

Charge of carnal knowledge is not the wife of the accused will be required in prosecutions under this Article when the Uniform Code of Military Justice becomes effective. Under present law proof that an unqualified state of marriage existed at the time of the act complained of would be a complete defense. It is therefore recommended that Specifications in future cases include the words "not his wife" in the appropriate place and that evidence thereof be presented.

9. Accused is 22 years old, is married, and has two children, one of whom is by a former marriage. He enlisted 29 August 1947 for a period of three years after prior service from 18 January 1946 to 22 March 1946. There is no record of combat experience. The character of his military service is rated as "Excellent". There is evidence of

two previous convictions by court-martial, the first for larceny of a Government-owned pistol for which he was tried by special court-martial, and the second for being disorderly in station for which he was tried by summary court-martial. There is no evidence of a civilian criminal record.

10. The Court was legally constituted and had jurisdiction of the accused and the offense charged. No errors injuriously affecting the substantial rights of the accused were committed. The Board of Review holds that the record of trial is legally sufficient to support the findings and the sentence. A bad conduct discharge is authorized upon conviction of the offense charged.

HANFORD (on leave), PERRY, and AVERBUCK, Judge Advocates. 16 June 1950.

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## UNITED STATES

v.

Corporal GUSTAV ADOLPH MUELLER (Alias JOHN S. WATSON),  
AF 16276444, 7001st Air Intelligence Service Squadron

ACM 2878

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### **Attempt to deliver classified information to a foreign nation — Specification — sufficiency.**

1. A Specification alleging that the accused did at a certain date and place "with reason to believe that it was to be used to the advantage of a foreign nation, wrongfully attempt to deliver to a representative of said foreign nation, certain classified writings and information relating to the National Defense", and identifying generally the particular documents in question, sufficiently charged an offense under AW 96, regardless of where the wrongful act or omission occurred.

### **Corresponding with foreign nation — Specification — sufficiency.**

2. A Specification alleging that the accused did at a certain date and place, and "without authority of the United States, commence correspondence with an agency of a foreign government, said agency being the Soviet Embassy in Berne, Switzerland, with intent to defeat the measures of the United States", sufficiently charged an offense under AW 96.

### **Discreditable conduct — Specification — sufficiency.**

3. A Specification sufficiently stating an offense which is grossly conduct of a nature to bring discredit upon the service need not allege in so many words that the accused's conduct brought discredit upon the military service (CM 211420, McDonald, 10 BR 61, 63, 64). The words "to the discredit

of the military service" add no special connotation to a specification (ACM 1058, Starks, 2 CMR 183; CM 202601, 6 BR 171).

**Corresponding with or attempting to deliver classified writings to foreign nation — evidence — sufficiency.**

4. Evidence for the prosecution established that the accused sent a telegram to the Soviet Consulate in Berne, Switzerland, asking that someone contact him. Subsequently, two Counter Intelligence agents contacted the accused, and the accused, believing them Soviet agents, volunteered information as to the mission and operation of an Air Intelligence Squadron, which mission was classified as secret. He also volunteered to remove classified material from the European Command Intelligence School library. At a second meeting with the agents, the accused turned over to them the classified material described in the Specification. The accused in his testimony made a complete admission of all the essential elements in each Specification except that he maintained that he did not intend that the documents be used to the advantage of a foreign nation, and contended that he had no intent to defeat the measures of the United States. As to his actions of delivering the classified material to what he believed were Russian agents, he declared that it was his purpose to trap the agents and "to turn them in". He admitted sending the telegram to the Soviet Consulate, and stated that it was sent "on the spur of the moment, just for the sake of curiosity."

HELD: It is not essential that there be capability of success present in an attempt to commit a felony (People v. Bush, 4 Hill (NY) 133; Regina v. Brown, LR 24 QB Div (Eng) 357; Wharton's Criminal Law, Vol 1, § 224). While the accused's actions may perhaps be characterized as a rather juvenile and amateurish transaction which had little, if any, likelihood of success, it was nevertheless his mode of operation. In so far as the element of intent is concerned the testimony of the various witnesses reveals that the accused intended to deliver classified information to the Soviet Government. The record of trial presents ample basis upon which the Court was justified in rejecting the explanation of the accused as incredible and incapable of belief. The credibility of the witnesses and the weight and value to be given their testimony is within the province of the Court to determine, and the Board of Review, after exercise of its responsibilities under the provisions of AW 50(g), concurs with the Court as reflected in its findings based upon competent evidence.

**Attempt to deliver classified writings to foreign nation — evidence — classified nature.**

5. As proof of the allegation that the classified material was "to be used to the advantage of a foreign nation", the Court could consider the character of the information delivered to the fictitious agents in addition to the fact that the accused should have had reason to believe that the information disclosed could be used to the advantage of the Soviet Union (Gorin v. United States, 111 F2d 712, affd 312 US 19). What is or is not connected with the national defense is a question of fact for the determination of the jury (Gorin v. United States, supra). The Board has examined the classified matter in question and holds that the Court was justified in finding that the documents and the information related to the national defense.

**Entrapment — evidence — sufficiency.**

6. The testimony of the Counter Intelligence agents disclosed that al-

## BOARD OF REVIEW

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though they inquired as to the possibility of the accused removing classified material from the library of the European Command Intelligence School, it was the accused who volunteered to bring the documents to the agents to prove his ability to do so. The doctrine of entrapment is available to the defense where an agent of the government incites or lures an accused into doing a criminal act (Dig Op JAG, 1912-40, § 395(35); *Cain v. United States*, 19 F2d 472; *Butts v. United States*, 273 F 35; *Woo Wai v. United States*, 223 F 412; ACM 675, *Ambabo*, 2 CMR 646). The evidence introduced in behalf of the prosecution in this case was sufficient to justify the Court in concluding that the accused voluntarily obtained the documents and delivered them to the "agents", and that he was not lured, induced, tricked or entrapped into the commission of the offense (CM 236937, *Kent*, 23 BR 179, 184; *Sorrels v. United States*, 287 US 435; *United States v. Echols*, 253 F 862; CM 252103, *Selevitz*, 33 BR 383, 395; CM 239825, *Wohl*, 25 BR 279, 286, 287; CM 296630, *Siedentop*, 58 BR 191, 196; CM 319194, *Austin*, 68 BR 187, 193).

Trial by General Court-Martial, convened at Garmisch Military Post, Garmisch, Germany, on 14 and 15 April 1950. Dishonorable discharge, total forfeitures after date of order, and confinement at hard labor for five (5) years.

1. The record of trial in the case of the airman named above has been examined by the Board of Review and the Board submits this, its holding, to The Judge Advocate General, United States Air Force.

2. The accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 96th Article of War.

SPECIFICATION 1: In that Corporal Gustav A. Mueller, 7001 Air Intelligence Service Squadron, alias Corporal John S. Watson, 7001 Air Intelligence Service Squadron, did, at Garmisch, Germany, on or about 6 October 1949, with reason to believe that it was to be used to the advantage of a foreign nation, wrongfully attempt to deliver to a representative of said foreign nation certain classified writings and information relating to the National Defense, to-wit:

1. Interrogation SOP (Confidential Document)
2. Report of German Sabotage Activities (Secret Document)
3. Oral Explanation of Mission and Operation of 7001 Air Intelligence Service Squadron (Secret)

SPECIFICATION 2: In that Corporal Gustav A. Mueller, 7001 Air Intelligence Service Squadron, alias Corporal John S. Watson, 7001 Air Intelligence Service Squadron, did, at Garmisch, Germany, on or about 6 October 1949, without authority of the United States, commence correspondence with an agency of a foreign government, said agency being the Soviet Embassy in Berne, Switzerland, with intent to defeat the measures of the United States.

The Court granted two motions made by the prosecution to amend Specification 2 of the Charge under the provisions of Paragraph 70b, Manual for Courts-Martial, 1949. In the first instance, the Specification was amended to read "Soviet Consulate" in lieu of "Soviet Embassy", and in the second instance, "on or about 1 September 1949" in lieu of "6 October 1949". Both amendments were accomplished with the expressed waiver of objection by the defense. The accused pleaded not guilty and was found guilty as charged. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order

directing execution of the sentence, and to be confined at hard labor at such place as proper authority may direct for five years. The reviewing authority approved the sentence, designated a United States penitentiary, reformatory, or other such institution as the place of confinement, and committed the accused to the custody of The Attorney General, or his designated representative, for classification, treatment, and service of sentence of confinement. The record of trial was forwarded for action pursuant to Article of War 50e.

### 3. Evidence.

#### a. *For the prosecution:*

On or about 1 September 1949, the accused was a student in the European Command Intelligence School at Oberammergau, Germany, in the Russian language course. On this date, he was hitchhiking toward Garmisch, Germany, and in the small town of Ettal, he was given a ride by the occupants of a German taxi. At the time, the accused was in uniform, wearing an Air Force patch and corporal stripes. The accused entered the taxi and identified himself as "John S. Watson". One of the occupants of the taxi was Corporal Richard J. Young, who was also a student at the School, additionally assigned to the "13th MP CID" (R. 11, 12). The two airmen subsequently engaged in a conversation, the accused informing Corporal Young, among other things, that he was going to Garmisch to send a telegram to his grandparents in Berne, Switzerland (R. 11). Corporal Young then asked the accused if he would like to attend a movie after first sending his telegram, to which the accused responded, "Yes". They arrived in Garmisch about 1900 hours and went to the main Bahnhof to the telegraph office where accused wrote a telegram (R. 12). Young purchased two "cokes" and then returned to where the accused was writing his telegram and handed him a "coke", noticing that the telegram was addressed to the "Soviet Consulate" (R. 12, 15) in Berne, Switzerland. He became curious and looked at the contents of the telegram as much as he could without arousing suspicion,

recognizing "that he [accused] asked someone to meet him in Garmisch on or around the 10th of September" (R. 12). He also recalled that the telegram contained a request that the accused be contacted at the Bahnhof Hotel on or before the 10th and the fact that the accused signed the name, "John S. Watson" (R. 12; Pros. Ex. 1). The accused handed the telegram to the clerk at the desk and paid for its transmission. The telegram was actually dispatched to the Soviet Consulate in Berne, Switzerland (R. 16, 17, 21). After sending the telegram, the two airmen left and went to the Bahnhof Hotel (R. 12). Upon entering the hotel, the accused asked the desk clerk if there were any messages for "John S. Watson". The desk clerk replied that he had no messages, whereupon the accused wrote his name (Watson) on a slip of paper, gave it to the clerk and requested that messages be held for him (R. 13, 18). They then left the hotel and went across the street to the movie. While waiting in the theater for the show to start, the two airmen engaged in a conversation talking about "governments, different governments. We came into the communistic form of government, and more or less it seemed to me [Young] that the accused was trying to convert me into being a communist. He stated that his father was a communist in Lenin's time, or rather that he had something to do with Lenin" (R. 13). The accused also told Young that his classmates were, "a little down on him or something to that effect because of his stating his communistic views at the school" (R. 13). After the movie was over, they went to the Alpenhof Hotel where they had two or three drinks and then returned to the School at Oberammergau (R. 14). Upon arrival at the school, the accused asked the charge of quarters if there were any messages for "Mueller" (R. 14). The accused told Young that he slept in room No. 73. Later that evening, after the accused had retired, Corporal Young checked the student roster. He ascertained that there was no student by the name of "Watson", although there was a student by the name of "Mueller" listed and

assigned to room No. 73 (R. 14). During the entire time that the accused and Corporal Young were together, a period of approximately five hours, the accused always identified himself as "John S. Watson" (R. 14, 15).

On or about 6 October 1949, Mr. Boris von Baillow was on duty in the Bahnhof Hotel in Garmisch as desk clerk (R. 22, 23). On that date, at 10:00 o'clock in the morning, accused approached him and asked if there was any mail for him. The accused reappeared at 2:00 o'clock in the afternoon and then again at 6:30 when he was given a letter, a telegram, and a telephone message by von Baillow. The letter and the telegram were addressed to "Corporal Watson" (R. 23, 24). The telephone message was to the effect that a person from Rosenheim wanted to see the accused at the Bahnhof at about 6:30. At 6:30 a civilian came to the desk asking for "Corporal Watson" (R. 23, 24), whereupon the accused walked to the desk and showed the civilian the letter and they left together.

On or about 6 October 1949, Mr. John E. Cukor, an agent assigned to the 66th Counter Intelligence Unit, was directed by his commanding officer to proceed to Garmisch-Partenkirchen to establish contact with the accused. At about 1800 hours, he walked into the lobby of the Bahnhof Hotel and noticed an Air Corps corporal sitting in an easy chair about fifteen or twenty feet from the desk. He asked the desk clerk for "Mr. Watson" and before the clerk had an opportunity to reply, Corporal "Watson" (the accused) was standing by him with an envelope in his hand upon which the name "John S. Watson" was written. Agent Cukor asked the accused to follow him out of the lobby, which he did. As they walked out into the street, the accused asked Cukor in Russian, "Do you speak Russian?" Cukor replied in German that since they were in Germany, he preferred to speak the German language and, furthermore, told him that he was not the Mr. Medvedsky (whom the accused expected to meet), but that he (Cukor) would take the accused to Medvedsky. He took the accused to Room No. 21, Hotel Neu-Werdenfels

in Garmisch where another army agent, John L. Spiegler (acting as Mr. Medvedsky) awaited them (R. 25, 40, 41, 52). They entered the room and Mr. Spiegler introduced himself as Mr. Medvedsky to the accused in the German language. The accused asked to use the Russian language since his ability to speak German was not too good. However, Mr. Spiegler (Medvedsky) explained that for reasons of his own security, he would prefer not to speak Russian but some other language. Subsequently they both agreed to speak English and the conversation was carried out in that language. Mr. Cukor was present during the entire conversation (R. 26). In the adjoining room, unbeknown to the accused, two other special agents were concealed, listening to the conversation (R. 28, 42, 47). Accused explained to Spiegler that his real name was not John S. Watson but Gustav A. Mueller (R. 26). Additionally, he explained that he attempted to make contact with the Soviet Consulate in Switzerland because his father was a Swiss National who participated in the Russian Revolution on the side of Lenin; that his father subsequently left Russia and resided in India and in Rangoon, Burma; further, that the accused had read the works of Engels and Marx and that he believed in their theory and that he felt that it was his duty to support the Soviet Union since that was the country in which the ideas and ideals of Marx and Engels were applied in a practical way. When questioned by Mr. Spiegler as to how it was consistent that the accused, a member of the Armed Forces of the United States, should try to serve the Soviet Union, Corporal Mueller stated that he joined the American Air Force strictly for financial reasons. He had attended the University of Minnesota but could not continue his education due to lack of financial means and he had entered the Air Force in order to save money to continue his education. He further stated to Spiegler that he was in a position to supply the Soviet Union with valuable information because he was presently attending the European Command Intelligence School and he could furnish information regarding the vari-

ous courses at the School, in particular the Russian liaison course which he was attending at that time. He could also furnish the names of the commanding officer, the chiefs of the departments, and the various instructors employed in the ECIS (European Command Intelligence School). He explained that he already had his assignment in which he would be placed upon graduation from the School in November 1949. He stated that he was assigned to the 7001 Air Intelligence Service Squadron, Headquarters, USAFE. When asked what sort of an organization this was, he explained that it was a high level positive intelligence organization and that he would be assigned to it in the capacity of an interpreter and interrogator. At this time, he orally explained the mission and operation of the 7001 Air Intelligence Service Squadron, which mission was classified as secret (R. 27, 54). He explained that this information would be extremely valuable in order to determine later bombing missions in case of an armed conflict. He further stated that he could start furnishing valuable material while assigned to the School, that he had classified material in his possession which most certainly would be of interest to the Soviet Union, and that he would be willing to turn this over to them. He indicated that there was a secret library at the ECIS from which classified material would also be available. Mr. Spiegler asked the accused if it would be possible to remove classified material from this secret library and the accused replied, "Well, it would be perhaps very easy since American security measures are rather lax." He stated that every once in a while, people would get security conscious, that this would last for only a couple of days, and after that, things would again go back to the ordinary state of affairs. To emphasize his statement, the accused promised to deliver classified material which he had in his possession and also from the library at the next meeting just to prove his ability to do it. When the accused was asked by Mr. Spiegler whether he expected any payment for this, he stated that his motives were purely idealistic and that he was in no

need of any financial assistance since he was able to save a considerable sum of his pay in the service. Mr. Spiegler then asked the accused to meet him the next day (7 October 1949). The accused agreed, stating that the meeting should not take place in Garmisch, but preferably in Oberammergau, because he was trying to save taxi fare between Oberammergau and Garmisch. It was decided between them that the meeting would take place at 2000 hours, 7 October, in front of the Pension Wolf in Oberammergau, Germany. The first meeting terminated at approximately 1900 hours, 6 October 1949 (R. 26, 27, 33, 41, 42, 45, 46, 65).

The following day (7 October 1949) at approximately 2000 hours, Agent Cukor met the accused at the Pension Wolf in Oberammergau and the two men proceeded to Garmisch for the meeting with Spiegler (Medvedsky). On this occasion they went to the same Hotel (Hotel Neu-Werdenfels), room No. 14. Again in an adjoining room there were special agents present, and on this occasion, three in number (R. 28). Shortly after entering the hotel room, the accused took some documents from his pocket and gave them to Mr. Spiegler. One of these documents, according to the accused, came from the secret library at the School (R. 29; Pros. Ex. 7). It was a report of German sabotage activities and classified as secret. He also gave Mr. Spiegler a mimeographed form entitled "Interrogation SOP" which document was classified as confidential (R. 29, 70; Pros. Ex. 3). Mr. Cukor was present during this conversation and also during the time when the accused passed the documents to Agent Spiegler (R. 30). There was a discussion between the accused and Mr. Spiegler relative to the evaluation system which is used by the United States Armed Forces. The accused explained how the Armed Forces evaluated their documents and wrote this information down on a piece of paper which he also gave to Mr. Spiegler (R. 30; Pros. Ex. 4). Mr. Spiegler asked the accused whether it was difficult to obtain the document which came from the secret library of the ECIS, whereupon the accused drew a design of the

library at the ECIS, explained where the American secretary was located, and explained in detail how he (accused) looked through the particular secret dossier from which the document came and how, when the secretary looked the other way, he removed it from the page to which it was fastened with staples, and then slipped it into his pocket and walked off (R. 30, 31; Pros. Ex. 5). There then was a discussion about some of the personnel who were acting as instructors at the ECIS and the accused wrote down the name of one of the instructors and of the officer in charge of the Russian section at the ECIS, and there was a general discussion about the instructors (R. 31; Pros. Ex. 6). The accused was complimented by Mr. Spiegler for having done an excellent service for the Soviet Union, and the accused stated that he would be able to get more classified information out of the library if only he would be furnished with a camera. Mr. Spiegler asked the accused whether he eventually would be willing to give up his American citizenship and go to Soviet Russia to continue his studies, to which the accused replied that he would be glad to do so. Mr. Spiegler also asked him if he were willing to furnish any information whatsoever relating to his superior officers and his fellow soldiers and any other information available to him, to which the accused replied in the affirmative (R. 31, 32). At this point Mr. Spiegler knocked on the connecting door and the three agents who were in the next room entered and placed the accused under arrest (R. 31, 32).

It was originally the accused's own idea to secure the classified documents and not the idea of the agents. The accused volunteered to get the documents (R. 34, 48, 50, 66, 67). He brought up the subject originally when he stated that he was in a position to furnish the agents with intelligence information. At that time he was asked if it were possible to obtain classified documents (R. 34, 35, 37, 39, 48), and volunteered to bring the classified documents after he was asked if he could get them (R. 35, 37, 39, 66, 67).

It was stipulated between the prosecution, defense counsel and the accused that if Major Julius W. Toelken were present, he would testify that in his opinion he is an expert examiner of questionable documents and that he made an analysis of Prosecution Exhibit No. 7 and of the first page of the dossier from which Prosecution Exhibit No. 7 was allegedly removed (Pros. Ex. 9), which exhibit was kept on file in the reference library in Oberammergau (R. 59), and that in his opinion the document (Pros. Ex. 7) was removed from the first page of the secret dossier and that his analysis was based on a comparison of the staple marks on both exhibits (R. 69).

It was orally stipulated that if Mr. Andrew M. Denny were present, he would testify that he is now, and was during the months of May through October 1949, employed as an instructor in the Russian liaison course at the European Command Intelligence School, that the accused was a member of his class, that he (Denny) personally authorized, edited and distributed a mimeographed form entitled "Interrogation SOP", that the document is classified as confidential, and that the "Interrogation SOP" referred to is in fact Prosecution Exhibit No. 3 (R. 70).

#### *b. For the defense:*

##### *Testimony of the accused*

The accused, after first having been advised of his rights as a witness in his own behalf, elected to make a sworn statement (R. 72).

He testified that he was not a Soviet spy. He was born in Rangoon, Burma, on 5 July 1930 and was nineteen years of age. He lived in Rangoon, Burma, off and on for about eleven years. His father was a Swiss citizen and his mother was English. His father was not a "buddy of Lenin's"; in fact, he fought against him. He lived in Rangoon until the Japanese invaded the country at which time he and his family were forced to move. His father and two sisters were killed by the Japanese during the invasion of Burma (R. 73, 113). He and his mother were separated and he made his way from Burma to Cal-

cutta, his mother arriving in Calcutta earlier than he by evacuation plane while he traveled by plane and river boat to Calcutta. He lived in Calcutta approximately four years until 1945 when he was fifteen years of age. His mother remarried and now lives in St. Paul, Minnesota. She met her present husband, who was formerly a technical sergeant in the United States Army, in Calcutta, and she and the accused returned to the United States with him and they went to St. Paul, Minnesota, to reside. He went to school in St. Paul and attended Marshall High School where he worked hard and was "promoted a couple of grades". He then went to Johnson High School and "fortunately or unfortunately, I don't know", joined the Army with the intent to save money in order to go to the University. While in the Army he studied on his own initiative and received a diploma from the Department of Education. He enlisted in the United States Air Force in St. Paul, Minnesota, in October 1948. He was not certain of his nationality, was either Swiss or American, but was definitely loyal to the United States and only to the United States. He never had any intention to go any other place nor did he have any loyalty to any other Government or form of Government on the face of the earth other than the United States. He had no loyalty to any ideology such as Communism and he did not believe in the Communistic ideology nor did he like it; in fact, he hated it because he did not believe that people could live freely under the totalitarian rule such as they have in Russia. He learned to speak Russian in the Intelligence School at Oberammergau, although he had forgotten a great deal of it during the last six months in confinement in Wiesbaden (R. 72, 75, 111).

He sent the telegram to the Soviet Consulate on the spur of the moment just for curiosity. He signed it "John Watson" and although he did not remember the exact words, he believed it stated that he wished to be contacted in the Bahnhof Hotel about the 10th of September. Actually, he had gone to

Garmisch originally to send a telegram to his grandparents in Basel, but had forgotten to bring the address. At the time he sent the telegram, he had no thought of betraying the interests of the United States. He definitely entertained no such thought nor does he now entertain any such thought (R. 75). After sending the telegram, he forgot about it (R. 75, 76, 92). Subsequently he read a notice on the bulletin board that indicated there was a telegram and a letter for John S. Watson at the Bahnhof Hotel and that Watson should report there immediately to pick them up (R. 76). He went to the Bahnhof Hotel because he was curious. The letter was from a person named "Masinsky or some name like that", and stated that Masinsky wanted to meet him on the 6th of October at the Bahnhof Hotel at 6:00 o'clock. The telegram stated that the Soviets were sending two agents, who were on a diplomatic mission in the Munich area, to contact him and it was hoped that they would be of service to him (R. 77). The following day he went to the Bahnhof Hotel and talked to the clerk, and told the clerk that he would call every hour to ascertain if Masinsky had been there. Subsequently a message was left with the hotel clerk that somebody would be there at 6:00 o'clock that evening. At 6:00 o'clock, Mueller met a civilian who went up to the desk clerk and asked for John S. Watson. The accused showed him the letter, the civilian told him to come with him, and they went to room No. 21 in the Hotel Neu-Werdenfels, where they met "another fellow". At this time the accused was just curious and wanted to see what it was all about. He went to the Hotel and these "characters" asked him who he was and he told them his name. They asked him all kinds of questions dealing with ideologies—Marxism, Leninism, Communism, and other kinds of isms". He invented a story that his father was a friend of Lenin's and "things like that". He was suspicious of the "Russian agents" because they came in smoking American cigarettes and because one agent was wearing his wedding ring on his right hand rather than on his left



hand in the European fashion (R. 78, 103). Spiegler (Masinsky) asked the accused to bring some documents pertaining to the organization of the Counter Intelligence Corps to prove his faithfulness to the cause (R. 78). The subject of obtaining the documents was first brought up by the agent (Spiegler) (R. 78, 79, 104). He was dubious as to whether or not they were Russian agents. It seemed odd to him that the Russians would be so gullible as to send a couple of agents to somebody that they didn't even know. He told the agents that he could not come to Garmisch the next day as it was a Friday and he had to clean up the room for an examination. However, they arranged to send a car to the Pension Wolf Hotel to pick him up at 1800, which they did (R. 79). He was asked by the agents if he needed any money since he had said that he joined the Army for financial reasons, and he replied that he was not in need of money. The agents brought up the subject of money first, and he never asked them for money (R. 79). The second night (7 October 1949), he was picked up in front of the Pension Wolf Hotel "by this little civilian [Cukor]". He got into the car and they proceeded to Garmisch to the same hotel (R. 80). The first day the room had been No. 21, the second day it was room No. 14. As he walked in, the shades were drawn and there was a table at the door and paper and pencils. They asked him to describe how he obtained the papers and he told them exactly how he had gotten them. They wanted him to write it down and they wanted to know the names of the instructors at the School. He didn't think that was advisable and didn't want to go that far, so he just gave them the commanding officer's name. They asked for the names of students who had parents in the Polish Zone of Germany or in the Soviet Union, and he thought that if they were really Russians, he couldn't give them that information (R. 80). He obtained the documents for the agents so that he could get into their confidence (R. 80, 81). If they were actually Soviet agents, he planned to "turn them in" (R. 81, 83, 113). When the second

meeting was concluded, one of the agents knocked on the door of the adjoining room and three men entered from there with their guns drawn. They shook him down and took away all of his papers and then handcuffed him and read the 24th Article of War to him and asked him to make a statement. He told them that he would like to see a chaplain and a lawyer. He "figured I was in trouble" (R. 82). They then went to the Intelligence School where they searched his billet and got some of the articles which he had written for a newspaper back in the United States. One of the articles was, "The Friendly Atom." There were other essays about democracy and freedom, "as I was interested in Governments" (R. 82).

While he was confined in Wiesbaden, the accused attempted to commit suicide twice by using razor blades (R. 83). He realized that it was wrong to get the papers, was sorry he did so, and would not do it again. He was trying to set a trap for these people and they got the trap working first. He knew that he had done wrong and believed that he should be punished, and that the six months' confinement at hard labor he served awaiting trial, "sort of makes it up".

After enlisting in the Air Force, he went to Spokane, Washington, where he worked in the "TI&E Office". After that, he went to gunnery school; then he was a gunner on a B-29 in Okinawa. After studying radar, he went back to Spokane and then to Germany and to Wiesbaden, where he worked as a reporter on the newspaper before being sent to the School in Oberammergau (R. 82, 83). On cross-examination, the accused stated that he didn't know what Communism was other than "dialectical materialism" as he learned in school, and that the Communists base their conception of present affairs on the economic aspect through history. Communism originated in a combination of Marx and Engels, both German philosophers (R. 84). He did believe that the Army agents were in fact Soviet agents. He intended to report his "contact with the Russians" that evening or the next

day (R. 91, 92, 108). He did not have authority to remove the secret document from the library, but he did not think that authority was really necessary (R. 96). He told the "Soviet agents" about the organization of the 7001 Air Intelligence Service Squadron and revealed the mission of this organization to them (R. 107, 109). He had been instructed not to divulge classified information to unauthorized personnel (R. 109, 110).

*c. For the defense other than the accused:*

It was orally stipulated that if the members of the board of officers of the Wiesbaden Station Hospital Psychiatric Section, which examined the accused sometime after he was confined in Wiesbaden, were called into Court, they would testify that the board's diagnosis was, "immature, emotionally unstable" (R. 115).

4. Immediately after arraignment, the defense made a motion to strike Specification 2 of the Charge upon the grounds that it was too vague and incomplete and that it did not properly state an offense, and the motion was denied. While the Specification does not specifically allege a violation of any particular statute, it is quite apparent that it is designed and modeled to conform in substance to the offense denounced by 18 USC 953, which states in part:

"Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, . . . or to defeat the measures of the United States, shall be fined not more than \$5,000 or imprisoned not more than three years, or both."

An accused most certainly has the right to be informed of the nature and cause of the accusation. This has been

construed to mean that the Specification must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged. The object of the Specification is to furnish accused with a description of the Charge against him to enable him to properly defend himself. The Specification must set forth the offense alleged with *reasonable* particularity. In this connection, see the leading case of United States v. Cruikshank, 92 US 542, 558, and United States v. Cook, 17 Wall 168, 174; Evans v. United States, 153 US 584, 587; ACM 2103, McAbee, 2 CMR 487; and ACM 673, Alvey, 1 CMR 465. Since the Specification in the instant case is modeled after a Federal statute, it is reasonable to make a comparison to determine if in fact the language of the Specification follows the statute. It appears by inspection that the words of the statute have been pursued very closely in the Specification. A Specification following the language of a statute which specifically defines an offense sufficiently complies with the requisite that the accused be informed fully as to the nature of the offense. In this connection, see State v. Hilton, 248 Mo 522, 154 SW 729; 31 CJ 711. It was contended by the defense in substance that the allegation, "with intent to defeat the measures of the United States", was not sufficient in that it did not apprise accused of what particular statute or order he was charged with having violated. In the case of Gorin v. United States, *infra*, the defendants were charged with a similar offense. The third count charged that the defendants conspired to communicate, deliver and transmit to the Soviet Union and to a representative thereof, documents, writings, plans, notes, instruments and information relating to the national defense. Defendants demurred to the indictment and the demurrers were overruled. In speaking of the words, "connected with the national defense", the Court said that "it is a question of fact for the determination of the jury. Like many words, what is meant by the use thereof may change from time to time." So it is also in the case before us. Fur-

ther, it was not necessary that the Specification particularize beyond the allegation "with intent to defeat the measures of the United States", since it would be sufficient for the prosecution to have proved any measure of the United States of some consequence which was intended by the accused to be defeated. From examination of all the facts and circumstances in this case, it cannot be said that the accused was misled as to the nature of the Charge against him or the specific acts relied upon by the Government.

Each Specification is charged as a violation of the 96th Article of War and is based upon a Federal statute. In the instance of Specification 1, the statute relied upon is set forth in Title 18, United States Code, Section 794, and is a statute of limited applicability depicting a noncapital offense. In the instance of Specification 2, the statute is Section 953 of the same title, a statute of unlimited applicability denouncing a noncapital offense. As such, both Specifications are chargeable under the 96th Article of War regardless of where the wrongful act or omission occurred (MCM, 1949, par 183c). Additionally, each Specification states an offense which is so grossly conduct of a nature to bring discredit upon the military service as to warrant no further comment.

The defense made further objection to the Specification stating in substance that if the offense alleged

**Headnote 3** was meant to charge an act bringing discredit upon the military service, it must contain such averment. This contention is without merit. It has been decided that it is not necessary that the Specification allege in so many words that accused's conduct brought discredit upon the military service (CM 211420, McDonald, 10 BR 61, 63, 64) and that the words, "to the discredit of the military service", add no special connotation to a Specification (ACM 1058, Starks, 2 CMR 183; also see CM 202601, Sperti, 6 BR 171).

5. The accused in his testimony made a complete admission of all the essential

elements in each Specification, except in connection with Specification 1, he maintained that he did not intend that

**Headnote 4** the documents be used to the advantage of a foreign nation, and as to Specification 2, he contended that he had no intent to defeat the measures of the United States. To explain his actions of delivering the classified material to the "Russian agents", he declared that it was his purpose to trap the agents and "to turn them in". He admitted taking the secret document from the library without authority. He admitted sending the telegram to the Soviet Consulate, and stated that it was sent "on the spur of the moment, just for the sake of curiosity". While the accused's actions may perhaps be characterized as a rather juvenile and amateurish transaction which had little, if any, likelihood of success, it was nevertheless his mode of operation. It is not essential that there be capability of success present in an attempt to commit a felony (People v. Bush, 4 Hill (NY) 133; Reg. v. Brown, LR 24 QB Div (Eng) 357; Wharton's Criminal Law, Vol 1, sec 224). The facts apparent are that the accused, admittedly, commenced correspondence with a foreign government by writing the telegram and causing it to be transmitted. In so far as the element of intent is concerned, the testimony of the various witnesses reveals that the accused intended to deliver classified information to the Soviet government. The record of trial presents ample basis upon which the Court was justified in rejecting the explanation of the accused as incredible and incapable of belief. The credibility of the witnesses and the weight and value to be given their testimony is within the province of the Court to determine, and the Board of Review, after exercise of its responsibilities under the provisions of Article of War 50(g), concurs with the Court as reflected in its findings based upon competent evidence.

6. The Board considers the allegation "to be used to the advantage of a foreign nation" contained in Specification

1 of the Charge. As proof of the allegation, the Court could

**Headnote 5** consider the character of the information delivered to the fictitious agents in addition to the fact that the accused should have had *reason to believe* that the information disclosed could be used to the advantage of the Soviet Union (Gorin v. United States, 111 F2d 712, affirmed 312 US 19). It has been said that, "The services must be trusted to determine what information may be broadcast without prejudice to the 'national defense' . . ." (United States v. Heine, 151 F2d 813), and the very fact that the documents in issue were classified should certainly have placed the accused on notice that the information therein related to the "national defense". "What is or is not connected with the 'national defense' is a question of fact for the determination of the jury" (Gorin v. United States, *supra*). The Board has examined the classified matter to which we refer and holds that the Court was justified in finding that the documents and the information related to the national defense.

7. The defense sought, by cross-examination of the prosecution's witnesses and through testimony of the accused, to establish that the documents delivered by the accused to **Headnote 6** the pretended "Soviet agents" were done so at the request of the agents rather than by the accused volunteering to do so. The testimony of the agents is to the contrary. Their testimony discloses that although Agent Spiegler inquired as to the possibility of removing classified material from the library, it was the accused who volunteered to bring the documents to the next meeting to prove his ability to do so. The doctrine of entrapment is available to the defense where an agent of the government incites or lures an accused into doing a criminal act (Dig Op JAG, 1912-40, sec 395(35); Cain v. United States, 19 F2d 472; Butts v. United States, 273 F 35; Woo Wai v. United States, 223 F 412; ACM 675, Ambabo, 2 CMR 646).

"The use of decoys in the entrapment of known or suspected criminals

is a practice recognized and supported by civil authorities generally, and, within proper limitations, is not forbidden by military law. An important and equally well recognized exception to the rule permitting decoys and entrapments, based on public policy, is that acts conceived and instigated by Government agents cannot be prosecuted criminally." (CM 187319, Line, 1 BR 25, 28, 29).

The evidence introduced in behalf of the prosecution in this case was sufficient to justify the Court in concluding that the accused voluntarily obtained the documents and delivered them to the "agents", and that he was not lured, induced, tricked or entrapped into the commission of the offense (CM 236937, Kent, 23 BR 179, 184; Sorrels v. United States, 287 US 435; United States v. Echols, 253 F 862; CM 252103, Selevitz, 33 BR 383, 395; CM 239825, Wohl, 25 BR 279, 286, 287; CM 296630, Siedentop, 58 BR 191, 196; CM 319194, Austin, 68 BR 187, 193).

8. The Manual for Courts-Martial, 1949, being applicable on the dates of the commission of the offenses, and there being no limitation of punishment prescribed in the Table of Maximum Punishments of the Manual for these particular offenses, they are punishable as authorized by Title 18, United States Code (MCM, 1949, par 117c). Examination of the statutory offenses heretofore mentioned, to which the offenses described in the Specifications are most closely analogous, reveals that the sentence is well within the maximum permissible. Section 794, Title 18 of the United States Code provides for imprisonment for not more than twenty years. Section 953 of the same Title provides for a fine of not more than \$5,000 or imprisonment for not more than three years, or both.

9. The accused is approximately twenty years of age. He was born in Rangoon, Burma. His parents were Swiss Nationals at that time, but his mother later became a United States citizen. His father was killed during the Japanese invasion of Burma, as were both of his sisters. His mother

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subsequently married a technical sergeant in the United States Army and the family went to the United States and resides in St. Paul, Minnesota. His AGCT score is 107 and he, at the time of the offense, had completed approximately two years of service.

10. The Court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously af-

fecting the substantial rights of the accused were committed during the trial. For the foregoing reasons, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and the sentence.

COOPER, DILLEMUTH (on leave), and MILLER, Judge Advocates. 20 June 1950.

## UNITED STATES

v.

Private ALBERT S. KOLBERT, AF 13028918, 2225th Returnee Squadron (Pipeline), 2225th Overseas Replacement Group

ACM S-684

**Assistant defense counsel — warrant officers.**

A Warrant Officer JG was designated, in orders appointing a special court-martial, as assistant defense counsel and was present at the trial of an accused in such capacity. HELD: The record of trial is legally insufficient to support the findings of guilty and the sentence. It is clear from the provisions of Articles of War 11 and 17, and MCM, 1949, par 6, and MCM, 1949, par 43a, that the intent of AW 11 is that the regularly appointed defense counsel shall be an officer (Sp CM 1770, Ness, 27 April 1950). In AW 1 it is provided that the word "officer" shall be construed to refer to a commissioned officer. While the appointment of an assistant defense counsel is not required under AW 11, if an assistant defense counsel is appointed he must be a commissioned officer of the United State Air Force, as the duty of defense counsel may devolve upon him (AW 116; MCM, 1949, par 44). However, there is no prohibition against a warrant officer sitting as individual counsel for the accused (MCM, 1949, par 45).

Trial by Special Court-Martial, convened at Fort Dix, New Jersey, on 12 May 1950. Bad conduct discharge, forfeiture of \$63.00 pay per month for three (3) months, and confinement at hard labor for three (3) months.

1. The record of trial in the case of the airman named above has been examined by the Board of Review.

2. The accused was arraigned and tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

SPECIFICATION: In that Private Albert S. Kolbert, 2225th Returnee Squadron (Pipeline), 2225th Overseas Replacement Group, Fort Dix,

New Jersey, did, without proper leave, absent himself from his organization at Fort Dix, New Jersey, from about 28 March 1950, to about 28 April 1950.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. After evidence was introduced as to five previous convictions occurring within accused's current enlistment and during the period of one year preceding the commission of this offense (MCM, 1949, pars 79, 117c sec