

## MILITARY JUSTICE INCOMPETENCE OVER COMPETENCY DETERMINATIONS

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*It was once said that the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy and the handicapped.<sup>1</sup>*

### I. Introduction

Current military justice procedures concerning the handling of mentally ill servicemembers is lacking. More specifically, competency determinations of an accused servicemember's capacity to stand trial are constitutionally invalid, legally illogical, unfair to the accused, and abrogate the independent judicial duties of commanders. Moreover, this poor handling serves to undermine the legitimacy of the military judicial institution.

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<sup>1</sup> Joe Hansen, *The Moral Test of Government*, HUFF. POST (Sept. 3, 2012), [http://www.huffingtonpost.com/joe-hansen/the-moral-test-of-governm\\_b\\_1847379.html](http://www.huffingtonpost.com/joe-hansen/the-moral-test-of-governm_b_1847379.html).

Historically, the military justice system has been at the forefront in providing and protecting the rights of the accused.<sup>2</sup> However, little attention has been paid to its dealings with an accused who may be incompetent to stand trial. When it comes to dealing with competency determinations and involuntary commitments, the rules for military courts-martial are outright odd and uncharacteristic from that of any other jurisdiction in the country. It is cross-breed with the federal system and something exclusively military. The current amalgamation of the federal model and commander-driven military procedures creates a forced and frustrated hybrid system that is neither fair nor just. It leaves the military process irrational in some ways and outright contradictory in others.

Part II of this article provides the general comparative framework of the different judicial models, the federal procedures, the American Bar Association (ABA) Model Rules,<sup>3</sup> and the military justice process, and examines how each of these systems address and adjudicate the competency of a defendant to stand trial. Part III reflects upon some of the key problems and difficulties with the current military justice procedures and argues why the status quo requires change. Part IV offers a recommendation—to shift pre-referral competency determinations from convening authorities to military magistrates—and explains why such an update to the military rules can better strengthen the due process rights of the accused servicemember, and best ensure justice under military law.

## II. Criminal Systems Compared

### A. The Federal Procedures

When a defendant's competency to stand trial is at issue under the federal system, the U.S. Code dictates the procedures and due process requirements.<sup>4</sup> Either the defense counsel or the prosecutor can make a motion to the court for a sanity or competency hearing, and the motion

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<sup>2</sup> See, e.g., Douglass Calidas, *Sensitive Military "Intelligence": Reconsidering Fifth Amendment Waivers*, 19 GEO. MASON U. CIV. RTS. L. J. 133, 133 (2008). "Several years before the Court [even] decided *Miranda*, Congress enacted Article 31 of the Uniform Code of Military Justice to safeguard accused servicemembers' Fifth Amendment rights." *Id.*

<sup>3</sup> William H. Erickson et al., *Mental Health, Mental Retardation and Criminal Justice: General Professional Obligations*, in AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1989).

<sup>4</sup> 18 U.S.C. § 4241(a).

may be made at any time during the proceedings, from the commencement of the prosecution up until just prior to sentencing.<sup>5</sup> The court can, and in certain circumstances, may be required,<sup>6</sup> to act *sua sponte* and “order such a hearing on its own motion.”<sup>7</sup> The court must grant the motion for a hearing if there is reasonable cause to believe that a defendant may be incompetent.<sup>8</sup> Courts have further defined “reasonable cause to believe” as any “bona fide doubt” to the defendant’s ability to proceed.<sup>9</sup> As a matter of practice, judges will often “order an examination when any question as to competency is raised, unless the motion is frivolous or in bad faith.”<sup>10</sup> Additionally, the courts may, and generally will, order a psychiatric or psychological evaluation of the defendant prior to the scheduled competency hearing.<sup>11</sup>

In accordance with the Supreme Court standard under *Dusky*,<sup>12</sup> a defendant may only be deemed incompetent to stand trial if he is “presently suffering from a mental disease or defect,” and if he is “unable to understand the nature and consequences of the proceedings against him or assist properly in his defense.”<sup>13</sup> The court will decide the defendant’s

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<sup>5</sup> *Id.*

<sup>6</sup> See *Pate v. Robinson*, 383 U.S. 375 (1966). “The court’s failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial . . . . Where the evidence raises a ‘bona fide doubt’ as to a defendant’s competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing.” *Id.* at 385.

<sup>7</sup> 18 U.S.C. § 4241(a). “The court . . . shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect.” *Id.* (emphasis added).

<sup>8</sup> *Id.*

The court shall grant the motion . . . if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

*Id.* (emphasis added).

<sup>9</sup> See *Roberts v. Dretke*, 381 F.3d 491 (5th Cir. 2004), *cert. denied*, 544 U.S. 963 (2005). “[A] trial court must hold a competency hearing when there is evidence before the court that objectively creates a bona fide question as to whether the defendant is competent to stand trial.” *Id.* at 497 (citing *Pate v. Robinson*, 383 U.S. 375, 385).

<sup>10</sup> JAMES MOORE ET AL, *MOORE’S FEDERAL PRACTICE: RULES AND OFFICIAL FORMS AS AMENDED* § 612.2.07(1) (2015).

<sup>11</sup> 18 U.S.C. § 4241(b).

<sup>12</sup> See *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>13</sup> 18 U.S.C. § 4241(a).

ability to proceed based upon the preponderance of the evidence.<sup>14</sup> However, the federal circuits are split over “which party bears the burden of proof in competency hearings . . . with some circuits placing the burden on the [g]overnment and others placing it on the individual.”<sup>15</sup>

Federal sanity hearings are formal proceedings and must comport with the provisions under § 4247(b) of the U.S. code.<sup>16</sup> The rule enumerates due process protections for the accused and it includes: the right to receive notice; to be represented by counsel; to call witnesses; to be afforded the opportunity to testify on his own behalf; to present evidence; and to confront and cross-examine testifying witnesses.<sup>17</sup> In fact, if the defendant can demonstrate indigence, the judge may issue subpoenas for witnesses and order their presence at no expense to the defendant.<sup>18</sup> Within federal criminal procedure, it is evident that Congress “recognized that such procedural safeguards were, at a minimum, desirable, if not constitutionally mandated.”<sup>19</sup>

In the course of conducting competency hearings, federal judges base their determinations of the defendant’s mental competency to stand trial on enumerable factors and evidence, to include the defendant’s testimony,<sup>20</sup> personal observations of the defendant’s courtroom

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<sup>14</sup> *Id.* § 4241(d).

<sup>15</sup> Brett F. Kinney, *An Incompetent Jurisprudence: The Burden of Proof in Competency Hearings*, 43 U.C. DAVIS L. REV. 683, 686 (2009) (citing *United States v. Patel*, 524 F. Supp. 2d 107, 112–14 (D. Mass. 2007) (discussing the split of the circuits)).

<sup>16</sup> 18 U.S.C. § 4241(c).

<sup>17</sup> *Id.* § 4247(d).

<sup>18</sup> MOORE, *supra* note 10, § 612.2.07(3) (citing FED. R. CRIM. P. 17(b)). “The court may order that a subpoena be issued on motion of a defendant who does not have sufficient means to pay a witness’s fees, upon a showing that the presence of the witness is necessary to an adequate defense.” *Id.*

<sup>19</sup> *United States v. Gillenwater*, 717 F.3d 1070, 1073 (9th Cir. 2013).

<sup>20</sup> *E.g., id.*

The right to testify reaches beyond the criminal trial: the procedural due process constitutionally required in some extrajudicial proceedings includes the right of the affected person to testify.” That a person has a constitutional right to testify before his or her welfare benefits are terminated strongly supports the conclusion that a defendant has an equivalent right to testify on his own behalf before he is determined to be incompetent and is deprived of his liberty.

*Id.* at 1073 (quoting *Rock v. Arkansas*, 483 U.S. 44, 51 n.9 (1987) (internal citations omitted)).

behavior,<sup>21</sup> medical testimony from examining witnesses, medical records and reports, proffers and opinions of defense counsels,<sup>22</sup> other lay witnesses' observations of the defendant,<sup>23</sup> and even the defendant's own assertions of competency.<sup>24</sup> If, after conducting the sanity hearing, the judge finds the defendant incompetent, the proceedings are then stayed, and the court is statutorily required, without discretion, to commit the defendant to the United States Attorney General's custody.<sup>25</sup>

A defendant may be committed at one of the federal facilities for treatment only for a reasonable period of time, but the initial detention cannot extend beyond four months.<sup>26</sup> The apparent intent of hospitalization is to allow doctors time to determine whether the defendant will regain competency in the near future. If after treatment the defendant is returned to competency, federal rules require the court to hold another competency hearing.<sup>27</sup> This follow-on hearing is also a full-course proceeding that demands all of the constitutional due process requirements under section 4247(b).<sup>28</sup> If the judge finds, by a preponderance of the

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<sup>21</sup> See, e.g., *United States v. Hems*, 901 F.2d 293 (2d Cir. 1990). "In making its assessment, the court may take account of a number of factors, including the defendant's comportment in the courtroom." *Id.* at 295 (citing *Drope v. Missouri*, 420 U.S. 162, 180 (1975) (finding evidence relevant to competency includes not only medical opinion but also the defendant's "irrational behavior" and "his demeanor at trial")); *United States v. Oliver*, 626 F.2d 254, 258–59 (2d Cir. 1980) (holding that the district court properly relied in part on its own observations in assessing defendant's mental capacity to stand trial); *United States v. Sullivan*, 406 F.2d 180, 185 (2d Cir. 1969); *McFadden v. United States*, 814 F.2d 144, 147 (3d Cir. 1987) (relying on defendant's conduct at competency hearing)).

<sup>22</sup> See, e.g., *United States v. Widi*, 684 F.3d 216, 221 (1st Cir. 2012). "[D]efense counsel's conclusion of competence is generally given great weight because of counsel's 'unique vantage.'" *Id.* at 220 (internal citation omitted); *United States v. Muriel-Cruz*, 412 F.3d 9, 14 (1st Cir. 2005). "Given that defense counsel enjoys a unique vantage for observing whether her client is competent . . . (noting that defense counsel and defendant are often the two parties 'most familiar' with the facts pertinent to this issue), it would be untoward indeed to disqualify her from stating her opinion." *Id.* at 14 (internal citations omitted).

<sup>23</sup> See, e.g., *United States v. Simpson*, 645 F.3d 300, 306–07 (5th Cir. 2011). "A district court can consider several factors in evaluating competency, including, but not limited to, its own observations of the defendant's demeanor and behavior, medical testimony, and the observations of other individuals that have interacted with the defendant." *Id.* at 306 (citing *United States v. Joseph*, 333 F.3d 587, 589 (5th Cir. 2003)).

<sup>24</sup> See, e.g., *Widi*, 684 F.3d at 216. The defendant's "own insistence on his competency is also entitled to consideration." *Id.* at 220 (citing *United States v. Muriel-Cruz*, 412 F.3d 9, 13 (1st Cir. 2005)).

<sup>25</sup> 18 U.S.C. § 4241(d).

<sup>26</sup> *Id.* § 4241(d)(1).

<sup>27</sup> 18 U.S.C. § 4241(e).

<sup>28</sup> *Id.*

evidence, that the defendant has regained competency, the court will again proceed with the case. If the court determines that the defendant remains mentally incompetent, it will extend the involuntary commitment if the defendant is expected to recover in the foreseeable future,<sup>29</sup> or if not, it may process the defendant for possible civil commitment.<sup>30</sup>

#### B. The American Bar Association's Model Rules

On August 7, 1984, the American Bar Association (ABA) formally adopted a set of ninety-six “black letter” standards on mental health and the criminal justice system.<sup>31</sup> The ABA model rules regarding the necessity for competency hearings are particularly clear. “In *every* case in which a good faith doubt of the defendant’s competence to stand trial has been raised . . . the court *should* conduct a hearing on the issue.”<sup>32</sup> The United States Supreme Court has echoed the same principle.<sup>33</sup> The ABA model rules not only recognize that all “[f]undamental constitutional rights afforded a defendant in criminal cases should apply to the hearing on competence to stand trial,”<sup>34</sup> but they specifically note that, “[i]n all cases, the defendant should have the right to be present at the hearing, to confront and fully cross-examine witnesses, to call independent expert witnesses, to have compulsory process for the attendance of witnesses, and to have a

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When the director of the facility in which a defendant is hospitalized . . . determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense . . . *the court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant.*

*Id.* (emphasis added).

<sup>29</sup> 18 U.S.C. § 4241(d)(2)(A). “[I]f the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward.” *Id.*

<sup>30</sup> 18 U.S.C. §§ 4246, 4248.

<sup>31</sup> Erickson et al., *supra* note 3.

<sup>32</sup> *Id.* at 7-4.7(a) (emphasis added).

<sup>33</sup> Gerald Bennett, *Symposium on the ABA Criminal Justice Mental Health Standards: A Guided Tour through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 397 (1985). *See also* Drope v. Missouri, 420 U.S. 162, 181 (1972) (finding the court should hold a hearing to determine the defendant’s competence to stand trial at any point in the proceedings at which that competence becomes doubtful); Pate v. Robinson, 383 U.S. 375, 385 (1966) (finding the court should hold a competence hearing whenever evidence raises a sufficient doubt about the defendant’s competence).

<sup>34</sup> Erickson et al., *supra* note 3, at 7-4.8(a).

transcript of the proceedings.”<sup>35</sup>

While the ABA standards prefer competency hearings as a default rule, it remains flexible enough to bypass formal hearing procedures when “all parties stipulate that no hearing is necessary and the court concurs.”<sup>36</sup> Note, however, that regardless of the parties’ agreement, the court is still required to make “a separate concurrence . . . made only after it independently has reviewed the factual basis for the report.”<sup>37</sup> Additionally, the ABA re-emphasizes that “[i]n absence of stipulation by the parties and concurrence by the court, a hearing on the issues should be mandatory in all cases.”<sup>38</sup> Ultimately, the ABA model rules strive to ensure that “each party and the court [is afforded] the absolute right to force a full hearing on the issues, while providing a mechanism to avoid an unnecessary expenditure of resources in uncontested situations.”<sup>39</sup>

Upon finding the defendant incompetent, the ABA model rules further list factors that the court should consider “relating to treatment or habilitation to effect competence, including its appropriateness, its availability in the geographic area, its probable duration, the likelihood of restoration to competence in the reasonably foreseeable future, and the availability of the least restrictive treatment alternative.”<sup>40</sup> The court must find, by clear and convincing evidence, that:

(A) there is substantial probability that the defendant’s incompetence will respond to treatment or habilitation and defendant will attain or maintain competence in the reasonably foreseeable future; (B) treatment or habilitation appropriate for the defendant to attain or maintain competence is available in a residential facility; and (C) no appropriate treatment or habilitation alternative is available less restrictive than that requiring involuntary hospitalization.<sup>41</sup>

Lastly, the ABA model rules require the court to make specific “written findings of fact setting forth separately and distinctly the findings

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<sup>35</sup> *Id.* at 7-4.8(a)(i).

<sup>36</sup> *Id.* at 7-4.7(a).

<sup>37</sup> Bennett, *supra* note 33, at 398.

<sup>38</sup> Erickson et al., *supra* note 3, at 7-4.7(b).

<sup>39</sup> Bennett, *supra* note 33, at 398.

<sup>40</sup> Erickson et al., *supra* note 3, at 7-4.9(a).

<sup>41</sup> *Id.* at 7-4.9(a)(ii)(A)-(C).

of the court on the issues of competence, treatment or habilitation, and involuntary confinement.”<sup>42</sup>

### C. The Military Justice Process

Competency determinations under military justice criminal procedures, embodied in the rules for courts-martial (RCM), are altogether different from that of any state or federal jurisdiction in the country. It is a bifurcated hybrid system of established federal procedures and something exotically fabricated.<sup>43</sup> The turn-pin to competency determinations pivot upon the convening authority’s referral of the case to court-martial.<sup>44</sup> Prior to referral, any questions of an accused’s mental competency are well within the sole discretion and judgment of the convening authority.<sup>45</sup> Commanders (a general courts-martial convening authority, or GCMCA) decide whether there is reasonable cause to evaluate an accused servicemember’s mental capacity.<sup>46</sup> The GCMCA alone determine if the accused is mentally capable to proceed to trial.<sup>47</sup> Only upon referral is the case finally before a court, and only then does a judge assume the judicial role overseeing competency determinations.<sup>48</sup> The referral, though not in itself that significant, demarks a critical turning point from what is uniquely military into the more recognizable conventions of federal criminal procedure.

#### 1. Pre-Referral Procedures

The pre-referral phase of military criminal case is the period between the pre-referral of charges against the servicemember and the convening authority’s referral of the case for court-martial.<sup>49</sup> Statutorily, the military

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<sup>42</sup> *Id.* at 7-4.9(b)(i).

<sup>43</sup> David M. O’Dea, *Navigating the Restoration of Capacity and Civil Commitment of a Mentally Incompetent Accused*, ARMY LAW., June 2013, at 5 (citing *Joint Service Committee on Military Justice Report, Analysis of the National Defense Authorization Act Fiscal Year 1996 Amendment to the Uniform Code of Military Justice*, ARMY LAW., Mar. 1996, at 145).

<sup>44</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706(a) (2012) [hereinafter MCM].

<sup>45</sup> *Id.* R.C.M. 706(b)(1).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* R.C.M. 706 (b)(2).

<sup>49</sup> See generally *id.* R.C.M. 307, 601.



prosecutor, or trial counsel, has 120 days to bring the case to trial.<sup>50</sup> This can often be much longer when accounting for the permissible tolling of excusable delays, to include, for example, the time necessary to conduct a competency evaluation of an accused.<sup>51</sup> During this pre-referral phase, nearly everything, including criminal procedure, is purely command-driven. Convening authorities serve both prosecutorial and quasi-judicial roles by overseeing and executing certain judicial responsibilities while, at the same time, maintain responsibility for the prosecution of the case.<sup>52</sup> If, within this pre-referral period, an accused's mental competency comes into doubt, all parties, including defense counsel, trial counsel, investigating officers, and subordinate commanders have an affirmative duty under the rules to report it to the chain of command.<sup>53</sup> The respective courts-martial convening authority will then consider the issue.<sup>54</sup> If the convening authority, upon the advice of her judge advocate, finds a bona fide doubt as to the accused's competency, she can order the accused to be examined.<sup>55</sup> Most often, the defense counsel is the first to raise the concern

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<sup>50</sup> *Id.* R.C.M. 707(a).

<sup>51</sup> *Id.* R.C.M. 707(c).

*Excludable delay.* All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run.

*Id.*

<sup>52</sup> See generally DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* (2004).

<sup>53</sup> See MCM, *supra* note 44, R.C.M. 706(a).

*Initial action.* If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is *reason to believe* that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation *shall* be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused.

*Id.* (emphasis added).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 706(b)(1). “*Before referral.* Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.” *Id.*

and the one to request the mental evaluation of the accused.<sup>56</sup> The defense counsel will generally draft a military memorandum, detailing the “facts and the basis of the belief or observation,” and submit his request through the trial counsel to the convening authority.<sup>57</sup> At this point in the process, the accused has no rights to a hearing, to call witnesses, or to demand an audience with the commander.<sup>58</sup>

Theoretically, the legal bar for granting competency evaluations is very low. Convening authorities should grant such requests “if it is not frivolous and is made in good faith.”<sup>59</sup> However, the rules do not require the convening authority to make any findings or publish any reasoning for her decision.<sup>60</sup> She can flatly deny the request without justification,<sup>61</sup> and her decision is not reviewable until after referral of the case to court.<sup>62</sup> In the interim, the accused is left with no recourse but to seek reconsideration, submit additional information, or simply wait until the convening authority refers the charges and the case is properly before a military judge.

If the convening authority grants the request and orders an examination per the Rules for Courts-Martial (RCM) 706, a board of one or more physicians or clinical psychologists will be convened to conduct the mental evaluation of the accused.<sup>63</sup> This is often called a “sanity board” or a “706 board.” Military rules mandate the convening authorities to always order the board to specifically and individually address four questions:

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<sup>56</sup> This assertion is based upon the author’s professional experience serving as a Senior Trial Counsel and Trial Counsel at Fort Hood, Texas and Multi-National Division-Baghdad, Iraq [hereinafter Lai’s Professional Experience].

<sup>57</sup> See MCM, *supra* note 44, R.C.M. 706. “The submission may be accompanied by an application for a mental examination under this rule.” *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *United States v. Nix*, 36 C.M.R. 76, 80 (1965).

<sup>60</sup> *Id.* R.C.M. 706.

<sup>61</sup> “The standard for ordering a sanity board is fairly low . . . [but despite] the low threshold, trial counsel will often oppose the defense request for a sanity board, assuming that the sanity board is intended as either a delay tactic or a fishing expedition.” Donna M. Wright, “*Though this be Madness, Yet there is Method in it: A Practitioner’s Guide to Mental Responsibility and Competency to Stand Trial*,” ARMY LAW., Sept. 1997, at 21–22.

<sup>62</sup> MCM, *supra* note 44, R.C.M. 706(b)(2). “After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge.” *Id.*

<sup>63</sup> *Id.* R.C.M. 706(c)(1). “Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist.” *Id.*

- (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?
- (B) What is the clinical psychiatric diagnosis?
- (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
- (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?<sup>64</sup>

The convening authority can tack on additional questions in her order to the 706 board so long as the questions are appropriately related to the mental capacity or mental responsibility of the accused.<sup>65</sup> Note that while a 706 boards is authorized to evaluate the accused for her competency to stand trial or lack of mental responsibility independently, the rules curiously demand that the board always report on both.<sup>66</sup> Accordingly, sanity boards are inescapably always dual-purpose.<sup>67</sup>

As the sanity board finalizes its RCM 706 evaluation, it will draft two separate reports, called “long-” and “short-form” reports.<sup>68</sup> The long-form is the board’s entire report, which will include the complete details of the examination, the test results, the evidence considered, its findings, and the basis of its conclusions.<sup>69</sup> Only the defense team and the appropriate

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<sup>64</sup> *Id.* R.C.M. 706(c)(2)(A)–(D).

<sup>65</sup> *Id.* R.C.M. 706(c)(2).

<sup>66</sup> *Id.* “When a mental examination is ordered under this rule . . . the order *shall* require the board to make separate and distinct findings as to each of the following questions.” *Id.* (emphasis added).

<sup>67</sup> J.W. Looney, *The Arkansas Approach to Competency to Stand Trial: “Nailing Jelly to a Tree”*, 62 ARK. L. REV. 683, 707 (2009). “Dual-purpose orders may be criticized on this basis alone.” *Id.* at 707. “The [Arkansas] Practice Guidelines specifically oppose the use of joint evaluations for determining competency and mental condition at the time of the offense. This is in accord with the American Bar Association’s Criminal Justice Mental Health Standard.” *Id.* (citation omitted).

<sup>68</sup> See R.C.M. 706(c) (requiring two reports). “Unlike many civilian jurisdictions, two separate versions of the report are prepared as the level of disclosure is different for the defense and the trial (government) counsels.” Meredith L. Mona, Carroll J. Diebold & Ava B. Walton, *Update on the Disposition of Military Insanity Acquittees*, 34 J. AM. ACAD. PSYCH. L. 538, 540 (2006).

<sup>69</sup> *Id.*

medical personnel are authorized to receive the long-form report.<sup>70</sup> Otherwise, only a military judge can order its release and disclosure.<sup>71</sup>

The trial counsel, the investigating officer, and the convening authority are only permitted to receive the short-form.<sup>72</sup> The short-form is the board's abbreviated report, which is specifically limited to "a statement consisting only of the board's ultimate conclusions as to all the questions specified in the order."<sup>73</sup> In other words, the short-form will merely identify the board's basic diagnosis of the accused's mental condition, if any, and its concluding opinions whether the accused is currently competent to stand trial.<sup>74</sup> In the short-form, the board will neither provide any explanation nor offer the basis for its conclusions, and it will only answer the questions submitted to it and not make additional recommendations or comments.<sup>75</sup>

If the sanity board's conclusion is that the accused is mentally capable to stand trial, its decision is, during the pre-referral phase, undisputed, final, and automatically adopted; there are no additional proceedings or further findings required.<sup>76</sup> While the defense counsel may request that the convening authority re-visit the issue or apply for another RCM 706 examination,<sup>77</sup> there is no mechanism to force the convening authority to review the board's report and make an independent legal finding of competency.<sup>78</sup> The defense counsel, at this point, is otherwise impotent to

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<sup>70</sup> MCM, *supra* note 44, R.C.M. 706(c)(3)(B).

<sup>71</sup> *Id.* R.C.M. 706(c)(3)(C). "That neither of the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge." *Id.*

<sup>72</sup> *Id.* at R.C.M. 706(c)(3)(A).

That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's commanding officer, the investigating officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge.

*Id.* See also UCMJ art. 32 (2012).

<sup>73</sup> MCM, *supra* note 44, at 706(c)(3)(A).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See *id.* R.C.M. 909(c).

<sup>77</sup> *Id.* R.C.M. 706(c)(4).

<sup>78</sup> *Id.* R.C.M. 909(c).

challenge the finding, and the finding is presumed valid.<sup>79</sup> Further action is only permissible if the sanity board reports that the accused is incompetent.<sup>80</sup>

If the sanity board finds the accused incompetent, military rules only require the convening authority to review the limited short-form report.<sup>81</sup> She can then either concur with the board's medical findings or dismiss it.<sup>82</sup> Again, the accused servicemember is not entitled to a hearing or to call any witnesses.<sup>83</sup> In fact, in most cases, the convening authority may never have personally observed the servicemember.<sup>84</sup> Even more, the rules do not require the convening authority to conduct any further inquiries, make any legal findings, or even provide any explanation of her decision.<sup>85</sup> A pre-referral competency determination is simply and purely the commander's document review of the sanity board's short-form report.<sup>86</sup> She is limited to either surrendering to the board's recommendation or blindly deny it.<sup>87</sup>

If the GCMCA adopts the board's finding that an accused is incompetent (she will almost always adopt the findings of the board) she is directed by the rules, without discretion,<sup>88</sup> to relinquish the accused servicemember to the custody of the United States Attorney General.<sup>89</sup>

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<sup>79</sup> *Id.* R.C.M. 909(b). “*Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.” *Id.*

<sup>80</sup> *See id.* R.C.M. 909(c).

<sup>81</sup> MCM, *supra* note 44, at 706(c)(3)(A).

<sup>82</sup> *Id.* R.C.M. 909(c).

If any inquiry pursuant to [the Rules for Court Martial, Rule] 706 conducted before referral concludes that an accused is suffering from a mental disease of defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion . . . [or] concurs with the conclusion.

*Id.*

<sup>83</sup> *Id.*, R.C.M. 909.

<sup>84</sup> Lai's Professional Experience, *supra* note 56.

<sup>85</sup> MCM, *supra* note 44, R.C.M. 909(c).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* R.C.M. 909(f). “The view that this is a non-discretionary act is consistent with federal courts examining this issue.” O’Dea, *supra* note 43, at 5 (citing *United States v. Salahuddin*, 54 M.J. 918, 920 (A.F. Ct. Crim. App. 2001)) (citations omitted).

<sup>89</sup> MCM, *supra* note 44, R.C.M. 909(c). “If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she *shall* commit the accused to

The U.S. Attorney General must then commit the accused to a medical facility with the Federal Bureau of Prisons<sup>90</sup> (BoP), who will then transfer the servicemember to an inpatient psychiatric center at one of five Federal Medical Centers (FMC).<sup>91</sup> This initial commitment cannot exceed four months,<sup>92</sup> and is solely intended to medically treat the accused and ascertain “whether there is a substantial probability the accused will attain the capacity to permit the trial to proceed in the foreseeable future.”<sup>93</sup> Beyond this initial four months, the convening authority may extend the commitment of the accused servicemember if she finds that the accused is expected to recover.<sup>94</sup> The extension can be even further prolonged, but all extensions must be only for a reasonable time.<sup>95</sup> The rules, however, do not provide further guidance on what constitutes a “reasonable time,” but arguably, it cannot be indefinite.<sup>96</sup>

While the initial four-month commitment is nondiscretionary,<sup>97</sup> the

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the custody of the Attorney General.” *Id.* (emphasis added).

<sup>90</sup> *Id.* R.C.M. 909(f). “Hospitalization of the accused. An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in section 4241(d) of title 18, United States Code.” *Id.*

<sup>91</sup> See generally O’Dea, *supra* note 43, at 4–5 (citing Bryon L. Hermel & Hans Stelmach, *Involuntary Medication Treatment for Competency Restoration of 22 Defendants with Delusional Disorder*, 35 J. AM. ACAD. PSYCH. L. 47, 48–50 (2007)).

<sup>92</sup> MCM, *supra* note 44, R.C.M. 909(f) discussion. “Under section 4241(d) of title 18, the initial period of hospitalization for an incompetent accused shall not exceed four months.” *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* “[T]he accused may be hospitalized for an additional *reasonable* period of time.” *Id.* (emphasis added).

<sup>95</sup> *Jackson v. Indiana*, 406 U.S. 715 (1972).

[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

*Id.* at 738.

<sup>96</sup> *Id.*

<sup>97</sup> O’Dea, *supra* note 43, at 5 (quoting *United States v. Ferro*, 321 F.3d 756, 761 (8th Cir. 2003) (“Even if the [General Courts-Martial Convening Authority] is of the opinion that

GCMCA may decide against extending the commitment and drop the charges against the servicemember.<sup>98</sup> However, if the convening authority dismisses the charges solely due to the accused's mental condition, the accused will then be automatically forced through the federal civil commitment review, where the servicemember may be committed *ad infinitum*.<sup>99</sup>

Similarly, if the FMC director determines that the accused cannot be restored to competency and that her "release would create a substantial risk of bodily injury . . . or serious damage to property of another," a Certificate of Mental Disease or Defect and Dangerousness is filed with the federal district court where the accused is held.<sup>100</sup> The servicemember will then be automatically processed for federal civil commitment proceedings.<sup>101</sup> While the GCMCA will receive a copy of the FMC's findings, federal courts will now assume jurisdiction.<sup>102</sup> In fact, by this point, the GCMCAs "have very little ability to influence when the accused is released . . . . [T]he final decision will be made by the district court where the accused resides."<sup>103</sup> Such civil commitments can be

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the accused will not regain capacity with treatment, the [commander] 'does not have the discretion, prior to a reasonable period of hospitalization in the custody of the Attorney General,' to make that determination.") *Id.*

<sup>98</sup> MCM, *supra* note 44, R.C.M. 909(f) discussion. "This additional period of time ends either when the accused's mental condition is improved so that trial may proceed, or when the pending charges against the accused are dismissed." *Id.*

<sup>99</sup> *Id.* "If charges are dismissed solely due to the accused's mental condition, the accused is subject to hospitalization as provided in section 4246 of title 18." *Id.* See also 18 U.S.C. § 4246.

<sup>100</sup> 18 U.S.C. § 4246(a).

If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons . . . who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another . . . he *shall* transmit the certificate to the clerk of the court for the district in which the person is confined.

*Id.* (emphasis added).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> O'Dea, *supra* note 43, at 11 (citing 18 U.S.C. § 4246(e)).

indefinite.<sup>104</sup> Even if not indefinite, “[a]n accused subject to civil commitment due to an underlying criminal offense will likely remain in custody longer than an ordinary, civil commitment patient.”<sup>105</sup>

If, however, the accused regains the capacity to stand trial and the FMC issues a certificate of competency,<sup>106</sup> the GCMCA is then instructed to “promptly take custody” of the accused.<sup>107</sup> The FMC often will hold the accused for up to an additional thirty days to facilitate transfer.<sup>108</sup> Upon returning the accused back to her unit, the convening authority again regains full command of the prosecution and “may take any action that he or she deems appropriate in accordance with RCM 407, including referral of the charges to trial” or dismissal of charges.<sup>109</sup> The RCMs do not require the GCMCA to conduct another sanity board or confirm FMC certification of competency; the accused’s mental capacity is again presumed by the rules.<sup>110</sup> Note that the time that the accused was

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[T]he Attorney General shall hospitalize the person for treatment in a suitable facility, *until* . . . the person’s mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another.

18 U.S.C. § 4246(d)(2) (emphasis added).

<sup>105</sup> O’Dea, *supra* note 43, at 1. In a study of Arizona defendants civilly committed under this section, “mentally incompetent non-restorable defendants spent ‘twice as long’ in hospitals compared to civil patients.” *Id.* at 11 n.137 (citing Gwen A. Levitt et al., *Civil Commitment Outcomes of Incompetent Defendants*, 38 J. AM. ACAD. PSYCH. L. 349, 356 (2010)).

<sup>106</sup> 10 U.S.C. § 876(a)(4)(A).

<sup>107</sup> MCM, *supra* note 44, R.C.M. 909(f).

If notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused.

*Id.*

<sup>108</sup> 10 U.S.C. § 876(a)(4)(B).

<sup>109</sup> MCM, *supra* note 44, R.C.M. 909(c). *See also id.* R.C.M. 706 discussion. “Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, [and] administrative action may be taken to discharge the accused from the service or, subject to [Military Rules of Evidence] 302, the charges may be tried by court-martial.” *Id.*

<sup>110</sup> *See generally id.* R.C.M. 706.



involuntary committed, however long, is excusable delay for speedy-trial purposes.<sup>111</sup> Even more, the rules permit the government an additional 120 days to bring the restored accused to trial.<sup>112</sup> In other words, the prosecution's statutory speedy-trial clock resets.

## 2. *Post-Referral Procedures*

Once the convening authority refers the case for courts-martial before a military judge, the military criminal procedures, especially those regulating competency determinations, are then altogether altered. While the substantive legal standards (i.e. burden of proof, level of proof, *Dusky* factors<sup>113</sup> determining incompetency) remain the same, the pre and post-referral rights, forum, and practice is distinctly different. Post-referral procedures parallel and adopt much of the conventional federal process.

When the case is referred, the military judge, as opposed to the GCMCA, assumes the full discretion, judgment, and responsibility over any issues regarding the servicemember's mental capacity to stand trial.<sup>114</sup> The court has full authority to not only judge the appropriateness for an sanity board, but to also order it.<sup>115</sup> Even if the convening authority had previously denied a request for a sanity board, the military judge can order it if reasonable cause is found by a preponderance of evidence.<sup>116</sup>

In further contrast to the pre-referral Rules, the post-referral procedures demand due process.<sup>117</sup> Upon referral of the case for trial,

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<sup>111</sup> *Id.* RCM 909(g). “*Excludable delay.* All periods of commitment shall be excluded as provided by R.C.M. 707(c).” *Id.*

<sup>112</sup> *Id.* “The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment.” *Id.*

<sup>113</sup> *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>114</sup> MCM, *supra* note 44, R.C.M. 706(b)(2). “*After referral.* After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge . . . . The military judge may order a mental examination of the accused *regardless of any earlier determination by the convening authority.*” *Id.* (emphasis added).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* R.C.M. 909(d).

*Determination after referral . . . .* If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge *shall* conduct a

military rules require the judge to conduct a competency hearing if the accused's mental capacity to stand trial comes into doubt.<sup>118</sup> Despite the 706 board's earlier findings, either party may request—or the judge *sua sponte* order—a full hearing to review the accused's mental capacity upon adequate proof.<sup>119</sup>

Unlike pre-referral competency determinations with a convening authority, where the only evidence is limited to the redacted, short-form 706 report, post-referral procedures require a full hearing on the matter.<sup>120</sup> In the hearing, the accused may submit evidence for the court's review, have medical experts testify, to include the 706 board members who examined the accused, call other witnesses for support, confront and cross-examine government witnesses, and even testify on her own behalf.<sup>121</sup> At the hearing, the accused's defense attorney is not only permitted to make arguments to the court, but counsel can even attest to his own observations of the accused so long as it does not violate attorney-client confidentiality.<sup>122</sup> In fact, "counsel will usually introduce relevant portions of the mental evaluation [long-form] report and call one or more experts who examined the accused. Counsel may also call lay witnesses with sufficient contact with the accused who can testify about incidents of bizarre or otherwise relevant behavior."<sup>123</sup> In stark distinction from the pre-referral stage, the post-referral military rules liberally and explicitly instruct that "[i]n making this [competency] determination, the military judge is not bound by the rules of evidence except with respect to privileges."<sup>124</sup>

At the conclusion of the hearing, the judge will consider all evidence and testimony and make a formal, specific, legal finding on the issue.<sup>125</sup> If the court concludes that the accused is incompetent to stand trial by a

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hearing to determine the mental capacity of the accused.

*Id.* (emphasis added).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* "After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party." *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* R.C.M. 909(e)(2)

<sup>122</sup> Margaret A. McDevitt, *Trial Defense Service Note: Defense Counsel's Guide to Competency to Stand Trial*, ARMY LAW., Mar. 1988, at 37 (citing *United States v. Martinez*, 12 M.J. 801, 807 (N.M.C.M.R. 1981)).

<sup>123</sup> *Id.*

<sup>124</sup> MCM, *supra* note 44, R.C.M. 909(e)(2).

<sup>125</sup> *Id.*

preponderance of the evidence, all further proceedings, including trial, are generally stayed, and the rules instruct the judge to notify the GCMCA of his findings.<sup>126</sup> In turn, the convening authority is then statutorily required, as before, to surrender the servicemember to the custody of the U.S. Attorney General and involuntarily commit the accused for rehabilitation.<sup>127</sup> Note that while in the pre-referral phase, the convening authority can refuse the 706 board and independently find the accused competent to stand trial, after referral the convening authority must abide by the court's ruling.<sup>128</sup>

If the servicemember is restored after treatment and the convening authority re-refers the case for trial, the military judge may still, if the accused's mental capacity remains in controversy, order another hearing to confirm continued competency.<sup>129</sup> In fact, if concerns over the accused's capacity to stand trial lingers, the military judge can, and in some cases is obligated, to conduct additional (if not multiple) competency hearings at any time throughout the proceedings, up to and until sentencing.<sup>130</sup>

### III. The Need for Change

The military should modify current military criminal procedure so that military magistrates, rather than commanders, conduct pre-referral competency determinations. One of the most obvious basis for this proposal is to update the military justice system to better reflect the federal legal developments and norms. This change will bring the military justice system closer in step with the federal criminal procedures and the ABA Model Rules.<sup>131</sup> Federal criminal procedures have proven reliable, particularly considering the federal criminal court's extraordinary volume of cases, and the magnitude of judicial and peer review, to include the Supreme Court. In comparison to the military, these procedures have been more tested and refined.<sup>132</sup> The ABA is undoubtedly the ultimate think-

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<sup>126</sup> *Id.* R.C.M. 909(e)(3).

<sup>127</sup> *Id.* "If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who *shall* commit the accused to the custody of the Attorney General" *Id.* (emphasis added).

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* R.C.M. 706(a), 909(d).

<sup>130</sup> *Id.*

<sup>131</sup> *See supra* section II for further discussion.

<sup>132</sup> UNITED STATES COURTS, *Official Business of the United States Court: Annual Report*

tank of the legal profession, representing the expert opinions of the industry's most respected, experienced, and renowned practitioners who specialize in the particular field and focus on the most specific, niche legal issues.<sup>133</sup> The military should not resist changing the rules to those that every other jurisdiction has already adopted. The military should likewise not insist on preserving the status-quo without the willing introspection to consider whether its methods are, in fact, serving its purpose, are legally sufficient, and, per military cliché, doing the right thing.

Are the military procedures in pre-referral competency determinations constitutionally valid, fair, and just to servicemembers? Do they make legal and logical sense? Do they best serve our commanders? Do they uphold the institutional integrity and commitment to justice? If not, then military justice becomes, in part, a misnomer.

#### A. Fundamentally Unfair

Appreciating the grave importance of due process during pre-referral competency reviews requires understanding why an accused would challenge such determinations. The accused may wish to contest the sanity board's examination methods or its underlying conclusions. The defense counsel, for example, may wish to dispute the 706 finding of competency when, despite the board's finding, he is convinced that his client is unable to understand the nature and consequences of the proceedings against her, or assist properly in her own defense. As

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*of the Director 2014*, ADMIN. OFF. OF U.S. COURTS (Sept. 30, 2014), <http://www.uscourts.gov/statistics-reports/judicial-business-2014>. Just in fiscal year 2014 alone, the U.S. District Courts adjudicated 376,536 cases, of which 81,226 were criminal prosecutions. *Id.* The U.S. Court of Appeals oversaw 54,988 cases, 11,003 of which were criminal appeals. *Id.*

<sup>133</sup> As one of its primary goals, the ABA's mission is to advance the rule of law, to include a mandate to:

Increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world . . . . Hold government accountable under the law . . . . Work for just laws, including human rights, and fair legal process . . . . preserve the independence of the legal profession and the judiciary.

*The American Bar Association Mission and Goals*, AMER. BAR ASSOC., [http://www.americanbar.org/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/about_the_aba/aba-mission-goals.html) (last visited Apr. 13, 2016).

acknowledged by the Supreme Court and reiterated by the ABA, the defense counsel “will often have the best-informed view of the defendant’s ability to participate in [her] defense.”<sup>134</sup> Forensic psychology, while certainly valuable, is not an exact science. In fact, even today, there are a number of competing methods for evaluating an accused’s competency and there is no one standard or test that is universally accepted as the “key.”<sup>135</sup> In 1965, psychiatrist Dr. Thomas Szasz wrote, “[w]hen it comes to judging ability to stand trial . . . we seem to be at sea, with no compass to guide us.”<sup>136</sup> Unfortunately, it seems that “his assertion is as accurate today as when it was written.”<sup>137</sup>

The accused may also want to challenge a sanity board’s findings because the stigma of a psychological diagnosis and involuntary hospitalization may be far worse and more damaging than the possible punishment at court-martial. Arguably, “involuntary hospitalization . . . serves the interest of justice and the accused by ensuring that the accused

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<sup>134</sup> *Medina v. California*, 505 U.S. 437, 450 (1992). “[A]s the American Bar Association asserts, [the] defense counsel ‘may well be the single most important witness’ on the issue of the defendant’s ability to consult and interact appropriately with his or her attorney.” Grant H. Morris et al., *Health Law in the Criminal Justice System Symposium: Competency to Stand Trial on Trial*, 4 HOUSTON J. HEALTH & POLICY, 193, 236 (2004) (citation omitted).

<sup>135</sup> Morris, *supra* note 134, at 233–34 (citations omitted).

By and large, the legal profession has left it to the mental health professionals to develop their own competency assessment instruments to operationalize the *Dusky* standard. But those instruments are not without their limitations. Until recently, such instruments did not provide for standardized administration and objective, criterion-base scoring. The recently developed MacArthur Competence Assessment Tool—Criminal Adjudication (MacCAT-CA) broadly assess both the defendant’s cognitive and decision making capabilities and is a standardized and nationally norm-reference clinical measure. However, the MacCAT-CA has been criticized for its primary reliance on a hypothetical vignette format which limits the evaluator’s ability to assess the defendant’s competence to deal with the specific issues involved in defending his or her particular case . . . research indicates that, at least currently, the overwhelming majority of psychiatrists and psychologist do not use psychological tests in assessing defendant’s competency. Rather they rely primarily on their own forensic interview with the defendant.”

*Id.* See also *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>136</sup> Morris, *supra* note 134, at 228 (quoting THOMAS SZASZ, *PSYCHIATRIC JUSTICE* 27 (1965)).

<sup>137</sup> *Id.*

receives care and treatment prior to trial.”<sup>138</sup> But this presumption may assume too much. Aside from the deprivation of liberty and forced medication, which are both in themselves injurious enough, the commitment of a servicemember to an infamous federal mental institution is exceptionally more stigmatizing than incarceration.<sup>139</sup> Federal mental facilities are known to be “notorious institutions for the criminally insane.”<sup>140</sup> Indeed, “ex-patients generally fare worse in the job market than ex-felons.”<sup>141</sup> As such, it may be “far worse to be considered both ‘mad’ and ‘bad’ than to be considered merely one or the other.”<sup>142</sup> Even if the convening authority subsequently dismisses charges, or if the servicemember is later acquitted, the damage from being involuntarily committed to a mental institution may be irreversible.

An accused may also contest an RMC 706 incompetency finding because the resulting delay and time spent in involuntary commitment could be longer and more onerous than her probable sentence at court-martial. Statutorily, the prosecution has 120 days to bring the accused to trial.<sup>143</sup> This does not include tolled excusable delay like the necessary time to convene and conduct a sanity board, or for the board to publish its reports.<sup>144</sup> If the accused is found incompetent, the convening authority is required to hospitalize the servicemember for another four months for further evaluation.<sup>145</sup> This involuntary commitment can be extended much longer if the accused is expected to regain competency.<sup>146</sup> There are also other additional logistical delays, to include the transfer of the accused to and from the custody of the Federal Bureau of Prisons that can tack on an additional month.<sup>147</sup> Adding insult to injury, the military rules then reset the statutory clock once the accused regains competency and grants the government an additional 120 days to re-prosecute the case.<sup>148</sup> All totaled, an accused may spend well over a year in legal limbo under the cloud of

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<sup>138</sup> Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemember*, ARMY LAW., Dec. 2005, at 10.

<sup>139</sup> See Bruce J. Winick, *Article: Restructuring Competency to Stand Trial*, 32 U.C.L.A. L. REV. 921, 944 (1985).

<sup>140</sup> *Id.* at 944.

<sup>141</sup> *Id.* (citing Ennis, *Testimony in Hearing before the Senate Subcommittee on Constitutional Rights*, 91st Cong., 2d Sess. 284 (1970)).

<sup>142</sup> *Id.*

<sup>143</sup> MCM, *supra* note 44, R.C.M. 707(a).

<sup>144</sup> See *id.* R.C.M. 707(c).

<sup>145</sup> *Id.* R.C.M. 909(f) discussion.

<sup>146</sup> *Id.*

<sup>147</sup> See 10 U.S.C. § 876 (a)(4)(A).

<sup>148</sup> MCM, *supra* note 44, R.C.M. 909(g).

criminal charges, deprived of her freedom, subjected to forced medication, all without ever being convicted of a crime. To deny the accused due process rights for such consequential pre-referral competency determinations is not only unconscionable, it is unconstitutional.

### B. Constitutionally Invalid

The contention that the military justice's pre-referral procedures are legally inadequate is not new. In 2005, Jeremy A. Ball argued that RCM 909 is invalid and unconstitutional, yet nothing has changed.<sup>149</sup> While the United States Supreme Court has adjudicated a number of cases regarding due process requirements in state and federal competency procedures, it has yet to specifically review the military process under RCM 909.<sup>150</sup> However, in synthesizing the significant Supreme Court opinions on the issue, it is abundantly apparent that "RCM's provisions authorizing the general court-martial convening authority to involuntarily hospitalize the accused without a hearing violate the Due Process Clause of the Fifth Amendment . . . [and] the servicemember's 'right to be free from involuntary confinement by his own government without due process of law.'"<sup>151</sup>

Among Supreme Court cases,<sup>152</sup> *Vitek v. Jones* is of particular interest.<sup>153</sup> There, the appellee, a convicted felon, was involuntarily transferred from prison to a mental institution for treatment, but he was never afforded a hearing.<sup>154</sup> The threshold question before the Court was "whether the involuntary transfer . . . to a mental hospital implicates a liberty interest that is protected by the Due Process Clause."<sup>155</sup> The Court not only found that "commitment to a mental hospital produces 'a massive curtailment of liberty,' and in consequence 'requires due process

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<sup>149</sup> Ball, *supra* note 138, at 1. "Considering the significant procedural shortcomings of R.C.M. 909, both in relation to federal criminal procedures and the Due Process Clause, and in conjunction with the lack of statutory support for involuntary hospitalization prior to referral, the only reasonable conclusion is that the provisions of R.C.M. 909(c) are invalid." *Id.* at 14.

<sup>150</sup> MCM, *supra* note 44, R.C.M. 909.

<sup>151</sup> Ball, *supra* note 138, at 10.

<sup>152</sup> See *Vitek v. Jones*, 445 U.S. 480 (1980); *United States v. Salerno*, 481 U.S. 739 (1987); and *Hamdi v. Rumsfeld*, 542 U.S. 507(2004) (containing language Ball found to be particularly convincing); see also Ball, *supra* note 138, at 13.

<sup>153</sup> *Vitek v. Jones*, 445 U.S. 480 (1980).

<sup>154</sup> *Id.*

<sup>155</sup> *Vitek*, 445 U.S. at 488.

protection,”<sup>156</sup> but it went further to recognize that just “the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections.”<sup>157</sup>

In *Pate v. Robinson*,<sup>158</sup> the Court considered whether due process is offended when the defendant never raised a competency objection at trial. The state contended that the defendant effectively waived the issue, but the Court decided otherwise.<sup>159</sup> In *Pate*, the Court held that evidence that sufficiently raises a bona-fide doubt of the defendant’s competence entitled him “to a hearing on this issue, [and a] court’s failure to make such inquiry thus deprived [the defendant] of his constitutional right to a fair trial.”<sup>160</sup>

In *Hamdi v. Rumsfeld*,<sup>161</sup> the Supreme Court, speaking more directly to the military, held that even in extreme circumstances of war where the governmental interest over enemy detentions is particularly elevated, due process is still nevertheless demanded.<sup>162</sup> It stated that “commitment for any purpose constitutes a significant deprivation of liberty that requires due process protections.”<sup>163</sup> Such due process requirements must include “notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decision-maker.”<sup>164</sup> The Court reminded the military that “[i]t is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”<sup>165</sup> “Indeed, failure of the court to order an evaluation when reasonable grounds exist to question the defendant’s competency—even if the defense did not raise the issue—has been held to violate the defendant’s right to due process, requiring reversal of any conviction

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<sup>156</sup> *Id.* at 491–92.

<sup>157</sup> *Id.* at 494.

<sup>158</sup> *Pate v. Robinson*, 383 U.S. 375 (1966).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 385 (emphasis added). “In the event a sufficient doubt exists as to his present competence such a hearing must be held.” *Id.* at 391.

<sup>161</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>162</sup> *Id.*

<sup>163</sup> Ball, *supra* note 138, at 12 (quoting *Hamdi*, 542 U.S. at 264–48).

<sup>164</sup> *Id.*

<sup>165</sup> *Hamdi*, 542 U.S. at 532.



obtained.”<sup>166</sup>

### C. Lacking Legal and Logical Sense

Aside from the constitutional objection, the bifurcated military procedure over competency determinations does not make legal or logical sense. The process due an accused servicemember cannot pivot so heavily on referral of charges when the legal consequences and the possible deprivation of liberty is the same. After all, the military referral process is not so legally distinctive to justify differential rights and protections. But what is more troubling is just how divergent and disparate the competency determination processes are in the military justice system pre versus post-referral.

If the court-martial is referred for trial, military rules mandate that the judge conduct a competency determination hearing wherein both parties can contest the other’s positions, present arguments, offer evidence, and call witnesses.<sup>167</sup> In fact, military judges are not even bound by evidentiary rules in such hearings, except privileges.<sup>168</sup> The court can receive and consider hearsay, character, or propensity evidence so long as it is relevant to the mental capacity of the accused.<sup>169</sup> Post-referral, the rules ensure that the military judge has all the pertinent facts and evidence he needs to make the best and most just decision concerning the accused’s capacity to stand trial.

The competency determination prior to referral is not only substantially different from that before a military judge at courts-martial, it is arguably different from any other federal or state jurisdiction in the country. Military rules not only fail to require the convening authority to

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<sup>166</sup> Winick, *supra* note 139, at 924–25.

<sup>167</sup> MCM, *supra* note 44, R.C.M. 909(d).

*Determination after referral . . .* If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental defect that renders him or her mentally incompetent to stand trial, the military judge *shall* conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with paragraph (e) of this rule.

*Id.* (emphasis added).

<sup>168</sup> *Id.* R.C.M. 909(e)(2).

<sup>169</sup> *See id.*

conduct a hearing, they fail to equip commanders with opportunities for further inquiry.<sup>170</sup> Indeed, the rules only provide convening authorities with the abbreviated RCM 706 findings and the charge sheet for consideration.<sup>171</sup> The rule expects that by simply reviewing these two documents, commanders can draw a fully-informed—and correct—conclusion about an accused’s mental competency to stand trial. This is neither logical nor justifiable.

How can the rules find it absolutely critical to require the military judge to conduct a full hearing, receive evidence, witnesses and arguments, and deliver legal findings on the records, but in the same ironic breath, determine that it is superfluous for the commander, who is tasked to make the same significant legal determinations? It seems safe to say that in contrast to commanders, military judges have more judicial experience, a better understanding of military justice processes, and have been specially trained as a lawyer and judge. Yet, underlying this double standard of pre- and post-referral procedures, the military rules assume that convening authorities have super-judicial insight into an accused’s mental competency that judges lack. Put simply, if the determination of an accused’s capacity to stand trial cannot be put through the same rigorous evidentiary review whether it is pre- or post-referral, or whether before a judge or a convening authority, then the military justice system is neither judicial nor logical.

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<sup>170</sup> *Id.* R.C.M. 909(c).

*Determination before referral.* If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

*Id.*

<sup>171</sup> *Id.*

#### D. The Burden of Proof Paradox

Another aspect that makes RCM 909 unworkable is its treatment of burden of proof. Under military rules, accused servicemembers are always “presumed to have the capacity to stand trial unless the contrary is established.”<sup>172</sup> As such, it places the burden to demonstrate incompetency squarely on the accused.<sup>173</sup> The rules further require the accused to produce proof of her lack of capacity to stand trial by a preponderance of the evidence.<sup>174</sup> This procedural framework is not extraordinary in post-referral cases in courts-martial.<sup>175</sup> If the case has already been referred to court-martial, the military judge is required to then hold a competency determination hearing that offers the accused all the usual opportunities to make arguments on the record, call witnesses to testify, and present evidence to the court.<sup>176</sup> However, the procedural framework of pre-referral cases is absolutely paradoxical. The presumption of competency remains, and the burden of proof is still placed upon the accused. Yet military rules do not grant any meaningful mechanism or forum for the accused to address the issue with the convening authority.

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<sup>172</sup> *Id.* R.C.M. 909(b).

<sup>173</sup> McDevitt, *supra* note 122, at 37. “Because the accused is presumed to have mental capacity, defense counsel will bear the burden of proving that the accused lacks capacity.” *Id.*

<sup>174</sup> MCM, *supra* note 44, R.C.M. 909(e)(2). “Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent . . . .” The standard of proof has been changed from beyond reasonable doubt to a preponderance of the evidence, which is consistent with the holdings of those federal courts which have addressed the issue. *See also* United States v. Gilio, 538 F.2d 972 (3d. Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); United States v. Makris, 535 F.2d 899 (5th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

<sup>175</sup> *See* Medina v. California, 505 U.S. 437 (1992).

Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

*Id.* at 446 (quoting Patterson v. New York, 432 U.S. 197, 201 (1977)).

<sup>176</sup> MCM, *supra* note 44, R.C.M. 909(d). “If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental defect that renders him or her mentally incompetent to stand trial, the military judge *shall* conduct a hearing to determine the mental capacity of the accused.” *Id.* (emphasis added).

Military procedures require an accused to prove her own incompetency to a decision-maker to whom the rules fail to guarantee her access. It is a futile exercise of meaningless *non sequitur*. The only quasi-opportunity for the accused or her defense counsel to address the convening authority on this issue is limited in an initial report of concern.<sup>177</sup> Otherwise, there are no other sanctioned opportunities or designated procedures for an accused to satisfy to her burden of proof. Although an accused is always free to submit materials for the commander's consideration informally and outside the purviews of the rules, or even contact the commanding general directly, these are disingenuous alternatives. It is legally unjustifiable to place the burden on the accused to persuade a high-ranking commander with whom she cannot legally demand an audience.<sup>178</sup>

#### E. Failing the Convening Authority

The recommendation to divest the convening authorities of competency determinations is not to question or doubt military commanders' abilities, willingness, or dedication to their justice responsibilities. Given proper procedures, convening authorities are arguably capable of deciding an accused's competency to stand trial. However, the current military justice system does not have a process for the convening authority to properly execute this duty. As discussed above, there are no formal competency determination hearings prior to the referral of the charges. The only evidence that the convening authorities have

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<sup>177</sup> Under R.C.M. 706(a), the defense counsel is mandated to report, through third-party channels, any reasonable belief that the accused lacks the capacity to stand trial. *Id.* R.C.M. 709(a).

If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is *reason to believe* that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation *shall* be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused.

*Id.*

<sup>178</sup> *See id.* R.C.M. 909(c).

before them is the charge sheet and the short-form RCM 706 finding.<sup>179</sup> As previously mentioned, they generally do not have the opportunity to personally observe the accused. Additionally, they do not have the benefit of observations of witnesses who have interacted with the accused. Finally, they often do not receive any insight from the accused's defense counsel.<sup>180</sup> They do not have the opportunity to question or learn from the medical experts who examined the accused, because there is no formal hearing. Under RCM 909, the convening authority can only blindly concur or dismiss the recommendations of the RCM 706 board.<sup>181</sup> If unsatisfied, the convening authority can only order another 706 examination or push forward with the referral.<sup>182</sup>

Commanders' reliance on sanity board findings is problematic because they effectively surrender their independent judicial judgment. An accused's competency to stand trial is a legal determination, not a medical one, and "the findings of a sanity board are not the same as a judicial determination of mental incapacity."<sup>183</sup> Sanity board reports are only meant "to provide for the detection of mental disorders not . . . readily apparent to the eye of the layman."<sup>184</sup> Furthermore, a medical diagnosis of mental disease may be a precursor to incompetency, but it is not dispositive.<sup>185</sup> Even more, "in some cases . . . the accepted legal approach

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<sup>179</sup> *Id.*

<sup>180</sup> Lai's Professional Experience, *supra* note 56.

<sup>181</sup> MCM, *supra* note 44, R.C.M. 909(c).

If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion . . . [or] concurs with the conclusion.

*Id.*

<sup>182</sup> *Id.* R.C.M. 706(c)(4). "Additional examinations. Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require." *Id.*

<sup>183</sup> Ball, *supra* note 138, at 14.

<sup>184</sup> *Id.* (quoting *Wear v. United States*, 218 F.2d 24, 26 (1954)).

<sup>185</sup> *See United States v. Nichols*, 56 F.3d 403 (2d Cir. 1995).

It is well-established that some degree of mental illness cannot be equated with incompetence to stand trial. The mental illness must deprive the defendant of the ability to consult with his lawyer "with a reasonable degree of rational understanding" and to understand the proceedings against him rationally as well as factually. Moreover, while the . . . court may consider psychiatric history in its deliberations,

does not comport with accepted psychiatric concepts . . . [while] in other cases, the accepted psychiatric approach cannot provide sufficient guidance to [authorities] vested with decision making.”<sup>186</sup> Simply put, “[t]he board’s findings are not legal conclusions, and should not be construed as such for purposes of justifying [an incompetency finding and] involuntary hospitalization.”<sup>187</sup>

The convening authorities’ dependence on the short-form RCM 706 finding is even more troubling.<sup>188</sup> Their authorized copies of the findings are so abridged that its value is extremely limited. The short-form report is limited to “a statement consisting only of the board’s ultimate conclusions.”<sup>189</sup> It only identifies the board’s basic diagnosis of the accused’s mental condition and the board’s conclusory opinion of her current competency to stand trial. The convening authority cannot judge the validity of the board members’ assessments armed with nothing more than a statement of their conclusions. In effect, the rules formulate a take-it-or-leave-it dilemma that leaves the convening authority with little choice but to rubber-stamp the 706 findings wholesale without inspection, or go rogue and deny the only evidence they have before them—neither is acceptable.

It is axiomatic that the judge . . . must decide legal issues independently. Reliance on the unsupported ultimate

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“the question of competency to stand trial is limited to the defendant’s abilities at the time of trial.”

*Id.* at 405 (quoting *United States v. Vamos*, 797 F.2d 1146, 1150 (2d Cir. 1986), *cert. denied*, 479 U.S. 1036 (1987)).

<sup>186</sup> Looney, *supra* note 67 (citing Alec Buchanan, *Competency to Stand Trial and the Seriousness of the Charge*, 34 J. AM. ACAD. PSYCH. & L., 458, 461–63 (2006)).

<sup>187</sup> Ball, *supra* note 138, at 14 (citing *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) (“[H]olding that a sanity board report is not admissible on the issue of the accused mental capacity, in part because the court would be denied the significant benefit of cross-examination of the expert witnesses.”)).

<sup>188</sup> MCM, *supra* note 44, R.C.M. 706(c)(3)(B).

[T]he full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused.

*Id.*

<sup>189</sup> *Id.* R.C.M. 706(c)(3)(A).

conclusions of the expert prevents the judge from independently evaluating the factual basis for the . . . conclusions and substitutes the evaluator's decisions for those of the judge.<sup>190</sup>

Lastly, the military rules' disparate treatment of convening authorities versus military judges is disquieting and very telling of just how little attention the rules give to the pre-referral competency process. On the one hand, the rules detail specific guidance to the military judge on how to adjudicate competency determinations,<sup>191</sup> to include for example, the standard of proof, the reiteration of the *Dusky* legal standard, and the relaxed evidentiary rules.<sup>192</sup> In contrast, its instruction to convening authorities, who are vested in making the same competency determinations, is wholly undeveloped and substantively lacking; it includes no determinations of law or particular facts.<sup>193</sup> It supplies no basis on how to judge.<sup>194</sup> The convening authority is completely left wanting. The rules do not provide convening authorities the necessary guidance, the needed evidence, or the forum to make a fully-informed and independent determination.

#### IV. Recommendation

The recommendation is straightforward—the general premise is to shift pre-referral competency determinations from a limited paper review by the convening authority, where there is little to no due process, to a competency hearing before a military magistrate, where a neutral and detached decision-maker can provide a forum for challenge and afford the constitutional rights owed to the accused servicemember. The following amendments should be made to RCM 909.

Rule 909. Capacity of the accused to stand trial by court-martial

(c) *Determination before referral.* If an inquiry pursuant

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<sup>190</sup> Gerald Bennett, *Symposium on the ABA Criminal Justice Mental Health Standards: A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 397 (1985).

<sup>191</sup> See MCM, *supra* note 44, R.C.M. 909(d).

<sup>192</sup> See *id.* R.C.M. 909(e).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

to R.C.M. 706 [was] conducted before referral, [a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned<sup>195</sup> shall review the competency of the accused and determine if the accused is, by a preponderance of the evidence, presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense.] ~~concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, [If the competency reviewing officer concludes that the accused is mentally capable to proceed,] the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If [the competency reviewing officer concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial] that convening authority concurs with the conclusion, the convening authority before whom the charges are pending for disposition shall forward the charges to the general court-martial convening authority. If, [U]pon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall [then] commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.~~<sup>196</sup>

Once the convening authority grants a request and orders a RCM 706 inquiry, she has effectively determined that there is cause to question the

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<sup>195</sup> R.C.M. 305(i)(2). The draft language here is directly adopted from R.C.M. 305(i)(2). *Id.*

<sup>196</sup> R.C.M. 909. To specifically authorization military magistrates to judge competency determinations requires further revision and updates to Army Regulation (AR) 27-10 and the 15 March 2012 Standing Operating Procedures (SOP) for Military Magistrates. See U.S. DEP'T OF ARMY, REG. 37-10, MILITARY JUSTICE (16 Nov. 2005), and U.S. DEP'T OF ARMY, REG. 27-10, STANDING OPERATING PROCEDURES FOR MILITARY MAGISTRATES (15 Mar. 2012).



accused's competency to stand trial. Accordingly, by convening a 706 board, the convening authority will then necessarily also trigger the requirement for a competency review by a military magistrate.

Upon the publication of the board's findings, the convening authority now has two options: (1) she may dismiss the charges against the accused and process the servicemember for a misconduct chapter and/or medical separation;<sup>197</sup> or, (2) submit the accused to a military magistrate for a competency review. If the convening authority wishes to continue with its prosecution, the trial counsel will provide the military magistrate with the necessary documents, to include, at a minimum, a copy of the preferred charges, the request for the 706 examination (if any), the convening authority's memorandum ordering the 706 inquiry, and the sanity board's short-form report.<sup>198</sup> The defense counsel will also be granted an opportunity to submit any statements or documents for the magistrate's review. Once notified and in receipt of all government and defense submissions, the military magistrate will make a determination whether there is a reasonable and bona fide doubt as to the accused's current mental capacity. If the determination is negative, the magistrate will issue his decision to all parties, and the accused is again presumed competent to stand trial. After this determination, the convening authority may take any action authorized under RCM 401, including referral of the charges to trial.

If the magistrate finds reasonable cause to believe the accused's mental capacity remains at issue, the military magistrate will then schedule a competency review hearing. However, if both the trial and defense counsel agree with the sanity board's findings then a hearing is unnecessary, the military magistrate may waive the hearing on the matter and issue his findings upon the documentary evidence submitted. If either party challenges, however, the military magistrate must conduct a competency review hearing.

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<sup>197</sup> R.C.M. 706 discussion. "Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, [and] administrative action may be taken to discharge the accused from the service or, subject to [Military Rule of Evidence] 302, the charges may be tried by court-martial." *Id.*

<sup>198</sup> Since the military magistrate is an entirely detached and neutral decision-maker (independent from command, trial and defense counsels, and even from the judge who will be presiding once the case is referred), and considering the magistrate is purely limited to reviewing the accused's competency to stand trial and not the underlying charged offenses, there is a strong argument that, under this proposal, it is legally proper and appropriate to authorize the magistrate to receive the full report from any or all of the 706 inquiries conducted in the case.

During the proposed pre-trial competency hearing, the accused will retain her due process rights and be represented by counsel. The servicemember and her defense counsel must be notified of the hearing and permitted to appear. The accused will also be afforded an opportunity to testify, to present evidence, to call witnesses on her behalf, and to confront and cross-examine witnesses who appear at the hearing.<sup>199</sup> Accordingly, any witness whose testimony is relevant to the competency review, and not cumulative “shall be produced if reasonably available.”<sup>200</sup> Reasonable availability of relevant witnesses will be determined similarly to the provisions of RCM 405(g).<sup>201</sup> Alternately, unless defense objects, a military magistrate may take testimony under oath via telephone or similar means.

The substantive law and legal standards do not change. The presumption of competence remains;<sup>202</sup> and the required threshold of proof is still by a preponderance of the evidence.<sup>203</sup> The legal criteria to determine competency per *Dusky* remains<sup>204</sup> and the burden of proof remains with the accused. As in competency hearings before a judge and in pre-trial confinement review hearings before a magistrate, the rules of evidence for competency review hearings are relaxed.<sup>205</sup> Military rules of evidence (MRE) shall not apply, except privileges under MRE Section V.<sup>206</sup> Both the defense and trial counsel are permitted to submit written statements or documents for the magistrate’s consideration, so long as it is relevant to determining the accused’s mental competency.

Upon completion of the review, the military magistrate shall issue a ruling on whether or not the accused is competent to stand trial. The magistrate shall publish his conclusions, including the legal and factual

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<sup>199</sup> See 18 U.S.C. § 4247(d). This section is adopted from the federal provisions in section 4247.

<sup>200</sup> MCM, *supra* note 44, R.C.M. 405(g)(1)(A). This language is adopted from R.C.M. 405(g)(1)(A).

<sup>201</sup> *Id.*

<sup>202</sup> See *id.* R.C.M. 909(b).

<sup>203</sup> See *id.* R.C.M. 909(e)(2).

<sup>204</sup> See *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>205</sup> See MCM, *supra* note 44, M.R.E. 305(i)(2)(A)(ii). Pre-trial confinement hearings’ rule of evidence, “[e]xcept for Mil. R. Evid. Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.” *Id.* Additionally, R.C.M. 909(e)(3) states, “During competency hearings before the court after referral,” the rule of evidence is that “the military judge is not bound by the rules of evidence except with respect to privileges.” *Id.*

<sup>206</sup> See MCM, *supra* note 44, M.R.E. 501–514 (2012) (Privileges).

findings on which they are based, in a written memorandum. The magistrate may, upon request and after notice to the parties, reconsider his decision if, based upon any significant information not previously considered, reasonable doubt of the accused's mental competency again arises prior to referral.

#### A. The Preference for Magistrates

Admittedly, military magistrates are not required to assure due process in the pre-referral competency determination procedures. Convening authorities themselves can achieve the same result if they are willing to conduct competency hearings, which is surely impracticable. More realistically the convening authorities could designate a surrogate, much like they do when appointing preliminary investigation officers for Article 32 hearings.<sup>207</sup>

The recommendation to employ military magistrates to assess competency challenges is premised upon the many advantages that the magistrate program offers. It would certainly free invaluable time and effort otherwise required of convening authorities to properly and fully make such decisions. Just as important, the process for magistrate review already exists and is well institutionalized.<sup>208</sup> The above recommended procedures for competency review hearings mirror that of the current pre-trial confinement practices in the Army.<sup>209</sup> In fact, it is derived from the basic framework of existing pre-trial confinement reviews.<sup>210</sup> As such,

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<sup>207</sup> See *id.* R.C.M. 405 (Pretrial investigation). See also UCMJ art. 32 (2012).

<sup>208</sup> See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 8-5 (16 Nov. 2005) [hereinafter AR 27-10]; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE 12-19 (15 Mar. 2012) [hereinafter MAG SOP] (containing the chapter *Standing Operating Procedures for Military Magistrates*).

<sup>209</sup> MAG SOP, *supra* note 207.

<sup>210</sup> See *id.* Note that there are two differences between the proposed competency review hearing and the current pre-trial confinement review hearing. First, while neither defense nor trial counsel are generally permitted to call witnesses during pre-trial confinement reviews, the magistrate may. *Id.* For example, per the magistrate standing operating procedures, "the military magistrate may determine that witnesses are necessary to resolve a substantial factual issue materially affecting the military magistrate's ability to perform a legally sufficient review." *Id.* at 15. Additionally, "in those cases where the military magistrate, based on an initial inquiry or subsequent information, determines that there is a basis for further inquiry, additional information may be gathered from commanders, supervisors in the confinement facility, the [Staff Judge Advocate's] office, or others having relevant information." *Id.* at 17. Second, unlike the proposed competency review hearings, pre-trial confinement hearings are specifically deemed non-adversarial. *Id.*

reviewing competency cases fit squarely within the nature and form of military magistrates' existing duties.<sup>211</sup>

Army magistrates are already entrusted with great responsibilities and the authority to not only issue search authorizations to commanders and military law enforcement,<sup>212</sup> but they are also entrusted to adjudicate all command pre-trial confinement orders.<sup>213</sup> Considering that both pre-trial confinement and competency hearings inexorably entail possible deprivations of significant liberties, adopting military magistrates to review pre-referral competency determinations becomes even more fitting and persuasive.

Military magistrate reviews are arguably significantly faster and much more streamlined than the notably complicated and multilayered requirements of Article 32 proceedings. With military magistrates, no investigating officers need to be vetted and appointed. There are military magistrates who are assigned to cover every possible jurisdiction of the military, including U.S. installations abroad and even in combat zones.<sup>214</sup> In fact, there are often multiple magistrates assigned at large installations with heavy military justice dockets.<sup>215</sup> Trial judges in the military are also authorized to perform magisterial duties.<sup>216</sup> Additionally, military magistrates do not need to be briefed or require additional legal support. They are judge advocates who are versed in the practice of law and criminal procedures, but they also practiced in holding hearings and

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While both trial and defense counsel are permitted to make arguments, they are disallowed to question or cross-examine any witnesses. *Id.* The military magistrate, on the other hand, is authorized to not only call witness if desired, but they, of course, are naturally also permitted to question those witnesses. *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See AR 27-10, *supra* note 197, paras. 8-1(a), 8-3(b), 8-7. "Any military magistrate, whether assigned or part-time, is authorized to issue search and seizure and search and apprehension authorizations on probable cause." *Id.* para. 8-3(b).

<sup>213</sup> See *id.* para. 8-1(a), 8-3(a), 8-5. "A military magistrate is a [judge advocate] empowered to direct the release of persons from pretrial confinement, or to recommend release from confinement pending final disposition of foreign criminal charges, on a determination that continued confinement does not meet legal requirements" *Id.* para. 8-1(d).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> MAG SOP, *supra* note 207, at 1. Note, a "military judge is not automatically disqualified from presiding in a case where he or she has previously reviewed the propriety of continued pretrial confinement or issued a search and seizure authorization and should recuse himself or herself only when the military judge's impartiality might reasonably be questioned." *Id.*

overseeing proper execution of the rules.<sup>217</sup> According to the regulation, military magistrates are specifically and individually selected because they “possess the requisite training, experience, and maturity to perform the duties.”<sup>218</sup> They are nominated by a staff judge advocate and appointed by The Judge Advocate General (TJAG).<sup>219</sup> The Chief Trial Judge of the United States Army Judiciary, as TJAG’s designee, is responsible for the supervision and administration of the magistrate program,<sup>220</sup> and each of the magistrates are mentored and supervised by a military judge.<sup>221</sup>

Even more, military magistrates, like judges, are equally bound by the Code of Judicial Conduct.<sup>222</sup> Accordingly, military magistrates are not only more efficient and effective at receiving witnesses, reviewing evidence, and adjudging any challenges expeditiously, but they are also more skilled at reviewing evidence. This enables them to make the necessary findings and publish a determination quickly, all to promote judicial efficiency, ensure constitutional compliance, and minimize judgment errors that can lead to grave miscarriages of justice.

#### B. No Change to Convening Authorities’ Prosecutorial Discretion

The prosecutorial discretion of the convening authorities is still fully intact and truly unaffected by shifting competency determinations to military magistrates. The command retains full control and the same ability to prosecute a case as before. Convening authorities are still empowered to deny unreasonable requests for RCM 706 evaluations or grant bona fide requests, and continue to order evaluations as they deem

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<sup>217</sup> AR 27-10, *supra* note 207, para. 8-1(e).

<sup>218</sup> *Id.* para. 8-2(b)(2).

<sup>219</sup> *Id.* paras. 8-1(e), 8-2. *See also* MAG SOP, *supra* note 207, at 1–2.

<sup>220</sup> AR 27-10, *supra* note 207 paras. 1-7, 8-4.

<sup>221</sup> MAG SOP, *supra* note 207, at 4.

Each military magistrate will be supervised in performing magisterial functions by a military judge assigned to the U.S. Army Trial Judiciary . . . . Supervising military judges should periodically review pretrial confinement memoranda and search authorizations issued by military magistrates to ensure that they contain sufficient information and are properly maintained. Supervising military judges will [also] train military magistrates upon appointment and assist military magistrate thereafter by providing advice and counsel as needed.

*Id.* *See also* AR 27-10, *supra* note 207, para. 8-1(g).

<sup>222</sup> AR 27-10, *supra* note 207, para. 5-8(b).

proper.<sup>223</sup>

If the sanity board members find an accused competent, the government may continue to move forward with its case, and the convening authority, as before, can “take any action authorized under RCM 401, including referral of the charges to trial.”<sup>224</sup> Prior to an incompetency determination by an RCM 706 board, the convening authority retains the option to dismiss charges and medically chapter the servicemember.<sup>225</sup> Once the accused is found incompetent, whether determined through a magistrate or by the convening authority, the convening authority is statutorily obligated to commit the accused to the U.S. Attorney General’s custody for treatment.<sup>226</sup> And, as always, the government remains constitutionally barred from trying an incompetent accused.<sup>227</sup>

The proposed revision is limited to the legal determination of the accused’s competency. It does not threaten any prosecutorial powers the convening authority would otherwise have. Just as important, it in no way undercuts the command’s ability to maintain good order and discipline, or to ensure the health and welfare of servicemembers. Competency determinations have little to no policy consideration to them at all. The accused is either able to consult with her attorney and assist in her own defense or not, and the accused either has a reasonable understanding of

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<sup>223</sup> MCM, *supra* note 44, R.C.M. 706(b)(1). “Before referral of charges, an inquiry into the mental capacity . . . of the accused may be ordered by the convening authority before whom the charges are pending for disposition.” *Id.*; *see also id.* R.C.M. 706(b)(2). “The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available.” *Id.*

<sup>224</sup> *Id.* R.C.M. 909(c).

<sup>225</sup> *See id.* R.C.M. 706 discussion.

<sup>226</sup> *Id.* R.C.M. 909(c). “If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General.” *Id.*

<sup>227</sup> *Id.* R.C.M. 909(a).

*In general.* No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.

*Id.*

the charges and the proceedings against her or she does not.<sup>228</sup>

## V. Conclusion

A competency determination “is the critical phase in the classification and disposition of criminal defendants having symptoms of mental disturbance.”<sup>229</sup> It is legally illogical and unjustifiable to maintain a double standard of review, pre- and post-referral, when the immense consequences and the possible deprivation of liberty is the same. Change to how military justice adjudicates competency determinations prior to referral is long overdue; it requires transformation. “If this critical phase of the criminal process is bankrupt, then the process itself is bankrupt.”<sup>230</sup>

Our American soldiers, sailors, airmen, and marines deserve this justice. However horrid the crime or psychologically lost, they remain United States servicemembers, and they deserve and are entitled to be treated justly, fairly, and conscientiously. As it is our military profession, throughout history, to fight for those who cannot fight for themselves, it is our equal duty to protect those who are incapable of defending themselves.

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<sup>228</sup> *See id.*

<sup>229</sup> Morris, *supra* note 134, at 227 (quoting ARTHUR R. MATTEWS JR., MENTAL DISABILITY AND THE CRIMINAL LAW 193 (1970)).

<sup>230</sup> *Id.* at 227.