

# *One Question Too Many: The Trial of Captain Charles B. McVay III*

by  
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*In the dog days of World War II, in a backwater of the Pacific, the cruiser USS Indianapolis was sunk. What ensued was a nightmare.*

Douglas Stanton, *In Harm's Way*.

## I. The Attack

Around midnight on July 29, 1945 in the Philippine Sea, a Japanese submarine fired six torpedoes in a fan pattern at the USS Indianapolis from a mile away. The Indianapolis, or "Indy" as she was known, had a crew of 1136 men and was almost 600 feet long. Days before, the ship had delivered the main components of the world's second atomic bomb to a Pacific island airstrip where the Enola Gay lay waiting.

A minute after they were fired, two or three of the torpedoes hit the ship's starboard bow and exploded. Her captain, Charles Butler McVay III, ordered abandon ship. The huge cruiser quickly turned over on her side and sank within 15 minutes.

Approximately 860 men who survived the initial explosions either fell or jumped into the black, 20-foot seas. After five torturous days clinging to debris and treading water above sharks clearly visible beneath them, about 300 were rescued.

Fans of the movie *Jaws* will recall Robert Shaw's riveting monologue describing the historic context of the sinking, and what the surviving crew endured in the shark-infested water:

*What we didn't know was our bomb mission had been so secret, no distress signal had been sent . . . Very first light, chief. The sharks come cruising. . . Sometimes that shark, he looks right into you. Right into your eyes. And then,*



*Captain Charles B. McVay III*

*ah, then you hear that terrible high pitch screamin' and the ocean turns red and spite all the poundin' and the hollerin' they all come in ... and rip you to pieces.*

*So, eleven hundred men went into the water. Three hundred sixteen men come out, the sharks took the rest, [July] the 29th, 1945.*

*Anyway, we delivered the bomb.<sup>1</sup>*

While the horror of what happened to the Indianapolis after she "delivered the bomb" is perhaps well known, thanks to *Jaws* and other accounts, the travesty of justice visited on her captain six months later in a military court, is less well known. To this day, the court martial of Captain McVay has to rank

among the most unfair trials in history. It is a lesson in not only how imperfect human systems of justice can be, but also illustrates, for lawyers today, the danger of asking what Irving Younger once described as "one question too many."

## II. The Trial

Stunned by the loss of the Indianapolis, and its own inexplicable failure to rescue her survivors for almost five days,<sup>2</sup> the United States Navy quickly decided to place blame on Captain McVay. His court-martial represented the first time that any wartime Navy captain was indicted for losing a ship to enemy action.

Against the recommendation of Admiral Nimitz, the Navy brought two charges against him: first, that he had been negligent in failing to "zigzag" the Indianapolis at night to avoid enemy submarine action;<sup>3</sup> second, that he allegedly failed to issue abandon ship orders in an "efficient" manner

during the 13 minutes after the torpedoes struck.

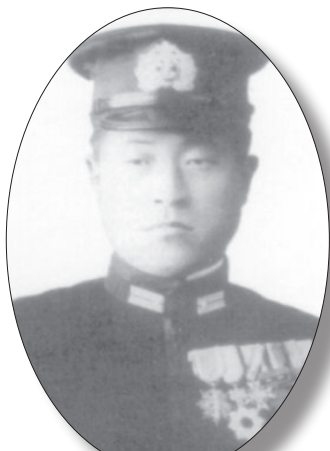
The Navy provided McVay with notice of the charges against him on November 29, 1945. Incredibly, the trial was to begin less than a week later, on December 3, 1945.

On the first day, the judge advocate asked McVay whether he was ready to proceed. The transcript shows that McVay replied, unsurprisingly, “in the negative, stating that he did not feel that sufficient time within which to properly prepare the case for the defense had elapsed” since receiving the charges. McVay then requested, and was granted, a one-day postponement of the trial. He then pled “not guilty” to both charges.

The prosecution’s case ultimately came down to the single issue of the alleged failure to zigzag at night during conditions of what it claimed were “good visibility.” McVay was cleared of the second charge of failing to issue abandon ship orders in an “efficient” manner. The ship had sunk in 15 minutes

and men were literally falling overboard into the ship’s still spinning propeller, so this charge had no credibility from the beginning. But on the issue of zigzagging, the Navy was determined to obtain a conviction.

To do this, it shocked many by calling the commander of the Japanese submarine that sank the Indianapolis, Mochitsura Hashimoto. The trial transcript



*Mochitsura Hashimoto*

clearly shows the animus against the Japanese at the time, which was only six months after V-J day. McVay’s counsel objected to his testimony thusly:

If the court please, I wish to make a formal objection to the idea of calling one of the officers of the defeated enemy who, as a nation, have been proven guilty of every despicable treachery, of the most infamous cruelties, and most barbarous practices in violation of all of the laws of civilized warfare, to testify against one of our own commanding officers on a matter affecting his professional ability and judgment . . . .

If the proposed witness Hashimoto is to be called, I will also

make legal objection on the grounds of competency, since his nation is not of Christian belief, thus affecting ability to take the oath as a witness to tell the truth.

After much skirmishing over whether Hashimoto could be admitted as a witness, his examination began. Speaking through an interpreter, he preliminarily stated that he believed that “the soul exists after the death,” and was “fully aware of the meaning of truth and falsehood.”

In terms of trial strategy, it is important to keep in mind that the Navy was calling Hashimoto for the purpose of supporting its charge that McVay was negligent in failing to zigzag. This was the purpose of flying him around the world to testify against McVay.

Apparently having learned of pre-trial statements by Hashimoto which supported McVay, however, the prosecution did not ask him on direct examination whether zigzagging was an effective defensive measure. It did not even inquire whether the ship had been zigzagging. It passed over the topic in total silence.

And, as the prosecution had feared, Hashimoto testified on cross-examination that zigzagging would have made no real difference in the method of firing the torpedoes, but only the way in which he maneuvered his submarine before firing:

Q. Was the target zigzagging at the time you sighted it?

A. At the time of the sighting of the target, there was an indistinct blur, and I was unable to - - unable to determine whether or not it was zigzagging.

Q. Was it zigzagging later?

A. There is no question of the fact that it made no radical changes in course. It is faintly possible that there was a minor change in course between the time of the sighting and the time of attack.

Q. Would it have made any difference to you if the target had been zigzagging on this attack?

[The question was repeated].

A. (As given by interpreter Commander Bromley) It would have involved no change in the method of firing the torpedoes, but some changes in the maneuvering.

This was of course not the testimony the Navy wanted to hear.

What Hashimoto was essentially saying was that his submarine, which was less than a mile away from the Indianapolis, would have made no real changes to her firing method if the ship had been zigzagging, and would have sunk her regardless. At the time, Japanese torpedoes traveled 50 miles per hour. When she was struck, the Indianapolis was moving at approximately 20 miles per hour - - toward the submarine. A course change under these circumstances would simply have exposed the ship's broad side to the torpedoes.

Several days after Hashimoto's testimony, McVay's defense counsel called as a submarine expert witness Captain Glynn R. Donaho, a highly decorated American submarine commander. He gave testimony even more damaging to the prosecution's case than Hashimoto. In a normal setting, it should have secured an acquittal:

Q. Based on your experience as outlined above, what is your opinion of the value of zigzagging of a target as affecting the accuracy of torpedo fire?

A. With our modern submarines, fire control equipment, high speed torpedoes, a well trained fire control party, and with torpedo spreads, I didn't find that zigzagging affected the results.

Q. Is it a reasonable inference from what you have just said that zigzagging as an anti-submarine measure is of no value to surface ships?

A. Yes.

The prosecution now had the Japanese commander Hashimoto and the American submarine expert Donaho, mortal enemies only months before, agreeing with each other that zigzagging was not an effective defensive measure. In a seeming panic, the judge advocate questioning Donaho repeatedly attempted to get him to state that zigzagging was, in fact, an effective anti-submarine measure for surface ships.

But Donaho, a four-time recipient of the Navy Cross, stubbornly maintained his position that zigzagging had no effect on when he would fire his torpedoes, or the likelihood that they would hit the target. He conceded only the truism that once torpedoes were fired, a ship could take evasive action by altering course one way or the other. This answer seemed to exasperate the prosecution:

Q. I mean no discourtesy, Captain Donaho, but I should remind you that in your capacity here as a witness you have been

accepted as a submarine expert, and that you are a professional naval officer; is that correct?

A. I think so, sir.

Q. And the way the question was put to you was to obtain your understanding as such a professional naval officer of the value or lack of value of zigzagging as an anti-submarine measure.

A. I don't understand your question.

[The question was repeated]

**A. I understand what you have stated, but what you are trying to get from me to answer, I am at a loss; I am not hedging; I don't understand how you want me to answer.**

Q. Captain Donaho, I will be very glad to have the question read back to you, to have the reporter do it.

[The question was repeated]

A. My previous answer is my conception of the zigzag after the torpedoes have been fired, that is, the advantages of a zigzag as well as the disadvantages. If the torpedoes had not been fired, it will delay the firing by having to get a new setup on a target whose zig I have seen before I have fired.

Q. Is it a fair assumption, then, Captain Donaho, that you believe the various instructions for surface ships concerning zigzagging have some value?

A. After your torpedoes are fired, it does.

Q. I beg your pardon?

A. If my torpedoes haven't been fired, it just means that I delay my firing.

The testimony of Hashimoto and Donaho clearly showed that the Navy's rush to a court-martial had not only prejudiced McVay, but its own case. The witnesses had, in short, made a powerful case for McVay's acquittal.

### **III. One Question Too Many**

A lawyer with at least some trial experience, after weighing the damage inflicted by Donaho's testimony, most likely would not have risen to question him further. To use a sports analogy, as Muhammad Ali refrained from throwing additional punches

at a collapsing George Foreman, McVay's counsel at the end of Donaho's testimony should have confidently asserted, "no questions," and left the prosecution's case for dead.

This did not happen. As Douglas Stanton notes in *In Harm's Way*, Captain McVay was not able to hire the lawyer he preferred, who was unavailable on the incredibly short notice of trial he was given. Instead, he had to settle for counsel whom Stanton describes as "inexperienced." That lawyer, who reportedly had no trial experience, and only four days to prepare McVay's defense, mistakenly rose to question a clearly fatigued and irritable Donaho further. Though his performance was superb in many other aspects of the trial, it was this last, unnecessary question which some believe gave the court members the fig leaf they needed to convict McVay, regardless of the earlier exculpatory testimony:

Q. Is it disconcerting to you as a submarine commander to have a ship, a target, zigzag?

A. **Yes**, because you may be - - just before firing, a zigzag throws your calculations off, and you have to get a new setup.

(emphasis added).

The transcript seemingly indicates an understandably awkward silence after this answer. Clearly having expected a "No" response to this question, counsel for McVay seemed nonplussed, and asked nothing further. The judge advocate and court declined to examine further, and Donaho was dismissed.

Despite the damage done by Donaho's final answer on re-direct, the prosecution declined to reference it anywhere in its closing argument. It made instead an extremely technical argument that McVay should be found guilty because he allegedly violated Navy regulations regarding zigzagging a ship in conditions where visibility was good at night "if and when the moon arose." This was despite the fact that McVay's orders expressly stated that he could zigzag at night "at his discretion," and testimony that visibility was not good that night. When McVay retired that night, the moon had not risen. The Navy made much of the fact that his night orders that night gave no instructions regarding zigzagging if and when the moon arose. But his standing orders, or "ship doctrine," were that zigzagging was to resume if visibility improved.

McVay's attorney, for his part, declined to cite any of the

testimony from Hashimoto supporting McVay's defense. He devoted a mere paragraph to Donaho's testimony:

Estimating the base course presented no problem at all to an enemy submarine commander, since the route [from Guam to Leyte] was practically the straight line between two of the largest ports we had in the area. Thus the situation was the very one which Captain Donaho described, in which zigzagging is of no avail. His impressive record of twenty-three consecutive, successful attacks on the enemy, all of whom were zigzagging, lends much weight to this point of view.

After closing arguments, the court found McVay guilty of the first charge. He was sentenced to a loss of 100 points in his "temporary grade of captain." The final entry in the December 19, 1945 record states:

In consideration of the outstanding previous record of the accused and our belief that no other Commanding Officer who lost his ship as a result of enemy action has been subjected to a court martial, we strongly recommend Charles B. McVay, 3rd, Captain, U.S. Navy, to the clemency of the reviewing authority.

## IV. Unanswered Questions

After his many years of service to the Navy, Captain McVay retired to Litchfield, Connecticut. Virtually no one in town knew his background, but got to know him as a friendly neighbor who enjoyed socializing.

In the early afternoon of a dreary November day in 1968, however, he told his housekeeper that he would eat his sandwich later. He had shared with her earlier that he had been having nightmares about sharks. He then walked into the front yard, lay down, and shot himself in the head. He was holding a toy soldier his father had given him as a boy. Twenty-three years after the disaster, and years of receiving Christmas hate mail blaming him for the loss of loved ones, his mental anguish over the catastrophe was finally over.

His question – why the Navy had taken five days to rescue him and his men, has never been satisfactorily answered. As one of the Marine survivors, Melvin C. Jacob, recounted in an interview, McVay repeatedly raised this question to anyone who would listen. But there was no answer. As Jacob stated, had even one more day gone by, there would have been no survivors from the



Indianapolis:

A. Well, after his wife passed away – see, and one of the first reunions we had Captain McVay wasn't even sure if he should come because he didn't know how the men would feel about him.

Q. Mm-hmm.

A. But he did come and he got a royal welcome from all of us, him and his wife . . . but the only thing he really wanted to know even at the court martial was, "Why did it take you so long to pick us up?"

Q. Right. No answer.

A: To be honest with you, another day I don't think there would have been any survivors.

Q. If what?

A. If there was another day or two days I don't think there would have been any survivors.

Q. Oh, you think you were that close.

A. Oh God, yes . . . that was a bad time, too, on the—the most

terrifying noise you want to hear is somebody getting bit by a shark.

Q. That must have been terrifying.

A. That was.

Q. When you were bit they usually were taken down and—

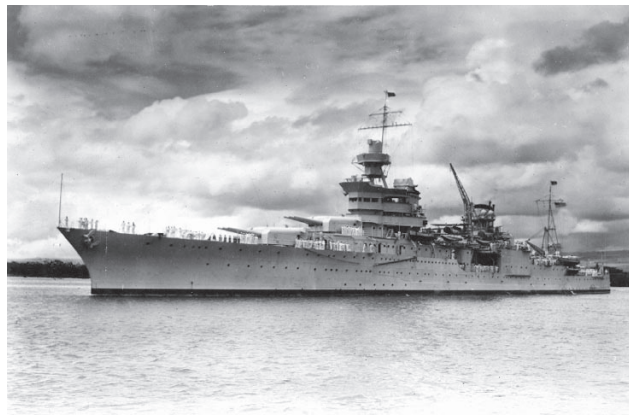
A. Pulled down.

Q. Not many guys that were bit and survived, is that right?

A. Not that I recall. I don't recall any

## V. Epilogue

In October 2000, 55 years after his conviction, Congress exonerated Captain McVay of any wrongdoing. The Navy - - which failed to provide him with specific information about enemy activity in the area (for fear of compromising its ULTRA intelligence operation),<sup>4</sup> failed to provide the Indianapolis with an escort, and convicted him despite exculpatory testimony from Hashimoto and Donaho - - cleared his record of the negligence conviction one year later.



<sup>1</sup> Little Boy bore on its side the chilling note: "Greetings to the Emperor from the men of the USS Indianapolis."

<sup>2</sup> Contrary to Robert Shaw's monologue in *Jaws*, evidence indicates that the Indianapolis had indeed transmitted a distress signal before going down. It was received at one station by a navy commander who was drunk at the time, it was ignored at a second, and was thought to be a Japanese prank at a third. Even if had not been received, however, an astonishing six days passed before the naval authorities at Leyte or Guam "began to bestir themselves to find out what had happened to the Indianapolis," as one newspaper wrote at the time.

<sup>3</sup> Highlighting the hyper-technicality of the first charge, the Navy later officially stated in 1946, after his conviction, that McVay "was neither charged with, nor tried for, losing the Indianapolis." The necessary implication of the negligence charge, however, was that he had "hazarded" his ship by failing to zigzag at night, and therefore could have avoided being sunk if he had been zigzagging.

<sup>4</sup> The Navy had failed to inform Captain McVay that a Japanese submarine had sunk the USS *Underhill* only days before on July 24, 1945 - - along the same path the Indianapolis was to take to Leyte. This information was obtained by the United States' ULTRA intelligence gathering program. As a captain, McVay did not rank high enough to have access to this intelligence. Had an admiral been on board the ship, the intelligence would have been shared. D. Stanton, *In Harm's Way*, pp. 77-79. After the Japanese deduced that its coded transmissions had been compromised after the Battle of Midway, the United States intentionally took no action on certain decoded transmissions, to deceive the Japanese into believing that their new code had not been compromised.