Military Law: Coercion and Duress as a Defense to Collaborating with the Enemy

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There is much criticism as to whether a trial judge or jury could properly apply a standard calling for such generalized definitions as: average person, community standards, dominant theme as a whole, and prurient interest. Mr. Justice Harlan, in his dissent, asserts a solution to these criticisms when he states that the question whether a particular work is obscene involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind. He illustrates this contention most persuasively:

"Many juries might find that Joyce's 'Ulysses' or Bocaccio's 'Decameron' was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are 'utterly without redeeming social importance.'"

Erwin J. Keup

Military Law: Coercion and Duress as a Defense to Collaborating with the Enemy—Lieutenant Colonel Harry Fleming was captured by the Chinese Communist forces near the Yalu River in North Korea in October 1950. He was held as a prisoner of war in various prison camps in North Korea. Upon his return to the United States he was court martialed. The charge against Fleming was that he, while a prisoner of war, did willfully, unlawfully and knowingly collaborate, communicate and hold intercourse directly with the enemy by joining with, participating in, and leading discussion groups and classes reflecting views and opinions that the United Nations and the United States were illegal aggressors in the Korean conflict, and by participating in the preparation and making communist propaganda recordings designed to promote disloyalty and disaffection among the United States troops, by praising the enemy and attacking the war aims of the United States. The charge was substantiated by the evidence.

The evidence also showed the pressure and privation which the prisoner Fleming had to endure. Immediately before his capture he was wounded about the back and legs. For ten days after his capture he was given no food or water. He was forced to march seventy miles to the prison camp in that condition, and during that time he was frequently questioned. Each time he refused to answer he was physically abused by being kicked, slapped and pushed. Due to wounds, mistreatment, malnutrition and debilitation he lost about forty pounds. At the camp the prisoners were so crowded that there was not enough room for them to lie down at night and stretch out. They were not given winter clothing or shoes, and the food ration consisted of but

[33] See note 11 supra at 1514.
two cups of millet per day. The mortality rate was so high that the
dead were not buried for days but were stacked up like cord wood in
the freezing weather.

The North Korean captor, Colonel Kim, demanded that the prisoners write scripts and record them for a propaganda broadcast. When Fleming resisted this demand he was threatened with a forced march to another prison camp which was 150 to 200 miles to the north. Testimony was introduced that the prisoner Fleming could not have survived such a march in his weakened condition and without winter clothing or shoes in the freezing temperatures of the Korean winter.

Colonel Kim also demanded that Fleming lead a round table discussion with the prisoners on various Communist propaganda subjects. Fleming used the preparation of the script for these discussions as a bargaining factor in his demands for more food and better conditions. The Communists rewarded his cooperation by increasing his food allowance from time to time. During the preparation of that script Kim asked the prisoners to sign several appeals which were to be used for propaganda purposes. The appeals called upon President Truman to withdraw the United Nations troops from Korea, and upon the United Nations troops to surrender to the Communists. Kim told Fleming that unless he signed the appeals he would be sent to the "Caves."

The "Caves" were recesses in a hillside. They were wet and muddy with little or no heating facilities. The prisoners lived in the muck and mire like animals. The mortality rate in the indescribable filth and privation of these holes in the ground was extremely high. To dramatize the hideousness of his threat, Kim often took Fleming to see the inhuman spectacle of the "Caves." On his first visit there Fleming saw fourteen American prisoners. On his last only one remained. He was lying in the mud, too sick to rise, and he informed Fleming that all the rest had died, and that he too was dying. However of Fleming's own group, eight were sent to the caves and all survived but one. Faced with the threat of the "Caves," Fleming signed the monstrous propaganda appeals. But despite the example of Fleming, a field grade officer and their leader in camp, the rest of the prisoners refused to sign.

The defense claimed that under these facts his collaboration with the enemy was the result of duress and coercion and that there was error in the instructions on duress, to wit:

"In order to excuse a criminal act on the ground of coercion, compulsion or necessity, one must have acted under a well grounded apprehension of immediate and impending death or of immediate serious bodily harm."

The Court of Military Appeals, affirming a conviction of dismissal and total forfeitures, held that the instruction as given was correct.
The mere threat of the march north was insufficient; it would have been a different situation if the prisoner had actually been started on the march and had seen that he would not survive. As to the march and to confinement in the "Caves" the court held that the prospect of death was problematical and remote.

Quinn, C. J., concurring in the result states that a threat of confinement in the "Caves" did constitute a sufficient threat of, at least, grievous bodily harm. But he went on to say:

"Raising a defense, however, does not mean that the court martial was bound to accept it. Other evidence shows that the accused had freely and materially cooperated with and helped the enemy before he had heard or seen anything of the caves."


The ingredients of the defense of duress, namely the threat of death or serious bodily harm and the immediacy of that threat, have long been established in the law. In the earliest days of our national history we find a case similar to the one presently under consideration. The case of Republica v. M'Carty in 1781 raised the question: what will constitute the defense of duress in the case of a prisoner of war. In that case the accused was indicted for high treason in levying war and by joining the armies of the King of Great Britain. He had been taken prisoner by the British in the Revolutionary War and remained with their troops for a year. In answer to the defense of duress the court held:

"In the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death; . . . . But had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue . . . ."²

Thus from our earliest history the existence of the defense of duress in the case of treason or defection by a prisoner of war was recognized, but also the requirement that the fear be of immediate death. The court refused to accept the fear of delayed death by starvation as a valid defense. In another early case, U.S. v. Vigol, the defendant was charged with high treason in levying war against the United States. He was part of a mob that attacked and ransacked an excise office in an attempt to obstruct the excise law. The defendant based his claim of duress on the fact that the mob threatened to destroy his home and his farm unless he joined them. The court in answering his defense of duress defined it saying:

¹ 1 L. Ed. (2 Dall.) 300 (1781).
² Id. at 301.
³ 1 L. Ed. (2 Dall.) 409 (1795).
RECENT DECISIONS

"... the fear which the law recognizes as an excuse for the perpetration of an offense, must proceed from an immediate and actual danger, threatening the very life of the party. The apprehension of any loss of property, by waste or fire; or even an apprehension of a slight or remote injury to the person, furnish no excuse."74

This concept of the defense of duress in treason cases has survived and is accepted as the general rule.5 The difficulty with this defense in a prisoner of war case is that the imminent threat to life or limb must be constant during the entire period of collaboration.6 A general threat or hostile attitude is too vague to extend to an entire period of imprisonment, but the threat must be direct, definite and be repeated or reinforced if its effectiveness has expired with the passage of time.

This position was questioned by an opinion rendered by a Judge Advocate General of Civil War times.7 He stated that Union prisoners who served the Confederacy because suffering and privation endangered their lives were not to be considered deserters. However, Gillars v. United States8 arising out of the Second World War reaffirmed the original doctrine which requires a direct, immediate and constant threat. The defendant in that case was convicted of treason for participating in psychological warfare against the United States by appearing on propaganda radio programs for the Nazis. The court in that case held that the threat of death or great bodily harm must be immediate and constant. Threats made to other prisoners and measures taken against them, as well as her fear of being sent to a concentration camp, were held to be insufficient. Another similar case is that of Iva Ikuko D’Quino v. United States.9 The defendant was convicted of treason for her part in the Japanese broadcasts to the American troops which attempted to undermine their morale. The court held that knowledge of atrocities committed upon un-cooperative prisoners by her captors was insufficient as a defense.

"... this coercion or compulsion that will excuse a criminal act must be present, immediate and impending, and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done."10

The same rule is applied in non-military cases.11 In Shannon v.

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4 Id. at 410.
5 15 Am. Jur., Criminal Law §318 (1938). The definition from the Vigol case is prefaced by the remark: "Even the crime of treason, if committed under the fear of death, may, it seems be excused."
6 1 Burdick, Crime §199 (1946).
8 War Department Office of the Judge Advocate General, A Digest of Opinion of the Judge Advocates General of the Army 1076-1077 (1912).
9 182 F. 2d 962 (D.C. Cir. 1950).
10 192 F. 2d 338 (9th Cir. 1951).
11 Id. at 358.
12 1 Wharton, Criminal Law §384 (12th ed. 1932).
the defendants were convicted for conspiracy to kidnap and hold for ransom. The kidnappers brought their victim to the house of the defendants and at gunpoint forced the defendants to permit them to use it as a hideout from the police for themselves and their victim. The court found that the kidnappers were not present all the time, and that there would have been an opportunity to call the police. Therefore since the threat was not immediate during the commission of some of the overt acts, the defense of duress would not lie. The courts are extremely strict in their requirement of immediacy in the threat before the defense will be available.¹³

The rule may seem harsh. The distinction between an immediate threat and a mediate one appears, at first, to be an unduly academic rule by which to judge the actions of a prisoner suffering from physical exhaustion and mental anguish. He may be validly aware that his life is in jeopardy even though the threat may not have been direct or immediate but delivered by innuendo or by the obvious attitude of the captors coupled with the knowledge of the fate of other prisoners. But the rule is nevertheless sound. If any resistance of our troops is to be attained when they are captured and taken as prisoners of war it must be required that resistance be up to the very face of death. If anything less were required the necessity of resisting would be eliminated altogether. If the defense of duress could be based on the threat of mediate death, as defense contended, the mere fact of being taken prisoner would in most cases satisfy that standard. As said by one court:

"We think that the citizen owing allegiance to the United States must manifest a determination to resist commands and orders until such time as he is faced with the alternative of immediate injury or death. Were any other rule to be applied, traitors in the enemy country would by that fact alone be shielded from any requirement of resistance. The person claiming the defense of coercion and duress must be the person whose resistance has brought him to the last ditch."¹⁴

It seems sound to retain the strict rule in determining guilt, and to consider all lesser circumstances in determining an appropriate sentence.

David A. Schuenke

Conditional Sales: Date of Compulsory Resale When Goods Replevied.—Plaintiff sold two pieces of farm machinery to the defendants, the agreement being in the form of a conditional sales contract. The vendees refused to make any payments on the $1,000.00 unpaid

¹² 76 F.2d 490 (10th Cir. 1935).
¹³ See R.I. Recreation Center Inc. v. Aetna Casualty and Surety Co., 177 F.2d 603 (1st Cir. 1949).
¹⁴ 192 F.2d 338, at 359 (9th Cir. 1951).