



To Do or Not to Do

IT IS SAID THAT IN 1860, A PRUSSIAN FIELD MARSHAL REPRIMANDED A MAJOR FOR AN OPERATIONAL LAPSE.

MAJ: "I HAVE OBEYED MY SUPERIOR."

FM: "THE KING MADE YOU A MAJOR BECAUSE THE KING BELIEVED YOU KNEW WHEN TO DISOBEY."




ACT I.



ARTICLES OF WAR—1775

ART. 5. ANY OFFICER OR SOLDIER WHO SHALL DISOBEY ANY *LAWFUL* COMMAND OF HIS SUPERIOR OFFICER, SHALL SUFFER[.]



UCMJ

Whoever

(ART. 90) DISOBEYS A “LAWFUL COMMAND”
OF AN OFFICER.

(ART. 91) DISOBEYS A “LAWFUL ORDER” OF A
WARRANT, NCO, PO.

(ART. 92) DISOBEYS “ANY LAWFUL GENERAL
ORDER,” OR “OTHER LAWFUL ORDER.”

Shall suffer the lash.



BASIC PRINCIPLES.

(1) DUTY OF OBEDIENCE.

(2) PRESUMPTION OF LEGALITY.

(3) DUTY TO DISOBEY.

(4) CONSEQUENCES?

(5) DEFENSES?



WINTHROP ARGUES.

“THE WORD “LAWFUL” IS INDEED SURPLUSAGE, AND WOULD HAVE BEEN IMPLIED FROM THE WORD “COMMAND” ALONE, BUT, BEING USED, IT GOES TO POINT THE CONCLUSION AFFIRMED BY ALL THE AUTHORITIES THAT A COMMAND *NOT* LAWFUL MAY BE DISOBEYED, NO MATTER FROM WHAT SOURCE IT PROCEEDS. BUT **TO JUSTIFY AN INFERIOR IN DISOBEYING THE ORDER AS ILLEGAL, THE CASE MUST BE AN EXTREME ONE AND THE ILLEGALITY NOT DOUBTFUL.**”

WINTHROP'S MILITARY LAW & PRECEDENTS (2D ED. 1912) AT 575.

“As ancient as the laws of war are, soldiers charged with violating them have consistently raised obedience to orders as their defense. One of the first recorded uses of the defense was in 1474, when Peter von Hagenbach, Governor of Breisach, unsuccessfully raised it as a defense to charges of murder, arson, and rape. ' Similarly unsuccessful 130 years later was Captain Axtell, the guard commander at the execution of Charles I.

Discussed in Gary D. Solis, [Obedience of Orders and the Law of War: Judicial Application in American Forums](#). 15 AM. U. INT'L L. REV. 481, 485 (1999).

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is *one which a man of ordinary sense and understanding would, under the circumstances, known to be unlawful, or if the order in question is actually known to the accused to be unlawful.*

United States v. Calley.

It is not a defense for appellant to claim that the order is illegal based on his [personal scruples and own] interpretation of applicable law. (Conscience, personal feelings, disagreement not a defense.)

United States v. New.

**ARTICLES OF WAR; CONTINENTAL CONGRESS 20
SEPTEMBER 1776.**

“ALL WANTON VIOLENCE, BLAH, BLAH, BLAH,” OR “DESTRUCTION OF PROPERTY NOT COMMANDED BY THE AUTHORIZED OFFICER,” AND ALL OTHER REALLY BAD THINGS IS PROHIBITED AND IF YOU DO THAT YOU WILL SUFFER.

A SOLDIER, OFFICER OR PRIVATE, IN THE ACT OF COMMITTING SUCH VIOLENCE, AND DISOBEYING A SUPERIOR ORDERING HIM TO ABSTAIN FROM IT, MAY BE LAWFULLY KILLED ON THE SPOT BY SUCH SUPERIOR.

Huum, not limited to the lash here.

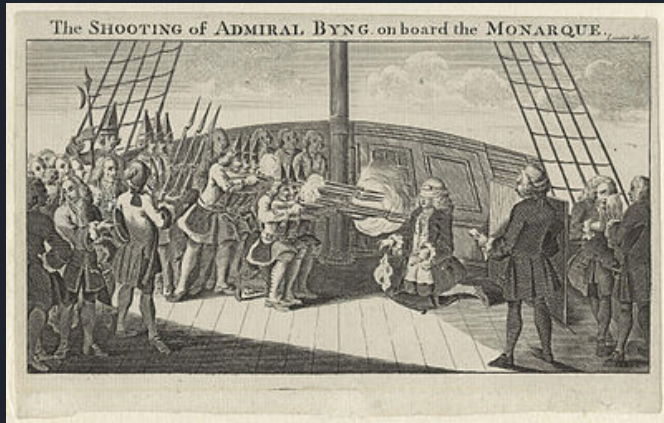


TO NOT FOLLOW ORDERS CAN BE BAD.

TO FOLLOW ORDERS CAN BE BAD.

AAAAGH!





Admiral John Byng.

Arguably punished for the failures of Parliament and the Admiralty—scapegoated.

“In this country, it is good to kill an admiral from time to time to encourage the others”

(Dans ce pays-ci, il est bon de tuer de temps en temps un amiral *pour encourager les autres*).

EARLIEST REJECTION OF THE “OBEDIENCE TO ORDERS” DEFENSE?

ENS MAXWELL, *ACTING UNDER ORDERS*, KILLED A FRENCH PRISONER HELD IN A SCOTTISH JAIL. THE SCOTTISH COURT REJECTED THE PLEA OF SUPERIOR ORDERS:

IF AN OFFICER WERE TO COMMAND A SOLDIER TO GO OUT TO THE STREET AND TO KILL YOU OR ME, HE WOULD NOT BE BOUND TO OBEY. IT MUST BE A LEGAL ORDER GIVEN WITH REFERENCE TO THE CIRCUMSTANCES IN WHICH HE IS PLACED; AND THUS EVERY OFFICER HAS A DISCRETION TO DISOBEY ORDERS AGAINST THE KNOWN LAWS OF THE LAND.

Discussed in ALAN M. WILNER, [SUPERIOR ORDERS AS A DEFENSE TO VIOLATIONS OF INTERNATIONAL CRIMINAL LAW](#).

26 MARYLAND L. REV. 127, 130 (1966).

CONTRAST WITH *REGINA V. SMITH*. A BOER WAR SOLDIER, ON ORDERS FROM HIS SUPERIOR OFFICER, KILLED A NATIVE FOR FAILING TO PERFORM SOME MENIAL UPON ACQUITTAL, THE COURT STATED:

“IT IS A SAFE RULE TO LAY DOWN THAT IF A SOLDIER HONESTLY BELIEVES HE IS DOING HIS DUTY IN OBEYING COMMANDS OF HIS SUPERIOR, AND IF THE ORDERS ARE *NOT SO MANIFESTLY ILLEGAL THAT HE MUST OR OUGHT TO HAVE KNOWN THAT THEY WERE UNLAWFUL*, THE PRIVATE SOLDIER WOULD BE PROTECTED BY THE ORDERS OF HIS SUPERIOR OFFICER.”

A BACKWARDS WAY OF STATING THE PRINCIPLE OF MANIFESTLY ILLEGAL ORDERS SHOULD NOT BE OBEYED.

CAPTAIN LITTLE AND THE BARREME

Little v. Le Barreme, 6 U.S. 170 (1804)

A 1799 Act of Congress authorized the seizure on the high seas of vessels of the United States bound or sailing to any port or place of the French Republic. This act did not authorize the capture of a vessel sailing *from* a French port. President Adams had an order issued based on the statute that greatly expanded the Congressional mandate. Captain Little captured an American vessel, leaving a “French” port IAW the order but in violation of the statute. Captain Little had to pay the modern equivalent of over \$165,000 because he obeyed the unlawful order. (Phew! Money not your life.)

See Gary D. Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*. 15 AM. U. INT’L L. REV. 481, 485 (1999).

It is alleged he sat as a Member in the first U.S. Navy court-martial. And he was otherwise a successful officer.
[https://en.wikipedia.org/wiki/George_Little_\(naval_officer\)](https://en.wikipedia.org/wiki/George_Little_(naval_officer))

MITCHELL V. HARMONY

54 U.S. 115 (1851)

A Mexican War civil suit. A U.S. Army officer in Mexico illegally seized the goods of a trader in occupied territory. Mitchell was sued for the price of the goods. He claimed to have *acted under orders of a superior officer*. The court rejected this defense. Chief Justice Taney, USSC “It can never be maintained that a military officer can justify himself for doing an *unlawful* act by producing the order of his superior. The order may *palliate*, but it cannot justify” the deed.

The Rome Statute (ICC)

ARTICLE 33: THE FACT THAT A CRIME WITHIN THE JURISDICTION OF THE COURT HAS BEEN COMMITTED BY A PERSON *PURSUANT TO AN ORDER OF A GOV'T. OR OF A SUPERIOR*, WHETHER MILITARY OR CIVILIAN, SHALL *NOT* RELIEVE THAT PERSON OF CRIMINAL RESPONSIBILITY UNLESS:

(A) THE PERSON WAS UNDER A LEGAL OBLIGATION TO OBEY ORDERS OF THE GOV'T OR THE SUPERIOR IN QUESTION;

(B) THE PERSON DID NOT KNOW THAT THE ORDER WAS UNLAWFUL; AND

(C) THE ORDER WAS NOT MANIFESTLY UNLAWFUL.



ACT II.



Sex cases

- All too common.
 - Most are she said / he said w/o witnesses to the sex acts.
 - Acquaintance (a shipmate, co-worker, or spouse).
 - Witnesses for events before and after the acts.
 - Social media.
 - Alcohol.
- Why lie or misunderstand?
 - Credibility.

**Thanks to Luke Alter,
Student at FLA. State Coll. of Law,
for his contribution.**



ACT III.



CBDR

I THINK OUR COURSE IS ON A CLOSING BEARING WITH DECREASING RANGE WHEN IT COMES TO WHO “COMMANDS” IN COURTS-MARTIAL ACTIONS.

I can remember this being talked about as I was doing my first courts-martial in 1980—but not as much or with such interest as over the last six-plus years.

DO WE KEEP THE SAME SYSTEM OR REPLACE IT COMPLETELY?

GOOD ORDER AND DISCIPLINE.

1. Required for commander to maintain good order and discipline.

or

**2. Referral to a Court-Martial Prosecuting Authority:
is still supportive of good order and discipline.**

How?

1. A new Military Justice Act or in the NDAA.

2. Executive Order using Presidential authority to:

a. Create a court-martial convening authority, and

b. Withhold jurisdiction over “major” crimes.

See Article 22, UCMJ; R.C.M. 504(b), R.C.M. 306(a), and R.C.M. 401(a)

MCIO
Investigation

Trial Counsel
&
SJA
&
SPCMCA

ARTICLE 32

COMMANDER
GCMCA
REFERS

GCMCA
APPOINTS
MEMBERS
APPROVES
EXPERTS
PTA

MCIO Investigation

