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HAZARDOUS DUTY IN MILITARY LAW: THE INAPPLICABILITY OF CIVILIAN SOURCES*

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INTRODUCTION

Criticism of the United States Court of Military Appeals is multiplying at an accelerating rate.[1] One of the major aspects of this criticism is the "civilianization" of military law.[2] This criticism involves, essentially, the importation into the body of the military law of civilian concepts not suited to military conditions or the tasks under which the military law must perform its prescribed functions. While some of these civilian concepts have a surface similarity, with military concepts, they essentially ring a discordant note when actually put to work in day-in, day-out military law practice.

The infirmities of this type of philosophy can best be examined within the context of a specific example. A ready-made one is provided by the concept of "hazardous duty" found in Article 85 of the Uniform Code of Military Justice,[3] punishing as a deserter one guilty of absence without leave with intent to avoid "hazardous duty." The term, "hazardous," is surely not unknown to the ordinary courts of law, as will be seen herein. And the approach of using civilian yardsticks to measure this concept has actually been used by one Army Board of Review during World War II in reference to this very statute.[4] Moreover, the dearth of military cases defining the precise limitations of the military concept offer a tempting inducement to use established civilian yardsticks as the controlling guidelines.

This article will examine the applicability of these civilian authorities to the military law. From this analysis the pitfalls of an uncritical borrowing should become clearer.

GENERAL CONSIDERATIONS

Article 85(a)(2) of the Uniform Code of Military Justice makes an absentee who intends to avoid "hazardous duty" a deserter and, during wartime, punishable with death. Such offense is therefore a capital

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[1] See Avins, *New Light on the Legislative History of Desertion Through Fraudulent Enlistment; The Decline of the United States Court of Military Appeals*, 46 MINN. L. REV. 69, 70-1, n. 1-6 (1961).

[2] See Richardson, *A State of War and the Uniform Code of Military Justice*, 47 A.B.A.J. 792, 796 (1961).

[3] Uniform Code of Military Justice, Art. 85(a)(2), 10 U.S.C. §885(a)(2) (1958).

[4] ETO 2368, Lybrand, 6 ETO 333, 340 (1944).

crime,[5] and well worthy of precise definition. Yet the Code contains no further definition of this term. Nor does the Manual for Courts-Martial,[6] for while it defines, to some extent, "important service," the companion term in the section, it does not comment on the meaning of "hazardous duty" to any like extent.[7] Indeed, the only example the manual gives which would pertain to "hazardous duty" is "duty in a combat or other dangerous area." However, not all duty in combat areas is hazardous as a matter of either fact or law. And since the term "dangerous" is only a synonym for the term "hazardous," the latter part of the example does not aid a military court in any specific instance.

Of more importance than the failure of the manual to give further examples is its lack of generalized criteria for determining whether the duty under consideration is hazardous or not. Both of these gaps are not surprising. While the term "important service" was copied from the British, and hence the writers of the 1921 manual were able to borrow extensively from British concepts,[8] the term "hazardous duty" originated in General Ansell's proposed revision of the 1916 Articles of War,[9] and aside from actual combat, it is probable that its framers had only the most vague notions of its precise limits. Because of this absence of legislative intent, the term can justifiably be approached from almost a common-law point of view, i.e., what would its framers have considered to be "hazardous duty" in light of sound legal reasoning as applied to military conditions then, and also, what, if any, changes have been wrought in the meaning of this term by changes in the military service as a whole since 1920.

The first object of inquiry is, what is a hazard? "It is a hazard," one congressman once remarked, "because the man might lose his life."[10] This definition hardly advances the inquiry at all, for the end of life is an inseparable incident of life itself. Because of this, the natural question to be asked after this comment is, when might he lose his life?

Nor would such an inquiry have a self-evident answer even in the

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[5] Indeed, the only American executed during World War II for a purely military offense was put to death for a violation of this provision. ETO 5555, Slovik, 15 ETO 151 (1945).

[6] Manual for Courts-Martial, U.S., 1951, Executive Order 10214.

[7] *Id.* at §164(a)(2), at 311. While this section mentions both "hazardous duty" and "important service" in the same breath, the examples given must be taken to apply principally to the latter, as most of them would manifestly not be hazardous in the overwhelming majority of cases.

[8] See Manual for Courts-Martial, U.S. Army, 1921, §409, at 343-4.

[9] *Hearings Before a Subcommittee of the Senate Committee on Military Affairs, on S.* 64, *A Bill to Establish Military Justice,* 66th Cong., 1st Sess. 14 (1919). See also Avins, *A History of Short Desertion,* 13 MILITARY L. REV. 143, 162 (1961).

[10] *Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, on H. R.* 2553, *Career Compensation for the Uniformed Forces,* 81st Cong., 1st Sess. 1570 (1949) (later becoming the Career Compensation Act of 1949), hereinafter referred to as *1949 House Subcommittee Career Compensation Hearings.*

present context. Indeed, for the purpose of obtaining flight pay, Air Force officials urged on Congress the theory that flying was hazardous because the life expectancy of a pilot at age 22 is 12 years less than that of other officers; the flier can expect to live to age 58, while the nonflier can expect to live to age 70, or, put another way, one out of four pilots at age 22 will be dead before age 40, while nonfliers will not suffer this attrition until they reach 61.[11] Part of the reason for this attrition is the nervous stress and strain on the pilot, as the following report from an Air Force board shows:

> c. *Nature of Hazards.*—That hazards are of two kinds—the direct hazard resulting from aircraft accident and the career hazard resulting from cumulative stress and strain on the nervous and physical system of the individual due to flying over a period of years. That during the past 10 years the direct hazard has not materially diminished and is endured by all who fly whether as pilots, observers, or passengers. That, although the career or "stress and strain" hazard cannot be measured accurately due to lack of sufficient data over a considerable period, evidence presented is convincing that it does exist, that it is due to the causes described by the medical witnesses, that it affects all who fly over a considerable number of years, that it is an important factor in the career of a flier, that, from present indications, it is likely to increase rather than diminish, and that any equitable system of compensation for flying must recognize this hazard.[12]

The above paragraph would seem to suggest that a duty is hazardous if, because it is nerve-racking, and produces tensions, stress, and strain, it causes, at the end of life, an increased death rate. Even if such a cause and effect were established to a scientifically accurate certainty, the duty would not be hazardous for the purposes of proving desertion. Such cumulative hazard, or "career hazard," as the above paragraph refers to it, cannot be considered as hazardous for the limited purposes of the criminal military law, because this offense looks to the dereliction born of the moment. Avoidance of hazardous duty is committed by people who fear an imminent and impending doom, and not by those whose perception is so keen that they are moved by a compelling drive and desire to extend their life-span 40 years hence. Experience does not dictate that heavier penalties are needed to offset the problematical hazards of a remote future.

Moreover, the numerous contingencies of life make it possible that the accused will be removed from the hazardous duty before its cumulative effect leaves its mark on him, and hence makes too speculative the conclusion that the duty is in fact hazardous at the time of AWOL. Thus, even though the accused fears the ultimate effect of his assignment, the fear must be deemed to be of a duty not in fact hazardous.

[11] *Id.* at 1573.
[12] *Supra* note 10, at 1593.

Hence, the hazard of the duty must have an immediate and proximate chance of causing the feared injury.

This analysis, of course, does not preclude the possibility of the duty being hazardous when the accused's condition is such that the added stress will pose an imminent threat. Nor does it prevent a duty from being hazardous merely because the hazard is inflicted or threatened through mental, psychological, or other means not physical, or because its effect is on the mind, nerves, or other similar aspects of the human body. Science is too far advanced for us to ignore these injuries. True, they may be more difficult to prove; and a mere threatened injury of this type will be even more difficult still to make out with the requisite degree of certainty necessary to sustain the offense, but their legal effect when proved is the same as any other hazard threatened.

A hazard is not confined solely to those situations which threaten the taking of human life. The threat of serious injury or disease, too, will also constitute a hazard. On the other hand, duty is not hazardous merely because it is arduous, unpleasant, or uncomfortable. Nor is it hazardous because it causes some temporary pain or discomfort, as long as there is no chance that they will become permanent. A hazard must therefore cause either death or serious permanent damage to be cognizable under this aspect of military law.

Nor can a definition of hazardous duty be confined solely to those endeavors wherein the threatened injury befalls all who engage therein. Few would be the occupations where someone does not escape unscathed. Yet in many other fields, the probability of injury is so high that men must be deterred from avoiding them because their natural tendency, impelled by such a significant chance of harm, to escape the duty. The statute must be held to cover such areas also, or be indeed most deficient in its scope.

The above definition would be sufficient were it not for the fact that all human endeavors and activities present a chance of death, injury, or disease. Such casualties attend the most commonplace of pursuits. Household injuries are an every day occurrence; a cook might cut himself when a knife slipped and injure or kill himself, yet surely cooking cannot be considered a hazardous occupation.[13] A clerk in an office might slip and fall on the floor, thereby injuring himself, but this fact cannot convert such duties into a hazardous employment.[14] Thousands of people are killed, and many more thousands are injured, in automobile accidents each year,[15] but to label movement by vehicle in the military as being "hazardous duty" would practically read out of the Uniform Code of Military Justice so much of Article 87 as punishes missing movement

[13] *Cf.*, De La Gardelle v. Hampton Co., 167 App. Div. 617, 153 N.Y. Supp. 162 (1915).
[14] Clyde v. City of New York, 275 App. Div. 161, 89 N.Y.S. 2d 105 (1949).
[15] Barton v. Hults, 23 Misc. 2d 861, 198 N.Y.S. 2d 539, 543-44 (1960).

by design, unless the movement were to be accomplished by marching away from highways through back hills. Surely, it was not the intent of Congress to cover chances so remote, or extend the grasp of the statute that far. People are not moved to avoid assigned duty by the infinitesimal possibility of danger appearing as but a flyspeck on the horizon of life; it is only a considerable probability of harm looming up in one's direct path which will require a counter-deterrent.

The subject of inquiry, then, must be, what activities are so fraught with potential peril that they require a balance to impel military personnel not to seek to avoid them. This necessarily requires an analysis of the degree and probability of the hazard to be faced, and what criteria should be used in determining to what extent that hazard must serve as an impetus of avoidance of duty before a countervailing deterrent created by law ought to be brought into play to balance the scales.

Inapplicability of Civilian Precedents

In determining whether a particular duty is hazardous or not in the military service, military lawyers might be apt to turn first to analogies from civilian sources. Such conduct would not be at all surprising, for military installations are often like little, self-contained communities, and hence the functions of many servicemen bear a strong resemblance to corresponding civilian occupations. True, the combatant arms are unique, but most military personnel are not directly engaged in combat or preparation therefor even in time of war. They are, rather, service personnel, and perform duties similar to those engaged in by the community at large. Therefore, it would not be surprising if civilian law were looked to in classifying military occupations.

Literally hundreds of civilian cases can be found which decide whether particular occupations are hazardous or not.[16] Most of them have been decided under workmen's compensation statutes. The meaning these courts have given to the word "hazardous" is incontestably a broad one.

For example, in some areas all mechanical or manual work is considered hazardous.[17] Under such a theory, it has been held hazardous to engage in construction,[18] even when just digging ditches,[19] loading and carting dirt and debris,[20] or just acting as a water boy on a construction project.[21] Likewise, it has been held hazardous to load cars,[22] load or

[16] 19 Words and Phrases *Hazardous* (1940) and supplement, contains almost 300 cases defining this word in various contexts. See also Guildry v. New Amsterdam Casualty Co., 252 F. 2d 233, 235 (5th Cir. 1958): "The cases . . . are legion."

[17] Pawnee Ice Cream Co. v. Price, 164 Okl. 120, 23 P. 2d 168 (1933); Tarbell v. Rivera, 31 Ariz. 214, 251 Pac. 553, 554 (1926).

[18] Svoboda v. Brooking, 132 Okl. 290, 270 Pac. 575 (1928).

[19] Oklahoma Natural Gas Co. v. Davis, 181 Okl. 530, 75 P. 2d 435 (1938).

[20] City of Muskogee v. Bebee, 193 Okl. 311, 142 P. 2d 859, 861 (1943).

[21] Washington v. Sewerage and Water Board, 180 So. 199, 206 (La. App., 1938).

[22] Twohy Bros. Co. v. Kennedy, 295 Fed. 462, 463 (9th Cir., 1924).

unload a truck,[23] or even merely to install and service a refrigerator.[24]

In some jurisdictions, all transportation, such as trucking, has been held to be a hazardous occupation.[25] Thus, driving a bakery delivery truck was held hazardous,[26] operation of a horse and wagon was also so held,[27] and the same result was reached in the case of a taxicab driver.[28] Likewise, since operation of a motor vehicle is considered hazardous in those jurisdictions, the same result was reached in the case of a salesman who delivers merchandise by car,[29] a door-to-door salesman who has to drive,[30] and a mortician.[31] Under the same theory, employment as a gasoline service station attendant was held to be hazardous,[32] as was employment with an automobile sales and service agency.[33]

A wide variety of fairly common occupations not involving heavy machinery has also been held to be hazardous. This has included making hats and feathers for millinery,[34] working as a bakery employee,[35] weighing hides,[36] acting as beauty parlor operator,[37] and being a retail appliance store employee.[38] Similarly, both the operation of a dairy[39] and the raising and marketing of poultry[40] have been held to be hazardous. And it was held that sorting time cards in a factory[41] and being a receptionist and telephone switchboard operator for the New York City Board of Water Supply[42] were hazardous employments because the employers as a whole were engaged in a hazardous business.

Indeed, there are a few cases which carry the concept of hazardous occupation quite far even for civilian life. Thus, it has been held that being a playground director is a hazardous employment when the individual has to maintain the grounds,[43] such as by climbing a ladder to put up a light.[44] So, too, one case held that an engineering draftsman

[23] Snear v. Eiserloh, 144 So. 265, 266 (La. App., 1932).
[24] Spurrier Lumber Co. v. Cook, 159 Okl. 186, 14 P. 2d 686, 688 (1932).
[25] Richardson v. Crescent Forwarding & Transportation Co., 17 La. App. 428, 135 So. 688 (1931).
[26] Lemmler v. Fabacher, 19 La. App. 144, 139 So. 683, 684 (1932).
[27] Costello v. Taylor, 217 N.Y. 179, 111 N.E. 755 (1916); Glatzl v. Stumpp, 220 N.Y. 71, 114 N.E. 1053 (1917).
[28] Plick v. Toye Bros., 13 La. App. 525, 127 So. 59, 61 (1930).
[29] Nash Finch Co. v. Harned, 140 Okl. 187, 284 Pac. 633 (1930).
[30] Crews v. Leviten Smart Shops, 171 So. 608, 611 (La. App., 1937).
[31] Hecker v. Betz, 172 So. 816 (La. App., 1937).
[32] Youngblood v. Colfax Motor Co., 126 Miss. 439, 125 So. 883, 884 (1930).
[33] Champagne v. Welsh Motor Car Co., 150 So. 35, 36 (La. App. 1933).
[34] Saenger v. Locke, 220 N.Y. 556, 116 N.E. 367, 368 (1917).
[35] Fetteroff v. State Industrial Comm., 207 Okl. 77, 247 P. 2d 505, 507 (1952).
[36] Hiers v. John A. Hull & Co., 178 App. Div. 350, 164 N.Y. Supp. 767, 768 (1917).
[37] People v. Sommerville, 167 Misc. 89, 4 N.Y.S. 2d 793, 795 (1938).
[38] Holsey Appliance Co. v. Burrow, 281 P. 2d 426, 427 (Okl., 1955).
[39] Staples v. Henderson Jersey Farms, 181 So. 48, 52 (La. App., 1938); Preferred Accident Ins. Co. v. Van Dusen, 202 Okl. 124, 210 P. 2d 341, 344 (1949).
[40] State *ex rel.* Kusie v. Weber, 72 N.D. 705, 10 N.W. 2d 741, 744 (1943).
[41] Joyce v. Eastman Kodak Co., 182 App. Div. 354, 170 N.Y. Supp. 401, 402 (1918).
[42] Leahy v. City of New York, 260 App. Div. 966, 23 N.Y. S. 2d 223, 224 (1940).
[43] Kaufman v. City of New York, 270 App. Div. 967, 62 N.Y.S. 2d 1 (1946).
[44] Schlessinger v. City of New York, 271 App. Div. 856, 66 N.Y.S. 2d 1 (1946).

was engaged in a hazardous employment because five years before he had to go up a stepladder to follow a wire with a pair of pliers, a flashlight, and a ruler.[45] A federal court has declared that a carpenter is engaged in hazardous employment because he uses an ordinary hammer and hand saw.[46] A minister who uses an automobile is engaged in a hazardous occupation.[47] And finally, it was held that a research librarian in a building with a scientific laboratory was engaged in "extrahazardous" work.[48]

It is obvious that were the above cases applied to military law, the distinction between hazardous duty and ordinary duty would be all but lost. Scarcely a duty could be found under military law which would not be hazardous, if the above cases were to be taken as the test.

The reason for the broad interpretation given to the word "hazardous" in the above cases is not difficult to perceive. These cases are concerned with compensation of workmen for injury, and cases suitable for compensation will be liberally viewed. Whether because of pressure to expand coverage,[49] or because of conflicting statutory and decisional concepts,[50] the meaning of "hazardous" in civilian sources of law has been stretched and pulled almost beyond recognition.

But if short desertion in military law is to retain its significance as a special deterrent, then the concept of hazardous duty must be limited far more than the above cases would permit. To label every serviceman who sought to avoid moving a couple of wooden benches around in a room[51] as a deserter would fast destroy the significance of the term.

[45] Gramlich v. Board of Education, 297 N.Y. 349, 79 N.E. 2d 437, 439 (1948).
[46] Laborde v. Blout Bros., 152 F. Supp. 816, 817 (E.D. La. 1957).
[47] Meyers v. Southwest Region Conference Ass'n, 230 La. 310, 88 So. 2d 381 (1956).
[48] Hart v. Sealtest, Inc., 186 Md. 183, 46 A. 2d 293 (1946). And see generally: Malone, *Hazardous Businesses and Employments Under the Louisiana Workman's Compensation Law*, 22 TUL. L. REV. 412 (1948); Lane, *Hazardous Businesses and Employments Under the Louisiana Workmen's Compensation Act*, 7 LA. L. REV. 415 (1947).
[49] 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION §55.60 (1952).
[50] *Id.*, at §55.24, where the author says:

> The net impression left by all these attempts to define hazardous employments, whether by specific lists or by general description, is one of hairsplitting distinctions, appalling waste of judicial time and effort, and continuing unpredictability of coverage. You get such paradoxes as Wyoming's solemn statutory declaration that dude ranching is "extrahazardous" in that "risks to life and limb of the workmen engaged therein are inherent, necessary, or substantially unavoidable," while in the next breath it declares regular ranching and stock raising to be exempt. A research librarian in Maryland is held covered because on the staff of a dairy which is a hazardous business, while nurses and orderlies in hospitals are held to fall outside the general term "extrahazardous employment." Telegraphy operations involving an electrical current that probably would not electrocute a healthy housefly become hazardous because of the technical presence of electrical current, while a police officer, armed with a gun, and shot and killed by a disorderly patron of a night club, is held to be in a nonhazardous category because the "explosives" he worked around were not the right kind.

[51] Naylon v. City of Rochester, 283 App. Div. 758, 128 N.Y.S. 2d 80 (1954).

It must follow, therefore, that civilian precedents as to what is hazardous duty cannot be applied in interpreting the provisions of Article 85(2) of the Uniform Code of Military Justice.

Significance of Special Incentive Pay

While, as shown above, civilian precedents as to what constitutes hazardous duty cannot be deemed applicable to the military service, a more significant group of precedents can be found in the special compensation given to certain military personnel by the Career Compensation Act of 1949.[52] Of course, special pay for sea and foreign duty[53] was meant as an aid for morale, and was not intended as compensation for hazards, which often do not inhere in such duty,[54] but other special pay was so intended.

The 1949 act established various types of duty "considered as susceptible of classification as 'hazardous.' "[55] These were flight duty, submarine duty, glider duty, parachute jumping, contact with lepers, demolition of explosives, training in a submarine escape training tank, and training in deep sea diving.[56] The Career Incentive Act of 1955, as amended, added duty as low pressure chamber inside observer, duty as human acceleration, deceleration, or thermal stress experimental subject, and deep-sea diving duty using helium-oxygen breathing mixture.[57]

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[52] 63 Stat. 804 (1949), 37 U.S.C. §231 (1958).

[53] 63 Stat. 811 (1949), 37 U.S.C. §237 (1958).

[54] *1949 House Subcommittee Career Compensation Hearings* 1636, where it was declared:

> Mr. KILDAY. . . . why do you pay a sailor extra to go to sea? Isn't it his profession?
>
> Mr. HOEN. The Commission did not consider sea or foreign duty pay as hazard pay. . . . the sea pay is because of the separation from family, the morale factor, and for that purpose it is not paid on the basis of hazard.

And at page 1620, it was further stated:

> Mr. HOEN. . . . foreign duty pay is not hazard pay. It is pay for the purpose of building morale in the services when people are separated from their families, there should be some reward for their separation. But the hazard of war doesn't enter into foreign duty necessarily. There are many cases of foreign duty which are not hazardous.
>
> Mr. KILDAY. And not unpleasant.

See also page 1639, where it was noted:

> The majority of the enlisted personnel expressed the opinion that such duty could be expected as normal and could not be regarded as an additional hazardous duty for which an additional emolument was needed. They did feel, however, that some money was needed to offset the expenses of the individual and his family in travel.

[55] REPORT OF THE CAREER COMPENSATION ACT OF 1949, S. REP. No. 733, 81ST CONG., 1ST SESS. 358 (1949), to accompany H.R. 5007 (July 20, 1949).

[56] 63 Stat. 809 (1949), 37 U.S.C. §235 (1958). See also *Hearings Before the Committee on Armed Services, United States Senate, Career Compensation Act of 1949,* 81st Cong., 1st Sess. 43 (1949) (here after referred to as 1949 Senate Hearings).

[57] Act of March 31, 1955, c. 20, 69 Stat. 19; as amended by Act of August 28, 1957, 71 Stat. 484 (1957), 37 U.S.C. §235 (1958). See *Hearings Before the Committee on Armed Services, United States Senate, Career Incentive Act of 1955,* 84th Cong., 1st Sess. 192, 194 (1955) (on H.R. 4720) (here after referred

As expressions of Congressional finding that the above categories of duties are sufficiently hazardous to warrant additional pay, the list of duties set forth in the statute is certainly suggestive of what would constitute hazardous duty during time of peace, at least. In other words, the nature of the hazards inhering in the above list of duties, if not forming a yardstick by which the degree of hazard needed to constitute hazardous military duty is to be measured, at least is a factor to be considered in formulating criteria to test for the presence of hazardous duty. In many instances, duty which is hazardous for the purpose of receiving extra pay, is by the same token, and for the same reasons, hazardous for the purposes of the criminal military law.[58] It may well be true that "the theory of the extrahazardous pay . . . is more in the nature of an inducement rather than what might happen to a man,"[59] yet the inducement is needed in many cases to offset the fear of what accident might befall the individual, and this fear is, in turn, based on the hazard inherent in the duty. Incentive pay offsets the fear of hazard by promise of reward; short desertion offsets this fear by a fear of punishment. In both cases, the object is the same; only the means are different. Hence, the categories of special incentive pay are entitled to consideration in the formulation of standards for what constitutes hazardous duty.

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to as *Career Incentive Act of 1955 Hearings*), where the justification for these new categories is explained as follows:

> These low-pressure chamber inside observers are employed in special pressure chambers to simulate high altitudes for training aviation personnel. It is necessary for these observers to perform this work in order to test physiological reactions and deficiencies at high altitudes.
>
> These observers must accompany the student pilot at all times. They are under changing air pressures and are subjected frequently to the ailment known to deep-sea divers as the bends. It also produces severe joint pain, lung collapses, neuro-circulatory collapse, and even death. [A total of nine deaths had been caused.]
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> * * * * *
>
> The second category is the acceleration and deceleration experimental subjects. This again requires volunteers to carry out necessary research on the acceleration and deceleration effects on the human body in connection with the increasingly high speeds of aircraft.
>
> The resulting unpredictable and frequently injurious defects on the human body make it very difficult to obtain volunteers to conduct this type of research.
>
> * * * * *
>
> The third category involves the use of helium-oxygen in connection with deep sea diving.
>
> This is a relatively new method of deep sea diving and is used . . . as a breathing mixture to permit divers to go to much greater depths than they could before or can with normal air.
>
> [p. 194] The diving authorities . . . are having difficulty getting men to perform the helium-oxygen diving because that is a much greater hazard.

[58] *Cf.*, Ford v. United States, 108 Ct. Cls. 174, 185, 69 F. Supp. 332, 336 (1947), describing the test of light planes for artillery observation as "hazardous."

[59] *Subcommittee Hearings, House of Representatives Armed Services Committee, to Provide Benefits for Reservists Who Suffer Disability,* 81st Cong., 1st Sess., 2268 (1949) (on S. 213).

But while the categories of incentive pay are entitled to consideration, they are by no means conclusive either as to the fact that all duty listed therein is necessarily hazardous, or that no other hazardous duties exist. The drafters of the statute themselves recognized this fact. Thus, on the one hand, they admitted that there might later be found other categories of duties which could be considered as hazardous,[60] while on the other they conceded that some classes of hazardous duty pay were designed as an incentive for unsought duty which was not in reality hazardous but rather was arduous and disagreeable.[61]

Several cases have also illustrated this point. Thus, it has been held that the rendering harmless and safe, and recovery by disarming or demolition, of explosives which have failed to explode as intended, does not come within the statute although the duty is hazardous.[62] The same result was reached where navy salvage divers had to stay in decompression chambers to avoid the "bends."[63] On the other hand, it was held that a dentist who spent one day a month at a leprosarium was within the statute.[64] And in a case where an Army officer in the Security Courier Service of the Army Postal Service Branch, was assigned to deliver secret material of an urgent nature, and directed to fly as a passenger to do this, the Court of Claims held: "It must be admitted that it is somewhat incongruous to give a passenger who is an officer additional compensation when passengers who are civilians are not given it; but so the law reads."[65]

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[60] *1949 House Subcommittee Career Compensation Hearings* 1580-1:

> Primarily, the Commission centered its attention on those activities which, today, are associated with exceptional risk and danger. Studies were made of flying and submarine duty, particularly, and of all airborne activity, including glider and parachute duty; handling of lepers; diving; and demolition of explosives . . . The Commission believes that individuals engaged in all of these functions merit special pay, . . . and urges continuing study of the problem so that . . . additional pay may be granted to activities which may gain features constituting unusual hazard or risk. For example, it may later be determined that work with fissionable materials or bacteria may involve exceptional hazard as operations in these fields progress.

[61] *Id.* at 1581:

> First the higher mortality rate during peacetime is a major factor in flying only, and, even in this field, varies considerably with technical experiment and changes, size of force, conditions of craft, and time and place. Submarine duty in peacetime, it was found, involved virtually no fatalities since the introduction of a hazard differential but, in wartime, men in this service had a high fatality rate. Parachutists, on the other hand, had the highest injury rate. Diving and leprosy duties offered potential death and disease to a great degree, but admittedly are not primarily dangerous, but, rather, disagreeable and generally unsought occupations.

[62] 34 Comp. Gen. 173 (1954).

[63] 25 Comp. Gen. 520 (1946).

[64] 34 Comp. Gen. 55 (1954).

[65] Griffin v. United States, 129 Ct. Cls. 244, 249 (1954). But this result is questionable in light of the following from *1949 House Subcommittee Career Compensation Hearings* 1572:

> General Nugent. . . . No one in the Air Force, and I believe in the

Moreover, the hearings show that the pay was not based on the accident rate even when the duty involved was generally considered as hazardous, although this was considered along with other factors, but was based on the amount deemed necessary to entice the person into the activity and keep him there.[66] Under these circumstances, the categories of duty for which extra pay is given cannot be considered as *ipso facto* hazardous, or conversely, the only categories of hazardous duty, nor can those activities paying most be considered, *ipso facto,* to be the most hazardous. Rather, the above factors are only evidence, based on a considered judgment, of what duties are hazardous in the military, and should be considered along with other evidence in formulating appropriate criteria.

Conclusion

It is clear from the above analysis that a facile application of civilian authorities, either judicial or legislative, to determine what duties are "hazardous," is a misleading endeavor, when applied to military law.

Navy, may draw any kind of hazard pay for flying as a passenger.

Mr. Johnson. Even if they are on duty?

General Nugent. Even if they are required to fly often as a passenger for the purpose of transportation.

[66] *Career Incentive Act of 1955 Hearings 62*:

Senator SYMINGTON. Mr. Burgess, do you figure up hazardous duty pay on the basis of the accident fatality rate?

Mr. BURGESS. . . . I am sure that was taken into account.

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Senator SYMINGTON. [Since a paratrooper gets less hazardous duty pay than an airman or submarine crew member] is there any analysis of fatalities or accidents that make him come out with less, or is it just arbitrary?

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[p. 63] Senator SYMINGTON. . . . Are there any standard rules based on accidents and fatalities which make the services happy about the fact everybody is getting hazard pay based on facts, instead of based on pressures?

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Was the previous pattern based on . . . the analysis of accidents, fatalities, or was it based on the Air Force using more pressure than the Army, or vice versa?

General LEE. . . . the figures . . . are not figured out on the basis of how many accidents he may encounter during his years of service. They are based on what we believe will be the amount of money that it will take to entice him or the incentive provided for him to come into that activity and stay in it.

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Senator SYMINGTON. When the original hazard pay was figured, did you not figure it on mortality rates, based on air insurance analysis? . . . The life span was estimated at so much shorter. . . . They had it worked into years. As I remember 57 for airmen as against 65.

At page 64 there appears the following explanation of derivation of rates of incentive pay for flying and submarine duty:

Rates of pay for flying and submarine duty are not based solely upon the degree of hazard, nor are they intended to actually compensate an individual for the possibility of shortened earning power. These factors, however, are considered by the services in working out rates designed to persuade individuals to enter and remain in a career known to be hazardous.

The reason for this is that the object of civilian inquiry is different, and hence the object to be attained produces the standard to be employed. When the criteria are different, the result will go askew. The purpose of military law is to deter; the civilian aim is to compensate. The same term is colored by its source.

This example applies to other areas of military law. Civilian criteria cannot be imported uncritically. The "civilianization" of military law on an indiscriminate basis will produce ill-fitting protection of legitimate service needs. Only an awareness of this problem on the part of the Court of Military Appeals can prevent the military law system from a breakdown at a crucial time.