

aboard the *Leopard* and impressed into service in the British Navy. There he served for five years and nine days before he finally was repatriated. Years later his widow sued for his pay and rations as a member of the United States Navy during the period he had been held by the British. The Court of Claims ruled that, even though we had not been at war in 1807, the *Chesapeake* had nevertheless been "taken by an enemy," and that Straughan's widow was entitled to the United States Navy pay and allowances that had accrued while he was serving with the British. *Straughan v. United States*, 1 Ct. Cl. 324.¹⁵

In October, 1863, a lieutenant in the Union Army named Henry Jones was taken prisoner by Confederate guerrillas near Elk Run, Virginia. Jones was confined in Libby Prison until March 1, 1865, when he was exchanged and returned to the Union lines. Upon his return he found that he had been administratively dismissed from the service in November, 1863, because he had been in disobedience of orders at the time of his capture. When the Army for that reason refused his demand for pay and allowances, he filed suit in the Court of Claims. The court entered judgment in his favor, stating that "[t]he contrary would be to hold that an executive department could annul and defy an act of Congress at its pleasure." *Jones v. United States*, 4 Ct. Cl. 197, 203.

It is against this background that we turn to the Government's contention that the Missing Persons Act authorized the Army to refuse to pay the petitioners their statutory pay and allowances in this case. The provisions of the Act which the Government deems pertinent

¹⁵ The case was decided under a statute specifically applicable to naval personnel, originally enacted in 1800, 2 Stat. 45, now 37 U. S. C. § 244. See n. 32, *infra*.

are set out in the margin.¹⁶ Originally enacted in 1942 as temporary legislation,¹⁷ the Act was amended and re-enacted several times,¹⁸ and finally was made permanent in 1957.¹⁹ So far as relevant here, this legislation provides that any person in active service in the Army "who is officially determined to be absent in a status of . . . captured by a hostile force" is entitled to pay and allowances; that "[t]here shall be no entitlement to pay

¹⁶ "§ 1001. Definitions.

"For the purpose of this Act [sections 1001-1012 and 1013-1016 of this Appendix]—

"(b) the term 'active service' means active service in the Army, Navy, Marine Corps, and Coast Guard of the United States, including active Federal service performed by personnel of the retired and reserve components of these forces, the Coast and Geodetic Survey, the Public Health Service, and active Federal service performed by the civilian officers and employees defined in paragraph (a)(3) above; . . ." 50 U. S. C. App. § 1001.

"§ 1002. Missing interned or captive persons. (a) Continuance of pay and allowances.

"Any person who is in the active service . . . and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same . . . pay [and allowances] . . . to which he was entitled at the beginning of such period of absence or may become entitled thereafter . . . and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]. Such entitlement to pay and allowances shall not terminate upon the expiration of a term of service during absence and, in case of death during absence, shall not terminate earlier than the dates herein prescribed. There shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be

[Notes 17-19 are on p. 407]

and allowances for any period during which such person may be officially determined absent from his post of duty without authority"; that the Secretary of the Army or his designated subordinate shall have authority to make all determinations necessary in the administration of the Act, and for purposes of the Act determinations so made as to any status dealt with by the Act shall be conclusive.

We are asked first to hold that "[s]ince the Missing Persons Act is later in time, is comprehensive in scope, and includes within its provisions the whole subject mat-

indebted to the Government for any payments from amounts credited to his account for such period. . . ." 50 U. S. C. App. § 1002.

"§ 1009. Determinations by department heads or designees; conclusiveness relative to status of personnel, payments, or death.

"(a) The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001-1012 and 1013-1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. . . . Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001-1012 and 1013-1016 of this Appendix], to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: . . . When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. . . ." 50 U. S. C. App. § 1009.

¹⁷ Act of March 7, 1942, 56 Stat. 143.

¹⁸ Act of December 24, 1942, 56 Stat. 1092; Act of July 1, 1944, 58 Stat. 679; § 4 (e) of Selective Service Act of 1948, 62 Stat. 608; Act of July 3, 1952, 66 Stat. 330, 331; Act of April 4, 1953, 67 Stat. 20-21; Act of January 30, 1954, 68 Stat. 7; Act of June 30, 1955, 69 Stat. 238; Act of July 20, 1956, 70 Stat. 595; Act of August 7, 1957, 71 Stat. 341.

¹⁹ Act of August 29, 1957, 71 Stat. 491.

ter of R.S. 1288 [the statute upon which the petitioners rely], any inconsistency or repugnancy between the two statutes should be resolved in favor of the Missing Persons Act." This step having been taken, we are asked to decide that the petitioners, because of their behavior after their capture, were no longer in the "active service in the Army . . . of the United States," and that they were therefore not covered by the Act. It is also suggested, alternatively, that the Secretary of the Army might have determined that each of the petitioners after capture was "absent from his post of duty without authority," and, therefore, not entitled to pay and allowances under the Act. We can find no support for these contentions in the language of the statute, in its legislative history, or in the Secretary's administrative determination.

The Missing Persons Act was a response to unprecedented personnel problems experienced by the Armed Forces in the early months after our entry into the Second World War. Originally proposed by the Navy Department, the legislation was amended on the floor of the House to cover the other services. As the Committee Reports make clear, the primary purpose of the legislation was to alleviate financial hardship suffered by the dependents of servicemen reported as missing.²⁰

²⁰ "In general, the purposes of this bill are to provide authorization for the continued payment or credit in the accounts, of the pay and allowances of missing persons for 1 year following the date of commencement of absence from their posts of duty or until such persons have been officially declared dead [In December, 1942, the statute was amended so as to permit a department head to continue personnel in a missing status for an indefinite period. 56 Stat. 1092.]; the continued payment for the same period of the allotments for the support of dependents and for the payment of insurance premiums, and for regular monthly payments to the dependents of missing persons, in the same manner in which allotments are paid, in those instances in which the missing persons had neglected to

The Government's alternative argument seems, as a matter of statutory construction, equally invalid. The legislative history discloses that the provision denying pay to a person officially determined to have been "absent from his post of duty without authority" was enacted to cover the case of a person found to have been "missing" in the first place only by reason of such unauthorized absence.²⁵ Moreover, desertion and absence without leave are technically defined offenses. 10 U. S. C. § 885, 10 U. S. C. § 886; see Manual for Courts-Martial, United States, p. 315 (1951). It is open to serious question whether the conduct of the petitioners after their capture could conceivably have been determined to be tantamount either to desertion or absence without leave. See Avins, *Law of AWOL*, p. 167 (1957); Snedeker, *Military Justice under the Uniform Code*, p. 562 (1953).

These are questions which we need not, however, pursue. We need not decide in this case that the Secretary of the Army was wholly without power under the statute to determine administratively that the petitioners after their capture were no longer in active service, or that they were absent from their posts of duty. Nor need we finally decide whether either such determination by the Secretary would have been valid as a matter of law. The simple fact is that no such administrative determination has ever been made. The only reason the Army ever advanced for refusing to pay the petitioners was its determination that they had "advocated, or were members of an organization which advocated, . . . the overthrow of the United States Government by force or violence."²⁶ That determination has now been totally abandoned. The Army has never even purported to determine that the

²⁵ See H. R. Rep. No. 1680, 77th Cong., 2d Sess., p. 5; Hearings before House Committee on Naval Affairs on H. R. 4405, 78th Cong., 2d Sess., p. 2316.

²⁶ See note 5, *supra*.

petitioners were not in active service or that they were absent from their posts of duty.²⁷ The Army cannot rely upon something that never happened, upon an administrative determination that was never made, even if it be assumed that such a determination would have been permissible under the statute and supported by the facts.²⁸

²⁷ Nor has the Army ever purported to determine that the petitioners were not in "captivity" or "in the actual service of the United States" within the meaning of 37 U. S. C. § 242.

²⁸ The record of a 1954 hearing before the House Armed Services Committee on a bill to extend the life of the Missing Persons Act indicates that some thought was being given at that time to the possibility of an administrative determination that the petitioners were absent from their posts of duty:

"Mr. Bates. General, what is the pay status of prisoners who have refused repatriation?"

"General Powell. Those prisoners, sir, are carried in pay status. In negotiating the armistice we agreed that until this matter was settled they would be carried as prisoners of war.

"Mr. Kilday. When does that stop?"

"Mr. Bates. Does that stop next week?"

"General Powell. The method of stopping the pay and allowances, allotments and status of military personnel of those 21 prisoners is a matter to be decided by the Secretary of Defense for all services involved. He has announced no decision.

"Mr. Bates. Aren't they absent without leave?"

"General Powell. No, sir.

"Mr. Bates. What is it?"

"General Powell. In the armistice agreement, the United States agreed to carry them as prisoners of war until the matter was settled.

"Mr. Bates. I thought there was also an understanding that they would be considered a. w. o. l. as of a certain date?"

"General Powell. That is a matter still to be decided by the Secretary of Defense.

"Mr. Bates. Or deserters, you know.

"General Powell. The Secretary of Defense is deciding for all services.

"The Chairman. Call the roll. It is not necessary to call the roll. There is no objection, is there?"

"(Chorus of 'No.')

[*Note 28 continued on p. 414*]

See *Service v. Dulles*, 354 U. S. 363; *Vitarelli v. Seaton*, 359 U. S. 535. For these reasons we hold that the petitioners were entitled under the applicable statutes to the pay and allowances that accrued during their detention as prisoners of war.

Throughout these proceedings no distinction has been made between the petitioners' pay rights while they were prisoners and their rights after the Korean Armistice when they voluntarily declined repatriation and went to Communist China. Since both the Army and the Court of Claims denied the petitioners' claims entirely, no sepa-

"Mr. Kilday. I would like it understood that they are going to be cut off as soon as you can.

"General Powell. Sir, the Secretary of Defense must make a decision, including psychological [*sic*] factors, individual rights, the law involved, and national policy.

"Mr. Vinson. That is right.

"General Powell. He has not as yet announced such a decision to us.

"Mr. Cunningham. Should the pay and allotments, benefits to the members of the family, ever be cut off?

"The Chairman. Sure.

"Mr. Van Zandt. Oh, yes.

"Mr. Cunningham. Why so? They are not to blame for this.

"Mr. Bishop. No, they are not.

"Mr. Vinson. Well, if a man is absent without leave—

"Mr. Cunningham. A man has children or wife and he is over there in Korea and decided to stay with the Communists. Why should the children be punished?

"The Chairman. Wait, one at a time. The reporter can't get it.

"Mr. Cunningham. I think it is a good question. The pay for the individual: he should never have that, and his citizenship. But here is a woman from Minnesota, goes over there and pleads with her son and went as far as Tokyo. Now that mother needs an allotment as that boy's dependent. Why should she be punished because the boy stayed over there? I think there are a lot of things to be considered; not just emotion.

"Mr. Kilday. That is inherent. When a man is court-martialed—

"The Chairman. Without objection, the bill is favorably reported."

Hearings before House Committee on Armed Services on H. R. 7209, 83d Cong., 2d Sess., pp. 3071-3072.

rate consideration was given to the petitioners' status after their release as prisoners of war until the date of their administrative discharges. Nor did the petitioners in this Court address themselves to the question of the petitioners' rights to pay during that interval. Yet, it is evident that the petitioners' status during that period might be governed by considerations different from those which have been discussed. Other statutory provisions and regulations would come into play. Accordingly we express no view as to the petitioners' pay rights for the period between the Korean Armistice and their administrative discharges, leaving that question to be fully canvassed in the Court of Claims, to which in any event this case must be remanded for computation of the judgments.

The disclosure of grave misconduct by numbers of servicemen captured in Korea was a sad aftermath of the hostilities there. The consternation and self-searching which followed upon that disclosure are still fresh in the memories of many thoughtful Americans.²⁹ The problem is not a new one.³⁰ Whether the solution to it lies alone

²⁹ See Report by the Secretary of Defense's Advisory Committee on Prisoners of War (1955).

³⁰ In 1333 John Culwin was charged with having sworn allegiance to his Scottish captors. 1 Hale, *Historia Placitorum Coronæ* 167-168 (1736). The earliest reported American case of prisoner of war misconduct appears to be *Respublica v. McCarty*, 2 Dall. 86 (Supreme Court of Pennsylvania, 1781). During the Civil War thousands of captives on each side defected to the enemy. See H. R. Rep. No. 45, 40th Cong., 3d Sess., pp. 229, 742-777 (1869); Report by the Secretary of Defense's Advisory Committee on Prisoners of War, p. 51 (1955). Two treason trials grew out of prisoner of war misconduct during World War II. *United States v. Provo*, 124 F. Supp. 185, rev'd, 215 F. 2d 531, second indictment dismissed, 17 F. R. D 183, aff'd, 350 U. S. 857; *United States ex rel. Hirshberg v. Malanaphy*, 73 F. Supp. 990, rev'd, 168 F. 2d 503, rev'd *sub nom. United States ex rel. Hirshberg v. Cooke*, 336 U. S. 210. More than forty British prisoners of war were brought to trial for misconduct. See note, 56 Col. L. Rev. 709-721 (1956).

in subsequent prosecution and punishment is not for us to inquire.³¹ Congress may someday provide that members of the Army who fail to live up to a specified code of conduct as prisoners of war shall forfeit their pay and allowances.³² Today we hold only that the Army did not lawfully impose that sanction in this case.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

³¹ Upon their return to the United States in July 1955, the petitioners were confined by the United States Army in San Francisco, California, to await trial by general court-martial for violation of Article 104 of the Uniform Code of Military Justice. In November of that year they were released from confinement by virtue of writs of habeas corpus issued by a Federal District Court, on the authority of *Toth v. Quarles*, 350 U. S. 11. There have been several court-martial prosecutions growing out of alleged misconduct by Army prisoners of war in Korea. See *United States v. Dickenson*, 17 C. M. R. 438, aff'd, 6 U. S. C. M. A. 438, 20 C. M. R. 154; *United States v. Floyd*, 18 C. M. R. 362; *United States v. Batchelor*, 19 C. M. R. 452, aff'd, 7 U. S. C. M. A. 354, 22 C. M. R. 144; *United States v. Olson*, 20 C. M. R. 461, aff'd, 7 U. S. C. M. A. 460, 22 C. M. R. 250; *United States v. Gallagher*, 21 C. M. R. 435; *United States v. Bayes*, 22 C. M. R. 487; *United States v. Alley*, 19 U. S. C. M. A. 559, 25 C. M. R. 63; *United States v. Fleming*, 19 C. M. R. 438. See the discussion of these cases in Prugh, *Justice for All RECAP-K'S*, Army Combat Forces Journal, November 1955, p. 15; Note, 56 Col. L. Rev. 709.

³² A statute relating to the right to pay of members of the United States Navy who are taken prisoner does appear to require a standard of conduct after capture:

"The pay and emoluments of the officers and men of any vessel of the United States taken by an enemy who shall appear, by the sentence of a court-martial or otherwise, to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid to them until their exchange, discharge, or death." 37 U. S. C. § 244.

No reported case has been found holding that this standard of conduct was not met. Cf. *Straughan v. United States*, 1 Ct. Cl. 324, discussed in text, *supra*, p. 404.