

STATEMENT OF RADM JOHN D. HUTSON, JAGC, USN

JUDGE ADVOCATE GENERAL OF THE NAVY

BEFORE THE

SENATE ARMED SERVICES COMMITTEE

ON

THE *USS INDIANAPOLIS*

14 SEPTEMBER 1999

The late Rear Admiral, then-Captain Charles B. McVay III assumed command of U.S.S. INDIANAPOLIS on 18 November 1944. In April of 1945, INDIANAPOLIS was damaged by a kamikaze attack and had to undergo repairs at Mare Island Naval Shipyard. Upon completion of those repairs, the ship departed for a mission involving the transport of atomic bomb components to Tinian. The mission was completed on 26 July 1945; on 27 July the ship arrived at Guam. Follow-on orders and routing instructions called for the ship to depart on 28 July and arrive at Leyte, Philippines on 31 July. The ship departed as scheduled. During the transit, at approximately ten minutes after midnight on 30 July, the ship was torpedoed by a Japanese submarine and sank in less than fifteen minutes. Because arrival of the ship was not monitored, the ship's absence from Leyte was not noted and no rescue effort began until 2 August. Captain McVay and just over

300 men were rescued after five days in the water.

On 9 August, Fleet Admiral Nimitz, Commander in Chief, Pacific, ordered a Court of Inquiry to investigate the loss of INDIANAPOLIS. Captain McVay was designated an "interested party" and afforded counsel and the opportunity to examine witnesses and present evidence. The Court of Inquiry placed "serious blame" on Captain McVay for his failure to order a zigzag course and recommended trial by general court-martial. Subsequently, a supplemental investigation was conducted by the Naval Inspector General.

The record of the Court of Inquiry and the record of testimony taken by the Inspector General were then reviewed by the Judge Advocate General. In a memorandum to the Secretary of the Navy, the Judge Advocate General proposed charging Captain McVay with the offenses of "Through Negligence Suffering a Vessel of the Navy to be Hazarded" by failing to order a zigzag course and of "Culpable Inefficiency in the Performance of Duty" by failing to issue timely orders to abandon ship. The Judge Advocate General also addressed other accusations and charges that had been recommended, including failure to maintain watertight integrity, but concluded that no other charges were supported by the evidence. On 29 November 1945, the Secretary of the Navy referred the two charges, as Charges I and II, respectively, to a general court-martial.

On 3 December 1945, the general court-martial was assembled. The court was composed of seven members, all senior officers with combat experience. At trial, Captain McVay stated that he did not object to any member. A Navy captain served as judge advocate or prosecutor for the court-martial. Captain McVay was represented by a Navy captain and also had two Navy lieutenants as assistant defense counsel. A third lieutenant joined the defense team mid-trial.

On the first day of the trial, Captain McVay stated that he needed additional time to prepare his defense, requesting adjournment until the following day. This request was granted. On the second day, Captain McVay was arraigned on both charges and entered pleas of "not guilty." The prosecution case began, eventually consisting of 39 witnesses and 15 exhibits. The prosecution rested on 13 December, with the defense beginning its case on 14 December. The defense called 18 witnesses, including Captain McVay, and introduced one exhibit. The defense rested on 18 December. Both sides made argument on 19 December. Following the court's deliberation, findings of guilty to Charge I and not guilty to Charge II were entered. Captain McVay's outstanding record of service was introduced at the sentencing hearing. The members, after deliberation, sentenced him to lose 100 lineal numbers in his temporary grade of captain and his permanent grade of commander. Additionally, the court members unanimously

recommended clemency.

Following trial, the Judge Advocate General reviewed the record of trial and determined that the proceedings, findings, and sentence were legal. The record was forwarded through the Chief of Naval Operations, Fleet Admiral King, to the Secretary of the Navy. On 20 February 1946, the Secretary approved the proceedings, findings, and sentence. Consistent with the recommendations of the court-martial and Fleet Admiral King, the Secretary of the Navy remitted the sentence in its entirety.

Review of the record of trial indicates that the proceedings were fair and provided full due process of law. Captain McVay was afforded all rights applicable to trial by court-martial. He was represented by counsel, allowed to confront and cross-examine all witnesses, and had the opportunity to present evidence on his behalf. The record also clearly indicates that Captain McVay's counsel performed his duties well, presenting evidence and argument and challenging the evidence presented by the prosecution. Finally, from a technical perspective, the charges were properly referred and the court was legally convened and composed. In short, the proceedings were fairly presented and legal.

In addition to fair and legal proceedings, the finding of guilty was supported by fact and law. The court found that

Captain McVay had committed the offense of "Through Negligence Suffering a Vessel of the Navy to be Hazarded." The text of this charge follows:

In that Charles B. McVay, 3rd, captain, U.S. Navy, while so serving in command of U.S.S. INDIANAPOLIS, making passage singly, without escort, from Guam, Marianas Islands, to Leyte, Philippine Islands, through an area in which enemy submarines might be encountered, did, during good visibility after moonrise on 29 July 1945, at or about 10:30 p.m., minus nine and one-half zone time, neglect and fail to exercise proper care and attention to the safety of said vessel in that he neglected and failed, then and thereafter, to cause a zigzag course to be steered, and he, the said McVay, through said negligence, did suffer the said U.S.S. INDIANAPOLIS to be hazarded; the United States then being in a state of war.

Aside from the jurisdictional and obvious elements, such as the fact that INDIANAPOLIS was a "vessel of the Navy," the offense essentially required proof that Captain McVay acted negligently and that such negligence caused his vessel to be hazarded.

Negligence, in this case, means that based on information available, Captain McVay had a duty to take reasonable

precautions and exercise reasonable prudence, including steering a zigzag course. The members found that the facts established that based on the visibility, speed of the ship, and the known threat of enemy contact, reasonable prudence required zigzagging. Whether INDIANAPOLIS should have been zigzagging depended on whether sufficient information was available to Captain McVay to indicate the existence of a submarine threat. The evidence in the record shows that Captain McVay's night orders included mention of a submarine contact in a position INDIANAPOLIS would cross before daylight the next morning. This fact, along with the navigator's comments and the other intelligence received, supports the court-martial members' finding that Captain McVay was aware of a sufficient threat of enemy submarine contact. Based on this evidence, the court implicitly found that Captain McVay either was aware or should have been aware that enemy submarines might be encountered during his transit and that his failure to take the precaution of steering a zigzag course amounted to negligence.

The court also found that the consequence of such negligence was that INDIANAPOLIS was hazarded. In this regard, "hazarded" means "placed at risk." The question of whether the ship was hazarded is not related to Captain McVay's responsibility, or that of others, for the consequences that resulted. A ship is hazarded, for the fulfillment of this element, regardless of whether it is ultimately harmed and regardless of the reason it

is at risk. The finding of the court reflects the conclusion that the failure to zigzag placed the ship in greater risk. In other words, the court concluded that zigzagging decreases the risk of a successful attack by an enemy submarine. This conclusion is consistent with the combat experience of the Navy and the science of relative motion. At the very least, zigzagging complicates the computation of an attack solution, increasing the time required and the difficulty experienced for a submarine to mount a torpedo attack. In many cases, zigzagging can render an attack unsuccessful. Based on naval science and experience, the court-martial found that Captain McVay's failure to zigzag hazarded his ship.

During trial, Captain McVay's defense focused on the ineffectiveness of zigzagging in preventing successful submarine attacks. Prosecution and defense witness testimony supported the Captain's assertion that zigzagging alone could not guarantee the safety of the ship. However, the law did not then, nor does it now, require the measure to guarantee success to impose a duty on the commanding officer to undertake such a measure. The law related to hazarding only requires that the measure contribute to the survivability of the ship. If failure to zigzag increased the likelihood of risk, then the ship was hazarded. Stated conversely, if zigzagging decreased the risk to the ship, the measure was required. Because zigzagging makes targeting more difficult and increases the chance of evasion upon launch of

enemy weapons, as noted in the record of trial, it increases the chances of survival. Because zigzagging increases the chance of survival, the ship was hazarded when zigzagging ceased under the circumstances prevailing at the time.

Those challenging the court-martial conviction of Captain McVay have made numerous factual allegations. The following are some of those challenges and associated factual or legal answers:

- One claim is that Captain McVay requested an escort, had that request denied, and that the absence of an escort was unusual or improper. This assertion is best answered by Captain McVay's own testimony at his court-martial. When asked whether he had inquired about an escort, Captain McVay responded: "Yes, I had the usual conversation with the routing officer about an escort, and he said, 'I will ask for one for you, but I do not believe there is one available.' I didn't give it another thought, because I had travelled [sic] many times without an escort." Thus, Captain McVay himself did not think that the absence of an escort was unusual. In any case, had he felt that the absence of an escort would jeopardize his ship, he would have had an obligation to press the issue with his superiors.

- Another issue relates to claims that information concerning submarine activity, obtained through communications interception intelligence, or "ULTRA," was not provided to

Captain McVay, or admitted as evidence at his court-martial. At the time of the sinking, Captain McVay, like almost all other afloat commanding officers, did not have direct access to ULTRA information. In fact, the ULTRA information was not relevant to the charges before the court: as Captain McVay had no access to the information, it could not have played a part in a determination of negligence. Accordingly, such information would not have been admissible. In any case, the ULTRA information at issue was so general - merely that two submarines had left home waters for patrol in an area of ocean roughly the size of Australia - that it could have played no reasonable role in Captain McVay's decision processes. In fact, the ship had received warnings of submarine activity in the general vicinity of its route. This was relevant, as one of the issues before the court-martial was whether Captain McVay should have considered that he was in "submarine waters" as contemplated by Fleet Doctrine and War Instructions concerning zigzagging. Based on the intelligence information provided to Captain McVay prior to his departure and communications received by the ship after departure, the court implicitly found that Captain McVay should have considered his ship to be in "submarine waters" and that he reasonably should have zigzagged, per applicable doctrine and prevailing standards of seamanship.

- Another claim made is that, at the court-martial, the Japanese submarine commander testified that "once he had detected

the ship, he would have been able to make a successful attack whether or not the ship was zigzagging." Actually, the Japanese submarine commander testified that zigzagging "would have involved no change in the method of firing the torpedoes, but some changes in the maneuvering." The Japanese commander did not say that his attack would have been successful if the ship had been zigzagging, but did say that he would have had to change "maneuvering." The Japanese commander's testimony did not contradict the conclusion that the failure to steer a zigzag course hazarded or increased the risk to INDIANAPOLIS.

- Other claims made have related to visibility when the attack occurred. Challengers have alleged that visibility was poor and that, therefore, zigzagging was not warranted. In this regard, the record indicates that visibility was poor at approximately 2000, when Captain McVay authorized the Officer of the Deck to cease zigzagging. However, the record also indicates that visibility improved later in the evening. In his report to the Secretary of the Navy, Captain McVay stated that "[t]here was intermittent moonlight at which times the visibility was unlimited." Moreover, numerous witnesses, survivors of USS INDIANAPOLIS, testified at the court-martial that the moon was visible and that visibility was good. Perhaps most significantly, the fact that the ship was observed at approximately 10,000 yards by a submarine and successfully tracked by visual observation indicates that visibility was good.

The evidence clearly supports the court-martial's implicit finding that there was adequate visibility to require zigzagging.

- Much has been made of the fact that Captain McVay's orders gave him discretion on whether to zigzag. It should be noted that Captain McVay was charged with negligence for his failure to zigzag and not violation of orders. A charge of failure to follow a general order requiring zigzagging was considered and rejected by the Judge Advocate General as not supported by the evidence. While Captain McVay's orders gave him discretion whether to zigzag, the orders did not relieve him from exercising his discretion consistently with applicable doctrine and the tactical situation. Accordingly, the court's finding of negligence implies by law a finding that Captain McVay's discretionary decision not to zigzag constituted negligent judgment under the circumstances.

- There is a popular misconception that Captain McVay was brought to trial for losing his ship in combat. In fact, the actual loss of the ship was not an element of either of the two charges referred against Captain McVay. He stood accused of not promptly and effectively ordering abandon ship, and of placing the ship at risk by failing to steer a zigzag course; he was convicted of the latter only. The loss of the ship was legally irrelevant to the proof of the prosecution's case. Of course, the loss of the ship and the tragic circumstances associated with

the delayed rescue effort focused scrutiny on Captain McVay's actions, as they would have on any commanding officer in the circumstance.

As discussed above, the court-martial proceedings were fair and legal. The court's findings were factually and legally sound. The results of the court-martial were properly reviewed and approved. Upon approval, the conviction was final. There is no authority under law to overturn or reverse a final conviction. Even if remedial action were warranted, no such action is legally available. For example, a presidential pardon does not overturn a conviction, but merely sets aside or mitigates the punishment imposed. In this case, as the Secretary of the Navy remitted the sentence in its entirety, a pardon would affect nothing. Finally, statutory secretarial authority to correct records does not extend to final convictions of courts-martial.

The findings of the Court of Inquiry are similarly final. Such administratively final acts may only be disturbed upon a showing of fraud, or mistake of fact or law. If it were found that the opinion of the Court of Inquiry was procured by fraud or resulted from mistake, then such a finding might be corrected. In this case, there is no evidence that fraud or mistake influenced the opinion of the Court of Inquiry.

Since this incident there have been numerous inquiries into

the sinking of the U.S.S. INDIANAPOLIS, the resulting loss of life, and the court-martial of Captain McVay. In addition to the full process of law at the time, this case was reviewed in 1975 by Senators Hartke and Eagleton, in 1992 by independent attorneys commissioned by Senator Lugar, and in 1996 by the Navy internally. Each review has found that the process, findings and sentence are warranted by the evidence and that no further action is necessary or appropriate.

In conclusion, thorough review of the court-martial record and the Court of Inquiry shows that all proceedings were legal and fairly conducted. The results show that Captain McVay was properly held accountable for professional negligence.

In the RESTATEMENT (SECOND) OF TORTS §§ 282 ("Negligence is conduct which falls below the standard established by law for the protection of others . . . ."), § 283 (the standard of conduct expected is that of a "reasonable man under like circumstances"), 284(b)(failure to perform an act for the protection of others "which the actor is under a duty to do.")(1977).

The court found that, under the circumstances and with the information we have available to him, Captain McVay had a duty to zigzag to reduce the risk to his vessel of submarine attack.

As noted above, and as reflected by the record of trial, 54 years of naval correspondence, and history, Captain McVay was never charged with losing his ship. He was charged with and convicted of suffering his ship to be negligently hazarded, unreasonably placing her at risk. This conviction is fully supported by the

evidence, as subsequent reviews have shown. The record reflects that Captain McVay received full due process throughout the proceedings, and they were conducted and reviewed fairly. Finally, neither the court-martial nor the official record attributes responsibility for the sinking of USS INDIANAPOLIS to Captain McVay. The sentence, its remission, and his subsequent retirement at the grade of Rear Admiral supports this.