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Codification of the "Special Forces Exception"

Jeffrey F. Addicott

generally is not punishable as an offense under military law unless it occurs "under such conditions of publicity or scandal as to enter that area of conduct given over to the police responsibility of the military establishment."[79] The court found that the allegation of "wrongful intercourse" in the questioned specification failed to aver misconduct of sufficient notoriety to satisfy this standard.

The court then examined the specification to see if it was sufficient to allege the offense of adultery. In doing so, it reiterated that one element of adultery is that "the accused or the other person was married to someone else."[80] The court then stated that, "as an allegation of 'adultery,' [the specification] lack[ed] utterly the essence of the offense—that at least one of the parties [was] married to another person."[81] Without this allegation, the court stated, "the essence of criminality was not even implied."[82] Accordingly, it held that the specification was fatally defective.

The court distinguished three decisions that had appeared to ease the strict rules that govern military pleading.[83] The court stated that "[a]lthough each of the specifications in [these] . . . three cases was defective to some degree, all of them clearly alleged that the accused had committed a particular offense under the UCMJ, and the time, place, and nature of the offense were clearly implied in the language of the *charge* and *specification*."[84] Because the specification in *King* was drawn under UCMJ article 134, neither the charge, nor the language of the questioned specification, was helpful in determining whether the Government properly stated an offense.

The Government easily could have avoided a reversal in *King* had the trial counsel taken more care to follow the form specifications set out in the Manual for Courts-Martial.[85] As the Court of Military Appeals noted in *United States v. Bryant*,

> it is beyond . . . understanding that a . . . [prosecutor] would undertake to draw . . . [a charge] without having before him [or her] the statute which defines the offense, or, having the statute before him [or her,] could be so careless as to omit allegations meeting the statutory definition of one of the essential elements of the crime.[86]

Major Hunter.

International Law Note

Codification of the "Special Forces Exception"

For the past eight years, Army Special Forces units have conducted training and operations with friendly foreign forces outside the continental United States. The Army has obtained funding for these operations under what has been termed the "special forces exception"—a phrase coined from the language of a 1986 Comptroller General decision concerning Department of Defense (DOD) activities in Honduras.[87] Although this 1986 General Accounting Office (GAO) opinion held that conventional United States forces may not use operation and maintenance appropriation funds during foreign exercises to provide more than basic familiarization and interoperability training to host nation forces, it specifically recognized that the unique mission of the Special Forces mandated an exception to this rule. The opinion stated,

> Training of indigenous military units is a fundamental role of the Special Forces; such training is provided as a means of utilizing indigenous forces as resources to achieve specific U.S. operational goals. To require that the host country utilize scarce security assistance funds for the limited training thereby imparted would be both impractical and unfair.[88]

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[79] *Id.* at 96.

[80] *Id.*

[81] *Id.* at 97.

[82] *Id.*

[83] *See* United States v. Bryant, 30 M.J. 72 (C.M.A. 1990) (holding that the omission of "wrongful" from specification for conspiracy to distribute controlled substances was not a fatal defect); United States v. Breechen, 27 M.J. 67 (C.M.A. 1988) (holding that the allegation of "wrongfulness" in connection with distribution of LSD was implicit in the specification as a whole); United States v. Watkins, 21 M.J. 208 (C.M.A. 1986) (holding that the omission of "without authority" from a specification of absence without leave was not fatal).

[84] *King*, 34 M.J. at 97.

[85] *See, e.g.*, Manual for Courts-Martial, United States, 1984, Part IV, para. 62*f*.

[86] *Bryant*, 30 M.J. at 74.

[87] *See* Ms. Comp. Gen. Dec. B-213137 (Jan. 30, 1986).

[88] *Id.* at 26.

Without this exception, a Special Forces unit could not fulfill a significant part of its mission—the training of indigenous forces. In recognizing the Special Forces exception, the GAO advised Congress to "consider clarifying the role of the Special Forces by specifically authorizing them to conduct (and use operational funds for) limited training of foreign forces during the course of field operations (actual or training exercises), for purposes of ensuring indigenous support of U.S. operations."[89]

With the passage of the National Defense Authorization Act for Fiscal Years 1992-1993,[90] Congress finally has codified the Special Forces exception.[91] The new statute adopts the restrictive tone of the GAO opinion, providing expressly that the primary purpose of operations funded under the statute must be "to train the special operations forces of the combatant command."[92] Subject to this guiding principle, the commander of Special Operations Command and the commanders of any other unified or specified combatant commands may draw on the DOD's operation and maintenance funds to pay, or authorize payment for, any of the following expenses:

> (1) Expenses of training special operations forces assigned to that command in conjunction with training, and training with, armed forces and other security forces of a friendly foreign country.
>
> (2) Expenses of deploying such special operations forces for that training.
>
> (3) In the case of training in conjunction with a friendly developing country, the incremental expenses incurred by that country as the direct result of such training.[93]

The definition of "special operations forces" includes civil affairs forces and psychological operations forces.[94] Detailed reporting requirements also are set out in the statute.

Operational law judge advocates must study the language of this statute carefully and must brief commanders and other operators meticulously. For additional information, judge advocates should contact the Center for Law and Military Operations (CLAMO), International Law Division, The Judge Advocate General's School, Charlottesville, VA 22903-1781. Major Addicott.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Note

State-by-State Analysis of the Divisibility of Military Retired Pay[95]

On 30 May 1989, the Supreme Court announced its decision in *Mansell v. Mansell*.[96] In *Mansell*, the Court ruled that states cannot divide the value of Department of Veterans Affairs (VA) disability benefits that are received in lieu of military retired pay.[97] It also suggested that, "under the . . . plain and precise language [of the Uniformed Services Former Spouses' Protection Act (USFSPA)], state courts have been granted the authority to treat disposable retirement pay as [divisible] community property; [but] they have not been granted the authority to treat [gross] . . . retired pay as community property."[98] *Mansell* overruled case law in a number of states—a fact that legal assistance attorneys should keep in mind when using the following materials.

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[89] *Id.* at 27.

[90] National Defense Authorization Act 1992-1993, Pub. L. No. 102-190, 105 Stat. 1290 (1991).

[91] *See id.* § 1052(a), 105 Stat. at 1471 (codified at 10 U.S.C. § 2011).

[92] *See* 10 U.S.C.A. § 2011(b) (West 1992).

[93] *Id.* § 2011(a).

[94] *Id.* § 2011(d)(1).

[95] This note updates TJAGSA Practice Note, *State-by-State Analysis of the Divisibility of Military Retired Pay*, The Army Lawyer, May 1991, at 48.

[96] 490 U.S. 581 (1989).

[97] *Id.* at 594.

[98] *Id.* at 589 (citing 10 U.S.C. § 1408(a)(4) (1988)).