MILITARY COMPETENCY REVIEWS: A HOBSON'S CHOICE CONDITIONED ON A CATCH-22

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"There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he were sane he had to fly them. If he flew them he was crazy and didn't have to, but if he didn't want to he was sane and had to. Captain Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle."[1]

I. Introduction

The legitimacy of U.S. criminal justice, whether within the military or in the civilian sector, historically rests on certain presumptions of fairness in the process. Criminally punishing

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[1] JOSEPH HELLER, CATCH-22, 52 (1999).

individuals, be they civilian defendants or accused service members,[2] for their volitional acts, and only doing so when those individuals are competent to stand trial, are foundational legal notions that can be traced into antiquity.[3] Competency and sanity are two distinct legal issues.[4] The military has long recognized that fairness in the military justice system rests on the twin pillars of an accused service member's mental health: that he is both competent to aid in his defense during trial[5] and that he was not insane at the time he committed the offense.[6]

Current military justice rules governing the competency and sanity inquiries of an accused do not protect service members's fundamental Fifth Amendment right against self-incrimination[7] nor their

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[2] In the military, a service member that has formally been charged with crimes is referred to as the "accused." *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019). This is equivalent to the more traditional title of "defendant" in civilian criminal proceedings referring to an individual charged with a crime. *Defendant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[3] *See generally* ARISTOTLE, THE NICOMACHEAN ETHICS (350 B.C.E.). Aristotle stated that something "[d]one under compulsion means that the cause is external, the agent or patient contributing nothing towards it; as, for instance, if he were carried somewhere by a whirlwind . . . ." *Id.*

[4] *See generally* The Law Dictionary, *What's the difference between the insanity plea and incompetency?* THE LAW DICTIONARY, http://thelawdictionary.org/article/whats-difference-insanity-plea-incompetency/.

[5] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 393 (2d ed. 1920) [hereinafter WINTHROP]:

> Where the fact is shown in evidence, or developed upon the trial, that the accused has become insane since the commission of the offense, here also the court will most properly neither find nor sentence, but will communicate officially to the convening authority the testimony or circumstances and its action thereon, and adjourn to await orders.

Id.

[6] *Id.*

> Where indeed the evidence quite clearly shows that the accused was insane at the time of the offence, whether or not the insanity is specially pleaded as a defence [sic], there can of course properly be ***no conviction*** and therefore ***no sentence.*** (Emphasis in original.)

Id.

[7] U.S. CONST. amend. V [hereinafter U.S. CONST.] ("No person shall . . . be compelled in any criminal case to be a witness against himself. . .").

Constitutional due process right to be tried only when legally competent.[8] The military justice system has antiquated rules that combine determining the distinct issues of an accused's competency to stand trial with the accused's sanity at the time of the alleged crimes, into a joint evaluation. The military's joint sanity-competency evaluation system unjustifiably compels the accused, whose competency to make legal decisions is reasonably doubted, to waive their right to remain silent in order to challenge his competency; or, waive their due process right to only be tried while competent to preserve his right against self-incrimination. Because of the rules and the nature of joint sanity-competency evaluations, the accused cannot assert their due process rights to be tried only while competent without a violation of his Fifth Amendment right to remain silent. This catch-22[9] puts the accused in the untenable position of making legal decisions about waiving his rights— something that only a competent person can do—in order to ensure he is competent to make legal decisions about asserting or waiving his rights.

The military's current mental evaluation rules violate a service members' right to remain silent and their due process rights. Neither rules reflect the current state of the law, nor align with federal civilian practice. Also, the American Bar Association specifically advocates against the practice of joint evaluations.[10] The practice of joint evaluations is opposed because of its legal implications and ethical concerns.[11] Moreover, the military's adherence to the historical practice of joint evaluations undermines the legitimacy of military justice and slows down the administration of justice. Therefore, the Rules for Courts-Martial (RCM)[12] should be changed to protect service members's fundamental rights against self-incrimination and to due process to be tried only when competent. Doing so will align military justice practice with federal civilian practice, and improve the legitimacy and

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[8] The criminal trial of an incompetent defendant violates due process. *See* Medina v. California, 505 U.S. 437, 453 (1992); Drope v. Missouri, 420 U.S.162, 172-3 (1975); and Pate v. Robinson, 383 U.S. 375, 385 (1966).

[9] A "catch-22" is defined "as a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *Catch-22*, MERRIAM-WEBSTER (2018).

[10] AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, para. 7-3.1 (1989) [hereinafter ABA CJS].

[11] Ronna J. Dillinger & Stephen L. Golding, *The Bifurcation of Competency and Sanity Evaluations*, WYO. LAW., Oct. 2010, at 20 [hereinafter Dillinger & Golding].

[12] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706 (2019) [hereinafter MCM].

administration of justice in the military.

This article will demonstrate how and why joint evaluations cause these violations, and how bifurcating competency and sanity evaluations will promote justice and judicial efficiency without infringing on the commander's ability to enforce and maintain good order and discipline in their formations. First, this article discusses the historical development and standards of competency and sanity in federal civilian and military law. Next, this article discusses the ethical problems created by joint evaluations. Then, it analyzes how the military's rules violate a service member's Fifth Amendment and due process rights, and compares the military justice framework to the Federal Rules of Criminal Procedure and the American Bar Association (ABA) Criminal Justice Standards (CJS).[13] This article also explains why such a revision to the military rules ensures that protecting the due process rights of an accused does not come at the expense of the commander's authority in military justice. Lastly, it proposes amended language for RCM 706 that resolves these constitutional and ethical problems while improving military justice.

II. What is Competency and Sanity?

As psychiatric techniques and standards developed,[14] case law and statutes evolved to better address the two separate, but commonly comingled issues—competency to stand trial and the defense of insanity. When a court finds an accused incompetent or insane, these findings have drastically different effects on a criminal case as well as the corresponding obligations on the government for the care, treatment, and protection of these individuals.[15] Competency and sanity will be addressed in turn.

A. Competency

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[13] ABA CJS, *supra* note 10 (discussing pretrial evaluations and expert testimony); *see also* 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).

[14] *See generally* Paul Montalbano, *Sanity Board Evaluations*, *in* FORENSIC AND ETHICAL ISSUES IN MILITARY BEHAVIORAL HEALTH (2014).

[15] *See generally* MCM, *supra* note 12, R.C.M. 909, 916(k), and 1102A.

Competency is a legal issue determined by the judge that addresses whether the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in the defense of the case.[16] An inquiry into the accused's competency is focused on his present mental state.[17]

B. Sanity

On the other hand, the sanity (or insanity) at the time of the offense is a factual matter for the fact finder to determine. Insanity is a defense to a crime, and a two-part sanity evaluation first addresses whether the accused, at the time of the criminal conduct was suffering a severe mental disease or defect.[18] Then the inquiry turns to the question of whether or not the accused was unable to appreciate the nature and quality or wrongfulness of his or her conduct because of that severe mental disease or defect.[19] Unlike competency evaluations that focus on the present state of mind of the accused, sanity inquiries are forensic and historic in nature, focusing on the accused's mental state at the time of the offense.[20]

III. How Competency and Sanity Have Developed

Understanding how the separate legal issues of competency and sanity developed over time highlights the current failure of the military system. Since competency and sanity determinations are distinct legal issues addressing different states of mind of the accused at different times, they require different psychiatric testing,[21] and are governed by

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[16] *Id.* at R.C.M. 909(a) ("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."). The accused is presumed to have capacity to stand trial. *Id.* at R.C.M. 909(b).

[17] Dillinger & Golding, *supra* note 11.

[18] MCM, *supra* note 12, R.C.M. 706.

[19] *Id.*

[20] Dillinger & Golding, *supra* note 11, at 20.

[21] *See generally*, Douglas Mossman, et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, J. Am. Acad. Psychiatry Law, Dec. 2007, at S3-S72 (Supp. 2007) [hereinafter Mossman].

different rules of procedure, rules of evidence, and standards of proof.[22] These differing rules aim to fairly balance the public's interest in prosecuting and punishing criminals on one side, against protecting the constitutional rights of a defendant or an accused on the other.

Competency to stand trial is rooted in the Due Process Clause of the Constitution.[23] The military rules governing competency are deeply rooted in history, dating back to as early as 1920.[24] Today, competency is governed in military and civilian courts by the standard articulated in the 1960 Supreme Court case *Dusky v. United States*.[25] *Dusky* held that due process requires that a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him."[26] RCM 909 reflects this standard.[27]

The second distinct mental health issue an accused may assert is the issue of their sanity and the corresponding affirmative defense of insanity. The defense of insanity is recognized in forty-six states,[28] and is codified in the U.S. Code[29] and the Uniform Code of Military Justice (UCMJ).[30]

Historically, the insanity defense in civilian and military jurisdictions was governed by the English case of Daniel M'Naghten, and is known as the *M'Naghten* rule.[31] The *M'Naghten* rule required that the defendant show he was suffering from a mental disease or defect that either caused him to not know that the act was wrong, or be unable to appreciate the

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[22] *See generally* MCM, *supra* note 12, R.C.M. 909(c) and 916(k), and MIL. R. EVID. 302 and 513(d)(7).

[23] U.S. CONST., *supra* note 7 ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."). *See supra* note 8.

[24] *See* WINTHROP, *supra* note 5.

[25] Dusky v. United States, 362 U.S. 402, 402 (1960) [hereinafter Dusky].

[26] *Id.*

[27] MCM, *supra* note 12, R.C.M. 909(a). 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. The accused is presumed to have capacity to stand trial. *Id*. at 909(b).

[28] Idaho, Kansas, Montana, and Utah do not recognize the insanity defense as a complete defense. Idaho Code § 18–207 (2004); Kan. Stat. Ann. § 22–3220 (1995); Mont. Code Ann. §§ 46–14–102, 46–14–311 (2005); Utah Code Ann. § 76–2–305 (LexisNexis 2003).

[29] 18 U.S.C. § 17 (1984).

[30] 10 U.S.C. § 850a. Art. 50a (1986).

[31] Daniel M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

nature of the committed act.[32] The insanity defense was judicially adopted and further defined in most U.S. jurisdictions, including the military.[33] Congress passed the Insanity Defense Reform Act in 1984, clarifying some of the differing judicial interpretations that developed among the circuits and making the insanity defense an affirmative defense that the defendant must prove.[34] In 1987, Article 50(a) of the UCMJ, which mirrors the federal law for the insanity defense as applied to courts-martial, was added to the Manual for Courts-Martial (MCM).[35]

Together, competency and sanity are the twin pillars of the minimum mental-health standards in the legal community that an accused must possess to be tried, convicted, and punished for his actions across state, federal, and military jurisdictions.[36] Military and civilian federal courts, and the American Bar Association Criminal Justice Standards (ABA CJS), have common *standards* regarding competency and sanity determinations.[37] However, the military's *procedural and evidentiary rules* differ greatly from the federal civilian courts and the ABA CJS rules in ways that violate an accused's right to remain silent if he wishes to establish or challenge his competency.

IV. Military Rules Governing Competency and Sanity

The military's current system that combines sanity and competency evaluations into a joint inquiry is functionally the same system that has been in place since 1951, before the Supreme Court articulated the current competency standard in *Dusky* in 1960 (see the

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[32] *Id.*

[33] *See* MILITARY JUSTICE REVIEW GROUP, U.S. DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP, 449-51 (2015).

[34] 18 U.S.C. § 17 (1984).

[35] National Defense Authorization Act FY 1987, Pub. L. No. 99-661, tit. VIII, 100 Stat. 3905; 10 U.S.C. § 850a.

[36] The Supreme Court has never directly ruled on whether or not the insanity defense is required by the Constitution. *See* Clark v. Arizona, 548 U.S. 735, 752 (2006) ("We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter.") However, *see, e.g.*, Delling v. Idaho, 133 S. Ct. 504, 506 (2012) (Bryer, J., dissenting) ("I would grant the petition for certiorari to consider whether Idaho's modification of the insanity defense is consistent with the Fourteenth Amendment's Due Process Clause.").

[37] *See generally* the Fed. R. Crim. Pro.; ABA CJS, *supra* note 10; and MCM, *supra* note 12.

footnote for a complete textual comparison of the 1951 and current rule).[38] The 1951 edition of the MCM combined what is currently recognized as the separate legally significant mental health issues of competency and insanity, into a singular definition.[39] At that time, military law defined *insanity* as when "[a] person is insane . . . if he lacked mental responsibility at the time of the offense as defined in 120b [lack of mental responsibility], or if he lacks the requisite mental capacity at the time of trial as stated in 120c [mental capacity at time of trial]."[40]

Thus, an accused service member could be determined to be 'insane' in one of two distinct ways under the singular definition of *insanity*: either insane at the time of the offenses, relying on the two-part *M'Naughten* rule, or insane at the time of trial. The 1951 MCM framework utilized a single inquiry to determine if an accused was either variant of "insane."[41]

It was not until the 1984 version of the MCM[42] that competency (mental capacity) and insanity (mental responsibility) were distinguished from one another as independent bases for ordering an examination of the accused.[43] The 1984 version of RCM 706 was largely a holdover from the 1969 MCM version.[44] However, even though competency and sanity were recognized as legally different mental health issues, the evaluation for competency and sanity were still combined into a single inquiry regardless of the basis for the inquiry, just as it was since 1951.[45] This is still the case in the 2019 MCM.[46] Despite changes in the law, the rules governing the initiation and scope of a sanity inquiry have remained functionally identical from 1951 until now.[47] Therefore, an accused service member

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[38] Dusky, *supra* note 25.
[39] UCMJ art. 120(a) (1951) [hereinafter UCMJ].
[40] *Id.*
[41] *Id.*
[42] Since 1951, the MCM was significantly amended in 1968, 1969, 1984, 1986, 1987, 1994, 1995, 1998, 2000, 2002, 2005, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, and 2018.
[43] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706a (1984) [hereinafter 1984 MCM].
[44] MCM, *supra* note 43, App. 21, R.C.M. 706(a).
[45] MCM, *supra* note 43, R.C.M. 706(c)(2)(A-D).
[46] MCM, *supra* note 12, R.C.M. 706(a), uses the term "preliminary hearing officer" vice "investigating officer" as is found in the 1984 version, but are otherwise identical.
[47] The analysis in MCM, *supra* note 12, App. 21, R.C.M. 706, states "[t]his rule is taken from paragraph 121 of MCM, 1969 (Rev.). Minor changes were made in order to conform with the format and style of the Rules for Courts-Martial." However, the 1969 version is functionally the same as the 1951 version. Below is paragraph 121 from the

who only wishes to assert their due process right to competency cannot do so without undergoing an evaluation determining their sanity at the time of the offense. This happens regardless of whether or not the accused is competent to knowingly waive his Fifth Amendment right to remain silent as is usually required during a sanity evaluation,[48] or whether or not the accused even chooses to assert the insanity defense. This occurs because the rules are based on the 1951 singular definition of sanity.

1951 version of The MANUAL FOR COURTS-MARTIAL that governed a 'sanity' inquiry (with clarifying reference added in the brackets):

> 1951 UCMJ paragraph 121: "If it appears to any commanding officer who considers the disposition of charges as indicated in 32 [immediate commander], 33 [Summary Court-Martial Convening Authority], and 35 [General Court-Martial Convening Authority] or to any investigating officer (34) [Article 32 Investigating Officer / Preliminary Hearing Officer], trial counsel, or defense counsel that there is reason to believe that the accused is insane (120c) [competency / mental capacity] or was insane at the time of the alleged offense (120b) [insanity / mental responsibility], that fact and the basis of the observation should be reported through appropriate channels in order that an inquiry into the mental condition of the accused may be conducted before trial… The board should be fully informed of the reasons for doubting the sanity of the accused and, in addition to other requirements, should be required to make separate and distinct findings as to each of the … following questions…"

Id. Compare this with the 2019 MCM rules in R.C.M.'s 706(a) and 706(c)(2):

> 706(a): "If it appears to any commander who considers the disposition of charges, or to any preliminary hearing officer, trial counsel, defense counsel, military judge, or the members 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. The submission may be accompanied by an application for a mental examination under this rule.
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> (c)(2). When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions . . . .

[48] Montalbano, *supra* note 14, at 53.

Thomas Ward's 1688 simple poem called "England's Reformation" eloquently conveys the familiar *take it or leave it* decision, also known as a *Hobson's* choice, "Where to elect there is but one, 'Tis Hobson's choice—take that, or none."[49] The military creates a *Hobson's* choice for an accused who wishes to establish or challenge his competency. The accused can assert his due process right to be tried only when competent and allow for the violation of his right against self-incrimination in the process, or leave unexercised his due process right to be tried only while competent to protect his Fifth Amendment right to remain silent. Not only is this an unconstitutional dilemma for an accused, it is truly an ethical dilemma for medical professionals conducting the examination and defense counsel advising their client, which is only the start of the problems with joint evaluations.

V. The Problems with Joint Evaluations

A. The Medical Community's Ethical Problem with Joint Evaluations

As the law and rules regarding sanity and competency diverged outside of the military, these issues remain comingled within the military, creating ethical problems for the medical community. Ethical problems within the medical community conducting joint evaluations arise in two ways. First, if there is a legitimate basis to question an accused's competency—or it is being challenged—a joint evaluation forces the accused to make a legal decision about waiving their right to remain silent and consider the risks and benefits of pursuing an insanity defense before he is determined competent. Making the choice to assert the affirmative defense involves understanding and weighing the risks of this unique affirmative defense, the burdens of proof for the accused, choosing to testify under oath and subject oneself to cross examination, as well as the collateral consequence if the fact-finder finds him not guilty by reason of insanity. If the competency of the accused is legitimately at issue when he is forced to make a decision about waiving his right to remain silent, he may not understand the consequences of these choices when he is forced to make them, and, if he is actively psychotic, he likely cannot

[49] THOMAS WARD, ENGLISH REFORMATION, A POEM 373 (New York: D.& J. Sadlier eds., 1853).

provide reliable information to begin with.[50] Second, if the accused has not raised the insanity defense, then conducting an intrusive forensic evaluation forces the medical provider to conduct unnecessary testing and examinations without the consent of the accused and against his rights to remain silent because the findings of such examinations are irrelevant to any disputed factual matter.[51]

Bifurcated evaluations would not put the accused or medical professionals in this dilemma. An accused, either found competent or presumed competent without challenge, would be able to make informed decisions about voluntarily waiving his rights and submitting to intrusive psychiatric testing in order to assert the insanity defense.

B. The Constitutional and Practical Problems of Joint Evaluations[52]

Military rules governing mental health inquiries are statutory leftovers from 1951 that have not kept pace with changes in case law. Exploring the problems created by these outdated joint evaluations highlights the self-incrimination and due process violations an accused suffers and the practical problems joint evaluations create for the military justice system.

During a court-martial, the trial counsel, defense counsel, military judge, commanders, and even the court members, can make a request to the convening authority to conduct an inquiry if there is a reason to believe the accused's mental capacity or mental responsibility is at issue.[53] These inquiries are often referred to as a *706 board* or *sanity board*. The board usually consists of one or more persons, each being either a physician or a clinical psychologist.[54] Normally, at least one member of the board is either a psychiatrist or a clinical

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[50] Dillinger & Golding, *supra* note 11. *See also* Mossman, *supra* note 21, at 53 (". . . it may be wise to establish competency to stand trial before this specific [sanity] inquiry is conducted.)

[51] AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, ETHICS GUIDELINES FOR THE PRACTICE OF FORENSIC PSYCHIATRY, Art. III (2005).

[52] The specific burdens of proof, and which party must meet those burdens, in order to obtain a competency or sanity evaluation are generally similar for the federal civilian courts, the American Bar Association Criminal Justice Standards, and military courts-martials, and as such will not be discussed for purposes of the this article.

[53] MCM, *supra* note 12, R.C.M. 706(a).

[54] *Id.* at 706(c)(1).

psychologist.[55] The order must contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused.[56] The convening authority or military judge is statutorily required to order the board to make separate and distinct findings as to each of the following questions:[57]

> (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?
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> (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?[58]

Therefore, regardless of the factual underpinnings as to why a sanity board is sought for the accused, whether it is a doubt solely of his current mental capacity or solely of his mental responsibility at the time of the crime, every military sanity board is a joint inquiry that evaluates both aspects of an accused's mental health. Neither civilian federal courts[59] nor the ABA CJS[60] follow this practice. The American Academy for Psychiatry and Law specifically opposes joint inquiries because "[t]his practice [of combining competency and sanity evaluations into a single inquiry] may create ethics-related problems for a prosecution-retained or court-appointed psychiatrist when it appears that an evaluee is

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[55] *Id.*
[56] *Id.*
[57] *Id.* at 706(c)(2).
[58] *Id.*
[59] 18 U.S.C. § 4241 (2006) (governs competency); 18 U.S.C. § 4242 (2006) (governs sanity).
[60] ABA CJS, *supra* note 10, para. 7.4-4 ("Unless a joint evaluation has been requested by the defendant or for good cause shown … the evaluation [of the defendant's competency to stand trial] should not include an evaluation into the defendant's sanity at the time of the offense, civil commitment, or other matters collateral to the issues of competence to stand trial.")

incompetent to stand trial and is revealing potentially incriminating information."[61]

Even the medical community in the military itself acknowledges "[c]ombining these inquiries can raise practical and logistic issues as well as legal and ethical concerns."[62] This is due in part because a sanity evaluation implicates an accused's Fifth Amendment right against self-incrimination.[63] This article turns next to a comparison of the military rules, federal civilian rules, and ABA CJS rules to demonstrate how the military's rules fail to safeguard the rights of the accused while adding inefficiency to the court-martial system.

VI. Comparative Analysis

The military's joint evaluation framework is the exact opposite of the federal civilian rules governing the same matters. The U.S. Code has separate statutes governing inquiries into a defendant's competency to stand trial[64] and their sanity at the time of the offense.[65] Similarly, the ABA CJS states, "[a] competency decision is fundamentally unlike resolution of the affirmative defense of mental nonresponsibility [insanity]. The issue of incompetency can be injected in a criminal proceeding by either a court or prosecuting attorney over defense objection, unlike [the insanity] defense that can be asserted only by defendants."[66]

In all three frameworks—the federal civilian courts, the ABA CJS,[67] and the military courts-martial—the purpose of competency and sanity examinations are generally the same. All three frameworks treat competency as a legal and factual matter to be determined by the court following *Dusky*, [68] allowing the judge to sua sponte order a competency evaluation, compel a competency hearing on motion by the government, and order a competency hearing at the request of the

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[61] Mossman, *supra* note 21, at 23.
[62] Montalbano, *supra* note 14, at 39.
[63] Estelle v. Smith, 451 U.S. 454, 465 (1981) [hereinafter Estelle].
[64] 18 U.S.C. § 4241 (2006).
[65] 18 U.S.C. § 4242 (2006).
[66] ABA CJS, *supra* note 11, para. 7-4.4 (commentary).
[67] The American Bar Association Criminal Justice Standards are not an actual 'jurisdiction,' but a legal model.
[68] Dusky, *supra* note 25.

accused.[69] Insanity, on the other hand, is an affirmative defense to be decided by the trier of fact as it relates to findings on the merits.[70] To highlight the constitutional and pragmatic problems for a military accused in the military justice system, the following comparative analysis will primarily focus on the problems created by the military's antiquated rules governing joint evaluations: specifically when an accused challenges his competency, undergoes a joint evaluation, and the issues created by the disclosure of these reports post-evaluation.

It is military practice that during these inquiries that the 706 board directly inquire into the accused's version of the alleged crimes,[71] but cautions "for legal and ethical reasons, it may be wise to establish competency to stand trial before this specific inquiry is conducted."[72]

The military's joint evaluation system puts the defense counsel in the untenable position of explaining the legal ramifications of waiving the right to remain silent in order to make a competency determination to a client that they have a 'bona fide doubt'[73] is not able to aid in his or her own defense. Conditioning the due process right to be tried only when competent on a violation of the right to remain silent, is itself a due process violation the accused is forced to suffer in the military.

The ABA CJS standards explicitly explain that "[a]n evaluation of defendant's present mental competency should not be combined with an

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[69] 18 U.S.C. § 4241(a); MCM, *supra* note 12, R.C.M. 706; ABA CJS, *supra* note 11, para. 7-4.4.

[70] MCM, *supra* note 12, R.C.M. 916(k); 18 U.S.C. § 17 (1984).

[71] Montalbano, *supra* note 14, at 53 ("It is recommended that there be a section in the 706 titled 'Accused's Current Version of the Alleged Offense.'").

[72] *Id.* The inquiry into the accused's version of events is not a glossary exposition, but an in-depth examination. The military practitioner's guides specifically recommends that:

> It is often helpful to have the accused describe in detail his or her thoughts, feelings, and behaviors starting in the hours or days leading up to the alleged instant offense and then continuing for some time after. Once this narrative has been obtained the evaluator can encourage the accused to fill in gaps and comment on information in the official criminal investigation, as well as on his or her own prior statements or witnesses' statements. After obtaining this information, it is often helpful to ask the accused to review the sequence of events again and ask about discrepancies or gaps.

Id.

[73] Pate, *supra* note 8.

evaluation of defendant's mental condition at the time of the alleged crime, or with an evaluation for any other purpose, unless defendant so requests or, for good cause shown, the court so orders."[74] The ABA CJS drafted the rules this way to promote what the ABA calls a "targeted" evaluation to minimize the legal and ethical problems involved in joint inquiries.[75]

When only competency is at issue, it is legally irrelevant to determine the accused's sanity at the time of the offense if it has not been challenged because sanity is already presumed.[76] A sanity evaluation that is historic and forensic in nature, involving significant investigation, testing, and evaluation, is a time-consuming endeavor that slows down the military justice system while needlessly violating an accused's Fifth Amendment rights against self-incrimination.[77] This inefficiency hinders the commander's ability to swiftly establish and maintain good order and discipline by delaying court-martial proceedings.

VII. Disclosure of the Competency and Sanity Reports

The constitutional, ethical, and practical problems regarding the military's joint mental health inquiries are compounded by both the military's overly-broad rules governing the disclosure of the sanity board's findings and the inadequate evidentiary rules designed to protect the accused's coerced statements.[78] After the 706 board completes its evaluation, two separate reports, often called the "long" and "short" form reports are produced.[79] The long-form is the board's full report, including the testing utilized, details of the examination, a factual narrative of the accused's version of the facts regarding the charged crimes, any other evidence considered, its findings, and the basis of its conclusions.[80] The long-form report is given to the defense

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[74] ABA CJS, *supra* note 10, para. 7-3.5.
[75] *Id.*
[76] MCM, *supra* note 12, R.C.M. 916(k)(3)(A).
[77] Dillinger & Golding, *supra* note 11.
[78] Military Rule of Evidence 302 is written to protect any evidence resulting from the accused's statement to the sanity board, and evidence derivative thereof, with limited exceptions, based on the theory ". . . which treats the accused's communication to the sanity board as a form of coerced statement required under a form of testimonial immunity." MCM, *supra* note 12, App. 22 , MIL. R. EVID. 302.
[79] MCM, *supra* note 12, R.C.M. 706(c).
[80] *Id.*

team, however, numerous other individuals, including the accused's commander, may gain access to it.[81] The military judge can also order its release and disclosure.[82]

The short-form report is limited to "a statement consisting only of the board's ultimate conclusions as to all the questions specified in the order."[83] The trial and defense counsel, the investigating officer, convening authority, and the military judge receive the short-form.[84]

While the constitutional, statutory, and procedural nuances surrounding disclosure of an accused's statements to a sanity board are highly fact and circumstance dependent, it is generally accepted that an accused's Fifth Amendment right against self-incrimination apply during compelled competency and sanity evaluations.[85] Because there is no way to limit the scope of the inquiry to issues solely pertaining to competency,[86] combined with the practice of 706 boards to make detailed inquiries into the "accused's current version of the alleged crimes" during the sanity evaluation,[87] the joint nature of military sanity inquiries almost always creates Fifth Amendment violations for an accused whose competency is challenged.

This problem is highlighted by the intrusive nature of the sanity portion of the evaluation and the requirement that *all* diagnoses of the accused, regardless of the basis of the evaluation, are reported and given

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[81] *Id.* R.C.M. 706(c)(3)(B). Note that this rule allows the accused's commander to request and receive the full and unredacted long-form report without any stated purpose or justification. *Id.* Medical personnel may also request and receive it without any notification or protest of the accused. *Id.*

[82] MCM, *supra* note 12, 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.*

[83] MCM, *supra* note 12, R.C.M. 706(c)(3)(A).

[84] *Id.*

[85] *See generally* Estelle, *supra* note 63. "The fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment." *Id. at* 465. "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him. . . ." *Id*. at 468.

[86] MCM, *supra* note 12, R.C.M. 706(c)(2).

[87] Montalbano, *supra* note 14, at 53.

to the government in the short-form.[88]

In addition to the rules of procedure and the constitutional problems for a military accused, the military rules of evidence further ensure that an accused who only wants to challenge his competency before the court cannot do so without being compelled to violate his Fifth Amendment right to remain silent because the rules governing the inquiry mandate that all 706 evaluations are joint sanity and competency inquiries. If an accused independently commissioned a competency evaluation, in order to limit the inquiry strictly to competency, he is nonetheless unable to introduce any of it without first submitting to a compelled joint 706 inquiry.

Military Rule of Evidence (MRE) 302 authorizes the military judge to "prohibit an accused who refuses to cooperate in a mental examination authorized under [RCM] 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination."[89] It is likely government counsel would oppose such an effort by the accused because the prosecution would be left without the broad disclosures contained in the short-form. This leaves the accused with the *Hobson*'s choice of either submit to an invasive joint inquiry in violation of his rights against self-incrimination that provides the short-form report to the prosecution, or not exercise his due process right to be tried only while competent.

Unlike the military courts' broad disclosure rules, the federal civilian court system operates under a more precise and efficient statutory scheme governing the release of mental health reports.

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[88] MCM, *supra* note 12, R.C.M. 706(c)(2)(B). Because the prosecution gets the short-form containing all current diagnoses of the accused, military officials can glean damaging information about the accused derived from that information and use in hard to quantify ways. For example, consider a hypothetical Soldier is pending charges of being Absent Without Leave (AWOL) in violation of UCMJ Art. 86, who is undergoing a 706 board due to a bona fide doubt as to his competency. He will undergo an intrusive forensic examination that may result in the board learning of other criminal misconduct, which corresponds to a diagnosis that has nothing to do with competency, such as illegal drug use (Opioid Abuse / Withdrawal), larcenies, and simple assaults committed during AWOL (Anti-Social Personality Disorder). How the government could use this information to relook at an investigation or interview, keep a watchful eye on an accused, or consider it during plea negotiations are murky at best.

[89] MCM, *supra* note 12, MIL. R. EVID. 302(d) allows the military judge to ". . . prohibit an accused who refuses to cooperate in a mental examination authorized under R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination." *Id.*

Under the federal rules, once the evaluation regarding *either* competency or sanity is complete, a report that is limited to the examiners specific findings for the specific type of inquiry[90] is filed with the court, government counsel, and defense counsel.[91] When a defendant gives notice of his intent[92] to rely on the defense of insanity, the court can then order that a psychiatric or psychological examination of the defendant be conducted.[93] The Supreme Court, in *Estelle v. Smith*, recognized the balance between the governments need to effectively challenge expert testimony with respect to the insanity defense and the defendant's Fifth Amendment right against self-incrimination.[94] The Court stated "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the [s]tate of the only effective means it has of controverting his proof on an issue that he interjected into the case."[95] However, it is not until the defense confirms its intent to assert the defense that the government receives those reports. Then, the government is limited to only introducing evidence derived from the accused's evaluation on an issue regarding a mental condition on which the defendant has introduced.[96]

Unlike the military system, in federal civilian courts the defendant makes the decision. Once found competent—or so presumed if he did not challenge his competency—to either submit to a sanity evaluation (or to release the mental responsibility report to the government if both evaluations were conducted) once the defendant chooses to assert the

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[90] 18 USCA § 4247(c)(4) (2006). There are also additional disclosure rules restricting government access to mental health reports in capital cases, preventing the government from receiving them before the sentencing phase begins, if the defense does not offer expert testimony of mental health issues during the merits phase of trial. *See* FED. R. CRIM. P. 12.2(c)(2). The military has no additional rules for disclosure of mental health reports in a capital case.

[91] 18 USCA § 4247(c)(4) (2006). As the limited report is given to both government and defense counsel, competency inquiries do not go into the defendant's version of events regarding the charged crimes, and thus does not create a Fifth Amendment issue.

[92] FED. R. CRIM. P. 12.2(a).

[93] 18 U.S.C. § 4242(a) (2006).

[94] Estelle, *supra* note 63. *See also* United States v. Clark, 62 M.J. 195, 200 (C.A.A.F. 2005) (citing Buchanan v. Kentucky, 483 U.S. 402, 422–23 (1987)) ("The Supreme Court has concluded that if a defendant requests the psychiatric evaluation or presents an insanity defense, '[t]he defendant would have no Fifth Amendment privilege against the introduction of [testimony from his psychiatric evaluation] by the prosecution.' Because Appellant requested the sanity board, he may not claim a Fifth Amendment violation because the Government did not compel his appearance at the board.").

[95] Estelle, *supra* note 63.

[96] FED. R. CRIM. P. 12.2(c)(4).

insanity defense.[97] This system is judicially efficient. By conditioning the reports' disclosure on the defense's intent to use the same, it strikes the right balance between the defendant's rights to remain silent and to be tried only when competent, against the state's need to prepare its own expert witnesses.[98]

The ABA CJS model is also efficient and protective of a defendant's Fifth Amendment and due process rights. The ABA CJS states that once the competency evaluation is complete, the corresponding report "should not contain information or opinions concerning either defendant's mental condition at the time of the alleged crime or any statements made by defendant regarding the alleged crime or any other crime."[99] The defense would receive the report once the evaluation is completed, but the government would not receive the report until the "defendant has given notice of an intention to utilize the testimony of a mental health or mental retardation professional to support a defense claim resting on the defendant's mental condition at the time of the alleged crime."[100] Whereas the federal civilian courts and the ABA CJS use rules of procedure to protect the accused's statements to a sanity board from going into the possession of the government, the military uses the rules of evidence to make the accused's statements a matter of evidentiary privilege.

Military Rule of Evidence 302 is a rule of privilege governing the accused's statement made during a sanity evaluation, and the disclosure of the 706 board's report and usage of those statements.[101] It is also fundamentally broken because it is premised on the condition that an accused is forced to violate the right against self-incrimination in the exercise of his due process rights. Military Rule of Evidence 302 only addresses the symptoms of the self-incrimination violation, and not the self-inflicted due process violation that is created by RCM 706. The commentary to MRE 302 discusses how it evolved over time

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[97] FED. R. CRIM. P. 12.2(d).

[98] Estelle, *supra* note 63 (When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.").

[99] ABA CJS, *supra* note 10, at para.7-3.8.

[100] *Id.* at para. 7-3.4.

[101] MCM, *supra* note 12, MIL. R. EVID. 302.

to address challenges created by military case law with respect to the affirmative defense of insanity, and makes no mention of changes in the law regarding competency.[102] The rule creates a form of "testimonial immunity" intended to protect an accused from the government's use of anything he said during a mental examination, while balancing the need to allow the government to prosecute its case in a judicially efficient manner.[103] However, the rule fails to fix the recognized "natural consequence . . . between the right against self-incrimination and the favored position occupied by the insanity defense."[104] MRE 302 is neither efficient for judicial economy nor protective of the accused's constitutional right against self-incrimination.

Much like RCM 706 is a statutory leftover from 1951, MRE 302 has not changed to address the differences in law regarding competency and sanity. The military rules of procedure allow the government to coerce incriminating statements from an accused—that are otherwise fully protected by the Fifth Amendment—pursuant to a joint evaluation, and then attempts to immunize those coerced statements with additional "unclear" rules.[105] It is fundamentally better to avoid the acknowledged constitutional wound in the first place, than to statutorily attempt to triage the hemorrhaging after the fact. Bifurcating competency and sanity evaluations permanently cures this injury without the need of legal Band-Aids.

VII. Bifurcation of Sanity and Competency Evaluations in the Military is Necessary

The accused who has not put their mental health forward as a defense to the charged crimes is left in two equally untenable positions. Under the UCMJ, after a bona fide doubt that the accused is incompetent is established, but before he is found competent, the accused must make legally significant decisions about waiving his rights against self-incrimination to the sanity board in order to exercise his due process rights. Also, the rules regarding what may be elicited during such a hearing or trial that "opens the door" for the government to use the accused's

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[102] MCM, *supra* note 12, App. 22, MIL. R. EVID. 302.
[103] *Id.*
[104] *Id.*
[105] *Id.*

statements to a 706 board and for what purpose are "unclear."[106]

For a military accused found incompetent by a sanity board, or for an accused who is challenging a perceived erroneous finding of competency, the military judge must conduct a hearing on the matter.[107] During the hearing, the accused can introduce evidence, call medical experts to testify—which includes the 706 board members who examined the accused—call other witnesses to support him, testify on his own behalf, confront and cross-examine government witnesses, and counsel can make arguments to the court.[108]

The accused must simultaneously do this while navigating unclear evidentiary waters to limit those witnesses from discussing anything he said about his alleged crimes, which the prosecution could use later. This proposition is even more confounding if the accused is challenging their competency determination, arguing that the 706 board improperly relied on information it discovered during the 'sanity portion' of the evaluation, in violation of their right to remain silent.

Defense counsel, especially those representing clients with mental illnesses,[109] are equally in an untenable position. The defense counsel must both advise their client that the law is unclear regarding the potential consequence of their waived right to remain silent in order to establish or challenge competency, and then obtain a decision from them on how they wish to proceed. The unclear rules surrounding the use of the accused's compelled statements creates confounding ethical problems for defense counsel, which in turn, invites unnecessary and time consuming litigation as defense counsel rightfully and zealously protects their clients' interests.[110] This friction in the military justice

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[106] *Id.* At present, what constitutes "opening the door" is unclear. An informed defense counsel must proceed with the greatest of caution being always concerned that what may be an innocent question may be considered to be an "open sesame." *Id*.

[107] This is for post-referral competency hearings. The pre-referral phase of military criminal case is the period between the preferral of charges against the service member and the convening authority's referral of the case for court-martial. *See generally* MCM, *supra* note 12, R.C.M.'s 307 and 601. Different rules, not relating to this article, apply to a finding of incompetency pre-referral. *Id.* at R.C.M. 909(c).

[108] *See generally* Major David C. Lai, Military Justice Incompetence over Competency Determinations, 224 MIL. L. REV. 48, 64 (2016).

[109] *See generally* Major Jeremy A. Ball, Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers, ARMY LAW. December 2005, 1.

[110] *See generally* MCM, *supra* note 12, MIL. R. EVID. 302(c). These issues potentially

system would simply not exist if competency and sanity evaluations were bifurcated.

Bifurcating mental health inquiries in the military has a number of practical advantages. First, it resolves the *Hobson's* choice interplay of the current RCMs that compel an accused to choose between exercising their constitutional due process right to be tried only when competent at the cost of their constitutional right against self-incrimination. Secondly, the gathering of detailed interviews of third parties, reviewing investigative reports, and obtaining and reviewing prior mental health and medical records that is usually required for a sanity evaluation is judicially inefficient if sanity is not raised by the defense. Third, it ends the ethical problems sanity board members may face.

In 1775, General George Washington stated "[d]iscipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all."[111] The efficient administration of military justice has been linked to military discipline and readiness since the founding of this nation.[112] Given that the goals of military justice are not equivalent to the civilian criminal justice system, the unique needs and role of the military in some circumstances require a different approach to administering justice.[113] However, there is no military readiness, justice, or discipline justification for the current rules mandating joint evaluations. A commander still has the authority to ensure the fitness of those service members under his or her charge,[114] and the proposed change of bifurcating the evaluations do not alter that—it actually enhances military justice efficiency.

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include litigation over what portions of the 706 long-form report must be redacted or not; what constitutes derivative evidence or not; and all the associated appellate litigation, including ineffective assistance of counsel.

111 U.S. Army Center of Military History, *Washington Takes Command of Continental Army in 1775, ARMY NEWS SERVICE* (June 5, 2014), https://www.army.mil/article/40819.

112 *Id.*

113 Curry v. Sec'y of Army, 595 F.2d 873 (1979) ("The Supreme Court has recognized that the military is 'a specialized society separate from civilian society,' and its unique circumstances and needs justify a departure from civilian legal standards.") *See also* Parker v. Levy, 417 U.S. 733, 743-44 (1974) ("[F]undamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

114 *See generally* U.S. DEP'T OF DEF., INSTR. 6490.04, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE MILITARY SERVICES (2013).

V. Conclusion

Amending RCM 706 to bifurcate mental health inquiries to address the distinct legal issues of competency and sanity separately will elevate the military justice system out from its archaic rules and provide the due process and Fifth Amendment protections guaranteed to all citizens—including service members. The current rules are judicially inefficient, which degrades readiness and the administration of justice across the Armed Forces. These rules also create ethical problems for medical professionals who are forced to perform these evaluations and defense counsel trying to zealously representing their clients. Captain Yossarian's respectful whistle can still be heard echoing in military court rooms across the world every time an accused, whose counsel has a bona fide doubt as to his client's competency to make legal decisions, is forced to make legal decisions about waiving his rights, in order to establish whether or not he is competent to make those very decisions.[115]

[115] Heller, *supra* note 1.

Appendix A. Proposed Amended Language to Rule for Courts-Martial 706

(a) *Initial action.* If it appears to any commander who considers the disposition of charges, or to any preliminary hearing 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. The submission may be accompanied by an application for a mental examination under this rule. (Unchanged.)

(b) *Ordering an inquiry.* (Unchanged.)

(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. (Unchanged.)

(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 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. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority. (Unchanged.)

(c) *Inquiry.*

(1) *By whom conducted.* When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. 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. The board shall report as to the mental capacity or mental responsibility or both of the accused. (Unchanged.)

(2) *Matters in inquiry.* When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other

reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions *for the type of examination ordered*:

(A) Mental Responsibility.

(i) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(ii) What is the clinical psychiatric diagnosis *regarding mental responsibility*?

(iii) 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?

(B) Mental Capacity.

(i) 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?

(ii) What is the clinical psychiatric diagnosis regarding mental capacity?

Other appropriate questions may also be included.

(3) *Directions to board.* In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

(A) Mental Responsibility.

(i) 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 *defense counsel; and* ~~officer ordering the examination, the accused's commanding officer, the preliminary hearing 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~~;

(ii) That the 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~~ *if* 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 *counsel*. ~~and, upon request, to the commanding officer of the accused; and~~

(B) Mental Capacity.

(i) That upon completion of the board's investigation regarding mental capacity, 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 preliminary hearing 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; and

(ii) That the full report of the board may be released by the board or other medical

personnel only to other medical personnel for medical purposes, if authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report, including raw test data, shall be furnished to the defense counsel.

(C) If a mental examination is ordered to evaluate both the mental responsibility and mental capacity of the accused, or mental capacity and another purposes, the examination for mental capacity shall occur first. If the board, upon completion of its evaluation, concludes the accused is unable to understand the nature of the proceedings against the him or her, or to conduct or cooperate intelligently in the defense, the board shall notify the ordering authority, trial counsel, and defense counsel, and shall not conduct any further examination of the accused until so ordered by the convening authority or military judge.

(D) That neither 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.

(4) *Additional examinations.* Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require. (Unchanged.)

(5) *Disclosure to trial counsel.* No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement. (Unchanged.)