (CM 1951); *United States v. Parker*, 2 A.-P. 33 (1944); *United States v. Weller*, 10 J.C. 381 (1951); *United States v. Anthony*, 5 J.C. 205 (1950); *United States v. Hoover*, 3 J.C. 39 (1949); *United States v. Morris*, 60 B.R. 49 (1945); *United States v. Welch*, 56 B.R. 234 (1945); *United States v. Stallworth*, 55 B.R. 97 (1945); *United States v. Kramer*, 54 B.R. 325 (1945); *United States v. Ponsler*, 51 B.R. 47 (1945); *United States v. Garriss*, 48 B.R. 39 (1945); *United States v. Lillis*, 39 B.R. 395 (1944); *United States v. Barrette*, 35 B.R. 125 (1944); *United States v. Martin*, 34 B.R. 223 (1944); *United States v. Bates*, 34 B.R. 147 (1944); *United States v. Murray*, 31 B.R. 389 (1944); *United States v. Phillips*, 26 B.R. 299 (1943); *United States v. Petty*, 26 B.R. 213 (1943); *United States v. Campbell*, 24 B.R. 216 (1943); *United States v. Johnston*, 23 B.R. 57 (1943); *United States v. Black*, 20 B.R. 345 (1943); *United States v. Marinelli*, 18 B.R. 377 (1943); *United States v. Van Huss*, 14 B.R. 271 (1942); *United States v. Thompson*, 14 B.R. 133 (1942); HOWLAND, *op. cit. supra* note 120, at 141; WINTHROP, *op. cit. supra* note 141, at 716, citing cases as early as G. O. of Dec. 10, 1812.

¹⁶⁹ *United States v. Berlin*, 13 C.M.R. 364 (CM 1953); *United States v. Jackson*, 8 C.M.R. 215 (CM 1952); *United States v. Huston*, 4 A.-P. 7 (1945); *United States v. Bautigan*, 1 A.-P. 265 (1943); *United States v. Patton*, 23 E.T.O. 75 (1945); *United States v. Slater*, 74 B.R. 371 (1947); *United States v. Gaddis*, 73 B.R. 181 (1947); *United States v. Doty*, 67 B.R. 281 (1947); *United States v. Heaton*, 64 B.R. 3 (1946); *United States v. Cloutre*, 60 B.R. 381 (1946); *United States v. Hart*, 60 B.R. 248 (1946); *United States v. Epperson*, 58 B.R. 324 (1945); *United States v. Young*, 57 B.R. 201 (1945); *United States v. Mann*, 55 B.R. 381 (1945); *United States v. Katz*, 54 B.R. 135 (1945); *United States v. Ponsler*, 51 B.R. 47 (1945); *United States v. Hagler*, 48 B.R. 163 (1945); *United States v. Futrell*, 47 B.R. 339 (1945); *United States v. Foster*, 46 B.R. 295 (1945); *United States v. Wright*, 44 B.R. 183 (1945); *United States v. Lake*, 41 B.R. 149 (1944); *United States v. Nettles*, 40 B.R. 385 (1944); *United States v. MacFarlane*, 38 B.R. 339 (1944); *United States v. Ninman*, 37 B.R. 381 (1944); *United States v. Martin*, 34 B.R. 223 (1944); *United States v. Bates*, 34 B.R. 147 (1944); *United States v. McPherron*, 33 B.R. 325 (1944); *United States v. Watts*, 33 B.R. 195 (1944); *United States v. Norren*, 32 B.R. 95 (1944); *United States v. Bradford*, 30 B.R. 279 (1944); *United States v. Cihos*, 29 B.R. 1 (1944); *United States v. Bunker*, 27 B.R. 385 (1943); *United States v. Thrall*, 27 B.R. 299 (1943); *United States v. Fields*, 26 B.R. 283 (1943); *United*

enlisted men.¹⁷⁰ All of these prohibitions have, as their single object, the desire to hide the weaknesses of the all-too-human military superiors and so to preserve, through respect of subordinates, the moral authority which is an indispensable prerequisite to effective military leadership. As one Board of Review has declared:

Gambling by an officer with enlisted men contains the same inherent vices as drinking with, or borrowing from, enlisted men. They bring the commissioned officer into contempt and expose him to the secret jeers of his subordinates. The victim of drink, financial stringency, or the gambling passion is exposed in a moment of weakness to those to whom he should be an exemplar of all soldierly virtues. The human foibles in which enlisted men themselves indulge or which they may freely tolerate in other enlisted men cannot be forgiven in an officer.¹⁷¹

Military law generally enforces only a minimum standard of conduct on servicemen. Thus, it does not enforce bravery, but merely prohibits cowardice.¹⁷² It does not enforce a willing and zealous obedience to orders, but only punishes disobedience.¹⁷³ It does not demand efficiency, but only punishes culpable inefficiency and dereliction of duty.¹⁷⁴ And this is as it should and indeed must be, for a criminal code cannot make people act as they should, but can only prohibit them from acting as they should not. In this respect, military law exhausts its function and purpose when it has enjoined the minimum standard of conduct tolerable in a military person.

States v. Strauss, 25 B.R. 75 (1943); United States v. Jones, 23 B.R. 353 (1943); United States v. Hyre, 23 B.R. 115 (1943); United States v. Johnston, 23 B.R. 57 (1943); United States v. Jordan, 22 B.R. 345 (1943); United States v. Anderson, 21 B.R. 369 (1943); United States v. Nelson, 21 B.R. 55 (1943); United States v. Field, 21 B.R. 41 (1943); United States v. Nicholl, 20 B.R. 121 (1943); United States v. Slaughter, 20 B.R. 9 (1943); United States v. Paradise, 19 B.R. 43 (1943); United States v. Granosky, 17 B.R. 193 (1943); United States v. Munson, 17 B.R. 139 (1943); United States v. Johnson, 16 B.R. 323 (1943); United States v. Cromer, 15 B.R. 17 (1942); United States v. Raymond, 10 B.R. 169 (1939); United States v. Hammond, 1 B.R. 83 (1929); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL (1912-40) § 453(9), at 342 (1940); CMO 2-1947 [P.23]; CMO 10-1933 [P.7]; CMO 19-1914; GCMO (Navy) 53, 1888; WINTHROP, *op. cit. supra* note 141, at 716.

¹⁷⁰ United States v. Free, 14 C.M.R. 466 (NCM 1953); United States v. Livingston, 8 C.M.R. 206 (CM 1952); United States v. Davis, 2 C.M.R. 818 (ACM 1950); United States v. Kroh, 2 A.-P. 405 (1945); United States v. Futrell, 47 B.R. 399 (1945); United States v. Patterson, 41 B.R. 365 (1944); United States v. Jones, 40 B.R. 149 (1944); United States v. Titus, 28 B.R. 89 (1943); CMO 3-1944 [P. 412]; CMO 1-1942 [P. 268]; CMO 2-1941 [P. 265]; CMO 1-1941 [P. 63]; CMO 1-1941 [P. 61]; CMO 2-1940 [P. 125]; CMO 10-1937 [P. 2]; CMO 8-1931 [P. 12]; CMO 5-1927 [P. 7]; JAMES, *op. cit. supra* note 154, at 368 (Lt. L. Huddleston, 1811). See also United States v. Pemick, 19 E.T.O. 257 (1945), majority and dissenting opinions.

¹⁷¹ United States v. Lillies, 39 B.R. 395, 406 (1944).

¹⁷² UCMJ art. 99(5), 10 U.S.C. § 899 (1958).

¹⁷³ UCMJ arts. 90(2), 91(2), 10 U.S.C. § 890, 891 (1958). Reluctant obedience will satisfy the law's requirement. See United States v. Ashley, 8 C.M.R. 810 (ACMS 1953) and the cases cited therein; United States v. Huffine, 7 E.T.O. 389 (1944).

¹⁷⁴ UCMJ art. 92(3), 10 U.S.C. § 892 (1958).

To do more would be to require the law to enter the world of nebulous standards of what conduct is desirable.

That part of the military law which concerns itself with leadership is also geared towards enforcing minimum standards of performance. Indeed, the law actually only enforces leadership responsibilities and duties, as distinguished from those moral qualities which constitute leadership itself. In short, the most that the law requires is that the leader try to lead. Thus, in one case,¹⁷⁵ accused were acquitted for, "while the efforts of Foshee and McCoy lacked the aggressive leadership the Army expects in its combat commanders, these two young lieutenants did try in an ineffectual way to rally their men, who the evidence shows were panicky from the start, and to comply with the orders to advance."¹⁷⁶ It thus appears that all that the law exacts is an honest attempt to perform leadership duties.

Since leadership stems from training, education, and innate ability, and not only is not derived from the law, but is not even enforced as such by the law, why, it may be asked, should the two be considered together? The answer is that the military law provides the basic framework for development of leadership. The law provides the starting point, or minimum, upon which proper military education will build leadership ability. In short, the first step towards being a leader is acting like a leader; and the law does enforce this first step. It follows that law is the foundation for military discipline in the area of leadership, just as it is in all other areas of military life. In sum, the silent partner of education in the training of military leaders is the military law.

¹⁷⁵ *United States v. McCoy*, 13 C.M.R. 285 (CM 1953).

¹⁷⁶ *Id.* at 294. Likewise, the board said: "In the instant case we have two second lieutenants, working with platoons to which they had just been assigned, and unfamiliar with their personnel, undertaking a raid, the rehearsals for which had been supervised by both the company commander and battalion commander. While we do not condone the shortcomings of the accused as leaders of men, we are of the opinion that they tried to accomplish their mission to the best of their capabilities under the circumstances." *Id.* at 295.