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Article

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Captain Howard H. Hoege III

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ROE . . . *also* a Matter of Doctrine

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Introduction

Judge advocates (JAs) have developed the U.S. Army's concept of operational law and rules of engagement (ROE) at an exponential rate over the past decade.[1] Several years ago, commentators and the Judge Advocate General's Corps (JAGC) correctly decided to emphasize training and doctrinal issues as JAs developed strategies to mitigate the foreseeable challenges that ROE would present.[2] Recent articles debate the effect of the current operational environment on the current approach to ROE training and development from the perspective of the challenges that ROE present to commanders and JAs.[3] The debate takes the form of first establishing whether these challenges generally rise to the level of actual "problems" in the current approach to ROE, and then recommending changes in or affirming a universal approach to ROE based on the existence or non-existence of "problems."

This method of evaluating the JAGC approach to ROE may not provide sufficient assistance to the JA struggling with a particular ROE challenge in a particular unit. Because ROE are mission-specific, because ROE are the tool of the individual commander, and because several layers of commanders may promulgate ROE in a given operation,[4] a "problem" in the development or training of ROE in one context may or may not translate into another context. Lessons learned from one operation surely inform and assist the implementation of ROE in another operation. Standing alone, however, lessons learned can advance efforts to develop and refine the JA's role in training and developing ROE only so far.

While the collective challenges encountered by JAs may not provide the unifying perspective needed to formulate strategies to continue the development of the JA's role in training and developing ROE, U.S. Army doctrine could provide that perspective. The term "doctrine," as a legal concept, of course has a particular meaning: "A principle, [especially] a legal principle, that is widely adhered to."[5] Courts are essentially free from one jurisdiction to the next to consider the merits of a particular doctrine before determining whether to adopt that doctrine as law. Furthermore, legal doctrine is a fairly limited concept in the sense that it captures a single principle to be applied to a very specific legal issue.

The term "doctrine," as a military concept, has a much more expansive meaning. Consider the following discussion of doctrine contained in *Field Manual* (*FM*) *3-0*:

> Doctrine touches all aspects of the Army. It facilitates communication among soldiers no matter where they serve, contributes to a shared professional culture, and serves as the basis for curricula in the Army Education System. Army doctrine provides a common language and a common understanding of how Army forces conduct operations. It is rooted in time-tested principles but is forward-looking and adaptable to changing technologies, threats, and missions. Army doctrine is detailed enough to guide operations, yet flexible enough to allow commanders to exercise initiative when dealing with specific tactical and operational situations. To be useful, doctrine must be well known and commonly understood.[6]

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1. *See generally* Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33 (1996); Lieutenant-Commander Guy R. Phillips, Canadian Forces, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4.

2. *See* Phillips, *supra* note 1, at 9; *see generally* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, ROE HANDBOOK (2000) [hereinafter ROE HANDBOOK].

3. *See* W. Hays Parks, *Deadly Force Is Authorized*, JOINT CENTER FOR LESSONS LEARNED: Q. BULL., Mar. 2001, at 14 (citing injuries to and prosecutions of soldiers as evidence that the current approach to ROE is a failed one); Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, but Also Trained*, ARMY LAW., Sept./Oct. 2001, at 1 [hereinafter *Deadly Force Also Trained*] (arguing that the shortcomings in the current approach to ROE hardly rise to the level of a systemic problem; where shortcomings exist, training can remedy them).

4. *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter CJCS SROE] (stating that "[c]ommanders at every echelon are responsible for establishing ROE for mission accomplishment that comply with ROE of senior commanders and these SROE").

5. BLACK'S LAW DICTIONARY 496 (7th ed. 1999).

6. U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 1-45 (14 June 2001) [hereinafter FM 3-0].

This recent description of the function of doctrine in the military builds upon similarly accepted conceptions of doctrine held by past commentators:

> Doctrine is an approved, shared idea about the conduct of warfare that undergirds an army's planning, organization, training, leadership style, tactics, weapons, and equipment. These activities in preparation for future war lie at the heart of the military profession in modern societies. When well-conceived and clearly articulated, doctrine can instill confidence throughout an army. An army's doctrine, therefore, can have the most profound effect on its performance in war.[7]

As these writings indicate, adherence to Army doctrine affects everything from confidence and trust among soldiers to efficacy of training and success on the battlefield. Conversely, failure to incorporate doctrine in any venture can have serious negative implications for the success of that venture. The JAGC's emphasis on ROE training and development already reflects some doctrinal language.[8] Only recently, U.S. Army operational and leadership doctrine underwent revision.[9] To continue the JAGC's success in training and developing ROE, JAs should incorporate as much of the new doctrine in their approach to ROE training and development as possible.[10]

A recommitment to U.S. Army operational and leadership doctrine in the approach to ROE training and development offers the greatest potential for continued development of the JA's role in the training and development of ROE. A recommitment to doctrine suggests making slight adjustments to the JA's conception of and approach to ROE training and development. Clearly, the proposition that the individual soldier's repetitive performance of ROE-guided tasks is the best way to ensure U.S. Army adherence to ROE is correct.[11] The JAGC should take two steps to further strengthen the training of the individual soldier on ROE. First, the JAGC has not fully capitalized on the vital role of the noncommissioned officer (NCO) in conducting individual training. Second, the JAGC has not adequately accounted for the challenges that NCOs face in training individual soldiers as indicated by the relative lack of off-the-shelf training resources available to these junior leaders.

A recommitment to doctrine also suggests clarifying and reinforcing the different responsibilities of commanders and JAs with respect to training and developing ROE. United States Army doctrine gives the commander primary authority to direct every facet of U.S. Army operations. Judge advocates are uniquely positioned to facilitate or frustrate the commander's ability to exercise that authority.[12] As such, JAs are obligated to be particularly cognizant of and sensitive to the leadership challenges faced by the commander. Judge advocates should take two steps to improve their support of commanders with respect to ROE.[13] First, they should better distinguish the responsibilities of commanders and JAs in the JAGC literature on ROE. Second, they should better articulate leadership and training management considerations in the JAGC literature on ROE.

Finally, the recommitment to doctrine requires a continuing focus within the JAGC on the underlying leadership considerations implicated by various strategies to improve the training and development of ROE. It is not enough to conduct individual soldier training on ROE without considering the leadership implications of the methods chosen to train them. It is not enough to outline commander responsibilities with respect to drafting and training ROE without considering the leadership implications of the commander's competing responsibilities. It is also not enough to carve out an operational niche in ROE

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7. Paul Herbert, Combat Studies Institute, Leavenworth Paper #16, *Deciding What Has to Be Done: General William F. Depuy and the 1976 Edition of FM 100-5, Operations* 3 (1988).

8. *See* ROE HANDBOOK, *supra* note 2, at 1-1. Consider the following language from the *ROE Handbook*: "While ROE should never drive the mission, the political, military and legal forces that may impact the mission and inhibit the use of force must be considered and planned for throughout the planning process." *Id*. Now compare the preceding quotation with language from U.S. Army operational doctrine: "ROE are responsive to the mission . . . ROE may impose political, practical, operational, and legal limitations upon commanders. Commanders factor these constraints into planning and preparation as early as possible." FM 3-0, *supra* note 6, at 6-27 to 6-28.

9. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP (31 Aug. 1999) [hereinafter FM 22-100]. *See generally* FM 3-0, *supra* note 6.

10. It is absolutely clear that the training approach comprehensively articulated in Lieutenant Colonel Mark Martins' seminal article on ROE training is rich enough to accommodate—indeed, in many places contemplates—the doctrinal considerations developed in this article. *See generally* Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1 (1994).

11. *See id.*

12. *See* CJCS SROE, *supra* note 4 (stating that "[t]he Staff Judge Advocate (SJA) assumes the role of principal assistant to the J-3 or J-5 in developing and integrating ROE into operational planning").

13. The attentive reader will note that the focus of this article is on JAGC literature and the actions that the individual JA can take to improve ROE training and development within a given doctrinal environment. One could just as easily approach this topic by focusing instead on recommending changes to doctrine as a way to improve ROE training and development. The author prefers to wring every bit of helpful guidance from the cloth of doctrine *before* evaluating the efficacy of that doctrine. The position promoted by this article is that U.S. Army doctrine could still be a little better incorporated in current strategies to train and develop ROE.

development and training without considering the leadership responsibilities the JA incurs by doing so.[14]

United States Army leadership, training, and operational doctrine will guide the remaining discussion of ROE in this article. The author recognizes that this article advocates strategies for the JA to pursue in an area that ultimately belongs to the commander. Rules of engagement are the commander's tool to promote the disciplined use of force within his command. A potentially tenuous line exists between the enthusiastic JA whose involvement in ROE training and development greatly enhances the unit's mission accomplishment, and the intrusive JA whose involvement dominates and stifles ROE training and development, inhibiting the unit's mission accomplishment. None of the ensuing strategies should be read as anything other than strategies to improve the JA's support of the commander's ultimate responsibility with respect to ROE.

The Soldier: Adjustments to the Emphasis on Training

Noncommissioned officers (NCOs), the backbone of the Army, train, lead, and take care of enlisted soldiers. . . . They ensure their subordinates, along with their equipment, are prepared to function as effective unit and team members. While commissioned officers command, establish policy, and manage resources, NCOs conduct the Army's daily business.[15]

The Noncommissioned Officer

The single most important step that the JA can take to support the commander's ROE training plan for the individual soldier is to coopt the NCOs of that unit. More than just a good idea, allowing NCOs to train individual soldier skills is doctrine: consider the quotation above from U.S. Army leadership doctrine. United States Army training doctrine reflects the primacy of the NCO in individual training as well: "The CSM [Command Sergeant Major] and NCO leaders must select the specific individual tasks, which support each collective task, to be trained. . . . [Noncommissioned officers] have the primary role in training and developing individual soldier skills."[16] *The Army Noncommissioned Officer Guide*, issued to every new sergeant at their Primary Leader Development Course, affirms this role: "Individual training is your primary job."[17]

Yet the literature to which JAs presumably look contains very little discussion of the role of the NCO in conducting individual soldier ROE training. United States Army legal doctrine does not mention NCOs under the section discussing individual soldier training on ROE. While the field manual clearly contemplates an "other trainer" joining the commander and JA in conducting lane training,[18] this hardly reinforces the primacy of the NCO's role in individual training.

The *ROE Handbook* does, however, devote two paragraphs to the NCO's role in individual ROE training. The *ROE Handbook* suggests that "[j]udge advocates should be involved in designing ROE scenarios for CTT [common task training] and STX [situational training exercises], and should monitor their implementation, particularly when noncommissioned officers who are not qualified as legal specialists will conduct the training."[19] The *Handbook* warns of NCOs that are not comfortable conducting ROE training or view it as a JA function, but offers that "[j]udge advocates can assist training NCOs by providing vignettes and solutions for use in these events, by training the NCOs, and by participating in regular unit training."[20] Other literature capturing the lessons learned by JAs during U.S. Army operations in the Balkans, however, recommends that "[j]udge advocates . . . conduct or closely monitor all ROE training" because individual training by NCOs "fell short of what soldiers needed."[21]

Judge Advocate General's Corps resources, then, seem at least uncertain about the proposition that NCOs should be the primary trainers of individual soldiers—at least in the context of ROE. The literature certainly does not contain the unequivocal commitment to NCOs that the rest of U.S. Army doctrine possesses. Three conditions likely create this tepidness among

14. *See* Colonel Michael Thompson, Commander, Battle Command Training Program, Address to Command and General Staff College ROE Term II Course at Fort Leavenworth, Kansas (4 Feb. 2002) [hereinafter Thompson Address] (preparatory notes on file with author). Colonel Thompson highlighted that JAs operate as "ghostwriters for their commanders." *Id*. As such, JAs must be particularly attuned to the warrior ethos, to the commander's intent, to the constraints acceptable to the commander, and to the limits of the JA's authority in an operational context. (That is, JAs cannot take courses of action (CoAs) off the table without the commander knowing about the decision to do so during the Military Decision Making Process. This is not to advocate leaving illegal CoAs or CoAs that violate the ROE on the table—only to confirm that the commander retains the final call on his CoAs).

15. FM 22-100, *supra* note 9, at A-4.

16. U.S. Dep't of Army, Field Manual 25-100, Training the Force 1-9 (15 Nov. 1988) [hereinafter FM 25-100].

17. U.S. Dep't of Army, Trng. Cir. 22-6, The Army Noncommissioned Officer Guide 21 (23 Nov. 1990) [hereinafter TC 22-6].

18. *See* U.S. Dep't of Army, Field Manual 27-100, Legal Support to Operations 8-14 (1 Mar. 2000) [hereinafter FM 27-100].

19. ROE Handbook, *supra* note 2, at 2-8 to 2-9.

20. *Id*. at 2-9.

21. Center for Law and Military Operations, The Judge Advocate General's School, U.S. Army, Law and Military Operations in the Balkans: Lessons Learned for Judge Advocates, 1995-1998, 60 (13 Nov. 1998) [hereinafter Balkans AAR].

JAs to hand the reins of ROE training to NCOs. First, NCOs are uncomfortable with the complex standards ascribed to ROE.[22] Second, as the *ROE Handbook* indicates, NCOs are equally unsure about their responsibility, then, of training their soldiers on those standards. Third, when NCOs are given the opportunity to train ROE, this training frequently may not meet standards, as the Balkans after-action review intimates.

These three conditions do not, however, warrant creating an ROE training exception to the doctrinal directive that NCOs are primarily responsible for individual training. Conversely, given the critical role ROE play in the success of U.S. Army operations, it is imperative that JAs dedicate themselves to enlisting and empowering the NCO Corps to conduct ROE training. Doing so holds the potential to improve ROE training dramatically in the JA's supported unit. The following is a strategy for developing proficiency in ROE training within the NCO Corps.

Judge advocates presumably need an ally in their efforts to assist commanders in providing the proper emphasis on ROE training during home-station training.[23] After notifying their brigade and battalion commanders of their interest in exploring ROE individual training possibilities with their respective CSMs, JAs should waste no time in establishing strong relationships with those CSMs.[24] The JA tasked to implement an individual training program should, by doctrine, consult the CSM early and often. This makes practical sense as well, once the JA recognizes the CSM's value as a resource and ally. The CSM, for example, can offer advice on when ROE training best fits into the Training Management Cycle. By doctrine, the CSM has responsibility for selecting individual tasks to train and coordinating them with the commander's collective training plan,[25] so the CSM represents the best and most appropriate vehicle for getting individual ROE training on the training calendar. The CSM can give the JA an idea of how often the unit conducts individual training, how frequently personnel change over, what competing demands the soldiers in the unit face, and the overall difficulties the CSM has in supervising individual training in the unit.[26]

Once individual ROE training appears on the calendar, the CSM can identify the strongest NCOs in the unit with whom the JA might work to develop ROE training resources. The CSM or an NCO that he designates can critique the JA's training resource material with an eye to what will best communicate significant points to soldiers. More important still, the NCOs offer years of experience at training soldiers in collaboration with the JA's substantive expertise. That experience can help tailor ROE training to the unique tasks any particular unit can expect to perform. The goal is to develop tools beyond the obligatory vignette[27] that could train soldiers on varying levels of ROE complexity.

Why proceed with ROE training by empowering the NCOs in a supported unit? First, the previous discussion emphasizes that by doctrine, this is the way we should do it. By treating ROE training as something special, it will always be something special and will never become familiar. Second, from a practical standpoint, growing a system whereby NCOs develop and conduct ROE training, using the JA as a resource, at the very least injects more trainers into the mix, allowing for more training to occur. Third, resourcing and developing an STX tailored to the unit's specific needs is beyond the experience level of many JAs. The final ROE training plan and execution can be enhanced immeasurably by the input and experience of NCOs. Fourth, doctrine and experience demonstrate that enlisting the NCO Corps offers the JA an important feedback mechanism.[28]

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22. "Commanders reassure soldiers with uneven success that actions taken in tense, uncertain, and rapidly evolving circumstances will not be second-guessed with 20/20 hindsight." *Deadly Force Also Trained*, *supra* note 3, at 16. "Several judge advocates cautioned that peace operations can cause greater, sometimes dangerous, reluctance on the part of soldiers to employ force when authorized and even perhaps, advisable." BALKANS AAR, *supra* note 21, at 66.

23. The *ROE Handbook* follows its emphasis on ROE as commanders' rules, not lawyers' rules, with the admonishment that JAs must ensure ROE development and training receive sufficient attention. *See* ROE HANDBOOK, *supra* note 2, at 2-1. Lieutenant Colonel Whitaker echoed this concern with his observation that ROE at times do not receive proper attention from the commander and his staff until the ROE have failed to support the mission in the middle of the training exercise. *See* Lieutenant Colonel Richard M. Whitaker, Impact of COE on ROE Development and Execution (Dec. 2001) (unpublished manuscript, on file with author).

24. Equally important is the designation of an OPLAW NCO in the SJA office that can act as a liaison between the CSM and the OPLAW attorney or JA. This article discusses the potential benefits of doing this *infra* notes 75-77 and accompanying text.

25. *See* FM 25-100, *supra* note 16, at 1-9. Again, some that would prefer to focus first on Army-wide doctrinal changes might argue that the CSM, with every individual task other than compliance with ROE, relies on mission training plans (MTPs) to identify supporting individual tasks to train. The argument continues that ROE compliance does not appear in MTPs as an individual task. Naturally, then, the CSM and senior NCOs are unable to make their individual training recommendations/individual task selections for ROE training the way they would with any other individual training. This argument would conclude that one improvement needed Army-wide is the addition of individual ROE tasks to the MTP rubric; however, this may improperly frame ROE individual training. Complying with ROE is not a mission in and of itself. Instead, ROE function as additional conditions on individual tasks such as "engage a target with your individual weapon." In this sense, ROE training might be more appropriately compared with NBC training. NBC training requires soldiers to quickly move through fundamental tasks, such as don a protective mask or MOPP gear, and then proceed to training their individual tasks subject to the conditions of a simulated NBC environment. Similarly, the individual soldier may be trained on certain ROE fundamentals like the CJCS SROE self-defense principles, then proceed on to individual or collective training with the added conditions of a certain set of ROE.

26. *See* FM 22-100, *supra* note 9, at A-23 to A-25.

27. *See* FM 27-100, *supra* note 18, at 6-12.

Consider this charge from the *Army NCO Guide*: "Because you live and work directly with and among your soldiers, you have the best opportunity to know them as they really are. You are the first to identify and teach soldiers how to best use their strengths; the first to detect and train soldiers to overcome their shortcomings."[29] A JA's strong relationship with the CSMs and other NCOs in the brigade that the JA supports will give him ready access to critical feedback regarding the level to which individual soldiers are trained on ROE.

Finally, as mentioned earlier, ROE govern the disciplined use of force. By using the NCO support channel to plan, execute, and assess training, the JA reinforces one of the chain of command's critical roles. Discipline is a key function of the chain of command.[30] To the extent that JAs sacrifice a degree of substance in their initial attempts to empower NCOs to conduct individual ROE training, they improve the strength of the chain of command with a subsequent positive effect on discipline. The soldier's knowledge of the ROE might be clouded at first, but the soldier's attribute of discipline necessary to comply with those ROE will be strengthened.

Nothing in the above section is revolutionary or even particularly exciting. It reflects a relatively quick survey of U.S. Army doctrine. Yet JAGC literature does not generally capture detailed discussions of the benefits of involving NCOs to a greater extent in individual ROE training. The JAGC should pay greater attention to capturing U.S. Army leadership and training doctrine, especially doctrine as it relates to NCOs, in the JAGC's emphasis on training.

The Standard

Of course, a decentralized individual ROE training effort requires a uniform standard on which to build. Arriving at a uniform standard presents a daunting challenge for two reasons. First, because ROE are the tools of the individual commander, one would anticipate slightly different ROE from one command to another. Second, while in theory ROE purport to be a "commander's tool," JAs to a varying degree perform much of the heavy lifting in terms of anticipating, analyzing, and mitigating ROE problems. The JAGC could, however, take at least two steps toward developing standards for basic ROE principles.

First, to the extent that the ROE for a particular mission may reflect some principles of the Law of War,[31] the JAGC should promulgate individual soldier training aids on the Law of War. The *Soldier Manual of Common Tasks* contains the Skill Level 1 task "Comply with the Law of War and the Geneva and Hague Conventions."[32] Ten printed pages of performance measures follow this task. A soldier must pass each of these performance measures to receive a "Go" on this task. Unfortunately for the motivated sergeant who wants to prepare his soldiers for their annual Common Tasks Test, the section of the task purporting to list references for the Law of War lists no such references.[33]

Field Manual 27-14, Legal Guide for Soldiers, makes no mention of the Law of War.[34] There are also no Graphic Training Aids (GTAs) on the Law of War. The JAGC should publish a pamphlet or GTA for soldiers as a reference for Law of War principles. The pamphlet could provide discussion for the issues raised by the performance measures outlined in the *Soldier Manual for Common Tasks*. The pamphlet would purport to do nothing more than provide soldiers with a baseline understanding of Law of War principles.[35]

Second, the JAGC should pursue the promulgation of a separate task entitled something like "Comply with Fundamental Self-Defense Principles." These self-defense principles would be grounded in the Standing ROE issued by the Chairman of the Joint Chiefs of Staff. Again, a GTA or pamphlet should accompany the new task to provide the proactive NCO the resource needed to correctly train the soldiers assigned to him.

The Law of War and the fundamental self-defense principles will be present in all U.S. Army operations and are the responsibility of every individual soldier. Since ROE will incorporate these pervasive principles to one degree or another in any given operation, individual soldiers must always possess a basic understanding of them. Furthermore, Law of War and self-defense principles are the two influences on ROE that are most conducive to a single Army-wide standard. Given the primacy of the NCO in conducting individual training, the JAGC should

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28. *See* FM 22-100, *supra* note 9, at A-25.

29. TC 22-6, *supra* note 17, at 11.

30. *See* FM 22-100, *supra* note 9, at 3-6 to 3-9.

31. *See* FM 27-100, *supra* note 18, at 8-2.

32. U.S. Dep't of Army, Soldier's Manual of Common Tasks, Skill Level 1, Task 181-105-1001(SL1) (1 Oct. 2001), *available at* https://hosta.atsc.eustis.army.mil/cgi-bin/adtdl.dll/stp/stp+21-1-smct/tasks/181-105-1001%28sl1%29.htm.

33. *See id*.

34. *See* U.S. Dep't of Army, Field Manual 22-14, Legal Guide for Soldiers (16 Apr. 1991).

35. The U.S. Army published *FM 27-10, Law of Land Warfare*, in the 1950s. It does not reflect the most current developments in the Law of War.

provide the NCO with readily-accessible training resources that reflect the basics of Law of War and self-defense principles.

The Commander: Recommitment to Doctrine and Leadership

Fortunately, the JAGC has devoted tremendous effort to developing individual ROE training. This effort has compiled a great body of literature and training vignettes to act as resources supporting a unit's ROE training program. Recognizing the development of training in this area, the recommendations discussed above should be taken as little more than course adjustments. The literature offering guidance on ROE as they relate to the commander and the staff function, however, is not as abundant. Commanders, with the support of their JAs, coordinate staff activities to interpret, draft, and otherwise employ ROE. Again, this article turns to U.S. Army doctrine and leadership considerations for assistance in evaluating appropriate strategies to achieve this staff coordination.

For purposes of this article, two principles emerge from another quick survey of U.S. Army doctrine. First, U.S. Army operational doctrine directs that ROE should be responsive to the mission and should permit the commander to exercise flexibility within the operation.[36] Rules of engagement may be tailored and supplemented to meet commanders' needs in a specific operation.[37] United States Army legal doctrine recognizes that "ROE must evolve with mission requirements and be tailored to mission realities. Rules of engagement should be a flexible instrument designed to best support the mission."[38]

The *ROE Handbook* generally reflects the principle that commanders own the ROE. When describing the process of Course of Action (CoA) development in the mission planning phase, however, the *ROE Handbook* seems to counsel JAs that if, in their judgment, supplemental ROE are not likely to be approved by higher headquarters, then the CoA planning group should be notified so "they can modify or abandon the proposed CoA."[39] This slip in guidance, albeit a small and unintentional one, indicates an incorrect ordering of priorities between ROE and the mission against which JAs should protect. The weight of doctrine indicates the proper approach would entail informing the commander of the likely disapproval so that the commander could determine whether to press for supplemental ROE approval with his higher commander.[40]

Second, U.S. Army operational and leadership doctrine value the commander's judgment. United States Army operational doctrine places a premium on the commander's well-informed judgment that allows him to make better decisions than the enemy.[41] Judgment, acquired from "experience, training, study, and creative thinking," is the key component in "the art of command."[42] Likewise, U.S. Army leadership doctrine recognizes judgment as one of the leader's key mental attributes. Importantly, doctrine directs that the leader exercising judgment must consider a range of alternatives, think methodically, and consider the consequences of the decision to be made.[43] Judge advocates should not confuse *FM 27-100*'s boast that "[i]nvolvement with ROE places judge advocates firmly within the command and control of operations"[44] as a grant of authority competing with that of the commander's authority to use his judgment.

Taken together, U.S. Army operational and legal doctrine have important implications for ROE development. Specifically in the context of the commander's relationship with his staff, ROE development must accommodate the principles above. Rules of engagement must not only be substantively correct, but a process must also be in place to rapidly supple-

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36. *See* FM 3-0, *supra* note 6, at 6-27.

37. *Id*.

38. FM 27-100, *supra* note 18, at 8-3.

39. ROE HANDBOOK, *supra* note 2, at 1-25. Course of action development is a primary component in the Military Decision Making Process. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS 5-2 (31 May 1997) [hereinafter FM 101-5]. During CoA development, the staff works to add flesh to the general guidance given by the commander on his vision of the upcoming mission. The staff later briefs the commander on the CoAs that they have developed so that the commander might choose between them. The danger in the sequence of events outlined by this quotation from the *ROE Handbook* is that the JA is determining the shape of the future mission (by taking a CoA off the table) based on his interpretation of the ROE, rather than letting the commander determine the shape of the ROE based on his judgment of the mission requirements.

40. *See* CJCS SROE, *supra* note 4, encl. L. The SROE clearly contemplate an active staff role in CoA development. The SROE also authorizes the commander's use of an ROE planning cell that includes the SJA. The SROE also clearly articulates, however, that "[c]ommanders will request and authorize ROE." *Id*. While the ROE planning cell and the JA within that cell might feel very strongly that supplemental ROE may not be approved by higher headquarters, the *ROE Handbook* may proceed a step too far by implying that the COA planning group has the authority to abandon a CoA without the commander's involvement.

41. *See* FM 3-0, *supra* note 6, at 5-3 to 5-4.

42. *Id*. at 5-4.

43. FM 22-100, *supra* note 9, at 2-42.

44. FM 27-100, *supra* note 18, at 8-2.

ment them in response to changing mission requirements. Likewise, ROE should not mandate pre-ordained courses of action for the commander, but should provide a methodical framework that the commander may use to exercise his judgment.

Draft ROE that the Commander Can Use

To draft ROE that the commander can use, the JA must first understand the ROE from higher headquarters. Initially, the JA might think of this requirement as an issue of interpretation. Consider again *FM 27-100*'s guidance to JAs who interpret ROE: "Interpretation of ROE demands skills that are well-honed in the legal profession and specifically cultivated within the 'judge' function of legal support to operations."[45] Later, the U.S. Army legal doctrine speaks again to the JA's unique ability to interpret presumably vague ROE: "In some situations, the OPLAW [Operational Law] judge advocate will be the sole member of the ROE Planning Cell . . . or the staff possessing the necessary training in objectivity and impartiality to state unpleasant interpretations of a higher headquarter's ROE."[46]

These passages indicate a potential point of divergence between U.S. Army legal doctrine and U.S. Army operational and leadership doctrine. Taken together, the excerpts from U.S. Army legal doctrine place a sort of primacy on the JA, not the commander, with respect to establishing the bounds of the ROE.[47] The focus on the JA's "judge" skills is misdirected, however. Unlike interpreting a statute or regulation, where the drafters or proponents cannot ordinarily be found or consulted, the ROE are passed through the chain of command. When disagreements about what the ROE allow or disallow arise on the staff, the interpretive skills or objectivity of the various staff members should not adjudicate the disagreement. Instead, the commander should be informed so that he, based on his judgment or his consultation with his chain of command, can decide the bounds of the ROE.[48] An understanding of U.S. Army operational and leadership doctrine provides the proper focus in this case.

Having correctly guarded against injecting themselves into the process improperly, JAs must guard against the lawyer's affinity for a well-turned locution when drafting ROE. The attempt to articulate just the right level of restraint and just the right guidance may result in amorphous ROE that render the rules ineffectual. On this score, *FM 27-100* gets it exactly right: "*Avoid Excessively Qualified Language*. Rules of engagement are useful and effective only when understood, remembered, and readily applied under stress."[49] Yet this and other warnings in U.S. Army legal doctrine[50] regarding pitfalls in ROE drafting fall short in providing positive guidance for the JA trying to craft a useful tool for the commander.

Again, a quick examination of doctrine with a particular eye to the leadership challenges facing commanders reveals much of the procedural guidance useful to JAs drafting ROE. It is important to recognize that targeting decisions and clearance of fires processes[51] follow directly from the development of ROE and represent the conduct of missions within the ROE. The lessons pulled from doctrine in this section necessarily apply to mission execution as well. United States Army operational doctrine charges commanders and staffs with the enormous task of synchronizing the Battlefield Operating Systems (BOS) during the planning and execution of a mission.[52] Rules of engagement development and clearance of fires decisions compete for the commander and staff's attention with myriad other systems supporting the success of the mission.

Indeed, further study of the operational doctrine shows that "operational design stresses simultaneous operations rather than a deliberate sequence of operations,"[53] reinforcing the con-

45. *Id*. at 8-10.

46. *Id*.

47. Of course, when the Law of War defines these bounds, most would agree that the JA does have a particularly important responsibility to identify clearly those bounds for the commander. The discussion that follows should be read with the understanding that the JA's interpretive skills are valuable in the context of Law of War considerations incorporated in the ROE.

48. *See* Thompson Address, *supra* note 14. As a former battalion and brigade commander and as the current commander of the Battle Command Training Program, COL Thompson's experience supports the doctrinal primacy of the commander's judgment in this case.

49. FM 27-100, *supra* note 18, at 8-13.

50. *Field Manual 27-100*'s section on drafting ROE advises: "*Avoid Restating Strategy and Doctrine*," "*Avoid Restating the Law of War*," "*Avoid Restating Tactics*," and "*Avoid Safety-Related Restrictions*." *Id*. at 8-12 to 8-13.

51. This article refers to the two processes collectively as "clearance of fires."

52. *See* FM 3-0, *supra* note 6, at 5-64. The BOS are: Intelligence, Maneuver, Fire Support, Air Defense, Mobility/Countermobility/Survivability, Combat Service Support, and Command and Control. *Id*. Coordinating these functions means overseeing and maximizing the productivity of an enormous number of tasks that support an operation, from Intelligence Preparation of the Battlefield to Communication Systems to Operational Security, and so on. Developing ROE must take place in the context of simultaneously coordinating all of these other systems.

53. FM 3-0, *supra* note 6, at 5-55.

cept of competing priorities within a given mission. United States Army leadership doctrine also emphasizes the importance of the organizational leader's ability to understand the interoperability of systems.[54] By understanding the merits and shortfalls of each individual system and by understanding how the use of one system affects the others, the commander can maximize the performance of the whole.[55]

These are important principles for the JA developing strategies to draft ROE that prove more useful to commanders. Combining the doctrinal guidance that the commander's reasoned judgment is the final arbiter in resolving mission uncertainties with the recognition that military operations should occur in a rapid, simultaneous manner, the JA can properly balance attention between the process or effect of ROE and the precise substance of the ROE. If the commander must consider all of the systems that contribute to mission success, then the JA supporting that commander must also have an eye to those competing systems. In drafting, then, a JA might design a flowchart or spreadsheet, based on the ROE, that "correctly" resolves every discrete targeting decision that a commander will need to make in the course of an operation. But, what effect does devoting the time to getting the decision exactly "right" every time have on synchronization, for example? What type of demands does making this decision place on the Intelligence Preparation of the Battlefield (IPB), one of the tasks under the Intelligence BOS? These types of questions inform the JA seeking to draft useful ROE for the commander.

Seeking a balance between process and substance when drafting ROE is validated by observations of organizational leaders and their JAs in the field. Two observations from the Battle Command Training Program make the point: "First, we have to construct the ROE based on a very careful and thoughtful IPB process, so that the rules contemplate the nature of the enemy and the type of terrain that we will fight on."[56] Additionally, "we have to refine clearance of fire rules and procedures so that we can generate flexible and rapid response to opportunities to strike at the enemy."[57] Both quotations demonstrate the growing emphasis on ROE accomplishing more than providing a "Go/No-Go" procession through potential target lists. Instead, drafting ROE requires that the JA address discrete targeting decisions in light of the fluid nature of ongoing operations.

Doctrine also validates these conclusions. Commanders cannot rely on rote adherence to extensive rules. Such adherence does not aid the commander when there are gaps in the information necessary to apply the rules. Instead, the commander must rely at times on "informed intuition" to fill these gaps,[58] "accept calculated risk" to seize the initiative,[59] and understand that it is "counterproductive to wait for perfect preparation and synchronization."[60] One final doctrinal warning summarizes the necessary balance between process and substance in ROE drafting: "Too great a desire for orderliness leads to overdetailed orders, overcontrol, and failure to seize and retain the initiative."[61] These excerpts do not in any way mean that a commander or JA should stop developing substantively correct ROE, or that commanders should disregard ROE if they become too "inconvenient" or "tough." The excerpts do, however, support the idea that ROE should not encumber the mission.

When drafting ROE and advising targeting decisions, to be useful to the commander, the JA must understand and provide for the fact that doctrine contemplates the commander doing his best, but that a substantively perfect decision may be elusive. The JA cannot have "tunnel vision"—focusing on the effects of ROE on an operation to the exclusion of all else. Yet broadening the focus of the JA should not diminish the important role of ROE in U.S. Army operations. How can the JA's capabilities and expertise be more fully integrated into the commander's staff?

Integrating the Judge Advocate on the Staff

As the preceding section suggests, one strategy for more fully integrating the JA in the staff function for purposes of ROE development is for the JA to broaden his exclusive focus on ROE and their impact on operations. To broaden his focus, the JA must continue to develop the inherent leadership responsibilities that accompany one's commissioning as an officer in the U.S. Army. The remainder of this article focuses on strate-

54. *See* FM 22-100, *supra* note 9, at 6-24. The term "organizational leader" refers to commanders at the brigade, division, and corps level—essentially those with the most assets and most expansive staff functions to oversee. *See id.* at 6-3.

55. *See id*. at 6-24.

56. E-Mail from Lieutenant Colonel Richard Whitaker, Senior Observer/Controller, Battle Command Training Program, to author (Dec. 18, 2001) [hereinafter BCTP E-mail] (on file with author).

57. *Id*.

58. FM 3-0, *supra* note 6, at 5-3.

59. *Id*. at 5-5.

60. *Id*. at 6-39.

61. *Id*.

gies for the JA to develop his role as a leader on the staff and in the unit he supports with the aim of strengthening the command's commitment to ROE development and training.

As before, U.S. Army leadership doctrine provides the start point for formulating a strategy for greater integration on the staff. Judge advocates may, to a greater or lesser extent, struggle with the apparent disconnect between the critical role in developing ROE with which they were tasked and the occasional inattention given to ROE by a commander and his staff. The natural place to begin a survey of leadership doctrine with an eye toward better integration is with the doctrinal mandate for self-development. Self-development obviously incorporates the need of the individual to identify areas of individual weakness or lack of knowledge and then to implement a program of study to address those weaknesses.[62] For some JAs, especially those that support a particular unit or, even more important, those that *anticipate* supporting a given unit on a future deployment, this program of study should include U.S. Army operational and training doctrine. This focus is especially true for the Operational Law Attorney or those attorneys that anticipate working on a staff and developing ROE.

By doctrine, leader self-development incorporates more than a self-study program. *Field Manual 22-100* also directs that commanders establish and monitor self-development programs in their units. Part of this self-development program is communication between the individual and their first-line leader and their commander.[63] Judge advocates, then, can use the vehicle of a self-development program to raise their concern over the extent to which they are integrated into the staff for purposes of developing and implementing ROE. Taking advantage of the doctrinal door into the staff judge advocate's office, the G-3's office, or the brigade commander's office provided by the self-development program offers JAs two benefits. First, it allows the individual JA to raise the issue of improved staff integration with respect to ROE development and implementation with these key individuals. Second, it allows the staff judge advocate, other staff officers, and the brigade commander the opportunity to develop, clarify, and articulate their guidance or thoughts on ROE to the JA. Both benefits provide an important first step toward better staff integration.

The JA's self-development program should also lead to a clear understanding of the Training Management Cycle. The JA seeking better integration into the staff for purposes of ROE development and implementation before a deployment or training event should take a cue from the earlier discussion about competing systems during the execution of an operation. It is a given that the commander and staff must train ROE development and implementation before a deployment or training exercise.[64] It is equally clear that some commanders and staffs train ROE development and implementation at best sporadically, if not rarely, before major training exercises.[65] To the extent that this shortcoming owes to competing demands on the commander and staff's time and resources,[66] the JA must clearly respect and understand the Training Management Cycle. To make the point, recall the earlier discussion about individual training on ROE.

The *ROE Handbook* counsels that JAs seeking to train others on ROE should, among other things, search for previously planned training events on which the JA could "piggy-back."[67] At first blush, this is an innocent enough proposition and might be adopted with respect to staff training as well. While previously planned training events might provide an opportunity for ROE training, the JA should approach this recommendation with caution. Looking to doctrine, the Training Management Cycle allows the commander to concentrate a unit's training priorities during a given period.[68] Indeed, "a unit cannot attain proficiency to standard on every task whether due to time or other constraints," but "commanders can achieve a successful training program by consciously narrowing the focus to a reduced number of vital tasks."[69]

Following this cue from U.S. Army training doctrine, the JA should understand that the commander plans training well in advance of execution. This planning incorporates not only resourcing the training, but also determining the focus of training. Consider the individual ROE training again. An ROE training station set up at a rifle range would, in most

62. *See* FM 22-100, *supra* note 9, at 5-77.

63. *See id*. at 5-78.

64. *See* FM 25-100, *supra* note 16, at 4-4.

65. *See* BCTP E-mail, *supra* note 56.

66. *See* Colonel John D. Rosenberger, *Reaching Our Army's Full Combat Potential in the 21st Century*, ARMOR, May-June 1999, at 8, 9. Colonel Rosenberger, the commander of the National Training Center's Opposing Force (widely considered to be a very effective fighting force—they are seldom defeated by U.S. Army units rotating through the National Training Center), draws attention to the "host of reasons—lack of money . . . lack of time, shortages of leaders and soldiers, installation support, and peacekeeping missions" that contribute to the difficulty in training appropriately. *Id*.

67. ROE HANDBOOK, *supra* note 2, at 2-3.

68. *See* FM 25-100, *supra* note 16, at 1-9.

69. *Id*. at 1-7.

instances, offer an excellent opportunity to conduct concurrent training. Imagine a commander that scheduled the range because he has an inordinate number of new privates straight out of basic training. With a significant training exercise upcoming, the commander wants to ensure that the privates are all proficient and comfortable with their weapons. The commander's training intent for the range is not mere sustainment of already proficient firers, but is instead developing proficiency in soldiers that lack it. The JA must be aware of the focus of the training before introducing a competing training objective.

The same insight may be applied to staff training on ROE development and implementation. To persuade a commander to incorporate ROE development and implementation in his staff training exercises, the JA must raise the proposal early in the Training Management Cycle. This requires both familiarity with the long-range training calendar[70] and the doctrinal understanding of what other staff sections and the commander will hope to accomplish during the planned training. Better yet, the JA should be cognizant of when the commander is setting his long-range and short-range training plans.[71] The JA, by notifying the commander before the meeting that he would like to propose some ROE training, then arriving at the long- or short-range planning meeting with a plan that is sensitive to or incorporates other staff functions, will stand a much better chance of persuading the commander to incorporate ROE in the staff's training. The alternative—attempting to interject ROE conditions in previously planned training—may result in frustrating the commander and members of the staff. Instead of strengthening ROE considerations, the JA may marginalize them.

Finally, U.S. Army leadership doctrine highlights the importance of organizational leaders building teams.[72] To the extent that improved staff integration incorporates team building, JAs can play a significant role. Doctrine articulates the important roles that the mutual demonstration of discipline and competence between team members and that the constant interaction between team members can play in developing an increasingly cohesive team.[73] While the responsibility of team building is most commonly associated with the commander, U.S. Army leadership doctrine offers another critical insight. Leadership is not only a function of position (that is, the commander), but also a function of role.[74]

The JA, then, who seeks better integration on the staff generally, but specifically toward improving ROE development and implementation as a staff function, has a leadership function by virtue of the role that the commander assigns the JA with respect to ROE. Anecdotally, the following is a recommended strategy. Colonel (COL) James Rosenblatt, the Staff Judge Advocate for Training and Doctrine Command, hosts a regular Wednesday afternoon social event. He invites members of his office and all of the members of another staff section to his house for food and drinks. After everyone has arrived, COL Rosenblatt gathers everyone in his dining room and makes a full round of introductions. Following the introductions, COL Rosenblatt asks the guest primary staff officer to speak for a few minutes on the critical issues that his staff section is facing. Colonel Rosenblatt follows with well-informed questions and solicits questions from the group. Afterwards, both sections have the opportunity to socialize.

This type of event has enormous potential for the JA seeking to solidify his role in operational planning and training, especially as it pertains to ROE development and implementation. One can imagine a staff judge advocate asking the other primary staff officers before the event to make remarks about their roles or perceptions of ROE and the staff processes that implement them. What a tremendous way both to foster trust and confidence between members of the staff and to exchange valuable insight into one another's roles in ROE development and implementation. Even the junior JA may incorporate this type of strategy by inviting junior officers and NCOs from other staff sections to a similarly informal setting.

The Judge Advocate

Two final recommendations require discussion separately addressed to the JA's internal function. First, for the JAGC to fully maximize its potential contribution in the field of ROE training and operational law, it must better use its own NCOs. Second, the JA may expand the sort of culture and team-building strategy personified by COL Rosenblatt's example to the units that he supports. Indeed, doctrine offers this as a valuable strategy toward emphasizing particular values within a unit.

The OPLAW NCO

United States Army leadership doctrine counsels leaders to carefully manage their low-density specialties.[75] The JAGC, like every branch of the U.S. Army, suffers from a shortage of

70. *See* FM 25-100, *supra* note 16, at 3-4.

71. The time horizons for these plans are laid out in *FM 25-100*. *See id*. at 3-5.

72. *See* FM 22-100, *supra* note 9, at 6-132.

73. *See id.* at 6-139.

74. *See id.* at 1-51.

75. *See* FM 22-100, *supra* note 9, at 3-41.

personnel—to include NCOs. At the same time, the JAGC, like every branch of the U.S. Army, has increased demands on its limited personnel. This paradox is nowhere clearer than in the field of operational law. The JAGC is struggling with the optimal force structure to meet the demands of operational law.[76] The aim of this article is not to recommend any doctrinal changes to the force structure of the JAGC. It does, however, recommend that JAs and staff judge advocates take advantage of the flexibility they possess in tasking NCOs under their immediate supervision to assign an NCO in every staff judge advocate office as the OPLAW NCO.[77]

Dedicating an NCO to work operational law issues, including ROE training, offers potentially enormous benefits. First, the NCO will often have military experience that exceeds or at least compliments that of the JA. This is true with most officer-NCO partnerships formed in the U.S. Army. That military experience can provide the JA with a valuable filter to view ROE training plans and strategies for approaching commanders and staff members with proposals for ROE training. Second, the NCO will simply provide an extra set of eyes to observe training in the supported unit. Furthermore, since NCOs conduct most individual training, having a dedicated OPLAW NCO observe individual ROE training will be less of a distracter and may provide a truer picture of the quality of training occurring in the unit.

Third, and arguably most important, an OPLAW NCO charged primarily with duties associated with individual ROE training would serve as a valuable interface between the JA and the NCO Corps in the supported unit. All the benefits of empowering NCOs to conduct individual ROE training discussed earlier will be best realized if the JA himself has an NCO on which he can rely. A CSM, for example, will likely approach the mentoring of a junior officer a little differently than the mentoring of an NCO. This subtle difference in approaches may result in enhanced feedback for the JA via the OPLAW NCO and increased ownership of ROE standards by the NCO Corps.

Leadership

Finally, the reliance on NCOs to improve individual ROE training does not replace the JA's responsibility to interact with soldiers and NCOs in the unit he supports. Again, U.S. Army leadership doctrine provides a potent strategy for imparting values (in this case, the internalization of self-defense principles and disciplined use of force principles that form the basis of ROE) to soldiers. While the following excerpt is taken from the context of combat or combat training, its message is weighty: "Soldiers are extremely sensitive to situations where their leaders are not at risk, and they're not likely to forget a mistake by a leader they haven't seen. Leaders who are out with their soldiers . . . will not fall into the trap of ignorance."[78]

Again, soldiers will have every reason to be skeptical of the JA that they only see twice a year peddling a class on ROE. Presence at various training events, including physical training and social events, can pay dividends with respect to the JA's credibility. This ability to be present at various unit events may be limited by the JA's commitment to participate in physical training and social events with the legal office or brigade staff, not to mention a demanding case or work load. This constraint on the JA, however, makes an additional argument for an increased role for an OPLAW NCO who could establish a regular legal presence at unit events.

Furthermore, as the JA's presence is sensed more and more, and as the JA continues to emphasize basic ROE principles, he can have an impact on the unit's culture. Another anecdote makes this point. Lieutenant Colonel Richard Whitaker recounts his experiences as a trial counsel:

> After each court martial, I would post the results in the company area, and then I would read the results of trial in the company formation. We took no questions, and made no reference to specific type of crime, etc. During the course of trial preparation, I made myself very visible as I came and went in preparation of the trial or preliminary hearings. The unit leaders told me that this had a profound impact on the soldiers and that my presence, coupled with the disappearance of those subsequently convicted and placed in jail was a healthy reminder that while the command rewarded those that worked hard, those that chose to violate the same rules others worked to uphold would be dealt with. You can do this without getting anywhere near an unlawful command influence issue, by allowing soldiers to draw their own conclusions and by relying on the soldier supported informal communications. Anybody that does not think that the results of an article 15 or a court martial do not spread like wild fire through a unit does not understand soldiers.[79]

76. Telephone Interview with Lieutenant Colonel Peter Becker, Combat Developments Department, The Judge Advocate General's School (Dec. 15, 2001) (notes on file with author).

77. Note that the JAG School has opened its OPLAW Seminar to legal NCOs. This is a welcome first step toward embracing the tremendous potential embodied in a designated OPLAW NCO.

78. FM 22-100, *supra* note 9, at 3-24.

79. E-Mail from Lieutenant Colonel Richard Whitaker to author (Dec. 10, 2001) (on file with author).

One does not need to think long to develop a similar strategy for the JA seeking to make an impact on a unit regarding ROE. As the JA builds relationships with the NCOs and the company commanders of the unit in which he serves, opportunities to make a difference in the unit's culture will present themselves. Whether pulling soldiers aside to talk to them about ROE, reading an account in formation of an actual incident where a soldier complying with the ROE made a difference, or posting an account where a soldier violated the ROE and it had an adverse impact on the mission, JAs should be open to opportunities to reach soldiers a little at a time.

Conclusion

In the end, commanders and JAs have successfully transitioned into an era in which formal ROE play a more prominent role in Army operations than at any time in history. Given the necessity of the disciplined use of force in Army operations, ROE assume strategic significance as they guide the individual soldier and the commander alike in their decisions to use force. Going forward, evaluating the development and training of ROE from a doctrinal perspective offers the best opportunity for continued refinement of the JA's role in implementing ROE.[80]

This article outlines several strategies grounded in Army doctrine for JAs to strengthen ROE development and training. Rules of Engagement represent a somewhat untraditional operational function for the JA, yet this function requires the same diligent study and commitment that JAs ordinarily devote to the law. In this case, however, JAs must become operational and, more specifically, doctrinal experts—just as they are legal experts in performing their other functions in the JAGC. This article offers recommendations not only in hope that JAs might adopt some of them, but also to convey the idea that just as the law guides JAGC legal practice, doctrine must guide JAGC operational practice.

80. After a thorough application of existing doctrine to the role of the JA in ROE training and development, one may reach the conclusion that doctrine remains underdeveloped in this field. This article intentionally avoids discussing potential shortcomings in existing doctrine. To make informed and truly effective future adjustments to existing doctrine, the JAGC should maximize the guidance and insight contained in existing doctrine.

Trying to Remain Sane Trying an Insanity Case: *United States v. Captain Thomas S. Payne*[1]

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Doctor (Expert in Forensic Psychiatry): Captain (CPT) Payne is a licensed dentist and, in addition to refusing to engage in any personal hygiene, he will not brush his teeth. It takes him forty to fifty seconds, sometimes minutes, to respond "Yes" or "No" to a simple question. We observe him through a monitor in his room and he will stand for hours staring at the wall, or he will swat at things that are not there.

Trial Counsel: How can you be certain CPT Payne is not malingering or faking this condition?

Doctor: For the past few weeks he has been on the maximum dosage of anti-psychotic medicine, and he is reacting very well. If you or I were to take that medication, it would knock us out. Captain Payne is not malingering—he is suffering from a severe mental disease.[2]

Introduction

A sanity board has just reported that an accused soldier is presently suffering from a mental disease or defect, and that the accused is not competent to stand trial. Whether you are a trial or defense counsel, your mission is to guide an insanity case through the legal battlefield. While a finding of "not guilty only by reason of insanity"[3] is extremely rare in the military,[4] it is not uncommon for military criminal law practitioners to face mental responsibility issues before and during trial. This article provides a suggested course of action based on the successful resolution of one such case, *United States v. Payne*.[5] This article is not doctrine; rather, it proposes a model for practitioners to reference when faced with the complex task of trying an insanity case.

1. This article incorporates a fictional name for an actual insanity acquittee to protect his privacy. Locations, units, and other names have also been changed to guard against any unwarranted disclosure of personal information.

2. Interview with Dr. (Major) Evan Whitmore, Chief, Hospital Psychiatric Services, Lindberg Army Medical Center (LMC), Williams Air Force Base, Springfield (Feb. 16, 2000).

3. In the federal criminal system, the more familiar terminology for findings in an insanity case is: "Not guilty only by reason of insanity." 18 U.S.C. § 4242(b)(3) (2000). At a court-martial, the terminology is: "Not guilty only by reason of lack of mental responsibility." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921(c)(4) (2000) [hereinafter MCM].

4. Of the thousands of courts-martial completed from 1998-2001, CPT Thomas Payne was the only military person committed to the custody of the Federal Bureau of Prisons (FBOP) resulting from a verdict of not guilty only by reason of lack of mental responsibility. Thus, the frequency of this verdict is quite low. Telephone Interview with Angela Dunbar, FBOP (May 8, 2000). Angela Dunbar, in her long tenure at the FBOP as the sole point of contact for coordinating transfers of military personnel to the FBOP for psychiatric treatment, had never done so as the result of a verdict until processing CPT Payne. *Id.*

Through the experience of the authors, whose background is similar to many military justice practitioners—both served tours as trial counsel, and one served additional tours as a defense counsel and a Chief of Military Justice, and through the authors' discussions with numerous personnel involved in the military justice system, it is apparent that processing a mental responsibility case through completion is very rare. The authors polled the Criminal Law Division of The Judge Advocate General's School of the Army, the Criminal Law Division of The Office of The Judge Advocate General, the Trial Counsel Assistance Program, military judges, senior judge advocates, and other Chiefs of Military Justice, and no one, at least as far as anyone could remember, had actually handled a case involving an accused that had to be committed.

5. Payne Record of Trial. The authors base other assertions and practice tips on their numerous experiences with sanity boards and mental responsibility issues.

The focus is twofold: (1) to explain to military legal practitioners how to get an insanity case to trial when a sanity board has determined an accused is incompetent to stand trial, and (2) to explain how to get an accused committed after a verdict of not guilty only by reason of lack of mental responsibility. This article does not focus on how to present or attack an insanity defense on the merits. Rather, it explores supporting efforts of such cases, which include the procedural hurdles facing the government and defense in those rare circumstances when an accused is not competent to stand trial (pretrial) or found not guilty by reason of insanity (post-trial). The first part of the article, Trying to Remain Sane, is a series of practice tips for counsel involved with an insanity case. The second part of the article, Trying an Insanity Case, details the authors' court-martial experience with *United States v. Payne*.

Part I: Trying to Remain Sane

Practice Tips

1. Processing the Sanity Board Request: RCM 706 Matters in Inquiry

When a credible accused pending trial tells his defense counsel or someone in his chain of command that he is depressed or suicidal, they usually initiate a sanity board.[6] If that same soldier wakes up on time every day, dresses in a normal fashion, reports to formations, completes assigned tasks, performs personal hygiene, and eats meals using appropriate utensils, the results of a sanity board inquiry should not be surprising. Although doctors may diagnose the accused with depression,[7] the doctor's other sanity board findings will be the usual: the accused does not have a severe mental disease or defect, the accused was able to appreciate the nature and quality of the wrongfulness of the criminal misconduct, and the accused is able to understand the nature of the proceedings or cooperate intelligently in his defense.[8]

Sanity board requests under Rule for Courts-Martial (RCM) 706 may be forwarded by a number of parties before or after referral.[9] Practitioners, however, will likely see the majority of RCM 706 requests initiated by the defense pre-referral. Defense counsel may serve the request directly on a commander; however, as a practical matter, the defense will usually serve it on the trial counsel. The trial counsel then coordinates a number of things: (1) the commander before whom the charges are pending must order an inquiry;[10] (2) the doctor conducting the inquiry must receive all required documents;[11] and (3) the unit must ensure the accused's presence at all sessions of the inquiry, an especially burdensome task when the accused is in pretrial confinement. Additionally, the government must account for the inevitable delay caused by sanity boards. The convening authority should sign an RCM 707(c) delay in conjunction with the sanity board order to cover the period of the sanity board.[12]

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6. *See* MCM, *supra* note 3, R.C.M. 706(a). Rule for Courts-Martial (RCM) 706(c)(2)(A)-(D), Matters in Inquiry, details the findings requested of a sanity board:

> 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:
>
> (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?

Id. R.C.M. 706(c)(2)(A)-(D).

7. This answer responds to Question B of RCM 706(c)(2). *See supra* note 6.

8. These answers respond to Questions A, C, and D of RCM 706(c)(2). *See supra* note 6.

9. "Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial." MCM, *supra* note 3, R.C.M. 601(a).

10. *See id*. R.C.M. 706(b). The commander who orders the RCM 706 inquiry must be a convening authority. *Id*. R.C.M. 706(b)(1). The trial counsel must be cognizant of the rank of the doctor who is the chief of the hospital section that will be conducting the inquiry. It may be awkward if an O-5 battalion commander orders an O-6 doctor to conduct this inquiry, and to do so in a timely fashion. Counsel should get the order signed by the special court-martial convening authority, usually an O-6 brigade commander. Although the defense may request completion of the inquiry before the Article 32 investigation, this is not mandatory.

11. The trial counsel must assemble a packet for the doctor conducting the sanity board. This packet should include, at a minimum, the sanity board order, the sanity board request, the charge sheet, and the preferral packet; that is, evidence supporting the charges. The unit escort should bring the accused's medical records to the doctor. Finally, the government should provide the doctors a copy of RCM 706.

12. *See* United States v. Arab, 55 M.J. 508 (Army Ct. Crim. App. 2001) (discussing speedy trial issues related to sanity boards). In *Arab*, the court found that the convening authority did not abuse his discretion when he granted an open-ended delay until the completion of the sanity board. Although the *Arab* court found that the 140-day delay for completing the accused's sanity board was unusually long, it determined the government displayed due diligence in processing the sanity board. *Id*. at 512.

2. Processing the Sanity Board Results When an Accused Is Unfit to Stand Trial

Trial and defense counsel anxiously await the results of the board, yet the report usually contains anti-climatic results declaring the accused sane at the time of the offense and fit to stand trial.[13] This may cause trial counsel to view the sanity board process as another defense delay tactic; however, it may provide the defense with valuable expert testimony for the pre-sentencing phase of trial.[14]

What should counsel do when they receive that rare sanity board result stating that the accused has a severe mental disease or defect, and that he is not competent to stand trial?[15] After re-reading the sanity board request to ensure it is correct, counsel should immediately call the doctor who compiled the report. Among many initial questions, the government and defense both need to know primarily what impact this result has on the accused: (1) whether he can be restored to competency, and if so, how long will it take; and (2) whether the accused can be released and treated on an out-patient basis or, if not, where the accused will be treated.

While the defense focuses on what is in the best interest of their client, the government must consider not only the needs of the accused, but also the needs of the Army and society. Trial counsel may have an uphill battle convincing their chief of criminal law and staff judge advocate, and more importantly, their commanders, to proceed to trial rather than a medical board or an administrative separation. In a violent crime with a true victim, the decision to go to trial should be simple. In a victimless crime, however, the decision is more difficult; under such circumstances, the best course of action for the accused may be commitment rather than punishment.

3. Know the Rules

Within the *Manual for Courts-Martial* (*MCM*), the primary rules practitioners must familiarize themselves with are RCMs 706, Sanity Boards; 909, Capacity of accused to stand trial; 916(k), Defense of lack of mental responsibility;[16] 921(c)(4), Not guilty only by reason of lack of mental responsibility; 1102A, Post-trial hearings; and UCMJ Article 76b, Lack of mental capacity or mental responsibility: commitment of accused for examination or treatment.[17]

The *MCM*, at RCM 909, and UCMJ Article 76b, refer practitioners to the applicable statutes within the federal criminal system: 18 U.S.C. §§ 4241-4246. Accused who are not competent to stand trial, or who are found not guilty only by reason of lack of mental responsibility, must be transferred to the federal system.[18] Current military treatment facilities have no long-term in-patient psychiatric wards.[19]

The commanders and the staff judge advocate also need to know the administrative procedures for separating an accused diagnosed as suffering from a severe mental disease or defect.[20] The court-martial and commitment of a soldier to a federal psychiatric ward is time and resource intensive; however, this should not discourage counsel from proceeding with a court-martial if justice warrants such action. Up front, judge advocates and their commanders must know that eventually, after the federal psychiatric ward releases custody of a soldier, the only way to discharge the soldier is through the same administrative procedure that could have been implemented initially.[21]

4. Requesting a Competency Hearing: Pre-Referral or Post-Referral?

Rules for Courts-Martial 909(c) and 909(d) provide for pre-referral and post-referral inquiry into the mental capacity of the

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13. *See supra* text accompanying notes 7-8.

14. In the pre-sentencing phase of a guilty plea when defense counsel have no intention of negating the pretrial agreement, they must clearly articulate their purpose in using mental capacity evidence in the form of extenuation or mitigation. *See* MCM, *supra* note 3, R.C.M. 1001(c). Military judges will not hesitate to re-open a providence inquiry when a doctor testifies the accused did not intend a certain result. *See id*. R.C.M. 916(k)(3)(B). This may cause defense counsel to refrain from presenting expert testimony which raises the issue of mental responsibility because the issue could negate the deal, even though the mental responsibility defense would fail if presented at trial.

15. If the report states that an accused was unable to appreciate the nature and quality of his acts at the time of the offenses, but that he is *not* currently suffering from a mental disease or defect and that he *is* competent to stand trial, then the mental responsibility issue will be litigated at trial. At this point in the article, the focus is on an accused determined to be suffering currently from a mental disease or defect such that he is not competent to stand trial. The requirement for competence to stand trial does not require that the accused's mental disease or defect be severe. *Id*. R.C.M. 909(a).

16. *See also* UCMJ art. 50a (2000).

17. *See* MCM, *supra* note 3, R.C.M. 706, 909, 916(k), 921(c)(4), 1102A; UCMJ art. 76b; *see also Joint Service Committee on Military Justice Report, Analysis of the National Defense Authorization Act Fiscal Year 1996 Amendments to the Uniform Code of Military Justice*, ARMY LAW., Mar. 1996, at 143-46 (discussing the creation of the new Article 76b).

18. *See* MCM, *supra* note 3, R.C.M. 909(f), discussion; UCMJ art. 76b. The federal statutes referred to are 18 U.S.C. §§ 4241, Determination of mental competency to stand trial; 4242, Determination of the existence of insanity at the time of the offense; 4243, Hospitalization of a person found not guilty only by reason of insanity; 4244, Hospitalization of a convicted person suffering from mental disease or defect; 4245, Hospitalization of an imprisoned person suffering from mental disease or defect; and 4246, Hospitalization of a person due for release but suffering from mental disease or defect. *See also* Practice Tip #12—Coordination: Commitment of an Insanity Acquittee, *infra* page 21.

accused, respectively.[22] Pre-referral, RCM 909(c) specifies the convening authority's ability to order an inquiry into the accused's mental capacity under RCM 706.[23] Post-referral, RCM 909(d) authorizes the military judge to order an inquiry sua sponte or at the request of either party. Furthermore, RCM 909(d) requires the military judge post-referral to conduct a competency hearing of an accused if that accused was determined mentally unfit to stand trial.[24] Although RCM 909(c) does not specifically authorize a military judge to preside over a competency hearing before referral, the rule does not prohibit the judge from conducting a hearing at this stage of the process, either.[25]

Counsel should request a competency hearing before a military judge because of his ability to expedite the judicial process. When an accused found incompetent to stand trial is transferred to the custody of the FBOP, the military can lose significant control over the accused. If the government intends to dismiss the case, or processing time is not pressing, then this loss of control may not be an issue. If, however, the government intends to go to trial, or processing time is an essential factor, or both, then the involvement of the military judge can assist the command with control over the committed soldier. The federal commitment rules have strict timelines.[26] Although the FBOP doctors know and understand the importance of these rules, they cannot always meet the timelines. Because federal prisons work with court orders on a routine basis, the FBOP personnel are more likely to respond to a court order from a military judge than a convening authority.

For several reasons, counsel should make their request for a competency hearing before a military judge pre-referral. First, in general courts-martial, if the government proceeds with an Article 32 investigation without a declaration of competency, the defense will most likely move for a new investigation when the case comes before a military judge.[27] Second, if counsel wait until post-referral, they may never get the chance for a competency hearing before a military judge. If a sanity board finds an accused incompetent to stand trial, and the general court-martial convening authority agrees with this finding, then the accused "shall [be committed] to the custody of the Attorney General."[28] Defense counsel who concede their client's lack of competency, but intend to challenge their client's commitment, are out of luck. The decision to commit the accused under these circumstances is mandatory; it is not reviewable by a military judge.[29] Finally, neither party suffers prejudice from a pre-referral hearing. The transcript will be appended to the record of trial for the appellate courts to see the extraordinary effort the parties undertook to protect the accused's rights.[30]

5. Getting the Competency Hearing on the Docket

Rule for Courts-Martial 909(e) is silent about the procedural requirements of the competency hearing, other than setting forth the burden of proof, the issue to be litigated, and a reference to the non-applicability of the rules of evidence.

The government or the defense can request a competency hearing using a document styled "Request for RCM 909(e) Competency Hearing."[31] The request to the court should come

19. Telephone Interview with Dr. Evan Whitmore, Chief, Hospital Psychiatric Services, LMC, Williams AFB (Feb. 9, 2000) [hereinafter Whitmore Interview, Feb. 9, 2000]. According to Dr. Whitmore, only a small percentage of society suffers from a severe mental disease or defect, with an even smaller percentage in the military. Service members diagnosed as suffering from a severe mental disease or defect are usually separated via a medical board. The military does not have any long-term in-patient psychiatric treatment facilities because contracting these services to civilian facilities is more cost effective. *Id.*

20. *See* Practice Tip #14—Administrative Separation, *infra* page 23 (listing governing Army Regulations).

21. *See* Practice Tips #13—The Post-Trial Hearings, *infra* page 22, #14—Administrative Separation, *infra* page 23.

22. *See* MCM, *supra* note 3, R.C.M. 909(c)-(d).

23. *Id*. R.C.M. 909(c).

24. *Id*. R.C.M. 909(d).

25. *See id*. R.C.M. 909(c).

26. *See* 18 U.S.C. § 4241(d) (2000).

27. *See infra* note 136.

28. UCMJ art. 76b (2000).

29. *See* United States v. Salahuddin, 54 M.J. 918, 920 (A.F. Ct. Crim. App. 2001). In *Salahuddin*, the convening authority agreed with Salahuddin's sanity board that Salahuddin was not competent to stand trial, and subsequently committed Salahuddin to the Attorney General's custody. The defense argued against what it deemed an "involuntary commitment," arguing for a competency hearing before a military judge. Although the defense agreed Salahuddin was incompetent, it argued that Salahuddin did not require hospitalization. The AFCCA denied any relief, finding that the purpose of a competency hearing "is to determine the competency of an accused to stand trial, not to determine the propriety of commitment to the Attorney General." *Id*. at 920.

30. *See* Practice Tip #6—The Competency Hearing, *infra* page 17.

from the Special Court-Martial Convening Authority (SPCMCA). If the defense submits the request, it should be served on the trial counsel for action by the SPCMCA. Or, if the government is requesting the hearing, the request should be drafted for the SPCMCA's signature. The signed document should be served on the court and opposing counsel.

The request should lay out the basic chronology and facts that led to the request, primarily an offer of proof that some expert is currently of the opinion that the accused is not competent to stand trial. If the other party has an expert who will testify to the contrary, the request should alert the judge of this fact as well. The request should note that the expert(s) will be produced by the government to testify at the hearing. Most importantly, it should clearly state what the moving party is seeking.

Because competency hearings are so rare in the military,[32] no statistics state the positions commonly taken by the prosecution and defense. Based on his vast experience with competency hearings, primarily in the civilian sector, Dr. Evan Whitmore, Chief of Psychiatric Services at Williams Air Force Base, stated that in the majority of cases, the defense asserts an accused is incompetent to stand trial, the government opposes this position, and an actual finding of incompetence is rare. It is possible that when an accused's lack of mental responsibility is not contested, the government may move for a competency hearing. When the government makes such a request, it should spell out the course of action it would take based on the court's finding, as the government did in *United States v. Payne*:

> If the court determines CPT Payne is not competent to stand trial at this time, then the government will comply with RCM 909(f) and remand CPT Payne to the custody of the Attorney General [under 18 U.S.C. § 4241(d)]. If the court determines CPT Payne is competent to assist in his defense, the SPCMCA will direct the Article 32 Investigating Officer to convene the hearing.[33]

All documents will eventually become appellate exhibits to the Record of Trial. Enclosures to the request should include the Charge Sheet, the Request for Sanity Board, the Sanity Board Order, a short memorandum from the expert outlining the preliminary opinion of the accused's competency, and the RCM 707(c) delay. At the competency hearing itself, since there is no record, the request and its enclosures will not be marked as appellate exhibits. They will be identified and referred to by their titles and maintained by the court reporter to hold as future exhibits should the case go to trial.

6. The Competency Hearing

At a pre-referral competency hearing, government counsel should begin making a record of the trial by using a court reporter to record the hearing, as one would record an Article 39(a) session,[34] and preserve a transcript of the hearing. If the case goes to trial, the transcript of the competency hearing will be appended to the record of trial as an appellate exhibit.

The official record of trial for a court-martial begins when the military judge calls the court to order at the initial Article 39(a) session for an accused's arraignment. Typically, the trial counsel follows with: "This court-martial is convened by Court-Martial Convening Order No. _, Headquarters, _____, dated ____, copies of which have been furnished the military judge, counsel, and the accused, and which will be inserted at this point in the record."[35] When a competency hearing is held pre-referral, however, the case has no convening order. To avoid the awkwardness presented by these extraordinary circumstances, counsel and the military judge should discuss the agenda for the competency hearing before entering the courtroom.[36]

The competency hearing should begin with either the military judge or the trial counsel briefly outlining the chronology of events that lead to the convening of the hearing. Counsel should identify the memorandum or document laying out the request for the hearing along with its enclosures. Although the rule does not mandate any initial inquiry with an accused, such as an explanation of rights to counsel, giving such advice at the onset of the hearing is prudent.[37] Then, with the judge's permission, both sides may make brief statements outlining their positions.

Following these statements, the moving party should call its first witness, presumably the previously identified expert wit-

31. The competency hearing request in *Payne* is attached to this article at appendix A.

32. Authors' informal polling of fellow chiefs of justice, trial counsel, military judges, and other key personnel involved in the military justice system.

33. Payne Competency Hearing Request, *infra* app. A.

34. A competency hearing under these circumstances would not be an Article 39(a) session since the charges have not yet been referred. *See* UCMJ art. 39(a) (2000) (Article 39(a) sessions may be held "[a]t any time after the . . . charges . . . have been referred for trial").

35. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 2-1 (1 Apr. 2001) [hereinafter BENCHBOOK].

36. Similar to an Article 39(a) session, this conference would not be an RCM 802 conference because the case has not yet been referred. *See* MCM, *supra* note 3, R.C.M. 802(a) (allowing the military judge to order post-referral conferences sua sponte or at the request of either party).

37. *See* MCM, *supra* note 3, R.C.M. 909(e).

ness, to get to the heart of the matter—his opinion of the accused's competency. After establishing the doctor's credentials and offering him to the court as an expert witness, counsel should have the doctor establish his relationship with the accused, the treatment regimen, and ultimately his opinion on the accused's mental status. To elicit expert testimony successfully, counsel must not only learn about the discipline of forensic psychiatry, but also educate their experts on what to expect in the courtroom. This includes counsel ensuring their experts are prepared to discuss their understanding of the standard for legal competency.[38]

Trial counsel should be prepared to leave the courtroom when the defense counsel or military judge wants to inquire into specific events that may require the expert to discuss privileged communications with the accused. Although RCM 909(e) provides minimal guidance on the conduct of the hearing, the rule states that "the military judge is . . . bound by the rules of evidence . . . with respect to privileges."[39]

7. Know the Accused's Current Mental Status

Counsel must have a firm understanding of the experts' opinions of the accused's mental status—past, present, and future. The sanity board's answers to the questions posed by RCMs 706(c)(2)(A) and (D) provide an expert opinion for the accused's past condition (his condition at the time of the offenses) and an opinion of the accused's present status (whether the accused is currently mentally fit to stand trial), respectively.[40] The accused's past and current mental status determine whether the accused will be committed, whether a competency hearing will be held, and ultimately how the case is tried, if at all. The following illustrates potential scenarios:

> 1. If the sanity board determines that the accused did not suffer from a severe mental disease or defect in the past and is currently able to stand trial, then the accused will not be committed. The defense may present lack of mental responsibility as an affirmative defense at trial, which the government may rebut, typically resulting in a "battle of the experts."
>
> 2. If the sanity board determines that the accused did not suffer from a severe mental disease or defect at the time of the commission of the alleged offenses, but is currently incompetent to stand trial, the issue becomes whether the accused's competency can be restored for trial. At a competency hearing, when a doctor opines that an accused presently suffers from a severe mental disease or defect rendering him mentally unfit to stand trial, the doctor must also render an opinion about the likelihood of the accused being restored to competency and the approximate time frame.[41] If the accused's competency cannot be restored, he will be committed to a federal institution, and no trial will be held.[42] If the accused's competency can be restored, he still faces commission, but can be brought to trial.[43]
>
> 3. If the sanity board determines that the accused did suffer from a severe mental disease or defect at the time of the commission of the alleged offenses, but is now competent to stand trial, the accused will not be committed pending trial. At trial, when the defense raises the affirmative defense of lack of mental responsibility, the government may take two approaches. The government may rebut with their expert. Alternately, the government may choose to concede the issue. In the latter case, the accused will be found not guilty only by reason of insanity and will be comitted post-trial.[44]
>
> 4. Finally, if the sanity board determines that the accused was mentally incompetent at the time of the alleged offenses and is currently

38. *See* Practice Tip #10—The Mental Responsibility Evidence, *infra* page 20.

39. MCM, *supra* note 3, R.C.M. 909(e)(2).

40. *See id*. R.C.M. 706(c)(2)(A), (D); *supra* note 6.

41. *See* MCM, *supra* note 3, R.C.M. 909(e), 909(f) discussion.

42. *See id*. R.C.M. 909; 18 U.S.C. § 4246 (2000).

43. The provision governing commission of an accused under these circumstances varies with stage of the court-martial. *See id*. R.C.M. 909(c) (pre-referral), 909(d) (post-referral—this scenario envisions the convening authority disagreeing with the sanity board's determination and the defense counsel subsequently requesting a competency hearing before a military judge); 18 U.S.C. § 4243(a) (post-trial).

44. *See* MCM, *supra* note 3, R.C.M. 1102A. An insanity acquittee will have a post-trial hearing covering commitment. *See id*. Article 76b(b)(1), UCMJ, provides that "[i]f a person is found by a court-martial not guilty only by reason of lack of mental responsibility, the person shall be committed to a suitable facility until the person is eligible for release in accordance with this section." UCMJ art. 76(b)(1) (2000). *See* Practice Tip #10—The Mental Responsibility Evidence, *infra* page 20; *see also supra* note 42 and accompanying text.

incompetent, the issue again is whether the accused can be restored to competency to stand trial. If the accused can be restored to competency and the government chooses to bring the accused to trial, under these circumstances the government should concede the issue of mental responsibility, as described above.

8. Commitment Before Trial[45]

Once the accused is transferred to the custody of the Attorney General and a suitable facility for psychiatric treatment, doctors will attempt to restore the accused to competency through medication.[46] An accused can continue to suffer from a severe mental disease or defect, yet be restored to legal competency through medication such that he can cooperate intelligently in his criminal defense.[47] The rules allow for four months of treatment and a reasonable, but not indefinite, extension of time.[48] Once the accused is restored to competency, the facility director will notify the Attorney General and the general court-martial convening authority, who must then take custody of the accused.[49] After the time period allowed for restoration of competency expires, if the federal psychiatric doctors determine the accused cannot be restored to a competency level at which he can stand trial, the government should dismiss the charges. The accused will then remain in the custody of the Attorney General and will eventually be released to his home state's psychiatric services.[50]

9. The Trial

The Government's Case-in-Chief

The trial of a person with mental competency issues is no different than any other trial. The government must put on its case, and the defense may put on its case in rebuttal. The defense of lack of mental responsibility[51] should never be a surprise to the government because of stringent notice requirements,[52] the complexity of the issues, and the need for expert testimony. While the government may raise the issue of mental capacity in its case-in-chief for tactical reasons, to avoid confusion it may be prudent for the government to leave the issue for the defense to raise.

Once an accused is found fit to stand trial, and legitimate, if not conclusive, evidence establishes that the accused was not mentally responsible at the time of the offenses, then the government's purposes in going to trial must include getting the accused committed.[53] If the government wants an accused committed as a result of a trial verdict, the government must prove its case beyond a reasonable doubt.[54] If the government does not prove its case, then the result is simply an acquittal, and the accused soldier goes home.[55]

The Defense's Case-in-Chief

While a straight acquittal is the defense's primary objective in every contested case, an insanity case raises an interesting issue. If the doctor's opinion is that the accused suffered from a mental disease or defect at the time of the offenses and was unable to appreciate the nature and quality or wrongfulness of his conduct, then government-funded professional psychiatric

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45. The actual coordination required to transfer an accused to the custody of the attorney general is discussed in Practice Tip #12—Coordination: Commitment of an Insanity Acquittee, *infra* page 21.

46. *See* United States v. Weston, 255 F.3d 873 (D.C. Cir. 2001) (discussing forcible medication of a defendant to make him competent to stand trial). In *Weston*, the government sought a court order to medicate the defendant, diagnosed as a paranoid schizophrenic. The court ruled that the defendant could be administered antipsychotic drugs to render him competent to stand trial. *Id.* at 873.

47. Payne Record of Trial, Transcript of 3 March 2000 Competency Hearing, Testimony of Dr. Evan Whitmore, at 38-39 [hereinafter Competency Hearing Transcript].

48. MCM, *supra* note 3, R.C.M. 909 discussion; 18 U.S.C. § 4241(d).

49. UCMJ art. 76b(a)(4) (2000).

50. MCM, *supra* note 3, R.C.M. 909(f) (2000), 18 U.S.C. § 4246.

51. MCM, *supra* note 3, R.C.M. 916(k).

52. *Id*. R.C.M. 701(b)(2).

53. In this situation, the government could have dismissed the charges before trial. "[I]f charges are dismissed solely due to the accused's mental condition, the accused is subject to hospitalization as provided in [18 U.S.C. § 4246]." *Id*. R.C.M. 909 discussion.

54. *Id.* R.C.M. 921(c)(4).

55. *See* Practice Tip #11—The Findings: Not Guilty Only by Reason of Lack of Mental Responsibility, *infra* page 21.

treatment is probably in the best interest of the accused. The means to this end is a finding of not guilty only by reason of lack of mental responsibility, and subsequent post-trial commitment.[56]

After the government rests, the defense can raise the affirmative defense of lack of mental responsibility by presenting expert testimony.[57] The government must then contest or concede the accused's mental responsibility. If the government contests the issue, then it will probably rebut the defense evidence with an expert of its own, creating a "battle of the experts." If it concedes the issue, the government has no need to call an expert. Under these circumstances, the testimony of the defense expert is almost pro forma. The government may cross-examine the expert to highlight some points, but the main issue—whether the accused was insane at the time of the offenses—is not in doubt.

10. The Mental Responsibility Evidence

The Experts

An expert's presentation of mental responsibility evidence is a joint venture between the expert and counsel. The expert educates counsel on the medical significance of mental competency, and counsel ensures the expert knows how to apply his expertise to the criminal responsibility standards set forth in the *MCM*.

Well in advance of a competency hearing or trial, counsel must review questions and answers with their expert witnesses. The doctors likely can assist counsel with forming questions or, at least, provide key reference words counsel can incorporate in their questions to trigger responses on specific issues. In anticipation of a battle of the experts, the doctors need to know their opposition's opinion and its basis. Knowing this enables the experts to prepare better for their direct testimony, anticipate questions they will be asked on cross-examination, and to further assist their counsel's preparation for cross-examination of the opposing expert.

Counsel must also interview, with caution, the opposition's expert. Rules of confidentiality and privilege impose restrictions on what information appointed psychiatric members of the defense team can provide to government counsel.[58] What may also frustrate the government is that even their witness, the expert testifying that the accused could appreciate the nature and quality or wrongfulness of his conduct, cannot disclose comments the accused made during the course of the sanity board inquiry.[59]

Similar to other affirmative defenses, when the government places too much emphasis on discrediting an accused's claim of lack of mental responsibility, the government not only gives some credibility to the defense, but may also confuse the trier of fact. Rather than anticipating the defense as part of the government's case-in-chief, cross-examination of defense witnesses and government rebuttal to the affirmative defense is a clear method for the government to proceed.

Lay Witnesses

In addition to expert testimony at a competency hearing, counsel for each side have a wealth of resources available to support their positions. Counsel should interview and potentially call as witnesses the soldiers who eat, sleep, and train on a daily basis with the accused. Facts about the accused's actions around fellow soldiers could sway a member's vote, especially when a panel is not receptive to complex medical testimony.

Defense counsel will want to elicit incidents of bizarre conduct, hopefully documented in counseling statements. Although these incidents may have been characterized as disrespect, disobedience, and failures to adapt to and learn military customs and courtesies, such occurrences may serve to bolster the expert's testimony. Conversely, testimony from an accused's peers that he regularly wakes up on time for formations, puts on the appropriate uniform, eats with the proper utensils, performs his job to standard, and carries on normal conversations can bolster expert testimony of the accused's sanity and help trial counsel place the defense theory in jeopardy.

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56. *See* UCMJ art. 76b(b)(1) (2000).

57. MCM, *supra* note 3, R.C.M. 916(k).

58. *Id*. R.C.M. 706(c)(3)(C); MIL. R. EVID. 302, 513; *see also* United States v. Cole, 54 M.J. 572 (Army Ct. Crim. App. 2000). When the defense offers expert testimony concerning the mental condition of the accused, the government can request the full contents of any mental examination ordered under RCM 706. MCM, *supra* note 3, MIL. R. EVID. 302(c).

59. *See* MCM, *supra* note 3, R.C.M. 706(c)(5).

11. The Findings: Not Guilty Only by Reason of Lack of Mental Responsibility

Counsel must remember that a not guilty only by reason of lack of mental responsibility verdict is only possible after the government proves its case beyond a reasonable doubt.[60] The concept of the government proving its case seems obvious—the trier of fact must determine if the government has proven the elements of the offenses beyond a reasonable doubt.[61] In a mental responsibility case, however, after an initial finding of guilty, the trier of fact must then determine whether the defense has proven lack of mental responsibility by clear and convincing evidence. If the affirmative defense succeeds, the finding is not guilty only by reason of lack of mental responsibility.[62]

12. Coordination: Commitment of an Insanity Acquittee

Office of The Judge Advocate General Criminal Law Division

Counsel must coordinate with higher headquarters when transferring a military "prisoner" from the military corrections system to the federal corrections system. Whether the commitment is pre- or post-trial, the procedures and points of contact (POC) for coordination of the transfer of an accused to the custody of the Attorney General are the same. The mandatory starting point is the Office of The Judge Advocate General (OTJAG) Criminal Law Division. The OTJAG Criminal Law Division current operations officer[63] assists government counsel by providing a POC at the Office of the Deputy Chief of Staff for Operations & Plans (ODCSOPS), the Army's top law enforcement office, with whom OTJAG coordinates and works regularly. The officer at ODCSOPS, in turn, provides counsel with a POC at the Federal Bureau of Prisons (FBOP), whom counsel need to contact a committed soldier's final destination—a federal psychiatric ward. These POCs can cut through the numerous levels of federal bureaucracy, thereby expediting the commitment process.[64]

Office of the Deputy Chief of Staff—Operations & Plans

Within ODCSOPS, the POC will be in DAMO-ODL.[65] The POC needs the following identifying data on any individual transferred from the military to the custody of the FBOP: date of birth; race; height; weight; hair and eye color; and identifying marks, such as tattoos, birthmarks, and deformities. The POC forwards this information to the FBOP and informs government counsel within a few days who their FBOP POC will be.[66]

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60. *See id.* R.C.M. 921(c)(4).

61. *Id.* A military judge, or two-thirds of the members, must make a finding of guilty before deciding the mental responsibility issue. The vote must be unanimous in a death penalty case. *Id.*

62. *Id.* In a trial with members, a majority of the members present must find that the accused proved lack of mental responsibility. *Id*. As illustrated by the military judge in *United States v. Payne*, the findings would be announced as follows:

> This court makes the following special findings: The government has proven the accused committed the following offenses beyond a reasonable doubt:
>
> > Attempted desertion in violation of Article 85; Failure to Repair in violation of Article 86; and Disorderly Conduct in violation of Article 134.
>
> Will the accused and counsel please rise. Captain [Thomas S. Payne], this court finds you:
>
> > Of the Charges and Specifications: Not Guilty only by reason of lack of mental responsibility.
>
> Have a seat please. In accordance with Article 76b, UCMJ, the accused will be committed to a suitable facility until such time that he is eligible for release.

Payne Record of Trial at 243-44.

63. During the author's tenure as Chief, Criminal Law Division, Fort Swampy [hereinafter Chief, CLD, FS], the current operations officer was Major (MAJ) Peggy Baines. Major Baines was instrumental not only in the coordination for the commitment of the accused in *United States v. Payne*, but also in providing valuable information for other procedural steps in the case.

64. Telephone Interview with MAJ Peggy Baines, Operations Officer, OTJAG, Criminal Law Division (Feb. 21, 2000) [hereinafter Baines Interview]; Telephone Interview with Lieutenant Colonel David Hassenritter, Operations Officer, Department of the Army Office, Deputy Chief of Staff for Operations & Plans, Operations, Readiness and Mobilization Directorate, Security, Force Protection, and Law Enforcement Division (Feb. 22, 2000) [hereinafter Hassenritter Interview]. Another reason for counsel to contact OTJAG is that higher headquarters tracks transfers from military to federal corrections systems. Baines Interview, *supra*.

65. The acronym DAMO-ODL stands for Department of the Army Office, Deputy Chief of Staff for Operations and Plans (DAMO), Operations, Readiness and Mobilization Directorate (OD), Security, Force Protection, and Law Enforcement Division (L).

66. Hassenritter Interview, *supra* note 64.

United States Attorney General—Federal Bureau of Prisons

The *MCM* and U.S. Code deem the Attorney General the custodian of mentally incompetent persons.[67] The FBOP is the Department of Justice agency that houses and treats such persons. Within the FBOP, the Psychology Services Branch oversees ten facilities that house and treat mentally incompetent patients.[68] Although government counsel may request a particular facility due to location, the POC at the FBOP will determine the location based on space availability. Counsel will have three POCs within the FBOP: (1) the initial FBOP POC received from DAMO-ODL, (2) the POC within the Psychology Services Branch, and (3) the POC at the actual institution. The POC at the institution will inform counsel which staff psychiatrist has been assigned to the accused, and more importantly, assist in the coordination for the transfer of the accused to the facility.[69]

13. The Post-Trial Hearings

The rules require a hearing forty days after a not guilty by reason of insanity verdict.[70] Once an accused is committed to the custody of the FBOP, counsel and the military judge should tentatively docket the post-trial hearing around the forty-day mark. One critical witness for the hearing is the treating staff psychiatrist at the federal hospital. Production of this witness on the scheduled hearing date may not be within the trial counsel's control. Due to the staff psychiatrist's workload and the lengthy report that must be generated,[71] the hearing could take place sixty to ninety days after the special verdict. One suggestion, pending approval by the military judge, is for counsel to schedule the post-trial hearing at the federal facility where the accused is being treated.

If the accused was committed post-trial, counsel will be working with a set of experts different than those who conducted the accused's pre-trial examinations. Before the actual hearing, communications with the staff psychiatrist likely will be telephonic. Counsel will probably not have an opportunity for a face-to-face interview with the expert until shortly before the hearing. Counsel must keep in mind that the doctor is likely unfamiliar with court-martial procedure, so counsel should prepare the witness for military formalities.

The main issue at the hearing will be to determine if the accused's release would create a "substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect."[72] The accused has the burden of proof, which varies according to his original offense. If the original offense involved bodily injury to another or serious damage to another's property, then the accused's burden of proof is by clear and convincing evidence. For all other offenses, the burden of proof is by a preponderance of the evidence.[73]

If the hearing is convened at the hospital, government counsel must coordinate the logistics for this off-site hearing. No detail, from the judge's robe to the court reporter's equipment, is too small. Notably, government counsel should bring all documentation required to secure the accused's release, should that become necessary.[74] Because the facility is a federal prison, government counsel must send the facility an advance list of all attendees. All personnel on the roster must have two forms of identification to be admitted to the federal facility, and counsel should inform these witnesses they will be subject to a search.[75]

This post-trial session will be on the record, just like any other post-trial Article 39(a) session.[76] The military judge will reconvene the court, account for the parties, and synopsize the events leading to the hearing. Next, the treating psychiatrist

67. *See supra* note 18 and accompanying text.

68. The FBOP has a total of ninety-six facilities. The following ten facilities fall under the Psychological Services Branch: Federal Correctional Institution, Butner, North Carolina; U.S. Penitentiary, Atlanta, Georgia; Federal Correctional Institution, Tallahassee, Florida; Federal Medical Center, Lexington, Kentucky; Federal Medical Center, Rochester, Minnesota; U.S. Medical Center for Federal Prisoners; Metropolitan Detention Center, Los Angeles, California; Federal Medical Center, Fort Worth, Texas; Federal Medical Center, Carswell, Texas; Federal Medical Center, Devens, Massachusetts. U.S. Dep't of Justice, Federal Bureau of Prisons, *Correctional Programs Division, at* http://www.bop.gov/cpdpg (last visited Apr. 25, 2002).

69. Hassenritter Interview, *supra* note 64.

70. 18 U.S.C. § 4243(c) (2000); MCM, *supra* note 3, R.C.M. 1102A(a).

71. *See* 18 U.S.C. §§ 4243(b), 4247(b)-(c).

72. MCM, *supra* note 3, R.C.M. 1102A(c)(3) (quoting 18 U.S.C. § 4243(d)).

73. *Id.* (implementing 18 U.S.C. § 4243(d)).

74. If the accused is to be released back to his unit, unit personnel should travel to the federal facility to act as escorts. If the accused is to be released on leave, all appropriate paperwork must be ready for the accused's signature.

75. Telephone Interview with Rendy Thomas, Butner Federal Correctional Institute, Butner, North Carolina (July 19, 2000).

76. *See* UCMJ art. 39(a) (2000).

will be called to elaborate on the previously submitted report.[77] If the doctor feels the acquittee is still a danger, then the acquittee will not be released, but if the doctor determines the acquittee is not a danger, then release is mandatory.[78] Based on the detail of the report, the result of the hearing should not be surprising.

14. Administrative Separation

Accused soldiers determined unfit to stand trial and incapable of being restored to competency, and insanity acquittees released after their post-trial hearings still face release from active duty. Army administrative regulations govern the rules for final separation from the military.[79]

The insanity acquittee's current mental condition is the main factor considered when determining whether he is released. If the acquittee is still suffering from a mental disease, he must be administratively separated.[80] Rarely, if ever, will an expert forensic psychologist diagnose an accused with a mental disease such that the accused is unfit to stand trial, then determine the accused is "cured" within a few months such that he can return to normal military duties. Most likely, the acquitee's command will have to process him for separation.[81]

After release from a federal psychiatric ward, the acquittee's command should place him on voluntary excess leave pending future administrative separation.[82] In coordination with the command, government counsel should begin the formal separation process for the acquittee following the detailed rules for an enlisted solider or officer, respectively.[83]

Part II: Trying an Insanity Case: *United States v. Payne*

The Facts of the Case

Springfield International Airport

Waiting for his departure flight at the Springfield International Airport on Friday, 4 February 2000, an off-duty Air Force Security Police (SP) sergeant looked up from his reading material and noticed a man in battle dress uniform (BDU) wearing a cap. The SP knew that a military individual indoors with a cap on meant that he could be armed.[84] Upon further inspection, the SP saw that the BDU cap with captain's rank was askew, and that the captain appeared disoriented. The captain's BDUs were badly wrinkled, and his bootlaces were untied and dangling out of his unpolished boots.

Captain Thomas Payne, an Army Dental Corps officer, approached a ticket counter in the airport terminal and asked for a ticket. His goal was to catch a connecting flight to Korea, where his mother lived. The ticket agent informed CPT Payne that she could not sell him a ticket because his credit card would not authorize the purchase. Captain Payne then asked bystanders if they could purchase a ticket for him. After receiving no response to his request, CPT Payne moved to the gate, where a flight attendant was boarding passengers. While the SP was watching, CPT Payne tried to walk past the flight attendant to board the plane. The stewardess politely informed CPT Payne that he could not board without a ticket. When the flight attendant, busy with other passengers, turned away from CPT Payne, he slipped by the attendant and began trotting down the runway toward the plane. Captain Payne ignored the flight attendant yelling for him to stop, but he immediately obeyed the SP's command for him to halt. The SP apprehended CPT Payne and turned him over to airport security, who then surrendered him to the Hazzard County police.

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77. *See* 18 U.S.C. §§ 4243(b), 4247(b)-(c); *supra* text accompanying note 71.

78. 18 U.S.C. § 4246(e); MCM, *supra* note 3, R.C.M. 1102A(c)(4).

79. *See* U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges (21 July 1995) [hereinafter AR 600-8-24]; U.S. Dep't of Army, Reg. 635-200, Enlisted Personnel (1 Nov. 2000) [hereinafter AR 635-200].

80. AR 600-8-24, *supra* note 79, para. 4-3, AR 635-200, *supra* note 79, paras. 1-32 to 33, 5-13.

81. *See* Competency Hearing Transcript, *supra* note 47, Testimony of Dr. Whitmore, at 39.

82. *See generally* U.S. Dep't of Army, Reg. 600-8-10, Leave and Passes paras. 5-22 to 25 (1 July 1994). If necessary, the command can place the acquittee on involuntary excess leave. *See id.*

83. *See supra* note 80.

84. *See* U.S. Dep't of Army, Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia para. 1-10(i)(2) (1 Sept. 1992).

Captain Payne spent the weekend in the Hazzard County Jail in Springfield.[85] On Monday morning, after the government coordinated the transfer of jurisdiction of CPT Payne from the state to the military, CPT Payne was transported from the county lock-up to his military pretrial confinement hearing.[86] The company commander preferred charges against CPT Payne immediately before Payne's hearing. The charge was a violation of the UCMJ, article 133, Conduct Unbecoming an Officer and a Gentleman, with four specifications for the underlying offenses of Fraudulent Appointment, article 84; Attempted Desertion, article 85; Failure to go to appointed place of duty, article 86; and Disorderly Conduct, article 92.[87]

Pretrial Confinement

At his pretrial confinement hearing, CPT Payne displayed signs of odd behavior. Captain Payne tried to walk out of the room several times without his officer escort; he stood with his face inches from a wall and stared straight ahead; and when he was asked basic questions by the military magistrate, it took him long periods of time to answer. To the layperson, CPT Payne appeared to be acting as if he were oblivious to what was going on rather than being defiant.[88] The military magistrate upheld the commander's pretrial confinement order,[89] and CPT Payne was transferred to the Williams Air Force Base (AFB) Regional Confinement Facility (RCF) in Springfield.[90]

Captain Payne's mental health issues first came to the government's attention when CPT Payne in-processed into the Williams AFB RCF. The RCF guards cited Captain Payne, the only officer pretrial confinee at the RCF, as being disruptive and disrespectful. At times, CPT Payne simply would not follow orders, either being non-responsive to the guards' commands, or ignoring their commands altogether. Captain Payne's responses to simple questions came only after long pauses. For example, in what was perceived as disrespect at that time, the RCF noncommissioned officer in charge (NCOIC) reported the following exchange:

Guard:	What is your name?
Payne:	<No response>
Guard:	Do you understand where your are?
Payne:	<No response>
Guard:	Do you understand why you are here?
Payne:	<No response>
Guard:	Move forward to the next line.
Payne:	<No response or movement>
Guard:	Do you understand that you have to follow my orders?
Payne:	<No response>
Guard:	Move forward to the next line.
Payne:	[Thomas Payne].[91]

85. Payne Record of Trial, Charge Sheet, secs. 8-9, [hereinafter Payne Charge Sheet]. The Hazzard County police detained CPT Payne in the Hazzard County Jail on Friday evening, 4 February 2000, to await arraignment the next Monday morning. Authorites notified Payne's company commander of Payne's absence sometime over the weekend, and the commander subsequently notified the trial counsel.

86. The Chief, CLD, FS coordinated with the Hazzard County District Attorney's Office for the release of CPT Payne from Hazzard County Jail to military authorities with an understanding that the military would prosecute CPT Payne for the state court offenses, and the district attorney would dismiss the state court offenses. Although double jeopardy would not apply, due to separate state and federal sovereigns, such an agreement was reached to save resources. Telephone Interview with Hazzard County Assistant District Attorney, Springfield (Feb. 7, 2000); *see also* Letter from CPT Jeff Bovarnick, Chief, CLD, FS, to Felony Intake Division, Hazzard County District Attorney's Office (Feb. 7, 2000) (copy on file with author); Motion to Dismiss/Order to Dismiss, State v. Thomas S. Payne (Feb. 7, 2000).

87. Payne Charge Sheet, *supra* note 85. After arraignment, the government dismissed the fraudulent appointment specification. *See infra* notes 142-44 and accompanying text.

88. It appeared to government counsel that CPT Payne was claiming mental problems to avoid repaying over $65,000 for dental school he owed under his Army's Health Professions Scholarship Program contract. Captain Payne reported to his Officer Basic Course (OBC) one year after his original report date without giving the Army any reason for his delay. Authorities eventually tracked Payne down, and he agreed to serve out his active duty commitment. He reported for OBC where he began engaging in strange behavior. Based on his unusual conduct, the faculty initiated proceedings to separate him from the course. An Academic Relief Board convened, voted unanimously to separate him from OBC, and recommended rescinding Payne's commission and separating him from military service. The events at the airport occurred while CPT Payne was awaiting his separation board.

89. Military Magistrate's Conclusions (Feb. 8, 2000) (copy on file with author) [hereinafter Magistrate's Conclusions]. Payne's commander placed him in pretrial confinement because he was a flight risk. Commander's Checklist for Pretrial Confinement: Captain Thomas Payne (Feb. 8, 2000) (copy on file with author). Although the defense raised issues concerning CPT Payne's mental status, the magistrate based his decision on flight-risk factors. *See* Magistrate's Conclusions, *supra.*

90. Telephone Interview with Commandant, Williams AFB RCF, Springfield (Jan. 1999).

Frustrated with CPT Payne's noncompliance and their inability to process him into their facility, the guards, all non-commissioned officers, reported the situation to their commandant. After the commandant, a lieutenant colonel, failed to get CPT Payne to obey, he ordered CPT Payne's removal from the facility.[92]

Pretrial Confinement Versus Mental Health Observation

After CPT Payne's confinement on Monday, 7 February 2000, Payne's defense counsel stated he would request a sanity board for Payne based on his observations of CPT Payne and his inability to communicate with his client. The government thus faced the prospect of coordinating CPT Payne's transfer to the RCF at Fort Sill, Oklahoma, with multiple returns to Fort Swampy, for his sanity board, Article 32 investigation, and trial, all with officer escorts.[93] This logistical burden made convincing Payne's command that prosecuting CPT Payne would serve the need for good order and discipline difficult, if not disingenuous.

After receiving the sanity board documents on 8 February 2000, the Chief of Behavioral Medicine at Sandler Army Medical Center (SAMC) recommended that the government check if the Lindberg Medical Center (LMC) at Williams AFB would admit CPT Payne into their in-patient ward for his sanity board.[94] Dr. Evan Whitmore, Chief of Hospital Psychiatric Services at LMC, agreed to admit CPT Payne temporarily during the sanity board process.[95] Although the government could accomplish the goal of keeping CPT Payne in the local area for his sanity board, the government still had to contend with the issue of his pretrial confinement status. Although Dr. Whitmore could tolerate CPT Payne's officer escorts on his ward twenty-four hours per day, Payne's battalion commander had other thoughts about how she could use her officers. After one week of around the clock escorts and a very preliminary report from Dr. Whitmore that CPT Payne would require extensive treatment, the battalion commander ordered CPT Payne "released" from pretrial confinement.[96]

Pretrial

The case involved victimless crimes. The government expert's opinion was that CPT Payne was currently suffering from a mental disease.[97] These major factors affected the government's recommendation to the command about how to dispose of the case, balancing what was most beneficial to the government and to CPT Payne.

If LMC simply released CPT Payne, he would return to his unit. The command was not willing to entertain this option. On numerous occasions before his attempted desertion, CPT Payne had sat down on the floor in his dental clinic, leaned against the wall, and fallen asleep in plain view of patients and initial-entry trainees. Captain Payne was an OBC student at this time, and the command could not assign him to another location. This presented the unit with a dilemma of what to do with CPT Payne.[98]

After extensive discussions with doctors involved in the U.S. Army Physical Evaluation Board process, Payne's command determined that the shortest turn around for processing a PEB on CPT Payne would be months, even with high-level (Commanding General) emphasis to "push" CPT Payne through the system.[99] The regulations governing the administrative separation of an officer did not make the process any

91. Telephone Interview with NCOIC, Williams AFB RCF, Springfield (1600 hours, Feb. 8, 2000).

92. Telephone Interview with NCOIC, Williams AFB RCF, Springfield (2200 hours, Feb. 8, 2000). About 2100 on 8 February 2000, the RCF Commandant called the Chief, CLD, FS, and said he wanted CPT Payne out of his facility immediately. After some discussion, the commandant agreed to hold CPT Payne until the next morning. Telephone Interview with Commandant, Williams AFB RCF, Springfield (Feb. 8, 2000).

93. Captain Payne's company had two permanent party officers, the company commander (O-3) and his executive officer (O-2). All Army Medical Department OBC students are attached to a company-sized unit.

94. Telephone Interview with Chief, Behavioral Medicine, Williams Army Medical Center, Fort Swampy (Feb. 9, 2000).

95. Whitmore Interview, Feb. 9, 2000, *supra* note 19. Dr. Whitmore explained that if Air Force patients needed the beds, CPT Payne would have to leave. *Id*. Captain Payne was an in-patient in Ward 4D, LMC, from 8 February 2000 until his transfer to the Butner FCI, Mental Health Division, on 18 May 2000. Payne Record of Trial, Appellate Exhibit X, Forensic Evaluation (July 17, 2000) [hereinafter Payne Forensic Evaluation].

96. Interview with Battalion Commander, Fort Swampy (Feb. 15, 2000) [hereinafter Commander Interview]; Telephone Interview with Dr. Evan Whitmore, Chief, Hospital Psychiatric Services, LMC, Williams AFB (Feb. 15, 2000) [hereinafter Whitmore Interview, Feb. 15, 2000]. Ward 4D at LMC was a locked in-patient ward that patients were prohibited from leaving without an escort. Captain Payne had a single locked room that was under constant surveillance, and Dr. Whitmore would never allow CPT Payne to leave without a unit escort. Whitmore Interview, Feb. 15, 2000, *supra*. Based on these facts, the commander lifted the "pretrial confinement" order, Commander Interview, *supra*, alleviating the unit's responsibility of providing CPT Payne with a twenty-four hour per day escort. The government officially credited CPT Payne with day-for-day *Allen* credit for the entire time he was on the ward before his trial. In the battalion commander's release order, she informed CPT Payne and the defense that she would order CPT Payne back into pretrial confinement as soon as Dr. Whitmore finished his sanity board testing. *Id*. Because CPT Payne was held in Ward 4D until his trial and following his trial pending admittance to Butner, a subsequent pretrial confinement order or hearing was never held.

97. Payne Record of Trial, Sanity Board Findings, Hospital Psychiatric Services, LMC, Williams AFB (Mar. 3, 2000).

98. Commander Interview, *supra* note 96.

easier than a court-martial.[100] This course of action—pushing CPT Payne through the system—did not serve the needs of CPT Payne or the military. Discharging CPT Payne and sending him back to society while he was suffering a mental disease would not have benefited CPT Payne, or enhanced the image of the military taking care of its soldiers.[101]

Exhaustive communications with many agencies at Fort Swampy revealed that the military has no internal system to provide extensive long-term in-patient psychiatric treatment. The military does not provide long-term care for its infrequent psychotic patients.[102] Realizing this, the drafters of the *MCM* adopted a procedure to use the federal criminal system in place for treating insane patients.[103]

Trial counsel recognized that the only way to get CPT Payne the long-term treatment he needed was to get CPT Payne committed to a psychiatric ward.[104] Convinced that trial counsel's position was in CPT Payne's best interest, the command authorized trial counsel to pursue the best legal route to commit CPT Payne.[105] Based on this directive, government counsel no longer had the option of dismissing the charge against CPT Payne.

Going to Trial—Level of Disposition

When Payne's commander preferred charges against him, government counsel had no medical opinion on CPT Payne's mental capacity. Based on the serious nature of the main specifications—attempted desertion and fraudulent appointment—and that CPT Payne was an officer,[106] the company and battalion commanders initially recommended disposing the case at a general court-martial. On 8 February 2000, the SPCMCA appointed an Article 32 investigating officer and signed an order for a sanity board of CPT Payne.[107]

On 11 February 2000, after observing CPT Payne on the ward for several days, Dr. Whitmore assessed CPT Payne as incompetent to stand trial. Based upon this initial assessment, Dr. Whitmore suggested to government counsel that they seek a competency hearing for CPT Payne. In Dr. Whitmore's opinion, as of 11 February 2000, "CPT Payne is suffering from a severe mental disease and . . . he cannot cooperate intelligently in his defense."[108] Depending on the date of the hearing and CPT Payne's reaction to anti-psychotic medicine, Dr. Whitmore's opinion would likely not change for a few months.[109]

When the medical staff informed trial counsel that it might take "a few months" for CPT Payne to cooperate intelligently in his defense, the government faced a potential "speedy trial" issue. Stopping the clock was extremely important for the government because charges had been preferred and CPT Payne was under some form of restraint.[110] Rule for Courts-Martial 707(c) specifically authorizes a delay for an accused hospitalized due to incompetence.[111] On 11 February 2000, the conven-

99. Interviews with Chief, Physical Evaluation Board (PEB), Fort Swampy (Apr. 2000) [hereinafter PEB Interviews].

100. *See* AR 600-8-24, *supra* note 79, para. 4-3.

101. PEB Interviews, *supra* note 99.

102. *See supra* notes 18-19 and accompanying text.

103. *See* MCM, *supra* note 3, R.C.M. 909(f), discussion; UCMJ art. 76b (2000); *supra* note 19.

104. *See* Practice Tip #8—Commitment Before Trial, *supra* page 19; Practice Tip #12—Coordination: Commitment of an Insanity Acquittee, *supra* page 21.

105. Interview with Battalion Commander, Fort Swampy (Apr. 15, 2000).

106. An officer can only receive a dismissal from a general court-martial. *Compare* MCM, *supra* note 3, R.C.M. 201(f)(1)(A), *with id*. R.C.M. 201(f)(2)(B)(i).

107. Memorandum for SPCMCA, Fort Swampy, subject: Investigation of Court-Martial Charges Against Captain Thomas S. Payne (Feb. 8, 2000).

108. Telephone Interview with Dr. Evan Whitmore, Chief, Hospital Psychiatric Services, LMC, Williams AFB (Feb. 11, 2000). Based on his extensive experience with competency hearings in the civilian sector, Dr. Whitmore considered this opinion, which answers Question D of RCM 706(c)(2), as addressing the only relevant issue for a competency hearing. Dr. Whitmore, a moderator and lead lecturer in sanity board roundtable discussions, pointed out that the other questions posed to a sanity board by RCM 706(c)(2) pertain to an insanity defense, and therefore are only relevant, if ever, after resolution of Question D. *Id.*

109. *Id*.

110. *See* MCM, *supra* note 3, R.C.M. 304(a)(2)-(4), 707.

111. *Id.* R.C.M. 707(c). This rule also excludes delay for when an accused is in the custody of the Attorney General. *See id*; *see also id.* R.C.M. 909(g) (excluding delay for a committed accused).

ing authority approved such a delay requested by government counsel.[112]

The Competency Hearing—Before or After Referral?

Before researching the substantive issues of CPT Payne's competency to stand trial, government counsel had to figure out the logistics and prerequisites to getting a competency hearing. Some of the issues included whether a competency hearing before a military judge could take place before referral and, if so, if the hearing would be "on the record." What type of record is there if the case has not yet been referred?

Rule for Courts-Martial 909—The Capacity of CPT Payne to Stand Trial

The starting point for government counsel's review of the competency hearing process was RCM 909. This rule explains the procedure, the burden of proof, and the potential outcomes.[113]

An accused is presumed competent to stand trial.[114] The determination by CPT Payne's sanity board that he presently suffered from a mental disease rendering him unable to cooperate intelligently in his defense overcame this presumption. After reading RCM 909(a), it was clear to the government that CPT Payne was not going to trial unless some stringent requirements were met.

Since the sanity board came to its conclusion pre-referral, RCM 909(c) controlled this case. If the determination had been made post-referral, RCM 909(d) would have controlled. Under either rule, the convening authority determines how the case is handled. Since CPT Payne could only go to trial after being found competent to do so, the sanity board's determinations presented the convening authority with two options: (1) disagree with the board's determination and dispose of the case, including referral to trial; or (2) agree with the determination and commit CPT Payne to the custody of the Attorney General.[115]

The First Competency Hearing

On 15 February 2000, the government requested a competency hearing.[116] The military judge granted the hearing, and it was held on 3 March 2000 in the Fort Swampy courtroom. The unit escorts were tasked to pick up CPT Payne from Ward 4D, the LMC psychiatric ward, and get him into his Class A uniform for the hearing. When the escort officer asked CPT Payne where he lived, CPT Payne responded, "Near a tree."[117] After discussing CPT Payne's response with the doctors, and realizing CPT Payne was not joking, the unit escort tried to impress upon him the importance of securing his uniform before going before the military judge. After a long pause, CPT Payne responded, "Near a tree, on a hill."[118] The military judge permitted CPT Payne to sit through the hearing in BDUs.[119]

At the hearing, Dr. Whitmore testified that CPT Payne currently was not competent to stand trial. Dr. Whitmore further testified that it could take close to six months of treatment, medication, and close evaluation before CPT Payne "might" be restored to a level of competency where he could stand trial.[120] It was obvious to all parties, except CPT Payne, that he was not competent to stand trial.[121]

The military judge, in various exchanges with counsel before the hearing and during a recess, made it clear to the government that he was unhappy with the prospect of remanding CPT Payne to the custody of the Attorney General. If he did so, the military could completely lose control over CPT Payne after he was processed into the federal system. The government counsel could not alleviate the court's concern. When the military judge asked Dr. Whitmore if LMC had the resources to provide short-term treatment for CPT Payne, Dr. Whitmore responded that it did.[122] Later in the proceeding, the military

112. Payne Record of Trial, RCM 707(c) Delay, Brigade Commander, Fort Swampy (Feb. 11, 2000).

113. *See* MCM, *supra* note 3, R.C.M. 909.

114. *Id*. R.C.M. 909(b).

115. *Id*. R.C.M. 909(c). Ultimately, the convening authority referred Payne's case to a special court-martial. *See infra* note 136 and accompanying text.

116. Payne Competency Hearing Request, *infra* app. A; *see* Practice Tip #6—The Competency Hearing, *supra* page 17.

117. Interview with Company Executive Officer (Mar. 3, 2000). The executive officer described his conversation with CPT Payne to government counsel after arriving at the courtroom with CPT Payne still in his BDUs. *Id.*

118. *Id.*

119. *Id.*

120. *See* Competency Hearing Transcript, *supra* note 47, Testimony of Dr. Whitmore, at 47.

121. *See infra* text accompanying notes 128-30.

judge recalled Dr. Whitmore to determine if his staff could provide the necessary treatment to restore CPT Payne to competency. Dr. Whitmore testified that while it could take three to four months to restore CPT Payne to competency, the main issue was that he needed authorization from the hospital commander to house CPT Payne indefinitely at the Air Force facility.[123]

After Dr. Whitmore's testimony, CPT Payne told his defense counsel he wanted to be heard.[124] Despite the sanity board's determination and Dr. Whitmore's opinion, CPT Payne did not think he was ill. Captain Payne had previously expressed to his doctors and defense counsel that he just wanted to go home.[125] To this point in the hearing, the defense had not contested the competency issue. Captain Payne put his defense counsel on the spot to advocate that CPT Payne was competent.

Captain Payne was sworn in and took the stand. After eliciting from CPT Payne that they had not prepared any questions, the defense counsel asked CPT Payne about the court process. Captain Payne understood what an oath was, and he knew what it meant to be prosecuted. Aside from the long pauses between questions and answers, CPT Payne articulated fairly well the potential verdicts and the differences between a judge alone and jury trial.[126] When the government counsel stood to cross-examine CPT Payne, the military judge promptly ended what would have been an interesting cross-examination.[127]

Next, the court asked CPT Payne simple questions about the roles of counsel. Captain Payne's responses negated his earlier, somewhat coherent, testimony. Between pauses and stuttering, CPT Payne seemed to switch the roles of counsel, stating that the prosecutor wanted him to be found competent and the defense did not.[128] When asked if the defense counsel sitting next to him was present to assist him, CPT Payne responded, "I guess so."[129] The court questioned this response and, after a few more questions, he asked CPT Payne to return to his seat, and called for a recess.[130]

In chambers, with both sides present, the court asked government counsel what course of action the government would take if he ruled CPT Payne incompetent to stand trial. The government preferred keeping CPT Payne in the local area at LMC because this was most beneficial to CPT Payne and the command. If CPT Payne could not remain at LMC until he was restored to competency, however, government counsel informed the court that RCM 909(e)(3) required the convening authority to commit CPT Payne to the custody of the Attorney General.

The court decided to defer ruling on CPT Payne's competency until Dr. Whitmore informed the court whether CPT Payne could remain at LMC. Additionally, if CPT Payne were to remain at LMC, the military judge directed that the government, through Dr. Whitmore, provide the court with periodic updates on CPT Payne's progress.[131]

The Referral Decision

The psychiatry staff at LMC subsequently received authorization to treat CPT Payne on an in-patient basis. On 1 April 2000, Dr. Whitmore reported that little had changed since the hearing, and he still predicted it would be several months before he could state anything definitively. Captain Payne was responding to treatment, but he was not close to the point at which he could cooperate intelligently in his defense.[132]

On 17 April 2000, Dr. Whitmore informed government counsel that CPT Payne had a relapse and was getting worse. Dr. Whitmore wanted to change the anti-psychotic medication, but currently, he predicted it would be a long time before CPT Payne could be restored to competency. Dr. Whitmore strongly

122. Competency Hearing Transcript, *supra* note 47, Testimony of Dr. Whitmore, at 47.

123. *Id*. at 64-68.

124. *Id*. at 50.

125. *Id.* at 48.

126. *Id*. at 50-57.

127. *See id*. at 57.

128. *See id*. at 58. According to Dr. Whitmore, prosecutors and defense normally take these positions—prosecutors arguing for competency, and defense counsel arguing lack thereof. Interview with Dr. Evan Whitmore, Chief, Hospital Psychiatric Services, LMC, Williams AFB (Mar. 3, 2000).

129. *Id.* at 57-60.

130. *Id.*

131. Despite the court's action, the convening authority still had the power to remand CPT Payne to the custody of the Attorney General. *See* MCM, *supra* note 3, R.C.M. 909(e)(3). The government, however, had previously foregone this course of action. *See id.* R.C.M. 909(c).

132. Telephone Interview with Dr. Evan Whitmore, Chief, Hospital Psychiatric Services, LMC, Williams AFB (Apr. 1, 2000).

suggested that the government move to get CPT Payne committed to the custody of the Attorney General for long-term mental health treatment.[133]

At this point, still pre-referral, the government could have simply requested that the convening authority direct CPT Payne's commitment under RCM 909(c).[134] But, since the government had already involved a military judge, the government decided to continue pursuing its goal through the judicial process. The government's intention was to have a post-referral competency hearing at which the military judge would find CPT Payne incompetent to stand trial and have CPT Payne committed. Post-referral, everything would be "on the record."[135]

The government now had to reconsider what level of court to recommend to the command. The government's goal was to get CPT Payne long-term psychiatric care, not jail time, a dismissal, or even a conviction. Therefore, on 19 April 2000, the convening authority referred the case to a "straight" special court-martial.[136] The military judge docketed the case for arraignment and a competency hearing on 28 April 2000.

The Arraignment and Second Competency Hearing

Initially, the 28 April 2000 Article 39(a) session appeared to be a mere formality in having CPT Payne committed. The day before the hearing, however, Dr. Whitmore shocked government counsel with the revelation that CPT Payne's capacity had improved such that Dr. Whitmore would testify that CPT Payne was now competent to stand trial. Dr. Whitmore explained that CPT Payne was reacting well to the new medication. He emphasized that CPT Payne still suffered from a severe mental disease, but that under the maximum dosage of his current medication, he was presently competent to stand trial.[137]

Captain Payne was arraigned, and the government proceeded with its motion to have him committed under RCMs 909(d) and (e). Combating the government's motion, Dr. Vince Carlson, a resident psychiatrist working with Dr. Whitmore, testified that CPT Payne was competent. Additionally, the psychiatrist acknowledged that CPT Payne would not take his medication voluntarily because he did not think he was ill. Dr. Carlson conceded, however, that CPT Payne could not be released from a twenty-four hour facility because he would not take his medication voluntarily, and without it he would have another severe relapse.[138]

After Dr. Carlson's testimony, CPT Payne agreed to answer questions from the military judge. Although he misunderstood a few of the finer points of law,[139] CPT Payne demonstrated that he generally understood the nature of the proceedings and the roles of the parties to the trial.

The government was left to argue why, despite uncontested expert testimony that CPT Payne was competent to stand trial, the court should rule to the contrary and allow CPT Payne to be committed. In a detailed ruling, the court denied the government's motion to commit CPT Payne to the custody of the Attorney General, and the court found CPT Payne competent to stand trial.

After the court entered its ruling, the defense requested an immediate trial date and indicated the accused would elect a judge alone forum. Defense counsel understood their client's competency may be fleeting, and the likely result would be not guilty only by reason of lack of mental responsibility. With no possibility of a discharge or jail time, the defense had two possible outcomes: a full acquittal, or commitment as the result of a not guilty only by reason of lack of mental responsibility verdict.[140] The court set the trial date for one week later, 5 May 2000.[141]

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133. Telephone Interview with Dr. Evan Whitmore, Chief, Hospital Psychiatric Services, LMC, Williams AFB (Apr. 17, 2000).

134. *See* MCM, *supra* note 3, R.C.M. 909(c).

135. *See* UCMJ art. 39(a) (2000).

136. *See* Payne Charge Sheet, *supra* note 85. Because the government did not seek confinement or a dismissal for CPT Payne, a special-court martial appropriately limited the punishment that CPT Payne could receive. *See* MCM, *supra* note 3, R.C.M. 909(e)(3), 1003(c)(2)(A)(ii) and (iv). "Only a general court-martial may sentence a commissioned . . . officer . . . to confinement . . . [or] to be separated from the service with a . . . dismissal." *Id.* R.C.M. 1003(c)(2)(A)(iv). Futhermore, given CPT Payne's lack of competency to assist with his own defense, convening an Article 32 hearing, as required of a case referred to a general court-martial, UCMJ art. 32(a), would be problematic. Even if the defense waived the Article 32 hearing, eventually the court would inquire if CPT Payne knowingly and voluntarily waived this right. *See* BENCHBOOK, *supra* note 35, para. 2-1-1 (requiring military judge to inquire whether Article 32 investigation waived knowingly and voluntarily).

137. Interview with Dr. Evan Whitmore, Chief, Hospital Psychiatric Services, LMC, Williams AFB (Apr. 28, 2000)

138. Physicians initially treated CPT Payne with the anti-psychotic medication Seroquel, but when CPT Payne relapsed, they changed his medication to Risperdal. Dr. Carlson also testified that CPT Payne had eaten breakfast, regurgitated, and then consumed his regurgitation at the breakfast table. *See also* United States v. Weston, 255 F.3d 873 (D.C. Cir. 2001) (concerning involuntary medication issues, discussed *supra* note 46).

139. For example, CPT Payne mistakenly thought he could be discharged from the service as a possible consequence.

Trial

The Government's Case-in-Chief

The government proceeded with *Payne* just like any other criminal case—calling witnesses to prove each element of the charged offenses beyond a reasonable doubt. Similar to a guilty plea in which, for all practical purposes, the parties know what the verdict will be, there was little doubt as to the verdict in CPT Payne's case. To avoid confusion, the government chose not to address CPT Payne's mental competency during its case-in-chief; rather, it let the defense raise the uncontested affirmative defense of lack of mental responsibility.

To prove the disorderly conduct offense, the government called three witnesses from the Springfield International Airport to testify about CPT Payne's actions on 4 February 2000. On cross-examination, the defense focused on the witnesses' observations of the accused's behavior. One flight attendant testified that CPT Payne appeared "[s]ort of blank, like there was no emotion, like I could run my hand across his face and he wouldn't even blink." For the military offenses of attempted desertion and failure to report, the government called the company commander, executive officer, and first sergeant.

While the testimony of the first six witnesses went quickly, the fraudulent appointment charge became the subject of extended litigation. Despite lengthy testimony, voluminous exhibits, and a couple of Article 39(a) sessions to argue about the fraudulent appointment, the government ultimately moved to dismiss this specification.

Dismissal of the Fraudulent Appointment Offense—Unresolved Issues

The facts surrounding the fraudulent appointment specification raised some interesting issues and could have exacerbated an already complex case if CPT Payne was convicted of this offense. While in dental school under a Health Professions Scholarship Program contract, a physician treated CPT Payne for a bi-polar depression disorder. Captain Payne's contract required him to disclose this treatment to program administrators.[142] The government charged Payne's failure to disclose his treatment as fraudulent appointment under a breach of contract theory.[143]

Dr. Whitmore's opinion was that CPT Payne was not suffering from the severe mental disease at the time he was appointed as a commissioned officer—27 June 1999. He testified CPT Payne's civilian doctor diagnosed CPT Payne with bi-polar depression disorder in May 1998, and that condition developed into the severe mental disease CPT Payne suffered at the Springfield Airport on 4 February 2000. With no evidence contradicting Dr. Whitmore's opinion, the affirmative defense of lack of mental responsibility would not apply to the fraudulent appointment specification, potentially resulting in mixed findings.[144] Due to evidentiary burdens, namely voluminous records and lengthy testimony from multiple out-of-state witnesses to authenticate such records, and the government's goal of getting CPT Payne the treatment he needed, the government dismissed the fraudulent appointment specification.

Although not raised by *Payne*, mixed findings driven by the mental responsibility of an accused raises a currently unresolved issue. If a court-martial finds an accused guilty on one charge and sentences him to confinement, but also finds the accused not guilty only by reason of lack of mental responsibil-

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140. Dr. Whitmore would later testify that CPT Payne was not mentally responsible for the events at the airport, but that he was mentally responsible for the fraudulent appointment that occurred eight months earlier. Potentially, CPT Payne could be found guilty of one specification and not guilty only by reason of lack of mental responsibility for the other three specifications. Because of the sentence limitations facing the government at a special court-martial of an officer, *see supra* note 136 and accompanying text, the fact that CPT Payne could be found guilty of one offense was inconsequential.

141. With no merits witnesses present, the only way the government could have immediately proceeded to trial was to enter into a stipulation of fact with the defense covering the events surrounding the charged offenses. Although the defense agreed to enter into such a stipulation, the court set the date one week out.

142. Payne Record of Trial, Department of the Army Service Agreement, F. Edward Hebert Armed Forces Health Professions Scholarship Program Contract (June 6, 1995).

143. Specification 2 of the Charge in violation of UCMJ article 133 read as follows:

> In that Thomas S. Payne, U.S. Army, on active duty, did, on or about 27 June 1999, by means of deliberate concealment of the fact that the said accused was diagnosed with bipolar depression on 19 May 1998, which the said accused had a continuing duty to disclose pursuant to paragraph 13 of his Edward Hebert Armed Forces Health Professions Scholarship Program (HPSP) Contract, to wit: "I understand that I must immediately notify (the) Office of the Surgeon General of any administrative or medically related problem I might incur while a participant in the program," procure himself to be appointed as a commissioned officer in the United States Army, and did thereafter, at Fort Swampy, receive pay and allowances under the appointment so procured.

Payne Charge Sheet, *supra* note 85.

144. Captain Payne could be found guilty of the fraudulent appointment specification, and found not guilty by reason of lack of mental responsibility for the remaining specifications.

ity on other charges, does the accused serve his jail term first or get committed first?

Sections 4245 and 4246 of 18 U.S.C. suggest that the accused would begin serving his sentence to confinement first. If, after a competency hearing, he is found to be suffering from a severe mental disease, he can then be transferred and hospitalized for psychiatric treatment for a period not to exceed his original sentence to confinement.[145] If a subsequent competency hearing determines the accused has recovered, he will be re-imprisoned to serve the remainder of his sentence. If the accused is found competent and his sentence has expired, he will be released.[146] If the accused's sentence has expired, but the court determines the accused still suffers from a mental disease *and* his release would create a substantial risk of bodily injury or property damage to another, then the Attorney General must make all reasonable efforts to transfer the accused to the appropriate officials in the accused's home state.[147]

The Defense Case: The Affirmative Defense of Lack of Mental Responsibility

Although the government called the psychiatric experts in the two prior competency hearings, the government did not call them in their case-in-chief. Therefore, by necessity, the defense had to call an expert to present their affirmative defense. For expediency and based on the complexity of the issues raised by this defense, the accused elected a judge alone trial.

The defense laid the foundation for CPT Payne's mental disease by showing how his behavior rapidly deteriorated during his Officer Basic Course. Captain Payne had been through an academic board a few months before his court-martial.[148] The defense called the officer who served as the recorder on the academic board:

DC: [S]ir what were the specific symptoms that Captain [Payne] exhibited which caused you to think that he might have a mental condition [at the academic board]?

Witness: He had difficulty speaking at times, would have a facial tick, and then he would start grunting.

DC: And what do you mean by grunting, sir?

Witness: We would be sitting in the board and he would start going hrr, hrr, hrr.

Next, Dr. Whitmore testified for the defense. The defense elicited Dr. Whitmore's opinion on CPT Payne's mental status at the time of the alleged conduct:

DC: Do you have an opinion about whether Captain Payne on the fourth of February suffered from a severe mental disease or defect?

Dr. Whitmore: Yes, I do.

DC: And what is your opinion?

Dr. Whitmore: That he did suffer from a severe mental disease.

DC: And what was that severe mental disease?

Dr. Whitmore: Schizophrenia.

Dr. Whitmore discussed the differences between a severe mental disease and defect, as opposed to a mental disease or defect that was not severe. Dr. Whitmore further testified that his diagnosis of the accused fell within the *MCM*'s standards for a severe mental disease. The following is an excerpt of his testimony concerning his observations of CPT Payne at the LMC psychiatric ward:

> I was called to see him on the Monday after he was put in jail. He was transferred to the confinement facility at Williams AFB and he was having trouble there just following rules and responding appropriately, and so they sent him to the emergency room and we evaluated him then.
>
> The same things were consistent—with hallucinations, with long periods of time without moving. When he would talk, it might be a single word; it would never be a sentence or even a phrase. He appeared to be having hallucinations.

145. *See* 18 U.S.C. §§ 4245-4246 (2000).

146. *See id.* § 4245(e) (plain language of rule implying that sentence continues to run while accused is hospitalized).

147. *Id.* § 4246(d).

148. Faculty Board Meeting concerning CPT Thomas S. Payne, Medical Officer Basic Course, Nov. 9 and Dec. 6, 1999 (transcripts on file with author).

> At times he would start talking to something that wasn't there, and at other times he would be hitting out at things. He would stand or sit in his room for hours staring at the wall or talking to the wall. He wouldn't do any of his personal hygiene. He's a dentist and he wouldn't brush his teeth, he wouldn't shower. He would have to be forced to try, and a lot of times, he wouldn't. When you tried to ask him a simple question, you either wouldn't get an answer or, in hallucination, he might give you a "no" or just stare for hours.
>
> Because we had him in an environment where we could observe him twenty-four hours, seven days a week, his behavior was all—it was consistent. It wasn't just when I was interviewing him, which I have seen in people that malinger mental illness. It was a constant, and that's what you will see in people that have schizophrenia.

After presenting expert testimony, the defense called lay witnesses, including classmates and members of Payne's chain of command, to paint a picture of a dentist who displayed very abnormal behavior, especially in small day-to-day activities. For example, the accused's company commander testified that while working at the dental clinic, CPT Payne repeatedly wore a disheveled uniform and fell asleep in front of enlisted students. After removing CPT Payne from the clinic, the commander assigned CPT Payne simple tasks in the orderly room. One task included alphabetizing leave and earning statements. Captain Payne, the valedictorian of his high school class, with a 4.0 grade-point average graduate from Johns Hopkins, would put the A's before the B's, but within the A's would put Anderson before Adams.

The government did not present rebuttal evidence. The court then allowed counsel to present bifurcated closing arguments. The initial arguments dealt solely with the facts of the crimes. The government focused on proving the remaining three specifications beyond a reasonable doubt. The defense argued for a straight acquittal. The next portion of the closing argument focused on the defense of lack of mental responsibility. The defense had the burden and presented their argument. With no evidence to the contrary, the government did not rebut this portion of the defense closing.

The Verdict

The military judge found that the government had proven that CPT Payne committed the underlying lesser-included offenses of Attempted Desertion, Failure to Repair, and Disorderly Conduct. He further found CPT Payne not guilty only by reason of lack of mental responsibility of the charge and its specifications.

Post-Trial

Coordination for the Commitment

The military judge remanded CPT Payne to the custody of the Attorney General on 5 May 2000. The FBOP assigned CPT Payne to the psychiatric unit of the Federal Correctional Institute (FCI) at Butner, North Carolina.[149] Captain Payne arrived at Butner FCI on 18 May 2000.[150]

The Butner FCI staff psychiatrist was aware of his statutory requirement to complete his examination and report on CPT Payne within forty days of Payne's arrival.[151] Due to his workload and the complexity and length of the required report,[152] the doctor could not meet this deadline.[153] Government counsel, with the consent of the defense, obtained an extension from the military judge.

The staff psychiatrist completed his report on 17 July 2000, and the Butner FCI warden forwarded it to the military judge on 19 July 2000.[154] The report made it clear that CPT Payne was not a danger, and that he would have to be ordered released by the judge.[155] The judge then docketed a post-trial "dangerousness" hearing for 28 July 2000 at Butner FCI. The government requested to hold the hearing at Butner to reduce several burdens: (1) on CPT Payne's unit, who would have to provide unit escorts for CPT Payne's travel; and (2) on the Butner FCI doctors, who would have to travel to an off-site hearing. Govern-

149. *See also* Practice Tip #12—Coordination: Commitment of an Insanity Acquittee, *supra* page 21.

150. Between 5 May 2000, the date of the trial and the military judge's commitment order, and his 18 May 2000 arrival at Butner FCI, CPT Payne remained on Ward 4D at LMC under Dr. Whitmore's care. Interview with Dr. Evan Whitmore, Chief, Hospital Psychiatric Services, LMC, Williams AFB (May 18, 2000).

151. *See* MCM, *supra* note 3, R.C.M. 1102A(b) (requiring military judge to obtain psychiatric report before mandatory post-trial hearing of accused found not guilty only be reason of lack of mental responsibility).

152. *See supra* note 71 and accompanying text.

153. Telephone Interview with Staff Psychiatrist, Butner FCI, North Carolina (June 15, 2000).

154. *See* Letter from Warden, Butner FCI, to Military Judge (July 19, 2000) (on file with author).

155. Payne Forensic Evaluation, *supra* note 95, at 13-14.

ment counsel subsequently coordinated with the Butner FCI hospital staff for the admittance of all parties to the federal prison, and secured all other items necessary to transform a federal prison conference room into a military courtroom, to include the appropriate flags and a judge's robe.[156]

The Hearing

The Butner FCI staff psychiatric team conducted a detailed forensic evaluation of CPT Payne to determine his eligibility for release.[157] The doctors found that CPT Payne was "not suffer[ing] from a severe mental disease or defect the result of which his release to the community would create a substantial risk of bodily injury to another [or] serious damage to the property of another."[158]

The government did not present any rebuttal evidence. The defense called the Butner FCI psychiatrist, qualified him as an expert, laid the foundation for his opinion, and then elicited the mental capacity standards for release, his findings on CPT Payne, and his expert opinion on the paramount issue—whether CPT Payne's release would create a substantial risk of bodily injury to another or serious damage to another's property:[159]

DC: Would you describe . . . your interviews and the testing that was done by your forensic team?

Doctor: The psychologists conducted a number of tests of cognitive functioning, intellectual functioning and personality assessment.

DC: Based on your study . . . do you have an opinion as to whether CPT Payne presently suffers from a mental disesase?

Doctor: Yes, I do.

DC: And what is that opinion?

Doctor : That he does suffer from a severe mental disease.

DC: And what's the diagnosis?

Doctor: I have diagnosed him as schizophrenia, paranoid type.

DC: Based on your study of CPT Payne do you have an opinion as to whether—if he were released from this institution—whether that release would pose a substantial risk of bodily injury to another person or to property?

Doctor: At this time—and, again, you have to keep in mind that prediction of dangerousness is a very, very difficult—in the immediate future, I don't see him as being a danger to himself, or the property of others, or to other people.[160]

The government did not present any evidence. After closing the evidence, the military judge issued his written opinion and release order to the confinement facility.[161] After out-processing, CPT Payne was released to the custody of his brother, and he returned home on voluntary excess leave, where he remained until completion of his separation from the military. Captain Payne received follow-up mental health treatment at a local military hospital, and he was referred to his home state's mental health system after his release from active duty.

Administrative Separation

After CPT Payne's return to his home state, he remained on his company's personnel roster. In the fall of 2000, the command initiated an officer elimination proceeding.[162] CPT Payne waived his presence before a Board of Officers, but his detailed defense counsel appeared at the 6 December 2000 proceedings.[163] The defense argued for CPT Payne's retention on active

156. *See generally* Practice Tip #13—The Post-Trail Hearings, *supra* page 22.

157. *See* 10 U.S.C. § 876b (2000) (outlining conditions for release).

158. Payne Forensic Evaluation, *supra* note 95, at 13.

159. *See* 18 U.S.C. § 4243(e). The hearing was conducted according to 18 U.S.C. § 4247(d). *See id.* § 4243(c); Practice Tip #13—The Post Trial Hearings, *supra* page 22.

160. Although the psychiatrist testified that CPT Payne was not a danger to *himself*, the statutory standard is whether the person's "release would create a substantial risk of bodily injury to *another*." 18 U.S.C. § 4247(c)(4)(C) (emphasis added).

161. Payne Record of Trial, Post-Trial Competency Hearing Findings and Release Order (July 28, 2000).

162. *See* AR 600-8-24, *supra* note 79, paras. 4-2 to 4-3.

duty in hopes of avoiding a recoupment action of about $41,300 for CPT Payne's dental education under Payne's HPSP Contract.[164]

The board of officers voted to separate CPT Payne with an honorable discharge.[165] On 12 April 2001, fourteen months after his offenses at the Springfield Airport, the Department of the Army finally released CPT Payne from active duty.[166]

Conclusion

When a sanity board diagnoses an accused soldier as being incompetent to stand trial due to a severe mental disease or defect, opponents on the legal battlefield may share the objective of getting the accused the professional medical treatment he requires.

In the pretrial phase, the *MCM* and the U.S. Code lay out the axis of advance practitioners must follow to get an accused committed to the custody of the Attorney General.[167] If the accused is restored to competency, the government has a decision point—whether to go forward with an administrative separation or a court-martial. This decision will likely hinge on the nature of the offenses. Once the government commits to a trial, it must bear in mind the high probability of a finding of not guilty only by reason of insanity. In the post-trial phase, the *MCM* and U.S. Code also lay out the framework to commit an insanity acquittee and further provisions for his ultimate release.[168]

Throughout the process, practitioners must focus on two key pieces of intelligence: what is the likelihood that medical personnel can restore the accused to competency, and what is in the best interests of the accused, the Army, and society. Once those issues are resolved, it is only a matter of trying an insanity case and not going insane.

163. Board proceedings on file with the Criminal Law Division, FS (Dec. 6, 2000) [hereinafter Payne Officer Elimination Board]. The trial counsel in Payne's criminal case appeared as a government witness to provide the board with a chronology of events surrounding CPT Payne's offenses, court-martial, commitment to the FBOP, and subsequent release.

164. *See id*.; *see also* Memorandum, Office of the Surgeon General, U.S. Army, to Commander, U.S. Army Medical Command, subject: Entitlements Paid Under the Health Professions Scholarship Program, RE: Payne, Thomas (11 Feb. 2000) (on file with author). "Captain Payne received HPSP entitlements totaling $66,577.62 ($41,344.47 in educational costs and $25,243.15 in stipend payments) . . . . $41.334.47 may be eligible for recoupment under [10 U.S.C. § 2005(a)]." *Id*. para. 4.

165. Payne Officer Elimination Board, *supra* note 163.

166. Message, 141213Z May 2001, Personnel Command, subject: Separation (Probationary). The Department of the Army message sent to the Commander, U.S. Army Garrison, Fort Swampy, also called for a prorated recoupment amount of $38,586.32. *Id*. para. 4.

167. *See* MCM, *supra* note 3, R.C.M. 909; 18 U.S.C. § 4241(d) (2000).

168. *See* MCM, *supra* note 3, R.C.M. 1102A; 18 U.S.C. § 4246.

Appendix A

U N I T E D S T A T E S	**)**	
	)	
v.	**)**	**REQUEST FOR RCM 909(e) COMPETENCY HEARING**
	)	
PAYNE, Thomas S.	**)**	
Captain; XXX-XXX-XXXX	**)**	
	)	**15 February 2000**
Fort Swampy	**)**	

Through the Special Court-Martial Convening Authority, the government respectfully requests this court to conduct a Competency Hearing IAW Rule for Court-Martial (RCM) 909(e).

I. FACTS

1. On 8 Feb 00, charges were preferred against the accused (Encl 1) and the accused was ordered into pretrial confinement. The accused was placed into pretrial confinement at the Williams AFB, Regional Confinement Facility (RCF) that evening. Based on his disruptive behavior and failure to follow the orders of the guards, the RCF Commander asked this command to remove the accused from his Air Force facility. An agreement was made for the accused to spend the evening at the RCF while coordination was made for his transfer to the Army RCF at Fort Sill, OK.

2. On 8 Feb 00, the Defense requested (Encl 2), and the Special Court-Martial Convening Authority (SPCMCA) ordered, pursuant to RCM 706(b)(1), an inquiry into the mental capacity and responsibility of the accused in accordance with Rule for Courts-Martial 706 (Encl 3). Based on the accused's removal from the Williams AFB RCF and the Sanity Board order, the government counsel and doctors coordinated a plan for the accused to be transferred from the RCF to Ward 4D of Lindberg Medical Center (LMC), Williams AFB. Ward 4D is a "lock-down" psychiatric ward at LMC. Dr. Evan Whitmore, Chief, In-Patient Mental Health, was directed to conduct the accused's Sanity Board.

3. On 15 Feb 00, both government and defense counsel received notice from Dr. Whitmore (Encl 4), the accused's attending psychiatrist, that the answer to the question posed in RCM 706(c)(2)(D) is that the accused **is** currently suffering from a mental disease or defect rendering him unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in his defense. Dr. Whitmore is continuing his examination to provide the answers to the other questions listed in RCM 706(c)(2).

4. On 8 Feb 00, in addition to directing a RCM 706 Sanity Board, the SPCMCA also directed an Article 32b Investigation. Further on 11 Feb 00, the SPCMCA delayed the Article 32 IAW RCM 707c until the Sanity Board was complete based on medical recommendations (Encl 5). To date, the Article 32b Investigation has not been conducted, thus the accused's charges are still before the SPCMCA for disposition and have not been forwarded to the general court-martial convening authority.

United States v. CPT Thomas S. Payne; Request for Competency Hearing

5. The SPCMCA respectfully asks the court to conduct a competency hearing IAW RCM 909(e) to answer the questions set forth therein.

6. If the court determines the accused is not competent to stand trial at this time, then the government will comply with RCM 909(f) and remand the accused to the custody of the Attorney General IAW Title 18 United States Code section 4241(d). If the court determines the accused is competent to assist in his defense, the SPCMCA will direct the Article 32 Investigating Officer to convene the hearing.

7. The government will produce Dr. Whitmore and his associate psychiatrist to testify before the court and any other witnesses ordered by the court necessary for the requested determination.

5 Encls
1. Charge Sheet
2. Defense Request for Sanity Board
3. Sanity Board Order
4. Dr. Whitmore Memo
5. RCM 707c Delay

THEODORE M. D'COSTA
LTC, MS
Acting Commander

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Tax Law Note

Earned Income Credit: New Rules Could Ease Qualification

Lieutenant Colonel Curtis A. Parker
Chief, Legal Assistance Branch
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Several changes to the Earned Income Credit (EIC) rules should reduce the confusion surrounding the EIC as well as increase the number of service members eligible for this valuable credit. The Economic Growth and Tax Reconciliation Act of 2001 (2001 Act)[1] changes the definition of earned income,[2] eliminates the use of modified adjusted gross income to measure eligibility for the EIC,[3] relaxes the definition of qualifying child,[4] and creates new rules for credit eligibility for persons with the same qualifying child.[5]

EIC: An Overview

In the case of an eligible individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to the credit percentage of so much of the taxpayer's earned income for the taxable year as does not exceed the earned income amount.[6]

The EIC is a refundable credit for working taxpayers whose income is below a certain dollar amount.[7] As a refundable credit, it not only reduces the amount of tax the taxpayer may owe, but also may provide a refund to the taxpayer in excess of his withholdings.

An eligible individual[8] is allowed a credit equal to the credit percentage times the amount of the individual's earned income for the tax year that does not exceed the statutory earned income amount.[9] For 2001, the EIC for a tax year could not be more than the excess of (1) the *earned* percentage of the earned

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1. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 115 Stat. 38 (codified in scattered sections of I.R.C. (LEXIS 2002)) [hereinafter 2001 Act].

2. I.R.C. § 32(c)(2)(A)(i) (codifying 2001 Act § 303(b)).

3. *Id.* §§ 32(a)(2)(B), (c)(5) (codifying 2001 Act §§ 303(d)(1), (2)(A)).

4. *Id.* §§ 32(c)(3)(A)(ii), (B)(i), (iii) (codifying 2001 Act § 303(e)(1), (2)(A)-(B)).

5. *Id.* § 32(c)(1)(C) (codifying 2001 Act § 303(f)).

6. *Id.* § 32(A)(1).

7. Generally, for tax year 2001, individuals with two or more qualifying children, and earned and modified adjusted gross income below $32,121, qualify for the EIC. For tax year 2002, individuals with two or more qualifying children, and earned and *adjusted gross income* below $33,178 ($34,178 if filing jointly), qualify for the EIC. I.R.S. Form W-5 (2002).

8. An "eligible individual" is any individual who "has a qualifying child for the taxable year." I.R.C. § 32(c)(1)(A)(i)). Qualifying children must live with the taxpayer for more than one-half of the year, and must be the taxpayer's (1) children or stepchildren (or their descendants); (2) brothers, sisters, step-brothers, step-sisters (or their descendants) whom the taxpayer cares for as his own children; or (3) eligible foster children. Eligible foster children are children "placed with the taxpayer by an authorized placement agency [that] the taxpayer cares for as [his] own child[ren]." *Id.* § 32(c)(3)).

An individual who does not have a qualifying child for the tax year is also an eligible individual if:

(1) "[the] individual's principal place of abode is in the United States for more than one-half of the taxable year," *id.* § 32(c)(1)(A)(ii)(I) (Armed Forces personnel are considered to have their personal abode in the United States for the time they are stationed outside the United States on extended active duty, *id.* § 32(c)(4));

(2) either the individual or the individual's spouse (if any) is older than twenty-four but younger than sixty-five before the end of the tax year, *id.* § 32(c)(1)(A)(ii)(II);

(3) the individual cannot be claimed as the dependent of another taxpayer for any tax year beginning in the same calendar year as the individual's tax year, *id.* § 32(c)(1)(A)(ii); and

(4) the individual is not a nonresident alien for any part of the tax year, or has elected under I.R.C. § 6013(g) or § 6013(h) to be treated as a U.S. resident, *id.* § 32(c)(1)(E).

9. *Id.* § 32(a)(1).

income amount, over (2) the phase-out percentage of so much of the modified adjusted gross income (or if greater, earned income) of the individual for the tax year as exceeds the phase-out amount.[10]

Huh? If you are wondering what that last paragraph means, then you understand the need for simplification. The instructions for IRS Form 1040, the *U.S. Individual Income Tax Return*, contain ten pages of worksheets and tables necessary for determining eligibility and amount of the EIC. The Form 1040 instructions, a booklet only sixty-one pages long, dedicates thirteen percent of its material for calculating the entry for one line on Form 1040.[11] The time obviously was, and remains, ripe for simplification.

In general terms, the EIC is available to single or married people who work, either full- or part-time at some point during the year, depending on their income. Workers raising one child in their home and with family incomes of less than $28,281 in 2001 could get an EIC of up to $2428. Workers raising more than one child in their home and with family incomes of less than $32,121 in 2001 could get an EIC of up to $4008. Workers not raising children in their home who were between ages twenty-five and sixty-four on 31 December 2001, and had income below $10,710, could get an EIC of up to $364.[12]

To understand the EIC better, one must understand that it phases-in as well as phases-out. That is, to a point, the amount of credit for which the taxpayer qualifies increases as his income increases—phases in. The credit then levels out and remains level over a set income range.[13] Once the taxpayer's income exceeds this range, the amount of credit reduces as income increases, until the entitlement ceases—phases-out.[14]

The following examples illustrate calculation of the EIC under the pre-2001 Act rules:

> ***Example 1.*** Corporal John Andrews and his wife Doris will file a joint return for 2001. They have two children—Mark who is age three and Connie who was born in May of 2001. Their total earned income is $23,650 (basic pay $16,104, basic allowance for housing (BAH) $4896, basic allowance for subsistence (BAS) $2650). John and Doris qualify for an EIC of $1779 in 2001.[15]
>
> ***Example 2.*** Staff Sergeant Brad Wilson and his wife Judy will file a joint return for 2001. They have two children —Angela who is six years old and Eric who is four years old. Their total earned income is $34,054 (basic pay $25,140, which includes $7780 nontaxable pay for service in a combat zone, plus BAH $6264 and BAS $2650). Even though the Wilsons' modified adjusted gross income is $17,360, they do not qualify for the earned income credit because their total earned income is not less than $32,121.[16]

In 2002, however, there will be some changes.

Earned Income

Old Law. Before the 2001 Act, the Internal Revenue Code defined earned income as wages, salaries, tips, and other employee compensation,[17] and it included both compensation

10. *Id*. § 32(a)(2).

11. I.R.S. Form 1040, Instructions, 41-50 (2000) (line sixty-one of a seventy-line form).

12. I.R.S. Pub. No. 596, Earned Income Credit (EIC) tbls. 46-48 (2000) [hereinafter IRS EIC Guidance] (for use in preparing 2001 tax returns).

13. *See id*. For 2001, workers attained maximum EIC benefits at the following income ranges:

workers with one child:	$7100 – 13,099	(EIC = $2428);
workers with more than one child:	$10,000 – 13,099	(EIC = $4008); and
workers with no children:	$4750 – 5949	(EIC = $364).

Id.

14. For 2001, maximum EIC benefits began to decrease at the following income levels:

workers with one child:	$13,100, terminating once income exceeded $28,299;
workers with more than one child:	$13,100, terminating once income exceeded $32,121; and
workers with no children:	$5950, terminating once income exceeded $10,750.

Id.

15. I.R.S. Pub. No. 3, Armed Forces' Tax Guide 17 (2000) (for use in preparing 2001 tax returns).

16. *Id.*

17. I.R.C. § 32(c)(2)(A)(i) (LEXIS 2001) (Code as it existed before the 2001 Act).

and self-employment income.[18] Such compensation included "anything of value received by the taxpayer from the employer in return for services of the employee."[19] The definition of earned income included compensation excluded from gross income as well as taxable compensation.[20] Nontaxable forms of compensation treated as earned income for EIC purposes included the following: (1) elective deferrals under a cash or deferred arrangement or annuity;[21] (2) employer contributions for nontaxable fringe benefits, including contributions for accident and health insurance,[22] dependent care,[23] adoption assistance,[24] educational assistance,[25] and miscellaneous fringe benefits;[26] (3) salary reduction contributions under a cafeteria plan;[27] (4) meals and lodging provided for the convenience of the employer;[28] and (5) housing allowance or rental value of a parsonage for the clergy.[29] For the military, it also included nontaxable combat zone pay and nontaxable housing and subsistence allowances received by military members.[30] Such amounts were included even if received in kind, for example, government quarters or furnished meals.[31]

The inclusion of nontaxable forms of employee compensation complicated the process of determining earned income. Both the IRS and taxpayers were required to keep track of nontaxable amounts for determining EIC eligibility, even though such amounts were generally not necessary for other tax purposes. Some of these items are not required to be reported on the Wage and Tax Statement (Form W-2), making it difficult for taxpayers to ascertain their correct amount of nontaxable earned income. The IRS also cannot easily determine these amounts. Congress believes that redefining earned income to exclude amounts not includable in gross income will simplify the calculation.[32]

New Law. The 2001 Act defines earned income, beginning in 2002,[33] as wages, salaries, tips, and other employee compensation, but only if such amounts are includible in gross income for the tax year.[34] Thus, the definition of earned income will be: wages, salaries, tips, and other employee compensation, *if includible in gross income* for the tax year, plus net earnings from self-employment.[35] Military taxpayers will no longer be required to include nontaxable combat zone pay, nontaxable housing allowance, and nontaxable subsistence allowance as earned income. These changes should increase the number of service members qualifying for the credit because the number of soldiers whose earned income exceeds the phase-out amount will decrease.

Revisiting the examples above best illustrates this change in the law. In Example 1, the Andrews' EIC under the old rules was $1779. Under the new rules for 2002, under which the Andrews no longer include any nontaxable compensation—BAH and BAS—when calculating income for determining

18. IRS EIC Guidance, *supra* note 12, at 20.

19. Research Institute of America (RIA) Checkpoint, Congressional Committee Reports Accompanying the Economic Growth and Tax Relief Reconciliation Act of 2001 (2002) [hereinafter Committee Reports] (generally summarizing the relevant congressional committee reports).

20. Treas. Reg. § 1.32-2(c)(2) (LEXIS 2002). The Treasury Regulations do not reflect the changes of the 2001 Act. *See id.*

21. I.R.C. §§ 403(b), 402(g), 7701(j) (LEXIS 2001) (Code as it existed before the 2001 Act).

22. *Id.* § 106.

23. *Id.* § 129.

24. *Id* § 137.

25. *Id*. § 127.

26. *Id.* § 132.

27. *Id.* § 125.

28. *Id.* § 119.

29. *Id*. § 107.

30. *Id.* §§ 112, 134.

31. Armed Forces' Tax Guide, *supra* note 15, at 17.

32. *See* Committee Reports, *supra* note 19.

33. The 2001 Act applies to tax years beginning after 31 December 2001. 2001 Act, *supra* note 1, § 303(i)(1)).

34. I.R.C. § 32(c)(2)(A)(i) (LEXIS 2002) (codifying 2001 Act § 303(b)).

35. *See* Committee Reports, *supra* note 19.

their EIC, the Andrews' EIC is $3369. In Example 2, the Wilsons did not qualify for the EIC under the old rules. Under the news rules, the Wilsons can exclude BAH, BAS, and pay for service in a combat zone when calculating income for purposes of the EIC. The Wilsons now qualify for an EIC of $3106.

Not everyone may benefit; the change apparently affects only a minority of military taxpayers, and only those at very low-income levels.[36] Recall that the EIC phases-in as well as phases-out. For taxpayers whose earned income, including only taxable compensation, is below the maximum amount of earned income used to calculate the EIC, excluding the nontaxable amounts from earned income will cause the taxpayer to qualify for a smaller EIC.[37] Those most at risk for a decrease in EIC are single soldiers without children and single soldiers with only one child. In each case, before the soldier realizes any decrease in EIC, his income would need to decrease below $4750 and $7100, respectively.[38]

Modified Adjusted Gross Income

Old Law. Pre-2001 Act law defined modified adjusted gross income (MAGI) as adjusted gross income (AGI) determined without regard to certain losses and increased by certain amounts not includible in gross income.[39] The disregarded losses were: (1) net capital losses (up to $3000); (2) net losses from estates and trusts; (3) net losses from nonbusiness rents and royalties; (4) seventy-five percent of net losses from businesses, computed separately with respect to sole proprietorships (other than farming), farming sole proprietorships, and other businesses.[40] The amounts added to AGI to calculate MAGI included tax-exempt interest and nontaxable distributions from pensions, annuities, and individual retirement plans (but not nontaxable rollover distributions or trustee-to-trustee transfers).[41]

New Law. Beginning in 2002, the phase-out of the credit will apply to taxpayers whose AGI (rather than MAGI), or earned income, whichever is greater, exceeds a phase-out amount.[42] The maximum credit amount will be reduced by the phase-out percentage multiplied by the AGI (or earned income) in excess of the phase-out amount (as adjusted for inflation).[43] The 2001 Act accordingly deletes the definition of MAGI.[44]

By replacing MAGI with AGI, Congress reduced the number of steps necessary for a taxpayer to determine his EIC.[45] While this may not have a significant impact on the number of service members qualifying for the credit, it will simplify the calculation.

Qualifying Child

Old Law. The amount of EIC that an eligible taxpayer may claim depends upon the number of "qualifying children" a taxpayer has. To be a qualifying child, a child must bear a specified relationship to the taxpayer and meet a residency requirement.[46] To fulfill the residency test, a child has to have the same principal place of abode as the taxpayer for *more than one-half* of the taxpayer's tax year.[47] For an otherwise eligible foster child to be a qualifying child, however, the pre-2001 Act required that child to have the same principal abode as the taxpayer for the taxpayer's entire tax year.[48]

New Law. "The distinctions among familial relationships drawn by [pre-2001 Act] law in defining a qualifying child add[ed] to the complexity of the earned income credit."[49]

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36. To illustrate, if the base pay of Corporal Andrews and Staff Sergeant Smith was reduced by half because of combat zone duty, their EIC actually increases.

37. Assume the taxpayer had one child and earned income of $8000, including $1000 of nontaxable income. Applying the 2001 rules, that taxpayer qualifies for a credit of $2428. Applying the 2002 rules, however, this taxpayer would calculate his EIC based on his taxable income of $7000, and his credit would be $2389.

38. IRS EIC Guidance, *supra* note 12, tbls. 46-48.

39. I.R.C. § 32(c)(5)(A) (LEXIS 2001) (Code as it existed before the 2001 Act).

40. *Id*. § 32(c)(5)(B).

41. *Id*. § 32(c)(5)(C).

42. I.R.C. § 32(b)(2)(A) (LEXIS 2002).

43. *Id*. § 32(a)(2)(B) (codifying 2001 Act § 303(d)(1)).

44. *Id*. § 32(b)(2) (codifying 2001 Act § 303(d)(1)).

45. COMMITTEE REPORTS, *supra* note 19.

46. *Id*. § 32(3) (unchanged by the 2001 Act).

47. *Id*. § 32(3)(A)(ii) (unchanged by the 2001 Act).

48. I.R.C. § 32(3)(B)(iii)(III) (LEXIS 2001) (Code as it existed before the 2001 Act).

Beginning in 2002, the 2001 Act removes "foster child" as an exception to the greater than six-month residency requirement to be an eligible child.[50] The 2001 Act also removes from the definition of "eligible foster child" the requirement that the child have the same principal place of abode as the taxpayer for the taxpayer's entire tax year.[51] The removal of the entire-year residency requirement for eligible foster children extends the more than six-month residency requirement to all children, including foster children, after 2001.[52]

The 2001 Act adds the descendant of any stepson or stepdaughter to the eligible child category.[53] It also removes brothers, sisters, stepbrothers, or stepsisters of the taxpayer (or a descendant of any such relative) from the definition of eligible foster child,[54] and it reclassifies them under the general eligible child category, but only if the taxpayer cares for them as the taxpayer's own.[55]

> **Example 3.** You and your sister live together. You are 30. Your sister is 15. When your parents died 2 years ago, you took over the care of your sister, but you did not adopt her. She is considered your eligible foster child because she lived with you all year and because you cared for her as you would your own child.[56]

In the above example, under the new rules, it is no longer necessary that the sister live with the taxpayer all year. Service members caring for foster children and siblings, whom they care for as they would their own child, will qualify for the EIC, even though the qualifying child does not live with the service member all year.[57] These changes will both simplify the calculation and expand the class of service members eligible for the EIC.

Tie-Breaker Rule

Old Law. Under pre-2001 Act tax rules, if a child was otherwise qualified for more than one taxpayer, the tie-breaker rules for calculating EIC treated the child as a qualifying child for only the person with the highest MAGI.[58]

New Law. Beginning in 2002, if an individual is a qualifying child for more than one taxpayer, and more than one taxpayer claims the EIC for that child, then the following tie-breaking rules apply: First, if one of the individuals claiming the child is the child's parent (or parents filing jointly), then the child is considered the qualifying child of the parent (or parents).[59] Second, if both parents claim the child and the parents do not file jointly, then the child is considered a qualifying child first of the parent with whom the child resided for the longest period of time during the year,[60] and second of the parent with the highest AGI.[61] Finally, if none of the taxpayers claiming the child as a qualifying child is the child's parent, the child is considered a qualifying child for the taxpayer with the highest AGI.[62]

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49. *See* COMMITTEE REPORTS, *supra* note 19.

50. I.R.C. § 32(c)(3)(A)(ii) (LEXIS 2002) (codifying 2001 Act § 303(e)(2)(B)).

51. *Id.* § 32(c)(3)(B)(iii) (codifying 2001 Act § 303(e)(2)(A)).

52. *See* COMMITTEE REPORTS, *supra* note 19.

53. I.R.C. § 32(c)(3)(B)(i)(I) (codifying 2001 Act § 303(e)(1)).

54. *Id.* § 32(c)(3)(B)(iii) (codifying 2001 Act § 303(e)(2)(A)).

55. *Id.* § 32(c)(3)(B)(i)(II) (codifying 2001 Act § 303(e)(1)).

56. IRS EIC Guidance, *supra* note 12, at 12.

57. *See* I.R.C. § 32(c)(3).

58. I.R.C. § 32(c)(1)(C) (LEXIS 2001) (Code as it existed before 2001 Act).

59. I.R.C. § 32(c)(1)(C)(i)(I) (LEXIS 2002) (codifying 2001 Act § 303(f)).

60. *Id.* § 32(c)(1)(C)(ii)(I).

61. *Id.* § 32(c)(1)(C)(ii)(II).

62. *Id.* § 32(c)(1)(C)(i)(II).

Conclusion

These changes in the rules will expand the number of service members who qualify for the EIC. Additionally, the new rules will simplify the calculation for service members and the tax assistance centers that support them. Judge advocates must get this information out to their clients *now.* Counsel should encourage their clients to determine their eligibility for the EIC and, if appropriate, apply for the Advanced Earned Income Credit by completing IRS Form W-5.[63]

63. If the taxpayer expects to eligible for the earned income credit in 2002 and has a qualifying child, the taxpayer can receive EIC payments in his paycheck, rather than as part of his tax refund, by submitting an IRS Form W-5 to his employer. IRS EIC Guidance, *supra* note 12, at 34-36

The Art of Trial Advocacy

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Preparing the Young Child-Victim for Trial

"And that's the jury-box," thought Alice, "and those twelve . . . I suppose they are the jurors." She said this last word two or three times over to herself, being rather proud of it: for she thought, and rightly too, that very few little girls of her age knew the meaning of it all.[1]

Introduction

You have been a trial counsel for about six months, and you are feeling very good about the hotly contested barracks larceny case you tried yesterday. It is a Friday afternoon in early June. Your thoughts wander from your superb closing argument to the upcoming weekend and the trip to the beach you have planned. You can actually hear the pounding of the surf and feel the sun on your shoulders when the phone rings, jerking you back to the present. It is the Special Agent in Charge (SAC) of your Criminal Investigation Division (CID) office, who tells you that a five-year-old girl has made a sexual abuse allegation against her stepfather, a soldier assigned to your jurisdiction.

The SAC explains that the girl told her teacher about the alleged abuse, and soon afterwards repeated the allegation to the school counselor and to a state Child Protective Services (CPS) counselor. The state has already made arrangements to remove the child from the home and place her in foster care. The CPS counselor is enroute to the post hospital with the child, where a pediatrician will examine the girl. Special Agent (SA) I. M. Smart is meeting them at the clinic, and plans to interview the child after the examination. The SAC tells you that he thought you should know, and he asks if you have any special guidance for SA Smart. Cursing under your breath, you try to think of something intelligent to say. You remember something about these cases being difficult to investigate and try, and you also know that you do not want to squander this opportunity to shape the investigation. Where do you go from here?

The Doctor and the Examination

Your most immediate concern must be the potential admissibility of any statements the little girl makes as exceptions to the hearsay rule. Because the girl is enroute to the hospital for the examination, your initial focus should be on the medical treatment and diagnosis exception to the hearsay rule.[2] You must try to ensure that any statements the girl makes to the pediatrician during the examination are admissible under this exception. With this in mind, you should identify the pediatrician who will examine the child so you can briefly talk to the doctor before the examination begins.

Because of the pediatrician's busy schedule, you will probably have to drop whatever you are doing to squeeze in some time before the examination starts. Once in the pediatrician's office, you must explain who you are, what your role is, and that you want to ensure anything the girl tells the doctor is admissible at trial, should the case go that far. Understanding that the pediatrician knows more about interviewing children than you do, you must make sure that the doctor: (1) knows not to ask leading questions; (2) takes careful notes, paying particular attention to words the girl uses; (3) does not throw any of the notes away, and most importantly, (4) explains to the girl that he is a doctor, is there to help her, and to make sure that there is not anything wrong with her.[3] You should also explain that you will interview the pediatrician later regarding the examination if the case goes to trial. Once you cover these points and answer the pediatrician's questions, you should get out of the way.

The CID Interview With the Child-Victim

You must also talk to the CID agent to set a positive tone for the rest of the investigation and to establish open lines of communication. You should ask the agent to give you a copy of all statements made by other witnesses in the case, so that you know the facts as they are developing and can give appropriate advice. You must also talk to the SA about the interview with the little girl. As with the doctor, your goal is to ensure that any statement the child makes is admissible at trial, this time under the residual hearsay exception.[4]

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1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 61 (1865).

2. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 803(4) (2000) [hereinafter MCM]. This rule says that "[s]tatements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded by the hearsay rule, even if the declarant is available as a witness. *Id.* The key to admissibility is the declarant's expectation of receiving medical treatment. The exception is broadened in child sex abuse cases. *See* White v. Illinois, 502 U.S. 346 (1992); *see also* United States v. Hollis, 54 M.J. 809 (N-M. Ct. Crim. App. 2000); United States v. Haner, 49 M.J. 72 (1998); United States v. Ureta, 44 M.J. 290 (1996).

3. *See White*, 502 U.S. at 346; Idaho v. Wright, 497 U.S. 805 (1990).

As you look at Military Rule of Evidence (MRE) 807, remember that if the little girl is unavailable to testify at trial and you try to admit the statement she makes to SA Smart, you must also address the Confrontation Clause implications raised. A large body of case law identifies factors that the military judge will consider to determine whether a residual hearsay statement has "particularized guarantees of trustworthiness."[5] The case law also sheds light on the "do's and don'ts" of child interviews.[6] The interview must be reliable, which means that SA Smart must have a plan. Your job is to help SA Smart formulate this plan in a way that maximizes the possibility that the military judge will admit the interview into evidence at trial. Ideally, SA Smart has been trained in child interview techniques, and you are simply refreshing his memory on some of the finer points. If not, SA Smart should consult with someone familiar with child development and interviewing children for assistance before conducting the interview.[7]

At a minimum, the child interview plan must include:

> (1) who will be present in the interview room;
> (2) who will ask the questions;
> (3) who will video tape the interview;
> (4) how questions will be formulated;
> (5) what props are necessary, such as crayons and paper;
> (6) when and where the child will take breaks;
> (7) who will remain with the child during these breaks; and
> (8) how the rapport session will be conducted.[8]

The entire interview must be videotaped, to include the rapport session. This makes it much easier for the military judge to determine the reliability of the interview and the resulting statement by the child, should you attempt to admit it into evidence at trial under the residual hearsay exception.[9]

Your Preparation for Trial

Weeks have passed, and your trial date is looming. Although the earlier medical examination and the CID interview were fruitful, you have still not interviewed the little girl yourself. Since making the allegation against her stepfather, the little girl has been removed from the home by the state CPS and is in foster care. After spending about a month with a strange foster family, she was placed in foster care with her grandmother. This is the fifth time in her short life that the little girl has been placed in foster care for various reasons, and she wants to go home.

The little girl has also been assigned a guardian-ad-litem, a local civilian attorney who is unfamiliar with and very suspicious of the military justice system. The girl is receiving weekly counseling from a child counselor employed by the state. Child Protective Services refuses to allow you to interview the girl without the guardian-ad-litem's consent. Both the counselor and the grandmother, also unfamiliar with the military justice system, support that position.

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4. MCM, *supra* note 2, MIL. R. EVID. 807. Military Rule of Evidence 807, Residual Exception, states that

> [a] statement not specifically covered by Rule 803 or 804 *but having equivalent circumstantial guarantees of trustworthiness*, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. (emphasis added).

5. Lilly v. Virginia, 527 U.S. 116 (1999).

6. Although a full discussion is beyond the scope of this article, practitioners should note the difference between the constitutional and statutory analysis. When the declarant does not testify and the Confrontation Clause is implicated, an out of court statement must either fall into a firmly rooted hearsay exception, or it must have particularized guarantees of trustworthiness, shown from the totality of the circumstances surrounding the making of the statement, such that adversarial testing would add little or nothing to its reliability. *Id.* at 116; *see also Wright*, 497 U.S. at 805; United States v. Cabral, 47 M.J. 268 (1997).

7. If no CID agents are trained in child interview techniques, your Chief of Military Justice should discuss this problem with the SAC. Training is available and it is essential that at least one agent in the local field office is prepared to deal with the unique requirements associated with investigating child abuse and child sexual abuse cases.

8. Factors that the military judge will consider to determine the reliability of a residual hearsay statement include, but are not limited to,

> (1) spontaneity, (2) mental state of the declarant, (3) terminology used by declarant, (4) motive to fabricate, (5) consistent repetition, (6) open ended questions, (7) emphasis on truthfulness, (8) declarations against the declarant's interest, and (9) whether the declarant understood the significance of telling the truth.

See Wright, 497 U.S. at 805; United States v. Hughes, 52 M.J. 278 (2000); United States v. Ureta, 44 M.J. 290 (1996).

9. *See Cabral*, 47 M.J. at 268.

You are pondering this state of affairs when the phone rings; it is the civilian attorney. He is willing to discuss your potential interview with the girl and also has some questions for you about the military justice system. You set an appointment to meet him in his office later in the week.

You are more nervous about interviewing the little girl than you are about the actual trial. How are you ever going to be able to talk to her? You have no children, do not know any children, and the thought of interviewing a child makes you break out into a cold sweat. The truth is, children scare you, and you do not like them. What do you do?

First, you must remember that witnesses are at the heart of every criminal case, and poorly prepared witnesses are a tremendous liability to the trial advocate. This is as true for child witnesses as it is for adults. Effective witness preparation requires a great deal of thought, planning, preparation, and strong communication skills.[10] The importance of good witness preparation and the challenges trial advocates face increase exponentially when the witness is a child abuse or child sex abuse victim. Because of the invasive nature of the crimes, the associated embarrassment and emotional trauma, and a child's age-associated limitations, child victims pose special problems. These problems are compounded when the abuser was a family member or trusted adult, as is often the case. Even if it is unlikely that the child-victim will ever take the stand, an effective interview and witness preparation are crucial because it is always possible that the child will testify. Given this possibility, both the child and the advocate must be prepared. Ultimately, you must either reach a level of comfort in dealing with child-victims or risk further traumatizing these already fragile witnesses and losing the case. The rest of this article focuses on some helpful strategies for preparing a child-victim for trial.

Preparing for the Interview

Regardless of the specific situation, preparation is always necessary before interviewing a child-victim. In this case you will have to speak with the civilian guardian-ad-litem and gain his trust before you will be able to interview the little girl. This is not uncommon in cases involving children. While you could fight the problem and attempt to end-run the guardian-ad-litem, this could unnecessarily complicate the situation and cause hard feelings. The best approach is to set aside some time to discuss the guardian's concerns, and explain to him the military justice system, your role, the status of the case, and where you see it heading.

When engaging in this discussion, you must never make promises that you might not be able to keep, sugarcoat the facts, or say things that you do not know to be true. The most effective approach is to communicate genuine concern for the child by honestly and forthrightly answering the guardian's questions. You must understand and acknowledge that the guardian-ad-litem's priorities and concerns, while different than your own, are legitimate. You should also offer to keep the guardian apprised of the case's progress. Such an open approach will establish good lines of communication and will ultimately be worth your time. Bear in mind that if you fail to gain the guardian's trust, you will likely be unable to interview the child before trial, if at all. Further, if you establish a good relationship with the guardian-ad-litem, the guardian may be able to facilitate your access not only to the child, but also to the child's counselor, if there is one.

Given the importance of your meeting with the guardian-ad-litem, you must know your case before the meeting. Before you meet, ask the guardian-ad-litem to identify his concerns and questions so that you can prepare to answer them. Additionally, you should thoroughly review the CID case file, interview any un-interviewed witnesses, and review your notes from previous witness interviews. Ensure you interview social workers and law enforcement personnel who talked to the child, any doctors who examined the child, and the child's teachers. In addition to preparing these witnesses for their own testimony at trial, your goal during these interviews is to learn as much as you can about the child. You must do this legwork before meeting with the guardian-ad-litem because your preparedness, or lack thereof, will impact the success of the meeting.

Once the guardian clears you to interview the child, you must decide how to proceed. You should strongly consider meeting first with the child's counselor or psychologist, if there is one, to get advice on how to best interview the child. If you understand the child's cognitive ability and communication skills, and know her favorite books, hobbies or interests, habits, problems, disabilities, likes and dislikes, family situation, and other personal details, you will better understand the child, and the first interview will be easier. Your understanding will enable you to establish rapport more readily, and you will be more comfortable, which will help the child relax. If you are able to interview the child's counselor or psychologist, you should ask for help with how to approach the child. The degree of trauma that the child has suffered because of the abuse and how the child is coping with that trauma will also strongly influence the way you approach the interview.

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10. *See* Major Timothy MacDonnell, *The Art of Trial Advocacy: It Is Not Just What You Ask, but How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 65.

This interview with the child's counselor also presents an excellent opportunity to discuss the child's ability to testify in open court against the accused and to identify measures necessary to accommodate the child's in-court testimony, if that is possible. If it appears that the child will have to testify from a remote location, under MRE 611(d) an expert must testify regarding the child's inability to testify in open court in the presence of the accused.[11] This means that before you talk to the counselor or mental health care professional, you must be familiar with MRE 611(d), *Maryland v. Craig*,[12] and the military case law dealing with remote testimony, the necessary findings of fact, and measures that can be taken to facilitate a child's testimony in or outside of the courtroom.[13]

Additional resources are available to help you prepare to interview the child-victim. These include the child's caregiver, mental health professionals in your community, pediatricians, elementary school or pre-school teachers, or as a last resort, the child's parents, all of whom can give you tips about talking to children. Another valuable resource is the National District Attorneys Association (NDAA)/American Prosecutors Research Institute Web site.[14]

The most important point to remember is that you should have several plans for how you will conduct the child interview so that you have the flexibility to adjust based on the child's reactions. You must also be willing to put yourself on the child's level, while remaining neutral, firm, and interested in what the child has to say. Additionally, you must never tell the child that you are going to do something without following through. Failure to do what you say you are going to do will be perceived as a broken promise to a young child, even if you have a legitimate reason for the failure, and will severely undermine your credibility.

Conducting the Interview

Initially you should meet the little girl in a place where she is comfortable and able to relax, with another trusted adult present, such as the counselor or a parent. If the child is under a counselor's care and trusts the counselor, the counselor's office may be a good place for this first meeting. If you take this option, discuss in advance with the counselor how the meeting will proceed. The counselor should explain to the child in advance who you are and why you need to see her. At the initial meeting, the counselor can introduce you to the child and start a dialogue. Expect the little girl to be nervous because you are a stranger. This nervousness may manifest itself in different ways; the child may be silly and obnoxious, or may not be willing to talk at all. Regardless of the child's behavior, you must relax, project confidence, be interested, and talk on the child's level so that the child's experience is positive. Most children will quickly perceive any nervousness and will react accordingly.

Do not expect to discuss the abuse with the child at this first meeting. Rather, your purpose during the initial interview is to meet the child on the child's terms and establish some level of trust. You must do this with body language and with words, without touching the child,[15] and you must be approachable, relaxed, and interested in the child. To that end, it may help to sit on the floor with the child, to talk to the child about her interests, to play games, color, or to allow the child to ask you questions, which you then must answer. During the interview, you should explain to the child, in simple terms, who you are and why you are there. You should finish the interview by explaining to the child that you will talk to her again and by asking the child if she has any questions for you.

11. MCM, *supra* note 2, MIL. R. EVID. 611(d)(3). Military Rule of Evidence 611(d)(3) states that

> [r]emote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused for any of the following reasons:
>
> (A) The child is unable to testify because of fear;
> (B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;
> (C) The child suffers from a mental or other infirmity; or
> (D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

Id. See also Maryland v. Craig, 497 U.S. 836 (1990) (holding that the preference for face-to-face confrontation may give way if it is necessary to further an important public policy, but only where the reliability of the testimony can otherwise be assured). Because MRE 611(d) does not fully incorporate the *Maryland v. Craig* standard, counsel must consider both when laying the foundation for remote testimony.

12. 497 U.S. 836 (1990).

13. This is beyond the scope of this article; however, trial counsel must consider these issues early in the court-martial process. *See Craig*, 497 U.S. at 836; United States v. Anderson, 51 M.J. 145 (1999).

14. The NDAA Web site at http://www.ndaa.org includes online updates addressing various issues associated with investigating and prosecuting child abuse cases. Two articles especially helpful to trial and defense counsel are Jennifer Massengale's *Facilitating Children's Testimony,* APRI HIGHLIGHTS NEWSLETTER, vol. 14, no. 6, 1998, *available at* http://www.ndaa.org/publications.newsletters/update_index.html, and Mary-Ann Burkhart's *Preparing Children for Court*, APRI HIGHLIGHTS NEWSLETTER, vol. 11, no. 8, 1998, *available at* http://www.ndaa.org/publications.newsletters/update_index.html.

15. While this applies when interviewing any victim, refraining from contact is particularly important when interviewing children who have been physically abused. Child-abuse victims are powerless against the "offensive touching" of their assailants. If you reach out and touch the child during your interview, you become just another adult invading the child's space, once again rendering the child powerless. One of your goals in the interviews is to empower the child.

While this can seem a daunting task, especially for an attorney who has little or no experience with children, it is surmountable. First, remember that children are simply little people with more limited experiences, vocabularies, and attention spans than most adults. You must also bear in mind that most children below the ages of nine or ten do not have the cognitive ability to understand the concept of time-ordering events, are very literal in their understanding, and have a very egocentric view of the world.[16]

Specifically, how should these characteristics influence your use of language during the interview with the child? When you talk to the child, use small words; use simple, single-idea sentences, and avoid negative sentence construction, which can easily confuse a child. You should avoid using ambiguous words, as well as technical terms and legal jargon. Rather, use concrete language; specific geographical and anatomical terms, and people's names instead of relationship words. Never assume that a child knows what a term means, even if she uses it. Further, avoid shifting subject matter or time frame without specifically orienting the child to the new topic or time frame of conversation.[17] These general rules will make your interview of the child much more fruitful.

Your work does not end with the initial interview, however. Now that you have met the child and, hopefully, established some rapport, you need to prepare the child to testify at trial. This involves talking with the child about the abuse, familiarizing the child with the courtroom, and explaining to the child what to expect when she does testify. Ideally, you should conduct the next several interviews in the courtroom, so that the child becomes more familiar with and comfortable in those surroundings. The amount of access you are given to the child by the guardian, the child's reaction, and the child's attention span will dictate the number of meetings necessary.

You should have the child meet you at the courtroom when it is quiet and you will have no interruptions. It is a good idea to ask the child to bring her favorite game or toy or coloring book, and you should also have some crayons and blank paper on hand as a fallback. Once the child arrives, have her sit down in a comfortable place. Spend a few minutes talking with her about your last meeting and about what you are going to do during this interview. To get her loosened up and talking, let the child know that you are happy to see her again, and ask her about school or hobbies. If that fails, ask the child to draw a picture for you of her favorite thing, or play for a while the game the child brings, so that she relaxes and gets engaged. Have several back-up plans for all of these interviews in case one approach does not work. You must also be prepared to stop the interview and try again another day if the child gets upset or is having a particularly bad day. You must remain relaxed and flexible in your approach, or you will sabotage your efforts with the child.

Once the child relaxes and is talking to you, you should orient her to the courtroom and what happens there. Make sure the child understands that she will probably have to come in and testify in front of people about what happened. Advance coordination with the child's counselor is helpful so that the counselor can talk with the child about court before your meeting. When you discuss this with the counselor, explain the court-martial process and the various court-martial personnel to him so that the child gets consistent information from both of you. If you are able to work with the counselor in this manner, then you will be building on what the child already knows, rather than starting from scratch. When you are explaining these ideas to the child in the courtroom, encourage her to ask questions, and make sure that you use simple language so that she can understand.

You should explain to the child what everything in the courtroom is, who will be in the room, and what they will be doing. One extremely effective approach is to move from one place to another in the room with the child—for example, from the defense counsel table to the trial counsel table, to the court-reporter box, to the panel box, to the military judge's bench, to the gallery—sitting with the child at each place and explaining who sits in each seat and what they do.[18] Try to get the child interested by making a game out of it or by letting the child ask and answer questions. Children like to pretend, so it may work well to allow the child to put on the military judge's robe and pretend to be the judge, asking you questions. Then you can take your turn, asking the child questions. The key is to keep it interesting. If you start to lose the child's interest, take a break or save the rest of the interview for another day. Later, when you are going over the child's testimony, you can use this technique again in combination with asking her questions from wherever she will be seated to testify during the trial. This is one way to keep the child engaged throughout the preparation.

At some point, you must also educate the child about her role in the case, the requirement for an oath, and the necessity that she tell the truth. Again, it is helpful if the counselor, after talking to you about the process, first broaches these subjects with the girl to lay a foundation for your discussion. You can then build on that foundation with a combination of role-play and discussion with the child during your courtroom orientation.

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16. Massengale, *supra* note 14; *see also* ANNE GRAHAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE 4, 10 (2d ed. 1999).

17. Mindy F. Mitnick, The Use of Language in Interviewing Children, Address at the 1998 Investigating and Prosecuting Child Abuse Cases Course (address materials on file with author).

18. *See* Burkhart, *supra* note 14.

Conclusion

While none of these techniques will make it easy to prepare a young child-witness for trial, they will make it easier on you, and most importantly, on the child. In cases such as this, the testimony of the child-victim can be vital to success or failure. Even if you think that the child will not testify, you must be prepared, for the sake of the case and for the sake of the child. The above suggestions should enable the trial practitioner to better communicate with a child-victim and thereby facilitate the truthful testimony of this often-unpredictable witness. Major Ekman.

Note from the Field

What Constitutes an Adverse Employment Action in Retaliation Cases?

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Introduction

You have been asked to defend against the judicial complaint of Mr. Craig Johnson, who is alleging reprisal discrimination under Title VII.[1] Mr. Johnson had previously filed a formal Equal Employment Opportunity (EEO) complaint for age discrimination. Mr. Johnson's employer amicably settled the EEO complaint by moving Mr. Johnson to a different section within the workplace. Several months later, however, Mr. Johnson was threatened with a letter of reprimand, and he was not awarded a discretionary bonus.[2] Mr. Johnson now claims that these two negative actions resulted directly from his EEO complaint.

On its face, Mr. Johnson's judicial complaint seems to establish a prima facie case of reprisal discrimination. Generally, to establish a prima facie case for reprisal, a plaintiff must show: (1) he engaged in a protected activity, like filing an EEO complaint; (2) an adverse employment action was taken against him; and (3) a causal connection existed between the protected activity and the adverse action.[3] Your supervising attorney wants to prevent discovery in Mr. Johnson's case. Therefore, she has asked you to draft a motion to dismiss, focusing on whether the actions of which Mr. Johnson complains—the proposed letter of reprimand and the lack of a bonus—amount to "adverse employment actions." You begin work and determine that what legally constitutes an adverse employment action in a retaliation context[4] depends on which judicial circuit the plaintiff filed in and whether the plaintiff is a federal employee. This note explores these two variables as they affect retaliation suits.

The Various Judicial Circuits

The federal judicial circuits have established varying standards for what constitutes an adverse employment action. The standards range from a narrow definition focusing on the "ultimate employment decision," to a very broad and liberal definition of a decision affecting some term or condition of employment.

The Ultimate Employment Decision Standard

Page v. Bolger

In 1981, the landscape of what constitutes an adverse employment action changed drastically with the advent of *Page v. Bolger*.[5] Mr. Page, a black postal service employee, applied for two different promotions in 1976. He first applied for the position of General Foreman of Mails. Eight months later, he sought a Senior Postal Operations Specialist position. Different three-member review committees considered Mr. Page's two applications, and neither committee recommended him; in turn, he was not selected for either position.[6] Three white males comprised each committee, even though postal regulations required that "[t]he official who designates a review committee is responsible for making every effort to select at least . . . one minority group member."[7] Mr. Page filed suit because the review committees that considered his applications for promotion lacked a minority group member.[8]

1. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2000e-17 (2000).

2. The letter of reprimand scenario is taken from *Bonk v. Pena*, 1998 U.S. Dist. LEXIS 7769 (E.D.N.C. Mar. 26, 1998); the denial of the bonus hypothetical is drawn from *Russell v. Principi*, 257 F.3d 815 (D.C. Cir. 2001).

3. *See* Anderson v. G.D.C., Inc., 281 F.3d 452, 458 (4th Cir. 2002) (citation omitted).

4. This note uses the terms "reprisal" and "retaliation" interchangeably.

5. 645 F.2d 227 (4th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 892 (1981).

6. The district court in *Page* gave an excellent discussion of the case history. *See* Page v. Bolger, No. 77-0400-R, 1978 U.S. Dist. LEXIS 16006 (E.D. Va. Aug. 16, 1978), *aff'd*, 645 F.2d 227 (4th Cir. 1981).

7. *Page*, 645 F.2d at 231.

8. *Id*.

The district court judge entered judgment for the Postal Service. On appeal, the Court of Appeals for the Fourth Circuit also rejected the plaintiff's argument, holding that the racial compositions of the review committees were not adverse employment actions sufficient to trigger Title VII protections.[9] The *Page* court first defined what constitutes discrimination, stating that "Title VII . . . has consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions."[10] The court defined ultimate employment decisions to include "hiring, granting leave, discharging, promoting, and compensating."[11] Second, the court held that "interlocutory or mediate decisions having no immediate effect upon employment conditions" do not fall within the purview of Title VII.[12]

The Fourth Circuit concluded that the compositions of Mr. Page's review committees were mediate decisions that were "simply steps in a process for making such obvious end-decisions as those to hire, to promote, etc."[13] In other words, *Page* places two requirements on a plaintiff. First, the action complained of must be an end decision, that is, not mediate. Second, the end decision must be an ultimate employment decision, for example, hiring, firing, and promoting. Because Mr. Page was not complaining about the discriminatory animus of an ultimate employment decision, but rather a mediate process, his claim was not actionable under Title VII.

Dollis *and* Ledergerber

The Fifth and the Eighth Circuits have followed the holding in *Page*, both requiring an ultimate employment decision to trigger Title VII. In *Dollis v. Rubin*,[14] the Fifth Circuit held that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions."[15] Ms. Dollis, the plaintiff and a federal employee, requested a desk audit of her EEO specialist position to determine if her grade level was proper or should be increased.[16] Her request for a desk audit was denied; Ms. Dollis filed suit, claiming retaliation, among other theories of discrimination.

The district court granted the government's motion for summary judgment, and the plaintiff appealed. The Fifth Circuit affirmed, citing *Page* and holding that a denial of a request for a desk audit was "not an actionable 'adverse personnel action' under Title VII."[17] The court found that "a desk audit is not the type of ultimate employment decision that Title VII was intended to address."[18]

Two years later, the Eighth Circuit in *Ledergerber v. Stangler*[19] likewise mandated that an adverse employment action must "rise to the level of an ultimate employment decision" to trigger Title VII.[20] Ms. Ledergerber, a Caucasian income maintenance supervisor, claimed race and retaliation discrimination when management replaced her staff with different employees. The Eighth Circuit found that the replacement of Ms. Ledergerber's staff did not affect "the terms and conditions of her employment."[21] Although the *Ledergerber* court admitted that the replacement of Ms. Ledergerber's staff might have a "tangential effect on her employment," the prevailing test under Title VII is whether the action was an ultimate employment decision.[22] Unlike *Dollis*, the Eighth Circuit did not mention *Page*. Instead, the court listed a series of Eighth Circuit deci-

9. The Fourth Circuit heard this case twice, first by panel and then en banc. The panel reversed the lower court, holding that the lack of a minority on the review committee had been racially constituted in violation of the postal regulations. *See* Page v. Bolger, 1979 U.S. App. LEXIS 9530 (4th Cir. Dec. 19, 1979). In 1980, sitting en banc, the Fourth Circuit reconsidered *Page*, reversed itself, and affirmed the lower court's decision. *See Page*, 645 F.2d at 228.

10. *Page*, 645 F.2d at 233.

11. *Id.*

12. *Id.*

13. *Id.*

14. 77 F.3d 777 (5th Cir. 1995).

15. *Id.* at 781-82 (citing *Page*, 645 F.2d at 233).

16. *Id.* at 779.

17. *Id.* at 782.

18. *Id.*

19. 122 F.3d 1142 (8th Cir. 1997).

20. *Id.* at 1144.

21. *Id.*

22. *Id.*

sions that help define what changes in duties or working conditions can establish "materially significant disadvantage[s]" sufficient to constitute adverse employment actions.[23] A plaintiff who does not incur a "reduction in title, salary or benefits" cannot look to Title VII for relief.[24]

The Reasonably Likely Standard

Not every circuit has embraced the ultimate employment decision standard first articulated by the Fourth Circuit. The most recent break with this standard occurred in the Ninth Circuit. In *Ray v. Henderson*,[25] Mr. Ray, a postal employee, complained about the harassment of his female co-workers in the workplace.[26] As a result of Mr. Ray's numerous complaints, management allegedly took four adverse actions: (1) elimination of employee involvement meetings (a forum for employees to communicate with management about workplace issues); (2) elimination of the flexible starting time policy; (3) institution of a lockdown policy in which the loading docks were kept locked at all times; and (4) reduction of the number of postal boxes serviced by Mr. Ray, costing him about $3000 a year. Mr. Ray filed a charge of retaliation in federal district court.[27]

The district court granted the Postal Service's motion for summary judgment. The Ninth Circuit, however, reversed, focusing on "whether Ray suffered cognizable adverse employment actions."[28] The *Ray* court noted the different positions on what constitutes an adverse employment action among the circuits; mainly, that some circuits define adverse employment action "broadly," and some circuits have the "most restrictive view of adverse employment actions."[29] The circuits using the broadest definitions—the First, Seventh, Tenth, Eleventh, and D.C.—have "take[n] an expansive view of the type of actions that can be considered adverse employment actions."[30] The Ninth Circuit adopted this approach and held that "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity."[31] The Equal Employment Opportunity Commission (EEOC) sets forth this same standard.[32]

In reaching its conclusions, the Ninth Circuit cited 42 U.S.C. § 2000e-3(a), the retaliation statute, which states "it is unlawful 'for an employer to discriminate' against an employee in retaliation for engaging in protected activity."[33] The *Ray* court further opined that the statutory language to bring a retaliation suit "does not limit what type of discrimination is covered, nor does it prescribe a minimum level of severity for actionable discrimination."[34] The Ninth Circuit concluded that § 2000e-3(a) does "not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion."[35]

What Type of Employee: Federal or Non-Federal?

The Ninth Circuit, like the other circuits that have interpreted adverse employment actions broadly, relied on the language of § 2000e-3(a).[36] A plain reading of the retaliation statute does not limit its reach to "ultimate employment decisions." What each of these courts have seemingly ignored, however, is the statutory provisions controlling federal employees.

Congress has waived sovereign immunity so that a federal employee can sue the United States under Title VII. The exclusive vehicle for a federal employee to bring suit is 42 U.S.C. § 2000e-16, which begins with the words "[a]ll personnel

23. *Id.* (citing Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994); Thomas v. Runyon, 108 F.3d 957, 959 (8th Cir. 1997)).

24. *Id.*

25. 217 F.3d 1234 (9th Cir. 2000).

26. *Id.* at 1237-38.

27. *Id.* at 1238-39.

28. *Id.* at 1240.

29. *Id.* The Second and Third Circuits hold an intermediate position: "an adverse action is something that materially affects the terms or conditions of employment." *Id.* at 1242 (citing Torres v. Pisano, 116 F.3d 625, 640 (2d Cir. 1997); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)).

30. *Id*. at 1241.

31. *Id.* at 1243.

32. *See* Elmore v. Potter, No. 01997056, 2001 EEOPUB LEXIS 8540 (EEOC 2001); Reyes v. Norton, No. 01981572, 2001 EEOPUB LEXIS 3416 (EEOC 2001).

33. *Ray*, 217 F.3d at 1243 (quoting 42 U.S.C. § 2000e-3(a) (2000)).

34. *Id.*

35. *Id*. (quoting Passer v. Am. Chem. Soc., 935 F.2d 322, 331 (D.C. Cir. 1991)).

actions."[37] Any suit brought by a federal employee must be viewed through this prism. When an employee, like Mr. Ray, works for the federal government, that employee must bring a discrimination case against the United States under § 2000e-16.[38] This specific provision, exclusive to federal employees, provides that "all personnel actions" shall be free from discrimination. The term "personnel action" is never mentioned in the retaliation statute, but it is required under § 2000e-16 for federal employees to bring suit under Title VII. To trigger Title VII protections, the action Mr. Ray complained of must be a "personnel action." This statutory requirement, in turn, mandates that the underlying action is an ultimate employment decision, "the general level of decision contemplated" by § 2000e-16.[39]

The distinction between federal sector employees and private sector employees must not be blurred when analyzing the issue of adverse employment actions. The protections of § 2000e-16 for federal employees were added to Title VII in 1972.[40] The legislative history indicates that the change to Title VII "would extend *some* protection to Federal employees."[41] This addition extended the same procedural protection against unlawful discrimination under Title VII to federal employees as had already been codified for private sector employees.[42] Instead of using the same language, however, Congress chose to use the phrase "personnel action" as the benchmark of discrimination in the federal sector.[43]

The legislative history of the Equal Employment Opportunity Act of 1972 provides no clear indication why Congress chose the phrase "personnel action."[44] Because § 2000e-16 does not clearly define "personnel action," the practitioner is left with the definition applied to the term by the courts. Unlike the abundant number of courts interpreting what constitutes an "adverse employment action," few courts have grappled with what Congress meant by the term "personnel action." Those courts that have addressed this issue, however, have concluded that federal employees must show an ultimate employment decision.

Von Gunten v. Maryland

Twenty years after *Page*, the Fourth Circuit indirectly addressed what constitutes "personnel actions" in *Von Gunten v. Maryland*.[45] Ms. Von Gunten, a non-federal employee, claimed reprisal for complaining about sexual harassment. The

36. Section 2000e-3(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

37. *Id.* § 2000e-16. Sovereign immunity exists absent an unequivocally expressed waiver. Lehman v. Nakshian, 453 U.S. 156, 160-61 (1981). Suits against the government may proceed "only if Congress has consented to suit; a waiver of the traditional sovereign immunity cannot be implied but must be unequivocally expressed." Army & Air Force Exchange Serv. v. Sheehan, 456 U.S. 728, 734 (1982). Section 2000e-16 is such a waiver.

38. Section 2000e-16(a) states:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin

42 U.S.C. § 2000e-16(a).

39. Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1991).

40. Equal Employment Opportunity Act of 1972, § 717, Pub. L. No. 92-261, 86 Stat. 103 (amending the Civil Rights Act of 1964).

41. H.R. REP. NO. 92-238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137 (emphasis added).

42. *See generally* Chandler v. Roudebush, 425 U.S. 840 (1976) (holding that federal employees have the same procedural right to a trial de novo as private employees enjoy).

43. *See* 42 U.S.C. § 2000e-16(a).

44. *See, e.g.*, H.R. REP. NO. 92-238.

45. 243 F.3d 858 (4th Cir. 2001).

district court granted Maryland's motion for summary judgment. On appeal, the Fourth Circuit affirmed; however, the court abandoned the ultimate employment decision standard in retaliation cases for non-federal employees. The *Von Gunten* court held that "[w]hat is necessary in all Section 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected 'the terms, conditions, or benefits' of the plaintiff's employment."[46]

The Fourth Circuit did not, however, limit or overrule the *Page* standard for federal employees. Rather, the court made a distinction between federal employees and non-federal employees. Maryland argued in *Von Gunten* that the ultimate employment decision standard of *Page* should control, and the district court agreed.[47] The Fourth Circuit disagreed because Ms. Von Gunten was a non-federal employee; therefore, *Page* was never triggered. The Fourth Circuit stated: "We reasoned in *Page* that inclusion of the term 'personnel action' in § 2000e-16 indicated that 'ultimate employment decisions' arose to 'the general level of decision' targeted by Congress in that statute."[48] The court further stated that "§ 2000e-3 does not confine its reach to 'personnel actions.'"[49] The Fourth Circuit distinguished between non-federal and federal employees. When the circuit abandoned the ultimate employment decision standard for non-federal employees, *Page* remained intact only for federal employees.

Wideman v. Wal-Mart Stores, Inc.

The Eleventh Circuit, a circuit that broadly interprets what constitutes an adverse employment action, also has hinted that federal employees are governed by a different standard than non-federal employees because of the language of § 2000e-16. In *Wideman v. Wal-Mart Stores, Inc.*,[50] another non-federal case, the court rejected the defendant's attempt to use the *Page* standard. The *Wideman* court stated: "We find [*Page v. Bolger*] inapposite because it did not involve a case arising under 42 U.S.C. § 2000e-3(a). Instead, it involved a claim . . . under 42 U.S.C. § 2000e-16."[51] The court did not explicitly state that federal employees suing under § 2000e-16 are different from non-federal employees suing under § 2000e-3(a); however, the Eleventh Circuit's effort to distinguish *Page* in a non-federal case compels the conclusion that federal employees are statutorily different.[52]

Peterson v. West

The Fourth Circuit confirmed this view in *Peterson v. West*.[53] In *Peterson*, the plaintiff, a federal employee, complained about management's reducing the number of employees he supervised; management claimed its action was due to reorganization. Mr. Peterson filed an EEO complaint, and the final agency decision found no discrimination. Mr. Peterson then filed suit alleging reprisal. The district court and the Fourth Circuit both agreed with the agency finding of no discrimination.[54]

In affirming the district court, the Fourth Circuit held that Mr. Peterson "failed to show an adverse employment action was taken against him."[55] The court noted that Mr. Peterson's official title, pay grade and level, benefits, and salary remained constant.[56] The court explained that a federal employee who claims retaliation must sue under § 2000e-16. Under this section, "to establish an adverse employment action, [the federal employee] must show discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensation."[57] The

46. *Id.* at 865 (quoting Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

47. Von Gunten v. Maryland, 68 F. Supp. 2d 654, 662 (D. Md. 1999), *aff'd*, 243 F.3d 858 (4th Cir. 2001).

48. *Page*, 243 F.3d at 866 n.3 (quoting Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981)).

49. *Id.*

50. 141 F.3d 1453 (11th Cir. 1998).

51. *Id.* at 1456 n.2.

52. The U.S. Court of Appeals for the District of Columbia Circuit has held that "[d]espite the difference in language between [the Title VII provisions governing private and Federal employers], . . .Title VII places the same restrictions on federal and District of Columbia agencies as it does on private employers, and so we may construe the latter provision in terms of the former." Brown v. Brody, 233 F.3d 446, 452 (D.C. Cir. 1999) (quoting Barnes v. Costle, 561 F.2d 983, 988 (D.C. Cir. 1977)). The D.C. Circuit, however, never really grappled with the wording of § 2000e-16, other than stating that "federal employees are governed by the same rules as those controlling suits by private employees." *Id.* at 455.

53. 2001 U.S. App. LEXIS 19726 (4th Cir. Sept. 5, 2001) (unpublished).

54. *Id.*

55. *Id.* at 6.

56. *Id.* at 2.

57. *Id.* at 5.

court drew its rationale directly from *Page* and *Von Gunten*: ultimate employment decisions for federal employees "illustrate the general level of decision contemplated by § 2000e-16."[58]

Conclusion

If Mr. Johnson filed suit in a jurisdiction that adheres to the ultimate employment decision standard, then his proposed letter of reprimand will not trigger Title VII protections. Likewise, the denial of his bonus most likely will not trigger Title VII.[59] Neither action amounts to the ultimate employment decision of hiring, granting leave, discharging, promoting, and compensating the employee. The actions taken by the employer must be more than mere inconveniences to be classified as adverse employment actions.

On the other hand, if Mr. Johnson is in a jurisdiction that views an adverse employment action as "reasonably likely to deter employees from engaging in protected activity," then the denial of the bonus will meet the plaintiff's prima facie case for retaliation. The proposed letter of reprimand will be a closer call, but Mr. Johnson will most likely be able to show that the "threat" of a letter of reprimand will "deter employees from engaging in protected activity."[60]

If Mr. Johnson is a federal employee, however, an excellent argument exists that the proper standard, regardless of the jurisdiction, is that Title VII is triggered by a "personnel action." This personnel action, in turn, has been interpreted to mean an ultimate employment decision. Neither a proposed letter of reprimand nor a denial of a discretionary bonus meets this higher standard, and your motion should be successful.

Because of the varied standards that the federal circuits and the EEOC apply to this issue, labor counselors should consider several avenues during the administrative process:

a. Pursue the *Page v. Bolger* standard. Labor counselors should apply this standard in federal-sector cases. The *Page* court relied on the language in § 2000e-16 to articulate that Congress intended a separate standard for federal employees. Because Congress decided to treat federal employees differently, absent some statutory change, counselors should argue that the *Page v. Bolger* standard applies.

b. Build a solid administrative record. A solid and complete administrative record is imperative to defend the Army in federal court. During the complaint-investigation stage of the administrative process, labor counselors should gather evidence that focuses on the "adverse" effects of the alleged discriminatory act. In any administrative hearing, counselors must be prepared to thoroughly examine and cross-examine witnesses on this issue. They must build a record that will support the Army's actions in the event that the complainant files a judicial complaint.

c. Do not lose sight of the applicable federal standard. This may be challenging when addressing this issue before an Administrative Judge of the EEOC. Labor counselors must remember that the applicable federal law in their jurisdictions can be used to guide their cases in the administrative process. Even though the EEOC uses a broader standard in determining whether a complainant has suffered an adverse personnel action,[61] the EEOC standard will not carry the day in federal court.

58. *Id.* at 6 (citations omitted).

59. Rabinovitz v. Pena, 89 F.3d 482, 488-89 (7th Cir. 1996) (holding that loss of a bonus is not an adverse employment action when the employee is not automatically entitled to the bonus).

60. Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000). *See* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (holding that making negative comments about an employee can amount to an adverse employment action).

61. *See generally* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL §§ 8-11 to 14 (May 20, 1998) (stating that "adverse actions need not qualify as 'ultimate employment action' or materially affect the terms or conditions of employment to constitute retaliation").

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2002

June 2002

3-5 June	5th Procurement Fraud Course (5F-F101).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	5th Voice Recognition Training (512-27DC4).
3 June-28 June	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-12 June	5th Team Leadership Seminar (5F-F52S).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Paralegal NCO Management Course (512-27D/40/50).
17-21 June	6th Chief Paralegal NCO Course 512-27D-CLNCO).
24-26 June	Career Services Directors Conference.
24-28 June	13th Legal Administrators Course (7A-550A1).
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-26 July	3d JA Warrant Officer Advanced Course (7A-550A0).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-2 August	MCSE Boot Camp.
15 July-13 September	8th Court Reporter Course (512-27DC5).
22-26 July	33d Methods of Instruction Course (5F-F70).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-22 May 03	51st Graduate Course (5-27-C22).

12-23 August	38th Operational Law Seminar (5F-F47).
26-30 August	8th Military Justice Managers Course (5F-F31).

September 2002

9-13 September	173d Senior Officers Legal Orientation Course (5F-F1).
12-23 August	Operational Law Course (5F-F47).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).
9-13 September	3rd Court Reporting Symposium (512-27DC6).
23-27 September	2003 USAREUR Legal Assistance CLE (5F-F23E).

October 2002

21-25 Ocotober	2002 USAREUR Administrative Law CLE (5F-F24E).

3. Civilian-Sponsored CLE Courses

23 August ICLE	Nuts & Bolts of Family Law Hyatt Regency Hotel Savannah, Georgia
6 September ICLE	U.S. Supreme Court Update Swissotel Atlanta, Georgia
27 September ICLE	Eight Steps to Effective Trial National Speakers Series Marriott Gwinnett Place Hotel Atlanta, Georgia

For further information on civilian courses in your area, please contact one of the institutions listed below:

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	31 December, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and

	reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the September/October 2001 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2002***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 October 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (434) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available Through the DTIC, see the March 2002 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the March 2002 issue of *The Army Lawyer.*

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users, who have been approved by the LAAWS XXI Office and senior OTJAG staff.

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads "Enter JAGCNet."

(b) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "password" in the appropriate fields.

(c) If you have a JAGCNet account, *but do not know your user name and/or Internet password,* contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(d) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(e) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(f) Once granted access to JAGCNet, follow step (b), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2002 issue of *The Army Lawyer.*

5. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (434) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's Web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible before departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessi-

ble e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (434) 972-6264. CW3 Tommy Worthey.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (434) 972-6394, facsimile: (434) 972-6386, or e-mail: lullnc@hqda.army.mil.

7. Kansas Army National Guard Annual JAG Officer's Conference

The Kansas Army National Guard is hosting their Annual JAG Officer's Conference at Washburn Law School, Topeka, Kansas, on 20-21 October 2002. The point of contact is Major Jeffry L. Washburn, P.O. Box 19122, Pauline, Kansas 66619-0122, telephone (785) 862-0348.

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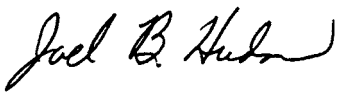

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