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Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers

Major Jeremy A. Ball[*]

I. Introduction

One of the most challenging tasks facing trial defense counsel is representing a mentally ill servicemember. Regardless of whether the government is considering administrative action, nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ),[1] or a court-martial, fully advising the mentally ill servicemember requires a comprehensive understanding of procedural and substantive laws that are often unique, and sometimes even arcane in interpretation and application. While many of the common legal issues are covered during basic criminal law instruction, such as capacity to stand trial and mental responsibility for offenses,[2] other issues remain obscure. Some examples include the consequences to the accused of a finding of mental incapacity or lack of mental responsibility, the practical meaning of the terms found within the lack of mental responsibility defense, and the impact of mental illness on an accused's ability to form mens rea. The complexity of potential issues that arise for the judge advocate representing a mentally ill servicemember can, under some circumstances, become overwhelming.

Adding to the complexity, mental illness can be relevant to many aspects of criminal procedure. Mental illness is legally relevant to mental capacity to stand trial,[3] mental responsibility,[4] possession of a criminal mens rea,[5] commission of a voluntary act,[6] and mitigation or extenuation of offenses.[7] For the majority of practitioners, who only rarely encounter mental illness as an issue in a case, understanding and applying the legal standards within each of these areas is a significant challenge. Of even greater difficulty is identifying the legal ambiguities within each area that create opportunities for creative and zealous advocacy.

The law within the military justice system as it applies to mental illness is unsettled and in immediate need of revision and clarification. These changes are necessary to correct constitutional due process concerns, as well as to ensure that mentally ill servicemembers receive a fair trial. In particular, the military justice system must address the following deficiencies: the rules allowing for the accused's involuntary commitment because of the lack of mental capacity prior to referral of charges are contrary to statute and violate the Due Process Clause;[8] the *Military Judges' Benchbook* (*Benchbook*) trial instructions for lack of mental responsibility contain on overly restrictive definition of "severe mental disease or defect,"

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[1] UCMJ art. 15 (2005).

[2] *See, e.g.*, CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, ONE HUNDRED SIXTY-SIXTH JUDGE ADVOCATE OFFICER BASIC COURSE tab V (Jan. – Apr. 2005).

[3] Rule for Courts-Martial 909(a) states:

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

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 909(a) (2005) [hereinafter MCM].

[4] Article 50a(a), UCMJ, states:

> It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

UCMJ art. 50a(a). *See* MCM, *supra* note 3, R.C.M. 916(k)(1) (containing language nearly verbatim to Article 50a(a), UCMJ).

[5] *See, e.g.*, Ellis v. Jacob, 26 M.J. 90, 93 (C.M.A. 1988) ("Thus Article 50a(a), like its model, does not bar appellant from presenting evidence in support of his claim that he lacked specific intent to kill at the time of his offense.").

[6] *See, e.g.*, United States v. Berri, 33 M.J. 337, 341 (C.M.A. 1991) ("What the status of unconsciousness might be under the Uniform Code of Military Justice, we do not decide here.").

[7] *See* MCM, *supra* note 3, R.C.M. 1001(c)(1) ("The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.").

[8] *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."). A proposed amendment of Rule for Courts-Martial (RCM) 909 is contained in Appendix A.

making the definition an incorrect statement of the law;[9] the *Benchbook* instructions for the doctrine of partial mental responsibility are reflective of an older body of law made inapplicable by statute, executive order, and judicial precedent;[10] and, although undefined, the defense of automatism exists within the military justice system and needs to be included in the *Benchbook*.[11] This article proposes amendments to the Rules for Courts-Martial and new or revised trial instructions.

In addition to the primary purpose of identifying the deficiencies listed above, this article has the secondary purpose of providing defense counsel with a resource that clearly explains the substantive law and significant procedural rules that apply when representing a mentally ill servicemember. The article begins by examining mental capacity, and continues with an analysis of mental responsibility, evidence negating mens rea, evidence negating voluntary act, and, finally, evidence in mitigation and extenuation. A detailed discussion of the four deficiencies listed in the preceding paragraph is embedded within the broader review of the law as it is applies to mentally ill defendants. This structure provides both context and meaning to the deficiencies themselves, and will orient the practitioner to the applicable statutes, rules, and case law for each area of the law.

II. Mental Capacity to Stand Trial

A. Substantive Law Relating to Mental Capacity

In accordance with Rule for Courts-Martial (RCM) 909(a), no servicemember may be brought to trial by court-martial "if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them [sic] or to conduct or cooperate intelligently in the defense of the case."[12] This standard remains essentially unchanged from the 1969 *Manual for Courts-Martial*[13] and mirrors the standard applied in federal courts.[14] The requirement that an accused be mentally competent at the time he faces court-martial has firm roots in both military law[15] and the Due Process Clause of the Constitution.[16] Structurally, the mental capacity standard contains three key elements: (1) mental disease or defect; (2) ability to understand the nature of the proceedings; and (3) ability to conduct or cooperate intelligently in the defense of the case.[17]

The first element requires that the accused be suffering from a mental disease or defect at the time of trial.[18] Practically speaking, the relevant time period begins prior to the beginning of trial because the accused must be mentally competent to assist in preparation of the case. Although RCM 909 does not expressly define "mental disease or defect," the Court of Appeals for the Armed Forces (CAAF), and its predecessor, the Court of Military Appeals (COMA), interpreted the term broadly. In *United States v. Proctor*,[19] the COMA reviewed a military judge's decision that the accused possessed sufficient mental capacity to stand trial.[20] Prior to trial, a sanity board diagnosed the accused with pedophilia and a personality

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[9] *See* U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK para. 6-4 (15 Sept. 2002) [hereinafter BENCHBOOK]. The complete text of instruction 6-4, Mental Responsibility at Time of Offense, is contained in Appendix B, along with a proposed amendment.

[10] *Id.* paras. 5-17, 6-5. The complete text of instruction 5-17, Evidence Negating Mens Rea, is contained in Appendix C, along with a proposed amendment.

[11] *See infra* Part V. A proposed *Benchbook* instruction 5-17a, Evidence Negating Voluntary Act, is contained in Appendix D.

[12] MCM, *supra* note 3, R.C.M. 909(a). The terms "mental capacity" and "mental competence" are used interchangeably within this paper and throughout many of the cited sources.

[13] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 120*d* (Rev. 1969) [hereinafter 1969 MCM] ("No person should be brought to trial unless he possesses sufficient mental capacity to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.").

[14] *Id.* R.C.M. 909 analysis, at A21-58. The standard for mental capacity applied in federal courts is found in 18 U.S.C.S. § 4241(d) (LEXIS 2005).

[15] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 393 (2d ed. 1920 reprint).

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

Id.

[16] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."); *see* Medina v. California, 505 U.S. 437, 439 (1992) ("It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial."); *see also* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (applying Fourteenth Amendment due process jurisprudence to the federal government via the Due Process Clause of the Fifth Amendment).

[17] MCM, *supra* note 3, R.C.M. 909(a).

[18] *Id.*

[19] 37 M.J. 330 (C.M.A. 1993).

[20] *Id.*

disorder.[21] The defense alleged that the personality disorder, which manifested itself through the accused's delusions that he spoke directly with God and that "God would deliver him from being sentenced,"[22] rendered the accused "mentally incapable of participating intelligently in his defense."[23] In its analysis, the court noted with approval that the military judge gave the accused the benefit of a broad interpretation of "mental disease or defect."[24] Citing to *United States v. Benedict*,[25] the court reiterated that even the more stringent insanity defense standard of "severe mental disease or defect" had never been interpreted to require the accused to suffer from a psychosis.[26] Ultimately, the court concluded that the military judge's finding of mental competence was not clearly erroneous.[27]

More recently, the CAAF addressed whether an accused suffering from amnesia was capable of assisting in his own defense.[28] In *United States v. Barreto*,[29] a sanity board diagnosed the accused as suffering from anterograde and retrograde amnesia,[30] a condition that resulted in his complete inability to recall the automobile accident underlying the offenses charged.[31] The defense asserted that the accused's inability to remember the critical events surrounding the alleged offense made him incapable of assisting in his own defense because he could neither relate the facts to his counsel nor testify in his own behalf.[32] Without addressing whether amnesia was a "mental disease or defect" within the context of RCM 909(a), the court analyzed whether the accused was capable of assisting in his own defense.[33] Although not stated expressly, the court seemed to accept without debate that the diagnosis of amnesia qualified as a "mental disease or defect."

To decide whether the accused was capable of assisting in his own defense, the court relied heavily upon a six-factor test used by the U.S. Court of Appeals for the District of Columbia Circuit in *Wilson v. United States*.[34] Those six factors are:

> (1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer. (2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf. (3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi. (4) The extent to which the Government assisted the defendant and his counsel in that reconstruction. (5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so. (6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.[35]

Applying the facts of the case, the court emphasized that Barreto's automobile accident could be reconstructed by use of extrinsic evidence, that the government assisted the defense in that reconstruction, and that the strength of the government's

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[21] *Id.* at 331.

[22] *Id.* at 337.

[23] *Id.* at 335.

[24] *Id*. at 336. Although the trial judge considered personality disorders as "technically" meeting the definition of mental disease or defect for the purpose of his analysis, he noted on the record that he did not believe the accused actually suffered from a mental disease or defect. *Id.* at 334. Regardless of the judge's misgivings, the COMA seems to have approved of his giving the accused the benefit of the doubt.

[25] 27 M.J. 253 (C.M.A. 1988).

[26] *Benedict*, 37 M.J. at 336.

[27] *Id.* at 337.

[28] *See* United States v. Barreto, 57 M.J. 127 (2002).

[29] *Id.*

[30] Amnesia is defined as a "disturbance in the memory of information stored in long-term memory, in contrast to short-term memory, manifested by total or partial inability to recall past experiences." STEDMAN'S MEDICAL DICTIONARY 58 (25th ed. 1990). Anterograde refers to "events occurring after the trauma or disease that caused the condition." *Id.* Retrograde refers to "events that occurred before the trauma or disease that caused the condition." *Id.*

[31] *Barreto*, 57 M.J. at 129 n.1. Senior Airman (SA) Barreto pleaded guilty to reckless driving and negligent homicide. *Id.* at 128. At the time of the offenses, SA Barreto was driving his privately owned automobile on a winding two-lane highway in Germany. *Id.* After exceeding the posted speed limit of 100 kilometers per hour in an effort to pass four cars, SA Barreto lost control of his vehicle on a curve and careened into oncoming traffic. The accident resulted in the death of SA Barreto's passenger, and the serious injury of SA Barretto and two other people.

[32] *Id.* at 129.

[33] *Id*. at 129-30.

[34] 57 M.J. at 131 (citing United States v. Wilson, 391 F.2d 460 (D.C. Cir. 1968)).

[35] *Wilson*, 391 F.2d at 463-64 (citations omitted).

case was such that any reasonable hypotheses of innocence was excluded.[36] On this analysis, the court concluded that the military judge had not erred in finding that the accused had the capacity to stand trial.[37] Had the facts of the case been different, however, it is reasonable to conclude that the court might have found amnesia to result in a lack of mental capacity. This conclusion is strongly supported by the court's reliance upon the fifth *Wilson* factor, which expressly reserves the possibility that amnesia could interfere with the accused's ability to present a viable defense, such as alibi.[38] Although the court declined to adopt the *Wilson* factors as a test to be used in all cases involving amnesia,[39] the court's reliance upon those factors as a means of determining whether amnesia might result in a lack of capacity strongly indicates that the CAAF would uphold such a finding under the right circumstances.

The *Proctor* and *Barretto* decisions, taken together, show that the meaning of "mental disease or defect" within the context of RCM 909 is extremely broad, potentially encompassing any mental condition that might have the effect of rendering the accused incapable of either understanding the nature of the proceedings or assisting in his own defense.[40] In both cases, the court tacitly declined to limit the doctrine to any particular mental illness, choosing instead to focus on the effect of the mental disorder rather than its severity. This conclusion is consistent with the Supreme Court's decision in *United States v. Drope*,[41] in which the Court stated that the prohibition against trying the mentally incompetent "is fundamental to an adversary system of justice."[42] The requirement that the accused be mentally competent to stand trial can be understood "'as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.'"[43] The analogy to trials *in absentia* highlights the significance of the effect, or impact, of the mental condition, rather than its cause or severity. In other words, the success of the adversarial system depends upon the participation of the defendant, both physically and mentally. The lesson for defense counsel is that, while the severity of a mental illness is certainly important, the doctrine of mental capacity hinges more on the illness's effect on the accused's ability to understand the proceedings and participate in the defense.

The second and third elements of the mental capacity standard are disjunctive. That is, the accused must only prove that his "mental disease or defect" has resulted in either an inability to understand the nature of the proceedings or an inability to conduct or cooperate intelligently in the defense of the case.[44] Once again, RCM 909 does not articulate what facts must be proven to meet this standard. In *Proctor*, discussed previously, the COMA essentially adopted the constitutional standard articulated by the Supreme Court in *United States v. Dusky*."[45] The accused must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . a rational as well as factual understanding of the proceedings against him."[46] Elaborating further, the COMA said:

> [T]he accused "must be able to comprehend rightly his own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense. . . ."[47]

Although this language provides considerably more guidance than RCM 909's more cursory language, the practitioner is still left with only a vague idea as to what facts must be proven to support a finding of mental incapacity. As shown by the

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[36] *Barreto*, 57 M.J. at 131.

[37] *Id.* at 127.

[38] *Id.*

[39] *Id.* at 131 n.4.

[40] Although lacking direct precedential value with regard to the current language in RCM 909(a), the Coast Guard Board of Review stated in *United States v. Victor*, 36 C.M.R. 814 (C.G.B.R. 1966), that "there is no requirement that incapacity be the result of a mental disease, defect or derangement as in the case of insanity at the time of the crime." *Id.* at 816. The board relied upon the same foundational case law that supports current law on mental capacity, namely *Dusky v. United States*, 362 U.S. 402 (1960). *Id.* at 818.

[41] 420 U.S. 162 (1975).

[42] *Id.* at 172.

[43] *Id.* (citing Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960)).

[44] MCM, *supra* note 3, RCM 909(a).

[45] United States v. Proctor, 37 M.J. 330, 336 (C.M.A. 1993) (citing Dusky v. United States, 362 U.S. 402, 402 (1960)).

[46] *Id.*

[47] *Id.* (citing United States v. Williams, 17 C.M.R. 197, 204 (C.M.A. 1954)).

court's analysis in *United States v. Wilson*, discussed above, a court's determination as to whether an accused possesses mental capacity to stand trial is based largely upon the factual evidence presented at trial.[48]

As a practical matter, the facts upon which the court will rely come primarily from mental health professionals. Rule for Courts-Martial 706 creates a mechanism that allows the trial counsel, defense counsel, and others involved in the case, to request an inquiry into the accused's mental capacity when warranted by the evidence.[49] While the RCM 706 inquiry, also referred to as a sanity board, generally results in the primary evidence that will be considered by the military judge before ruling on the issue of capacity,[50] defense counsel may wish to question the client on their own. Under these circumstances, one commentator has suggested the following questions:

> 1. Does the client understand the roles of the major participants in the adversary process?
>
> 2. Does the client appreciate defense counsel's function and is he capable of trusting and working with counsel?
>
> 3. Does the client recognize the difference between a guilty plea and a trial?
>
> 4. Is the client aware of the nature of the charges he faces, the seriousness of such charges, and the possible consequences?
>
> 5. Is the client capable of discussing the factual basis of the charges, possible defenses, and problems with accounts given by prosecution witnesses?
>
> 6. Can the client testify in a relevant, coherent manner?
>
> 7. Is the client able to discuss likely outcomes and make choices regarding plea options or defense strategy?
>
> 8. Can the client control his motor and verbal behavior to the extent that court proceedings will not be disrupted?[51]

The content of these questions gives substance to the legal standard articulated in *Proctor*. While the sanity board will likely ask very similar questions, only the defense counsel has the ability to assess whether or not the accused is truly able to assist in the defense of the case over a longer period of time. Unlike the members of a sanity board, who may observe the accused for only a handful of hours, the defense counsel works with the accused on a regular basis over an extended period of time. Ultimately, the defense counsel should fall back on the very simple question of whether the client's mental condition is interfering with the normal attorney-client relationship.[52] If the answer to this question is yes, then the defense may have a colorable argument that the accused lacks capacity to stand trial.[53]

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[48] *See supra* note 34 and accompanying text.

[49] Rule for Courts-Martial 706(a) states:

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

MCM, *supra* note 3, R.C.M. 706(a).

[50] *See, e.g.*, United States v. Collins, 41 M.J. 610, 612 (C.M.A. 1994) (holding that a military judge cannot rule finally on the question of mental capacity without considering the results of an RCM 706 inquiry, or an adequate substitute).

[51] Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 99 (citations omitted).

[52] *Id.* at 69. A normal attorney-client relationship may be defined as a relationship in which the client is able to understand his or her attorney's advise and make reasoned decisions based upon that advise.

[53] This last sentence should not be construed as an argument that defense counsel should raise the issue of mental capacity at every opportunity. Because involuntary commitment, like confinement, involves a serious deprivation of liberty, an accused servicemember may regard commitment to the custody of the Attorney General, although referred to kindly as "hospitalization," as no better than being in pretrial confinement. On the other hand, some clients may welcome the opportunity to receive free mental health care from the federal government, while at the same time drawing their full military salary. Given the potential for minor charges to be preferred and referred to trial by court-martial, whether from the outset or following an offer of punishment under Article 15, UCMJ, it is certainly possible that the costs of pretrial hospitalization may outweigh the benefits of seeing the case through to trial and sentencing. Defense counsel should be aware of not only the costs to his own client, but also those to the government, which include the financial and administrative costs of coordination, transportation, hospitalization, and treatment of the accused. On top of these direct costs are the intangible costs associated with

B. Procedural Rules Relating to Mental Capacity

Turning from the substantive law to the procedural law, the first thing to note is that "[t]he mental capacity of the accused is an interlocutory question of fact" determined by the military judge.[54] An accused is presumed to possess mental capacity unless the contrary is established by a preponderance of the evidence.[55] In general, the accused has both the responsibility of raising the issue, usually in the form of a motion for appropriate relief,[56] and the burden of persuading the military judge.[57] Normally, the issue of mental capacity arises in the early stages of trial, raised either directly with the convening authority prior to referral or with the military judge after referral.[58] Because the accused's mental capacity is directly related to the accuracy and fairness of the judicial process, however, the defense and the court may raise the issue of mental capacity at any stage of trial, including the appellate process.[59]

In those cases in which an RCM 706 inquiry conducted prior to referral results in a finding that the accused lacks mental capacity, RCM 909(c) requires the convening authority, if he agrees with the report, to forward the charges to the next higher convening authority.[60] Assuming each of the subordinate convening authorities agree with the sanity board, the charges will eventually reach the general court-martial convening authority, who "shall" commit the accused to the custody of the Attorney General.[61] The Attorney General is then required to hospitalize the accused without any provision for a judicial hearing.[62] Only if the general court-martial convening authority disagrees with the findings of the sanity board will he maintain the normal wide discretion to dispose of the charges as deemed appropriate.[63]

The provisions of RCM 909(c) result in a substantial loss of discretion at all levels for convening authorities who normally have complete authority to dismiss charges, forward charges to a higher commander, or refer charges to court-

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having a mentally ill servicemember remain assigned to an active military unit. Not only does the accused's duty position go unfilled by a suitable replacement, but the unit leadership must also continue to take care of the administrative details of the servicemember's pending court-martial. *See id.* (providing an excellent discussion of the pragmatic considerations that impact the representation of a mentally ill client).

[54] MCM, *supra* note 3, R.C.M. 909(b).

[55] Rule for Courts-Martial 909(e)(2) states:

> Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case.

Id. R.C.M. 909(e)(2).

[56] *Id.* R.C.M. 906(b)(14). *See* DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 13-5(A) (5th ed. 1999). When the defense makes a motion for appropriate relief, the specific relief requested is for the military judge to conduct a competence determination hearing in accordance with RCM 909. If the military judge finds that the accused lacks mental capacity, he should grant a stay of the proceedings and then forward a report of his findings to the general court-martial convening authority. *See* BENCHBOOK, *supra* note 9, para. 6-2.

[57] MCM, *supra* note 3, R.C.M. 904(c)(2)(A); *see also* Medina v. California, 506 U.S. 437 (1992) (holding that the Due Process Clause is not violated by a rule placing the burden of proof on the defendant to prove incompetence by a preponderance of the evidence).

[58] MCM, *supra* note 3, R.C.M. 909(c), (d).

[59] *See, e.g.*, Drope v. Missouri, 420 U.S. 162, 181 (1975) ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); United States v. Thomas, 34 M.J. 788, 792 (A.C.M.R. 1992) (setting aside the findings and sentence after determining that the appellant was mentally incompetent at the time of trial and not mentally responsible for the offenses charged); MCM, *supra* note 3, R.C.M. 1107(b)(5) (prohibiting the convening authority from approving a sentence if the accused lacks mental capacity); *id.* R.C.M. 1203(c)(5) (prohibiting an appellate authority from affirming court-martial proceedings while the accused lacks mental capacity, and providing a mechanism for requesting a post-trial RCM 706 inquiry).

[60] Rule for Courts-Martial 909(c) states:

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

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

[61] *Id.*

[62] *Id.* R.C.M. 909(f) ("An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in Section 4241(d) of title 18, United States Code.").

[63] *Id.* R.C.M. 909(c) ("If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.").

martial.[64] Not only is the accused involuntarily committed without receiving a hearing,[65] but the general court-martial convening authority, along with his subordinate convening authorities, lose their wide discretion to act upon charges when a sanity board finds that an accused lacks mental capacity.[66] This consequence arises even when the charges are minor or the government's case is weak, issues that are significant for at least two reasons. First, from the convening authority's perspective, these two criteria may weigh in favor of alternate disposition. If the charges are relatively minor or the government's case is weak, then the high cost of involuntary commitment, which includes both human and pecuniary costs,[67] might easily be outweighed by the convenience of administrative discharge. Second, from the accused's perspective, these two criteria will be important considerations in determining whether to contest the charges on the merits. When the Attorney General involuntarily hospitalizes a servicemember prior to referral, the accused is denied the ability to contest both the appropriateness of the commitment and the validity of the allegations. In the case of minor offenses, the accused may by hospitalized for a period longer than if he were confined after being convicted at trial. Defense counsel should, therefore, avoid the impulse to embrace a finding of mental incapacity as a way to avoid or delay possible conviction, looking instead to the overall interests of their client.

After referral of charges, the issue of mental capacity may be raised by either party, *sua sponte* by the military judge, or by an RCM 706 inquiry.[68] If an RCM 706 inquiry, conducted before or after referral, concludes that the accused lacks capacity to stand trial, "the military judge *shall* conduct a hearing to determine the mental capacity of the accused."[69] At the incompetence determination hearing, as it is referred to by RCM 909, the only applicable rules of evidence are those concerning privileges.[70] If the military judge determines that the accused is not mentally competent, he must report his findings to the general court-martial convening authority, "who shall commit the accused to the custody of the Attorney General."[71] As with the situation in which mental capacity is found to be lacking prior to referral and the general court-martial convening authority agrees, RCM 909 mandates the accused's commitment to the Attorney General. The real difference between pre- and post-referral procedures, which is significant in terms of the accused's due process rights, is that after referral, the military judge is required to conduct an adversarial hearing before making a finding of incompetence.[72]

Once the accused has been hospitalized by the Attorney General, the procedures of 18 U.S.C. § 4241(d) control.[73] The accused will remain hospitalized until medical personnel make a determination whether the accused is likely to regain competency within a foreseeable period of time.[74] Although this period initially is limited to four months, the accused may

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[64] *Id.* R.C.M. 401(c).

[65] *Id.* R.C.M. 909(c); 18 U.S.C. § 4241(d) ("The Attorney General shall hospitalize the defendant in a suitable facility . . . .").

[66] As noted earlier, the convening authority is not required to commit the accused to the custody of the Attorney General if he does not concur with the sanity board's findings. Applying the rule in good faith would require that the convening authority have a legitimate reason to doubt the professional opinion of the sanity board, rather than a pragmatic reason for avoiding the consequences of applying RCM 909(c) as it is written. Thus, a convening authority could not reject the sanity board's findings based solely on the severity of the charges or the strength of the government's evidence because those two factors do not bear on whether the accused lacks mental capacity to stand trial.

[67] The human costs referred to in this paragraph include the time and effort of the trial counsel in preparing the case and litigating the accused's mental capacity, the time and effort of the servicemembers in the accused's command who will likely be responsible for making his transfer to the Attorney General, and the time and effort of the numerous individuals employed by the Department of Justice and the Bureau of Prisons in dealing with the accused's transportation and treatment. The financial costs include the expenses of transportation, payment of salaries to all individuals who will be dealing with the accused's case rather than some other official duty, and the salaries of the physicians and other medical personnel who will tend to the accused during the period of hospitalization.

[68] *Id.* R.C.M. 909(d).

[69] *Id.* Other than this one clause referring to the types of evidence the military judge may consider, RCM 909 does not prescribe any additional procedures to be followed by the military judge in conducting the incompetence determination hearing.

[70] *Id.* R.C.M. 909(e)(2).

[71] *Id.* R.C.M. 909(e)(3).

[72] Interestingly, if a sanity board conducted after referral finds an accused mentally incompetent, the general court-martial convening authority could theoretically avoid the burden of an incompetence determination hearing by withdrawing the referred charges, rather than immediately submitting the sanity board report to the court. Once the charges were withdrawn, the accused could be immediately turned over to the Attorney General under the provisions of RCM 909(c). This hypothetical scenario seems implausible if one assumes that the government is anxious to proceed to trial, in which case the opportunity to litigate the accused's lack of capacity in front of the court might be welcomed. In the case where the government is not anxious to get to trial, for whatever reason, there is the possibility that the provisions of RCM 909 could be abused.

[73] UCMJ art. 76b(a)(2) (2005).

[74] Section 4241(d)(1) states, in part, that:

> The Attorney General shall hospitalize the defendant for treatment in a suitable facility—(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and (2) for an additional reasonable period of time until—(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he

remain hospitalized for a longer period of time if there is a substantial probability that he will regain competency within that period.[75] If the accused regains his mental capacity to stand trial, either through treatment or otherwise, the general court-martial convening authority, after receiving notification, must promptly take custody of the accused.[76] If the accused does not regain mental capacity by the end of the initial hospitalization period, he will be returned to the custody of the general court-martial convening authority.[77] At this point, the general court-martial convening authority must order a hearing to determine whether the accused should be released.[78] At the hearing, the military judge will determine whether the accused's release would pose a substantial threat to either people or property.[79] If the military judge finds by clear and convincing evidence that the accused's release would pose such a threat, the accused is committed to the Attorney General indefinitely.[80] If the accused's hospitalization occurred prior to referral of charges, Article 76b, UCMJ, does not create any procedure by which the convening authority may hold a hearing.[81] In the absence of a military judge to conduct the hearing, the convening authority may unilaterally determine whether the accused should be released or remain hospitalized.[82] As will be argued below, this procedural gap is strong evidence that the drafters of Article 76b, UCMJ, did not intend for accused servicemembers to be hospitalized by the Attorney General prior to referral of charges.[83] At a minimum, the drafters probably did not foresee the possibility of a servicemember being hospitalized indefinitely without receiving any form of judicial review.

If, after referral, the military judge finds that the accused is competent to stand trial, the accused must generally proceed to trial and raise the issue on appeal.[84] During the appellate process, the military judge's decision on an interlocutory

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> will attain the capacity to permit the trial to proceed; or (B) the pending charges against him are disposed of according to law; whichever is earlier.

Id. At least three federal circuit courts of appeals have found the mandatory commitment provisions of § 4241(d) to be constitutional. *See* United States v. Filippi, 211 F.3d 649 (1st Cir. 2000); United States v. Donofrio, 896 F.2d 1301 (11th Cir. 1990); United States v. Shawar, 865 F.2d 856 (7th Cir. 1989).

[75] 18 U.S.C.S. § 4241(d) (LEXIS 2005).

[76] UCMJ art. 76b(a)(4).

[77] 18 U.S.C.S. § 4241(d).

[78] UCMJ art. 76b(a)(5) ("In the application of section 4246 of title 18 to a case under this subsection, references to the court that ordered the commitment of a person, and to the clerk of such court, shall be deemed to refer to the general court-martial convening authority for that person.").

[79] 18 U.S.C.S. § 4246(d). Section 4246(d) states:

> If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General.

Id. The legal standard for indefinite commitment contained in § 4646(d), including the government's burden of proving dangerousness by clear and convincing evidence, is consistent with the Supreme Court's decision in *Addington v. Texas*, 441 U.S. 418 (1979).

[80] 18 U.S.C.S. § 4646(d).

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

Id.

[81] UCMJ art. 76b(a)(5) ("In the application of section 4246 of title 18 to a case under this subsection, references to the court that ordered commitment of a person . . . shall be deemed to refer to the general court-martial convening authority for that person.").

[82] The Air Force Court of Criminal Appeals is the only military appellate court that has interpreted RCM 909(c). In *United States v. Salahuddin*, the petitioner was charged with three specifications in violation of Article 134. 54 M.J. 918, 919 (A.F. Ct. Crim. App. 2001). Prior to referral, the special court-martial convening authority, at the request of the defense counsel, ordered an RCM 706 inquiry. *Id.* Following receipt of the sanity board's finding that Master Sergeant Salahuddin lacked mental capacity due to "neuropsychological deficits," the general court-martial convening authority committed the appellant to the custody of the Attorney General. *Id.* Because commitment occurred prior to referral, the appellant did not receive a hearing in front of a military judge. The court denied a defense request for either (1) a writ of mandamus ordering that the accused be granted a hearing before a military judge or (2) an order quashing the convening authority's order to commit the accused to the custody of the Attorney General. *Id.* Avoiding the issue of whether the All Writs Act, 28 U.S.C.S. § 1651 (LEXIS 2005), provided jurisdiction, the court held that the petitioner was not entitled to relief. *Id.* at 920. The *Salahuddin* court gave the language of Article 76b, UCMJ, and RCM 909, its literal interpretation, finding that both the statute and the rule afforded no discretion to the convening authority. *Id.* The court did not address either of the issues argued in this paper. The Court of Appeals for the Armed Forces (CAAF) denied a petition for writ appeal. United States v. Salahuddin, 54 M.J. 456 (2001).

[83] *See infra* note 98 and accompanying text.

[84] *See* UCMJ art. 66; MCM, *supra* note 3, R.C.M. 1203.

question of fact will not be overturned unless clearly erroneous.[85] If the accused prevails on appeal, however, the judge's findings will usually be reversed, and the accused will be entitled to a new trial, assuming he has regained mental capacity.[86]

The final provision of RCM 909 is noteworthy in that it excludes all periods of hospitalization by the Attorney General from the RCM 707 speedy trial clock—a 120-day time period.[87] This provision is clearly more favorable to the government than the accused, primarily because it provides an additional 120 days for the government to bring the accused to trial after the accused is released from commitment. Rather than tolling the 120-day clock during the accused's hospitalization, the clock is reset to zero following his release. Defense counsel should note that RCM 909 does not mention any other speedy trial rights held by the accused, including those under Article 10, UCMJ,[88] or the Sixth Amendment to the Constitution.[89] Although Article 10, UCMJ, does not apply directly to a case of involuntary hospitalization due to mental illness, it may still apply to a given case if the accused has been placed in pretrial confinement either before or after the period of hospitalization. Because of this omission, the defense may still have an argument that an accused subjected to pretrial confinement was deprived of his Article 10 right to a speedy trial, even if the government has not violated the RCM 707 120-day speedy trial clock .[90]

C. Legality of the Involuntary Commitment Provisions of RCM 909

When a general court-martial convening authority agrees with a pre-referral sanity board's finding that an accused lacks mental capacity, RCM 909(c) requires the general court-martial convening authority to commit the accused to the Attorney General without providing any meaningful procedural rights to contest the findings of the sanity board.[91] The accused may be directed to undergo an RCM 706 inquiry at which he has no right to representation,[92] no right to gather or present evidence, and no means to contest the findings.[93] Based upon the results of that inquiry, the general court-martial convening authority may involuntarily commit the accused to the custody of the Attorney General, once again without giving the accused any means by which to contest either the decision or the facts supporting the decision.[94] Rule for Courts-Martial 909's pre-referral provisions are invalid for two reasons: (1) the statutory authority for RCM 909, found in Article 76b(a), UCMJ,[95] only applies to charges that have been referred to court-martial; and (2) the involuntary commitment of an individual without a hearing violates the Due Process Clause of the Fifth Amendment.[96]

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[85] United States v. Proctor, 37 M.J. 330, 336 (C.M.A. 1993). *Cf.* United States v. Collins, 60 M.J. 261 (2004) (Crawford, C.J., concurring).

[86] *See* Drope v. Missouri, 420 U.S. 162 (1975) (holding that an attempt to conduct an after-the-fact inquiry into the accused's mental capacity at the time of trial would not be adequate to protect the appellant's due process rights); United States v. Thomas, 34 M.J. 788 (A.C.M.R. 1992) (setting aside the findings and sentence after determining that the accused lacked mental capacity at the time of trial); *see also* United States v. Collins, 41 M.J. 610, 613 (Army Ct. Crim. App. 1994) (returning the case to the Judge Advocate General without reversing it, and directing that the military judge order an RCM 706 inquiry to determine mental capacity of the appellant at the time of trial).

[87] MCM, *supra* note 3, R.C.M. 909(g) ("All periods of commitment shall be excluded as provided by RCM 707(c). The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment."); *see id.* R.C.M. 707(b)(3)(E) (containing a parallel provision regarding the 120-day time limit).

[88] UCMJ art. 10; *see also* United States v. Cooper, 58 M.J. 54 (2003); United States v. Birge, 52 M.J. 209, 211 (1999) (reiterating that the standard for compliance with Article 10 is whether the government acted with due diligence in prosecution of the case).

[89] U.S. CONST. amend. VI; *see also* Barker v. Wingo, 407 U.S. 514 (1972) (articulating the legal standard for the government's compliance with the Speedy Trial Clause of the Sixth Amendment).

[90] *See Cooper*, 58 M.J. at 59 (2003) (holding that the protections afforded by Article 10, UCMJ, extend beyond those provided by RCM 707).

[91] *See supra* notes 61-64 and accompanying text.

[92] Because charges must be preferred prior to an RCM 706 inquiry, the accused will have access to legal advice from a military defense counsel; however, no statutory or regulatory provision allows actual representation of the accused at a sanity board. *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 6 (6 Sept. 2002).

[93] *See* MCM, *supra* note 3, R.C.M. 706; *see also* U.S. DEP'T OF ARMY, REG. 40-400, PATIENT ADMINISTRATION para. 7-6 (12 Mar. 2001) (providing no procedural guidance for the conduct of a sanity board).

[94] *See supra* Part II.B.

[95] Article 76b(a)(1), UCMJ, states:

> In the case of a person determined under this chapter [10 USCS §§ 801 et seq.] to be presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case, the general court-martial convening authority for that person shall commit the person to the custody of the Attorney General.

UCMJ art. 76b(a)(1) (2005).

[96] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .").

Before developing the two arguments listed above, it is helpful to understand the context in which an accused may wish to raise those arguments. When the defense counsel is requesting a sanity board, one might reasonably ask why the accused might complain about a finding of mental incapacity. After all, involuntary hospitalization arguably serves the interests of justice and the accused by ensuring that the accused receives care and treatment prior to trial. This line of reasoning presumes at least four facts that may or may not be true: (1) the results of the sanity board are accurate; (2) the accused committed the offenses alleged; (3) the government can prove that the accused committed the offenses alleged; and (4) the accused regards the potential punishment at trial as being worse than detention in a mental hospital and the stigma associated with involuntary commitment. There are at least two categories of defendants who would want to contest a finding of mental incompetence: those who wish to contest their guilt, either because they are truly innocent or because the government cannot prove its case; and those who stand to suffer more harm from involuntary commitment than criminal punishment. For individuals in these two categories, the right to a hearing in front of a neutral decisionmaker is of tremendous value because it would give them the procedural opportunity to fight a potentially unjust deprivation of their liberty.

The first argument—RCM 909 should apply only to referred charges—requires nothing more than an application of the plain meaning of Article 76b, the statue from which RCM 909 derives its authority.[97] The implementing language of Article 76b, UCMJ, states "Section 876b of title 10, United States Code (article 76b of the Uniform Code of Military Justice) . . . shall apply with respect to charges *referred* to courts-martial . . . ."[98] The plain meaning of this statutory language is that Article 76b, UCMJ, does not apply to charges prior to referral. Although the President has independent authority to prescribe appropriate rules for courts-martial under Article 36, UCMJ,[99] that authority does not include the ability to authorize the Attorney General to involuntarily hospitalize a servicemember.[100] Neither Article 76b, UCMJ, nor RCM 909(c), gives the Attorney General authority to involuntarily hospitalize a servicemember facing charges that have not been referred.[101]

In addition to the lack of statutory support, RCM 909's provisions authorizing the general court-martial convening authority to involuntarily hospitalize the accused without a hearing violate the Due Process Clause of the Fifth Amendment.[102] As will be demonstrated below, the Due Process Clause guarantees that an individual will not be detained[103] against his or her will without receiving some minimal procedural protections, the most important of which is an adversarial hearing in front of a neutral decisionmaker to contest the factual basis for the detention.[104] Rule for Courts-Martial 909 fails to provide this fundamental protection, thus violating the servicemember's "right to be free from involuntary confinement by his own government without due process of law."[105]

The Due Process Clause states, "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."[106] While the Constitution does not prescribe what process is due, the Supreme Court has interpreted the Fifth Amendment to guarantee that certain minimum standards must be followed before a citizen may be denied liberty.[107] In the

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[97] *See* MCM, *supra* note 3, analysis, at A21-58 ("The rule was changed to provide for the hospitalization of an incompetent accused after the enactment of Article 76b, UCMJ, in section 133 of the Nation [sic] Defense Authorization act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 464-66 (1966).").

[98] National Defense Authorization Act of Fiscal Year 1996, Pub. L. No. 104-106, § 1133(c), 110 Stat. 466 (1995) (emphasis added).

[99] UCMJ art. 36(a) (giving the President authority to prescribe rules for trial procedure and rules of evidence).

[100] Authority for the Attorney General to hospitalize a mentally incompetent defendant is found in 18 U.S.C. § 4241 (2000). This statutory authority is referenced explicitly by Article 76b(a)(1)(2), UCMJ, which states, "The Attorney General shall take action in accordance with section 4241(d) of title 18." Because Article 76b only applies to referred charges, it would be illogical to conclude that the statute supports a rule for courts-martial that requires action by the Attorney General in cases that have not been referred.

[101] UCMJ art. 76b(a); MCM, *supra* note 3, R.C.M. 909(c).

[102] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .").

[103] The word "detain" is used as a generic term to describe any circumstance in which a person has been deprived of liberty. Forms of detention include "Terry" stops and arrests made by law enforcement and civil commitment or hospitalization authorized by a competent authority.

[104] *See* Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

[105] *Id.* at 2647.

[106] U.S. CONST. amend. V.

[107] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding a Kansas statute allowing for indefinite civil commitment after a judicial finding of dangerousness coupled with mental illness); Medina v. California, 505 U.S. 437 (1992) (upholding a California statute requiring a defendant to prove mental incapacity by a preponderance of the evidence); Foucha v. Louisiana, 504 U.S. 71 (1992) (finding that a Louisiana statute allowing for the continued involuntary hospitalization of an insanity acquittee who was no longer mentally ill violated the Due Process Clause); United States v. Salerno, 481 U.S. 739 (1987) (holding that the 1984 Bail Reform Act allowing for a defendant to be detained based upon dangerousness to the community did not violate the Due Process Clause in part because of the many procedural protections afforded); Jones v. United States, 463 U.S. 354 (1983) (ruling that the Due Process Clause permits the government to confine an insanity acquittee to a mental hospital "until such time as he has regained his sanity or is no longer a danger to himself or society"); Vitek v. Jones, 445 U.S. 480 (1980) (holding that the Due Process Clause guarantees a prisoner a right to notice, an adversarial hearing, and counsel before he may be transferred to a mental hospital); Addington v. Texas, 441 U.S. 418 (1979) (stating that the Due Process Clause requires the state, acting in a civil commitment proceeding, to prove by clear and convincing evidence that the person to be committed is both mentally ill and dangerous to

words of Chief Justice Rehnquist, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[108]

The first step in determining whether the involuntary commitment provisions of RCM 909 comport with due process is to identify the applicable legal standard. When deciding whether government action affecting life, liberty, or property satisfies due process, the Supreme Court has traditionally applied a test from the 1976 case of *Mathews v. Eldridge*.[109] In *Mathews,* the Court considered the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [110]

Although *Mathews* involved the deprivation of government benefits rather than individual liberty, the Court subsequently cited *Matthews* favorably in numerous cases involving involuntary detention.[111] More recently, however, in *Medina v. California*,[112] Justice Kennedy, writing for the majority, rejected the *Mathews* test in cases involving the validity of state criminal procedures.[113] Justice Kennedy instead applied the test set out in *Patterson v. New York*.[114] The *Patterson* test upheld a state criminal procedure under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[115] Under the *Patterson* test, procedures that comport with due process are essentially those that have roots in historical practice, as reflected in the English common law tradition.[116] Because the *Patterson* test limits the protections of the Due Process Clause to those practices that have existed historically, rather than allowing for judicial expansion through the more subjective balancing test prescribed by *Mathews*, it necessarily gives greater deference to legislative judgments in the field of criminal procedure.[117]

Unfortunately, the debate over the appropriate test by which to evaluate compliance with procedural due process did not end with *Medina*. Just last year, the Supreme Court revisited the question of what legal standard to apply when determining whether government detention of an individual violates the Due Process Clause.[118] In *Hamdi v. Rumsfeld*, the Court answered the limited question of whether the government could detain a citizen captured abroad and held as an enemy

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either himself or others); Morrissey v. Brewer, 408 U.S. 471 (1972) (establishing procedural Due Process guarantees prior to revocation of parole); Jackson v. Indiana, 406 U.S. 715 (1972) (holding that a defendant committed indefinitely solely because of his mental incapacity is entitled by the Due Process Clause to formal commitment proceedings); Greenwood v. United States, 350 U.S. 366 (1956) (upholding the federal procedures (18 U.S.C. §§ 4244 – 4248 (2000)) for commitment of mentally ill defendants, which included an adversarial hearing in addition to other safeguards). In the cases cited above, the Supreme Court makes no distinction between the procedures guaranteed by the Fifth Amendment as applied directly to the federal government, or as applied via the Fourteenth Amendment to the states. Although not stated expressly by any of the authorities cited above, the application of precedent within the many opinions makes it clear that the law applied to the states through the Fourteenth Amendment is equally applicable to the federal government under the Fifth Amendment. *See Hamdi*, 124 S. Ct. at 2646-48 (citing numerous cases decided under the Fourteenth Amendment as support for the court's interpretation of the Fifth Amendment's Due Process Clause).

[108] *Salerno*, 481 U.S. at 755.

[109] 424 U.S. 319 (1976).

[110] *Id.* at 335. The *Mathews v. Eldridge* test is applicable to claims that governmental action has failed to comport with guarantees of "procedural" due process, rather than "substantive" due process. *See Salerno*, 481 U.S. at 746. Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *Id.* (internal citations omitted).

[111] *See Salerno*, 481 U.S. at 747 (denial of bail); *Addington*, 441 U.S. at 425 (civil commitment); *Jones*, 463 U.S. at 366 (commitment following successful sanity defense).

[112] 505 U.S. 437 (1992).

[113] *Id.* at 445.

[114] *Medina*, 505 U.S. at 446 (citing Patterson v. New York, 432 U.S. 197 (1977)). Justice O'Connor argued in a concurring opinion, joined by Justice Souter, that the *Mathews* balancing test remains appropriate in cases of criminal procedure, and that the majority's exclusive reliance upon *Patterson* was not justified. *Id.* at 453 (O'Connor, J. concurring). Likewise, Justice Blackmun, joined by Justice Stevens, argued in a strong dissent that the majority's application of the *Patterson* test over that of *Matthews* was incorrect. *Id*. at 459 (Blackmun, J., dissenting).

[115] *Id.* at 445 (citing *Patterson*, 432 U.S. at 201-02).

[116] *Id.* at 446.

[117] In *Medina*, the Court ultimately ruled that the procedure established by the State of California was neither fundamentally unfair, nor in violation of a universal practice under the common law. The Due Process Clause, therefore, was not violated by a statute requiring the defendant to prove lack of mental capacity by a preponderance of the evidence. *Id.* at 449.

[118] *See* Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

combatant on U.S. soil, without access to judicial review or other meaningful due process.[119] Justice O'Connor, writing for a plurality, applied the *Mathews* balancing test.[120] Balancing Hamdi's interest in freedom against the government's need to detain enemy combatants, Justice O'Connor concluded that even under circumstances of war or national emergency "'commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection.'"[121] The purpose of those procedures must be to "'protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.'"[122] The plurality opinion concluded that even under the circumstances of the Global War on Terror, the Due Process Clause guaranteed Hamdi the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker."[123] Justice Scalia, joined by Justice Thomas, wrote a dissent in which he sharply criticized the plurality's reliance on the *Mathews* test.[124] Although not relying directly on *Patterson*, Justice Scalia once again sought authority primarily from common law tradition.[125] Justice Scalia's historical analysis of the treatment of detainees led him to the conclusion that Hamdi was entitled to be released, unless the Executive began criminal prosecution or Congress suspended the writ of habeas corpus.[126] Although the vitality of the *Mathews* balancing test seems to be supported by the *Hamdi* decision, it remains unclear what the Court might do in a case involving a matter of criminal procedure, such as temporary commitment of an incompetent defendant.

Whether applying the *Mathews* balancing test or the *Patterson* inquiry into the common law tradition, the best evidence of the meaning of the Due Process Clause, as applied to the commitment of a mentally incompetent defendant, is found in current Supreme Court precedent. Beginning with *Vitek v. Jones*,[127] the Court addressed the question of whether the Due Process Clause guaranteed a prisoner any procedural rights before he could be transferred involuntarily to a mental hospital for treatment.[128] In *Vitek*, the Director of the Department of Correctional Services transferred Jones, the appellee, from prison to a state mental hospital after receiving the results of a required mental health evaluation.[129] The state statute authorizing Jones's transfer did not provide any means for him to contest either the results of his mental health evaluation or the validity of his transfer.[130] In its analysis, the Court recognized that "commitment to a mental hospital produces 'a massive curtailment of liberty,' and in consequence 'requires due process protection.'"[131] Because the law did not allow Jones to challenge the factual basis for his transfer, the Court affirmed the district court's finding of a due process violation.[132] The *Vitek* decision also affirmed the district court's articulation of the following procedures that state law should have afforded to Jones: (1) written notice of the contemplated action; (2) a hearing at which the individual would have access

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[119] *Id.* at 2635.

[120] *Id.* at 2646. Justices Souter and Ginsberg both dissented, arguing that the government's detention of Hamdi was illegal, and therefore did not reach the question of what process is guaranteed by the Due Process Clause. *Id.* at 2660 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). They did, however, support the plurality's conclusion that Hamdi was entitled, at a minimum, to notice and a hearing before a neutral decisionmaker. *Id*.

[121] *Id.* at 2646-47 (quoting Jones v. United States, 463 U.S. 354, 361 (1983)). The majority's citation to *Jones* is important because that case involved commitment following a finding of not guilty by reason of insanity. The Court's reliance upon a case involving state criminal procedure while applying the *Mathews* balancing test supports a conclusion that the *Medina* decision may not have a significant impact on the Court's due process analysis in future cases.

[122] *Id.* at 2647 (quoting Carey v. Piphus, 435 U.S. 247, 259 (1978).

[123] *Id.* at 2648. One of the issues initially litigated by Hamdi included his right to the assistance of counsel; however, by the time the Supreme Court received the case, the government provided Hamdi with an attorney, making the issue moot. The Court stated in dicta that Hamdi "unquestionably has the right to access to counsel in connection with the proceedings on remand." *Id.* at 2659.

[124] *Id.* at 2672 (Scalia, J., dissenting). The language chosen by Justice Scalia is telling of the degree to which he disagrees with the majority's application of the *Mathews* balancing test:

> [T]he plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protection *it* thinks appropriate. It 'weigh[s] the private interest . . . against the Government's asserted interest,' and—just as though writing a new Constitution—comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a 'neutral' military officer rather than judge and jury. It claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*, a case involving . . . *the withdrawal of disability benefits!*

Id.

[125] *Id.* at 2663 (Scalia, J., dissenting).

[126] *Id.* at 2671 (Scalia, J., dissenting).

[127] 445 U.S. 480 (1980).

[128] *Id.* at 482-83.

[129] *Id.*

[130] *Id.* at 484.

[131] *Id*. at 491-92 (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972) and Addington v. Texas, 441 U.S. 418, 425 (1979)) (internal citations omitted).

[132] *Id.* at 496.

to the government's evidence and an opportunity to present a defense; (3) an opportunity to call witnesses and to cross-examine witnesses called by the government; (4) an independent decisionmaker; (5) a written statement of the final decision along with the evidence considered by the decisionmaker; (6) availability of legal assistance; and (7) timely notice of each of the above rights.[133] These procedures were again cited by the Supreme Court a few years later in *United States v. Salerno*,[134] a case involving pretrial detention of a criminal defendant.

In *Salerno*, the Court upheld the Bail Reform Act of 1984 after finding that the statute provided procedural protections similar to those articulated in *Vitek*.[135] The issue in *Salerno* was whether the provision of the Bail Reform Act allowing for continued detention of an arrestee to assure the safety of the community violated the Due Process Clause of the Fifth Amendment.[136] In its analysis, the Court weighed the government's interest "in preventing crime by arrestees" against "the individual's strong interest in liberty."[137] In reaching its decision in favor of the government, the Court relied heavily upon the "extensive safeguards" contained in the statute, including: (1) the right to counsel; (2) the right to a detention hearing in front of a judicial officer; (3) the right to testify, present evidence, and cross-examine witnesses; (4) the requirement that the judicial officer consider prescribed factors in arriving at a decision; (5) the requirement that the government prove its case by clear and convincing evidence; (6) the requirement that the judicial officer make written findings of fact supporting the decision to detain; and (6) the right to seek judicial review.[138] These procedural protections, in the words of the Court, "must attend this adversarial hearing" to defeat a constitutional challenge.[139]

Although the Supreme Court has decided numerous other cases requiring application of the Due Process Clause to involuntary detention,[140] the question of whether RCM 909 violates the Due Process Clause of the Fifth Amendment can be fully answered by the Court's decisions in V*itek*, *Salerno*, and *Hamdi*. First, the *Jones* decision makes it clear that involuntary commitment to a mental institution infringes upon a constitutionally-protected liberty interest.[141] Second, *Jones* and *Hamdi* strongly support a conclusion that commitment for any purpose, including mental incapacity, requires some due process protection.[142] Third, *Hamdi* specifies that the Due Process Clause guarantees notice of the basis for the detention and an opportunity to challenge that basis in front of a neutral decisionmaker, even when the government's interest is at its peak.[143] And finally, *Jones* and *Salerno* concluded that the following procedural framework will comply with the Due Process Clause—(1) notice of the basis for the detention; (2) a right to counsel; (3) an adversarial hearing in front of a neutral decisionmaker; (4) the right to testify, call witnesses, present evidence, and cross-examine government witnesses; (5) written findings by the decisionmaker; and (6) the right to a judicial review of the outcome.[144] Of the six baseline procedures listed above, RCM 909 provides only for notice of the basis for commitment, access to counsel, and written findings of the decisionmaker.[145] The fundamental right to contest the factual basis for commitment in front of a neutral decisionmaker, as described in *Vitek*, is completely absent.

Rule for Court-Martial 909's deficiencies become even more apparent when compared to the federal court commitment procedures. Before a federal criminal defendant may be involuntarily committed due to mental incompetence, he is entitled to a psychiatric or psychological evaluation followed by a judicial hearing.[146] At the hearing, the defendant is entitled to

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[133] *Id.* at 495-96 (citing Morrissey v. Brewer, 408 U.S. 471, 496-98 (1972)).

[134] 481 U.S. 739 (1987).

[135] *Id.* at 755.

[136] *Id.* at 741.

[137] *Id*. at 750.

[138] *Id.* at 751-52.

[139] *Id.* at 754.

[140] *See* cases cited *supra* note 107.

[141] Vitek v. Jones, 445 U.S. 480, 491-92 (1980).

[142] Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2646-47 (2004).

[143] *Id*. at 2648.

[144] *See supra* notes 133, 138 and accompanying text.

[145] Although the accused has no right to a direct appeal of the interlocutory determination of incompetence by the sanity board or convening authority, one could argue that the availability of habeas corpus suffices for access to judicial review.

[146] 18 U.S.C.S. § 4241 (LEXIS 2005).

> § 4241. Determination of mental competency to stand trial
>
> (a) Motion to determine competency of defendant. At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the

representation by counsel, the opportunity to testify, present evidence, subpoena witnesses, and cross-examine witnesses for the government.[147] Only after the court determines, by a preponderance of the evidence, that the defendant is mentally incompetent may he be committed.[148] In comparison to the federal criminal procedures described above, RCM 909 is woefully inadequate.

Considering the significant procedural shortcomings of RCM 909, both in relation to federal criminal procedures and the Due Process Clause, and in conjunction with the lack of statutory support for involuntary hospitalization prior to referral, the only reasonable conclusion is that the provisions of RCM 909(c) are invalid.

D. Recommendations for Amending RCM 909

At a minimum, those provisions of RCM 909 that apply to charges not yet referred must be repealed, not only because they violate the Due Process Clause, but simply because they are not supported by the implementing language of Article 76b, UCMJ.[149] Appendix A, a draft amendment to RCM 909, includes numerous changes based on the arguments above. The proposed changes bring the rule into compliance with the Due Process Clause, respect the limited applicability of Article 76b, UCMJ, restore final discretion in the convening authority, and provide procedures consistent with federal criminal law.

The changes in section (c) of appendix A reflect that the findings of a sanity board are not the same as a judicial determination of mental incapacity. The purpose of an RCM 706 inquiry is "'to provide for the detection of mental disorders not . . . readily apparent to the eye of the layman.'"[150] The board's findings are not legal conclusions, and should not be construed as such for purposes of justifying involuntary hospitalization.[151] The amendment to section (c) supports a

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> mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.
>
> (b) Psychiatric or psychological examination and report. Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).
>
> (c) Hearing. The hearing shall be conducted pursuant to the provisions of section 4247(d).

Id.

[147] *Id.* § 4247(d).

> (d) Hearing. At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

[148] *Id.* § 4241(d).

> (d) Determination and disposition. If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--
>
> (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and
>
> (2) for an additional reasonable period of time until--
>
> (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or
>
> (B) the pending charges against him are disposed of according to law;
>
> whichever is earlier.
>
> If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

Id. § 4241(d).

[149] *See supra* Part IIC.

[150] *See* United States v. Nix, 36 C.M.R. 76, 90 (C.M.A. 1965) (quoting Wear v. United States, 218 F.2d 24, 26 (1954).

[151] *See* United States v. Benedict, 27 M.J. 253 (C.M.A. 1988) (holding that a sanity board report is not admissible on the issue of the accused's mental capacity, in part because the court would be denied the significant benefit of cross-examination of the expert witnesses).

conclusion that the results of the sanity board should be treated the same as any other piece of factual evidence that might be relevant to the discretionary decision of a convening authority.

The only contrary argument for maintaining the current provisions of RCM 909 is that Article 76b(a)(1) requires the convening authority to commit the accused to the custody of the Attorney General after a finding of mental incapacity.[152] This argument fails, however, because it confuses the relevant evidence contained in the sanity board report with the factual findings required by Article 76(b)(a)(1)—the "finding of mental incapacity" referred to in Article 76b(a)(1) is a finding based on a consideration of all relevant evidence, not just the written conclusions of a sanity board. Rule for Courts-Martial 909(c) authorizes the convening authority to commit the accused based only upon the factual findings of a sanity board, rather than requiring that those facts be tested by the adversarial process and then applied to the law by a court.

The addition of section (e) in appendix A implements 18 U.S.C. § 4247(d), providing basic procedural rights applicable to hearings. These are the same rights granted to an accused found not guilty only by reason of lack of mental responsibility,[153] and, as previously argued, are guaranteed by the Due Process Clause. Section (f) also contains a significant change, giving the convening authority discretion to withdraw or dismiss charges following a military judge's finding that the accused is mentally incompetent. While this may seem to contradict the mandatory language of Article 76b(a)(1), UCMJ, it actually reflects two fundamental concepts of the military justice system. The first is that the convening authority is vested with a quasi-judicial role that allows him to accept or reject the findings and sentence of a court-martial, as long as the action is not more harmful to the accused than that of the court.[154] The second is that the convening authority has a prosecutorial function—he is the one who ultimately decides what offenses warrant prosecution.[155] Justification for this change finds further support in 18 U.S.C. § 4241(d), the statute upon which Article 76b(a) is based.[156] While § 4241(d) clearly divests authority from the court as to whether an incompetent defendant shall be committed, it does nothing to divest the U.S. Attorney of that authority.[157] In fact, an incompetent defendant who has been hospitalized by the Attorney General may not remain hospitalized after "pending charges against him are disposed of according to law."[158] The use of the broad phrase "disposed of according to law" is reasonably interpreted to include action by the U.S. Attorney dismissing the charges.[159] Because the convening authority has a prosecutorial role that allows him to dispose of charges by means other than trial, it only makes sense that Congress would not seek to foreclose action in the military justice system that is permitted in the federal system.[160] Finally, section (g) adds provisions for a judicial determination of dangerousness when an incompetent

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[152] UCMJ art. 76b(a)(1) (2005).

> In the case of a person determined under this chapter to be presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case, the general court-martial convening authority for that person shall commit the person to the custody of the Attorney General.

Id.

[153] *See* MCM, *supra* note 3, R.C.M. 1102A(c).

[154] *Id.* R.C.M. 1107(b)(1) ("The action to be taken on the findings and sentence is within the sole discretion of the convening authority.").

[155] *Id.* R.C.M. 403.

[156] *Id.* R.C.M. 909 analysis, at A21-58.

[157] *See* 18 U.S.C.S. § 4241(d)(2)(B) (LEXIS 2005) ("The Attorney General shall hospitalize the defendant for treatment in a suitable facility-- (2) for an additional reasonable period of time until--(B) the pending charges against him are disposed of according to law; whichever is earlier.").

[158] *Id.*

[159] S. REP. NO. 98-255, at 222 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3419 n.52 (discussing disposition of a defendant who has been hospitalized under the provisions of 18 U.S.C. § 4241(d) because he lacks mental capacity to stand trial).

> If all charges against a presently mentally defective defendant are dropped, the head of the facility in which the defendant is hospitalized may notify State authorities of the defendant's condition so that State authorities may determine if civil commitment proceedings are warranted. If State authorities cannot or will not arrange for the commitment of the defendant, Federal proceedings under section 2425 may be instituted if the reason for dropping the charges is related solely to the mental condition of the defendant. If the charges were dropped for other reasons, such as inadequate evidence to prove an offense, the Federal Government has no further interest in the case and cannot seek to civilly commit the defendant even if the State chooses not to proceed.

Id.

[160] Article 76b(b), UCMJ, applicable when an accused has been found not guilty only by reason of lack of mental responsibility, contains similar mandatory language for commitment of the accused to the Attorney General. *See* UCMJ art. 76b(b)(4) (2005). Interestingly, the discussion following R.C.M. 1107(b)(4), states, "Commitment of the accused to the custody of the Attorney General is discretionary." MCM, *supra* note 3, R.C.M. 1107(b)(4) discussion. It is not clear why the drafters of the *Manual for Courts-Martial* would view the mandatory provisions of Article 76b(a) differently from those of Article 76b(b).

servicemember does not regain competency after four months. These provisions implement Article 76b(a)(3), and are similar to those found in R.C.M. 1102A.[161]

III. Mental Responsibility

A. Substantive Provisions Relating to Mental Responsibility

In addition to the Constitutional requirement that the accused be mentally competent to stand trial, the common law affirmative defense of insanity, referred to in the military justice system as the lack of mental responsibility, is codified in Article 50a(a), UCMJ,[162] and implemented by RCM 916k(1).[163] Rule for Courts-Martial 916(k)(1) states, "It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts."[164] Unfortunately, the key terms in RCM 916(k)(1) are not defined. Understanding the elements of the insanity defense therefore requires practitioners to have a basic understanding of its history.

The insanity defense has existed throughout the history of American jurisprudence, and derives its elements from the English common law.[165] The most widely cited source for the insanity defense is an 1843 discussion from the English House of Lords regarding the *M'Naghten Case*.[166] From that discussion evolved the *M'Naghten* Rule, which states, in part:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong.[167]

Over the course of much of the nineteenth and twentieth centuries, the insanity defense underwent a gradual expansion, largely at the hands of the state judiciaries.[168] One major expansion occurred in 1870, when the highest court of New Hampshire rejected the *M'Naghten* Rule,[169] adopting instead what later became known as the *Durham* Rule.[170] The *Durham* Rule held that a defendant must be acquitted if his crime "was the product of mental disease or mental defect."[171] Another major expansion occurred with the development of the "irresistible impulse" test.[172] Ultimately incorporated into the American Law Institute's Model Penal Code, the "irresistible impulse" test excuses a defendant's otherwise criminal conduct if, due to a mental disease or defect, he lacks substantial capacity to "conform his conduct to the requirements of the law."[173] Following a failed attempt by John Hinckley, Jr. to assassinate President Ronald Reagan on 30 March 1981, and the subsequent trial focusing on Hinckley's insanity, Congress further changed the insanity defense by passing the Insanity Defense Reform Act of 1984.[174] That portion of the Act redefining the insanity defense, now codified in 18 U.S.C. § 17,[175]

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[161] *See* MCM, *supra* note 3, R.C.M. 1102A.

[162] UCMJ art. 50a(a); s*ee supra* note 4 (providing the text of Article 50a(a)).

[163] MCM, *supra* note 3, R.C.M. 916(k)(1).

[164] *Id.*

[165] *See generally* HENRY WEIHEFON, MENTAL DISORDER AS A CRIMINAL DEFENSE 52-81 (1954); CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 101, at 7-17 (15th ed. 1993) [hereinafter WHARTON'S CRIMINAL LAW].

[166] *See, e.g.*, WEIHOFEN, *supra* note 165, at 61.

[167] *Id*.

[168] *See* S. REP. NO. 98-255, at 223 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3405; WHARTON'S CRIMINAL LAW, *supra* note 165, §§ 101-05, at 7-38.

[169] *See* State v. Pike, 49 N.H. 399 (1870).

[170] *See* Durham v. United States, 214 F.2d 862 (1954); WAYNE R. LAFAVE, CRIMINAL LAW § 7.4, at 393 (4th ed. 2003).

[171] *Durham*, 214 F.2d at 875.

[172] LAFAVE, *supra* note 170, § 7.3, at 389. The irresistible impulse test and the *Durham* Rule developed independently of one another.

[173] *Id.* § 7.5 at 398; *see* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES pt. I, § 4.01 (1985) [hereinafter MODEL PENAL CODE].

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

Id.

[174] Insanity Defense Reform Act, Ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984).

resulted in a substantial narrowing of the insanity defense in the federal criminal system, largely resurrecting the *M'Naghten* Rule from 1843.[176] Two years later, Congress passed the Military Justice Amendments of 1986, changing the UCMJ insanity defense to mirror that of the federal criminal justice system.[177] Because the language of Article 50a(a) (and ultimately RCM 916(k)(1)) comes directly from 18 U.S.C. § 17, both the legislative history and judicial interpretation of the federal criminal statute are important to understanding the military defense of lack of mental responsibility.[178]

Rule for Courts-Martial 916(k)(1) creates a test with two elements for establishing the affirmative defense of lack of mental responsibility. The accused must prove by clear and convincing evidence: (1) that he suffered from a severe mental disease or defect at the time of the acts constituting the offense; and (2) that, as a result of that severe mental disease or defect, he was unable to appreciate either, the nature and quality of his acts or the wrongfulness of his acts.[179] The difficulty in understanding the elements is twofold. First, when is a mental disease or defect "severe?" And second, what does it mean to be incapable of "appreciating" either the "nature and quality" or "wrongfulness" of one's acts?

1. Defining "Severe Mental Disease or Defect"

Unfortunately, neither Article 50a(a) nor RCM 916(k)(1) define the word "severe." The President attempted to provide some guidance in RCM 706(c)(2)(A), which states in a parenthetical that "the term 'severe mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects."[180] The *Military Judges' Benchbook* uses similar language in the instruction on the defense of lack of mental responsibility:

> The term severe mental disease or defect can be no better defined in the law than by use of the term itself. However, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct or by nonpsychotic behavior disorders and personality disorders.[181]

This language, although not included in Article 50a(a), UCMJ, or its federal counterpart, 18 U.S.C. § 17, finds some support in the legislative history of the Insanity Defense Reform Act of 1984.[182] Specifically addressing the inclusion of the word "severe," the Senate Judiciary Committee explained that the "concept of severity was added to emphasize that nonpsychotic behavior disorders or neuroses such as an 'inadequate personality,' 'immature personality,' or a pattern of 'antisocial tendencies' do not constitute the defense."[183] Nonetheless, the potential effect of the definition found in both RCM 706 and the *Benchbook* is to narrow the affirmative defense of lack of mental responsibility by potentially excluding severe mental

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[175] 18 U.S.C.S. § 17 (LEXIS 2005) (originally codified at 18 U.S.C. § 20).

[176] S. REP. NO. 98-255, at 222 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3404-10 (discussing the reasons for eliminating the volitional prong of the cognitive-volitional test, as reflected in the Model Penal Code insanity defense, and returning to the a pure cognitive test, as reflected in the *M'Naghten* Rule).

[177] Military Justice Amendments of 1986, Pub. L. No. 99-661, 100 Stat. 3905 (1986). *See generally* MCM, *supra* note 3, R.C.M. 916(k) analysis, at A21-64. Prior to the Military Justice Amendments of 1986, RCM 916(k)(1) essentially restated the insanity defense from the Model Penal Code.

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacks substantial capacity to appreciate the criminality of that person's conduct or to conform that person's conduct to the requirements of the law. As used in this rule, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial behavior.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(k)(1) (1984) [hereinafter 1984 MCM]. In the 1969 *MCM*, the insanity defense was essentially the *M'Naugten* Rule plus the irresistible impulse test. *See* 1969 MCM, *supra* note 13, ¶ 120*b*. *See* United States v. Frederick, 3 M.J. 230 (C.M.A. 1977) (holding that the President lacks authority under Article 36, UCMJ, to prescribe affirmative defenses, like insanity, and finding that the appropriate test to be applied in courts-martial was that found in § 4.01 of the *Model Penal Code* rather than paragraph 120*b* of the 1969 MCM).

[178] *See, e.g.*, United States v. Martin, 56 M.J. 97, 103 (2001) (reciting the statutory history of Article 50a(a), UCMJ, as derived from 18 U.S.C. § 17).

[179] *Id.*

[180] MCM, *supra* note 3, R.C.M. 706(c)(2)(A).

[181] BENCHBOOK, *supra* note 9, para. 6-4.

[182] S. REP. NO. 98-255, at 229 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3411.

[183] *Id.*; *see also* LAFAVE, *supra* note 170, § 7.2(b), at 381 (concluding that the word "severe" in 18 U.S.C. § 17 is of no significance because the concerns raised in the legislative history that justified its addition were only relevant to the volitional prong (irresistible impulse test) of the Model Penal Code provision).

disorders that do not meet the definition of psychosis.[184] As will be argued below, this unjustified limitation upon a substantive defense is both contrary to military case law and an unlawful exercise of the President's rule making authority under Article 36, UCMJ.[185]

In *United States v. Proctor*[186] and *United States v. Benedict*,[187] the COMA affirmatively rejected any requirement that an accused be suffering from a psychosis to support an insanity defense. Looking first at *Proctor*,[188] the court stated expressly "that an accused need not be found to be suffering from a psychosis in order to assert an affirmative defense based on lack of mental responsibility, even though RCM 916(k) requires a finding of 'a severe mental disease or defect.'"[189] Because the court is empowered under Article 67, UCMJ, to interpret the law, which includes the meaning of the insanity defense as it is found in Article 50a, UCMJ, the court's definition necessarily trumps the definition found in RCM 706 and the *Benchbook*.[190] Although one might argue that the exclusion of "nonpsychotic behavior disorders" from the definition of "severe mental disease or defect" is not the same as requiring that the accused suffer from a psychosis, any possible distinction is semantic at best. As stated in *Benedict*, "Military law has never recognized an absolute rule that an accused must suffer from a psychosis in order to merit acquittal by reason of insanity."[191] To the extent the phrase "nonpsychotic behavior disorder" might cause either a court-martial panel or a sanity board to believe that the insanity defense requires proof of a psychosis, the phrase is contrary to law.

Even if one were to argue that *Proctor* and *Benedict* do not have precedential value in defining what constitutes a "severe mental disease or defect,"[192] there is still a strong argument that the President exceeded his authority under Article 36, UCMJ, by imposing a limiting definition.[193] Article 36(a), UCMJ, by its express language, limits the President's rulemaking authority to "[p]retrial, trial and post-trial procedures, including modes of proof.[194] . . ." Military appellate courts have consistently held that the President's power under Article 36(a) does not extend to the substantive criminal law, including both crimes and affirmative defenses.[195] While this proposition appears in numerous sources, it is, perhaps, most clearly

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[184] Psychosis is defined as "[a] mental disorder causing gross distortion or disorganization of a person's mental capacity, affective response, and capacity to recognize reality, communicate, and relate to others to the degree of interfering with his capacity to cope with ordinary demands of everyday life." STEDMAN'S MEDICAL DICTIONARY 1286 (25th ed. 1990).

[185] Article 36(a), UCMJ, states:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

UCMJ art. 36(a) (2005).

[186] 37 M.J. 330 (1993).

[187] 27 M.J. 253 (1988).

[188] *See supra* note 19 and accompanying text.

[189] *Proctor*, 37 M.J. at 336.

[190] *See* UCMJ art. 67(c) ("The Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."); UCMJ art. 66(c) ("The Court of Criminal Appeals . . . may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.").

[191] *Benedict*, 27 M.J. at 259.

[192] There are essentially two arguments in support of this conclusion. The first is that the language in both *Proctor* and *Benedict* was dicta, and therefore not binding in future cases. Looking first at *Proctor*, the issue specifically addressed by the court was whether the military judge's finding that the accused possessed mental capacity to stand trial was in error. *Proctor*, 37 M.J. at 330. The *Proctor* court made reference to the decision in *Benedict* primarily for the purpose of analogy, rather than engaging in the more thorough review that would ordinarily accompany interpretation of a federal statute. In *Benedict*, the court addressed four issues regarding the admissibility of evidence in a case that included a defense of lack of mental responsibility. *Benedict*, 27 M.J. at 253. Although the court specifically addressed the admissibility of evidence to prove "mental disease or defect," the case was tried prior to Congress's 1986 amendment of Article 50a, UCMJ. *See supra* note 177 and accompanying text. The statement made in *Benedict* regarding the court's past treatment of psychosis was, therefore, relevant to the insanity defense before Congress added the word "severe."

[193] UCMJ art. 36; *see supra* note 185 (reproducing the relevant text of Article 36(a), UCMJ).

[194] *Id.*

[195] *See, e.g.*, United States v. Czeschin, 56 M.J. 236 (2002) (stating that Article 36(a) does not extend to substantive offenses); United States v. Valigura, 54 M.J. 187 (2000) (reciting the text of Article 36(a) and stating that the President's authority does not extend to substantive crimes); United States v. Frederick, 3 M.J. 230 (C.M.A. 1977) (holding that the defense of mental responsibility is a rule of substantive law, and rejecting paragraph 120*b* of the original 1969 *Manual for Courts-Martial*); United States v. Smith, 33 C.M.R. 3 (C.M.A. 1963) (invalidating a *Manual for Courts-Martial* provision that incorrectly defined the defense of self-defense because it fell outside the President's Article 36 power). *But see* United States v. Smith, 17 C.M.R. 314 (C.M.A. 1954) (upholding the original 1969 *Manual for Courts-Martial* provision for mental responsibility because of an inference that Congress's deferral to the President to prescribe circumstances warranting commitment included the authority to define related defenses).

stated in *Ellis v. Jacob*.[196] In *Ellis*, the COMA found RCM 916(k)(2) invalid because it purported to bar the accused from presenting psychological evidence relevant to his mental state at the time of the alleged offense.[197] The court articulated the following proposition of law: "the President's rule-making authority does not extend to matters of substantive military criminal law [citing Articles 36 and 56, UCMJ]. Thus, even ignoring constitutional questions, such a Manual provision [RCM 916(k)(2)] could only be effective if it reflected a legislative act."[198] Although the *Ellis* decision did not cite any authority in support of this proposition, it is consistent with the earlier decision of *United States v. Frederick*,[199] in which the COMA held:

> [T]he standard for determining complete mental responsibility, as with partial mental responsibility, is a matter of substantive law whether the standard is termed an affirmative defense or some other type of defense. Therefore, the adoption of the standard for mental responsibility is not within the scope of the President's rulemaking powers under Article 36 UCMJ.[200]

Although the *Frederick* decision is over twenty-five years old, its continued validity is reflected by the consistent analysis in *Ellis.*

The holding of *Frederick* is directly on point with the question of whether the President may limit the definition of "severe mental disease or defect." Applying *Ellis* and *Frederick*, the weight of the law supports a conclusion that Article 36 does not give the President authority to limit the definition of severe mental disease or defect to "nonpsychotic behavior disorders" absent legislative action. It should be noted that there is at least a plausible argument that use of the phrase "nonpsychotic behavior disorder" within the legislative history of the Insanity Defense Reform Act of 1984 is sufficient legislative action to support the President's definition of "severe."[201] This argument finds support in a handful of federal decisions at both the trial and appellate levels that have interpreted "severe mental disease or defect" by reference to the legislative history.[202] Because neither the holding nor the analyses of these federal cases is binding upon the military appellate courts,[203] however, the COMA's decisions in *Proctor* and *Benedict* still provide a more authoritative interpretation of Article 50a(a), UCMJ. Thus, the definition of "severe mental disease or defect" found in RCM 706 and the *Benchbook* is invalid because it is unsupported by both statute and military case law.

The definition's continued use in either a court-martial or by a sanity board makes it inherently more difficult for the accused to gather evidence of and to prove the defense of lack of mental responsibility. In consequence, both provisions—RCM 706 and the *Benchbook* para. 6-4—should be amended by deleting the words "or by non-psychotic behavior disorders and personality disorders."[204] From a procedural standpoint, defense counsel should raise this issue with the military judge at the earliest opportunity, either by contesting the validity of the sanity board or by making an early request for an amendment to *Benchbook* instruction 6-4. Because military judges are generally reluctant to modify standard instructions, requesting an amended instruction is the best method of preserving the issue for appeal.[205] In addition, defense counsel should ensure that expert witnesses, whether for the government or the defense, provide a medical opinion regarding the severity of the accused's mental disease or defect, rather than attempting to apply the arguably invalid legal definition contained in RCM 706.

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[196] 26 M.J. 90 (C.M.A. 1988).

[197] *Id.* at 92-93.

[198] *Id.*

[199] 3 M.J. 230 (C.M.A. 1977).

[200] *Id*. at 236.

[201] S*ee supra* notes 182-183 and accompanying text.

[202] *See* United States v. Cartagena-Carrasquillo, 70 F.3d 706 (1st Cir. 1995) (holding that the trial judge did not err by excluding evidence of "significant" post traumatic stress disorder); United States v. Denny-Shaffer, 2 F.3d 999 (10th Cir. 1993) (holding that the trial court erred by not admitting evidence of multiple personality disorder, a disorder not expressly excluded in the legislative history of 18 U.S.C. § 17 (2000)); United States v. Salava, 978 F.2d 320 (7th Cir. 1992) (rejecting a government argument that expert testimony on the insanity defense should be excluded because the diagnosis did not qualify as "severe" for purposes of 18 U.S.C. § 17; instead accepting the expert's opinion that the defendant's diagnosis of antisocial and paranoid personality disorder were severe); United States v. Rezaq, 918 F. Supp. 463 (D.D.C. 1996) (holding that post-traumatic stress disorder could qualify as a "severe mental disease or defect" under 18 U.S.C. § 17).

[203] *See* Garrett v. Lowe, 39 M.J. 293, 296 n.4 (C.M.A. 1994). For a thorough treatment of this very complicated issue, *see* H. F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25.

[204] This proposed change to *Benchbook* instruction 6-4 is shown at Appendix B.

[205] *See* Lieutenant Colonel Patricia Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—the Why and How*, ARMY LAW., Mar. 2003, at 10.

2. Defining "Appreciate," "Nature and Quality," and "Wrongfulness"

Turning from the first element of the insanity defense to the second—the accused was "unable to appreciate the nature and quality or the wrongfulness of his or her acts,"[206]—the terms "appreciate," "nature and quality," and "wrongfulness" are not defined by statute or by the *Manual for Courts-Martial*. In fact, in most jurisdictions that follow the *M'Naghten* Rule, or some variation of the *M'Naghten* Rule, the terms are similarly undefined.[207] The legislative history of the Insanity Defense Reform Act of 1984 is also silent on the meaning of these terms.[208] Finally, the *Military Judges' Benchbook* leaves the meaning of these very important terms largely to panel members' imaginations.[209]

Looking instead to case law, the CAAF grappled with these terms most recently in *United States v. Martin*.[210] The appellant, Major (MAJ) Robert Martin, was an active duty judge advocate who engaged in a series of criminal activities over a two and one-half year period that generally fell into four categories, "(1) unpaid personal loans, (2) fraudulent investment schemes, (3) unauthorized and incomplete legal services, and (4) worthless checks."[211] Prior to trial, numerous mental health professionals evaluated the appellant, ultimately concluding that he suffered from bipolar disorder throughout the period of the alleged offenses.[212] The issues before the court were: (1) whether the evidence "clearly and convincingly" established that appellant was not mentally responsible; and, (2) whether the Army Court of Criminal Appeals erred when it required that the evidence demonstrate lack of mental responsibility "at the precise moment" of each of the acts constituting the charged offenses.[213] The court decided the second issue quickly and easily.[214] The insanity defense requires proof, whether direct or circumstantial, that the elements of the defense existed at the moment of the acts constituting the offense.[215] The first issue, however, required considerably more analysis.

Although the court eventually held that a reasonable panel could have found that MAJ Martin failed to carry his burden of proving lack of mental responsibility,[216] the analysis provides some important insight into how the court interprets the key terms of "appreciate," "nature and quality," and "wrongfulness." Addressing the word "appreciate" first, the court looked to federal case law, the Model Penal Code, and the legislative history of the Insanity Defense Reform Act of 1984.[217] The court noted that to "appreciate" means to have both a cognitive and emotional understanding of the "moral or legal import of behavior."[218] Stated differently, the word "appreciate" connotes more than mere cognitive knowledge that a fact is true; it

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[206] MCM, *supra* note 3, R.C.M. 916(k)(1).

[207] LAFAVE, *supra* note 170, § 7.2 (citing A. GOLDSTEIN, THE INSANITY DEFENSE (1967)).

[208] S. REP. NO. 98-255 (1983), *reprinted as* 1984 U.S.C.C.A.N. 3182.

[209] The applicable instruction from the *Military Judges' Benchbook* states, in part, the following:

> If you determine that, at the time of the offense(s) . . ., the accused was suffering from a severe mental disease or defect, then you must decide whether, as a result of that severe mental disease or defect, the accused was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct.
>
> If the accused was able to appreciate the nature and quality or the wrongfulness of (his) (her) conduct, (he) (she) is criminally responsible; and this is so regardless of whether the accused was then suffering from a severe mental disease or defect, (and regardless of whether (his) (her) own personal moral code was not violated by the commission of the offenses(s)).
>
> (On the other hand, if the accused had a delusion of such a nature that (he)(she) was unable to appreciate the nature and quality or wrongfulness of (his)(her) acts, the accused cannot be held criminally responsible for (his)(her) acts, provided such a delusion resulted form a severe mental disease or defect.)

BENCHBOOK, *supra* note 9, para. 6-4.

[210] 56. M.J. 97 (2001).

[211] *Id*. at 100.

[212] *Id.*

[213] *Id*. at 99.

[214] *Id*. at 111. The appellant's strategy at trial was to prove that his lack of mental responsibility had existed throughout the entire two and one-half year period of the alleged offenses, rather than present evidence of insanity at the moment each offense was alleged to have occurred. The court agreed that this would be an acceptable method of establishing lack of mental responsibility, but held that, under the facts of this case, it was reasonable for the panel to conclude that the appellant had failed to meet his burden. *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.* at 107 (citing United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); United States v. Meader, 914 F.Supp. 656 (D. Me. 1996); AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 4.01 cmt. 2, at 166 (official draft 1962); S. Rep. No. 225, 98th Cong., 2d. Sess. (1984) *reprinted as* 1984 U.S.C.C.A.N. 3182 n.1).

[218] *Martin*, 56 M.J. at 107-08.

includes recognition of meaning and significance.[219] Ultimately, the CAAF accurately recognized the broad meaning of "appreciate" in spite of the fact that neither the Rules for Courts-Martial nor the *Benchbook* reflect that recognition.

For defense counsel, the broad definition of appreciate is important because it increases the scope of the lack of mental responsibility defense. The phrase "legal and moral import" includes the concept of understanding the consequences of one's actions.[220] This is a high cognitive threshold, making it easier to show that an accused lacks mental responsibility. Unfortunately, if court-martial panel members are unaware of a term's legal definition, they will not be able to correctly apply the facts when reaching their conclusion. Therefore, trial defense counsel may wish to request a panel instruction that includes a definition of "appreciate." An example is shown at Appendix B.

Following the *Martin* court's discussion of "appreciate," the court next addressed the terms "nature and quality" and "wrongfulness."[221] Lacking any military case law addressing the terms, the court looked to a learned treatise for an oft-cited explanation of the terms:

> The first portion [nature and quality] relates to an accused who is psychotic to an extreme degree. It assumes an accused who, because of mental disease, did not know the nature and quality of his act; he simply did not know what he was doing. For example, in crushing the skull of a human being with an iron bar, he believed that he was smashing a glass jar. The latter portion [wrongfulness] of *M'Naghten* relates to an accused who knew the nature and quality of his act. He knew what he was doing; he knew that he was crushing the skull of a human being with an iron bar. However, because of mental disease, he did not know that what he was doing was wrong. He believed, for example, that he was carrying out a command from God.[222]

From this language, along with a definition from the *Century Dictionary*, the court concluded that "a defendant who is unable to appreciate the nature and quality of his acts is one that does not have mens rea because he cannot comprehend his crimes, including their consequences."[223] This conclusion is suspect, however, because it confuses the affirmative insanity defense with the doctrine of partial mental responsibility, discussed in Part IV of this article.[224] It also fails to provide any guidance regarding how the facts of a particular case might demonstrate, or fail to demonstrate, an appreciation for the "nature and quality" of one's acts.

Ultimately, the term "nature and quality" must be analyzed separately from the concept of mens rea, otherwise the insane accused would be entitled to a full acquittal, rather than the much more onerous consequences of a verdict of not guilty only by reason of lack of mental responsibility.[225] At least one legal scholar has observed that the phrase "nature and quality of the act" is "typically held to mean that the defendant must have understood the physical nature and consequences of the Act. Thus, an accused must have known that holding a flame to a building would cause it to burn, or that holding a person's head under water would cause him to die."[226] This articulation of "nature and quality," while admittedly superior to that found in

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[219] *See* BLACK'S LAW DICTIONARY 97 (17th ed. 1999) (providing the following definition of appreciate: "to understand the significance or meaning of"); *see also* HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY 148 (1972) ("Hence, there is near universal agreement that if the *M'Naghten* criterion is to have any relevance, 'know' must be interpreted more broadly than mere ability to give a verbally correct answer."); MODEL PENAL CODE, *supra* note 173, § 4.01 cmt., at 169 ("The use of 'appreciate' rather than 'know' conveys a broader sense of understanding than simple cognition.").

[220] "Import" is defined as "consequence or importance." WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998).

[221] *Martin*, 56 M.J. at 108.

[222] WHARTON'S CRIMINAL LAW, *supra* note 165, § 101, at 17.

[223] *Martin*, 56 M.J. at 109.

[224] The "defense" of partial mental responsibility is discussed in Section IV of this paper. *See* LAFAVE, *supra* note 170, ¶ 9.2 ("Under the doctrine referred to as partial responsibility, diminished responsibility, or (somewhat less accurately) partial insanity, recognized in some but not all jurisdictions, evidence concerning the defendant's mental condition is admissible on the question of whether the defendant had the mental state which is an element of the offense with which he is charged."); United States v. Berri, 33 M.J. 337 (C.M.A. 1991).

[225] For an excellent discussion of the intersection of the insanity defense with the doctrine of partial mental responsibility, *see* FINGARETTE, *supra* note 219, at 128-41. After an exhaustive review of the historical development of the insanity defense, as well as the writings of eminent jurists, Professor Fingarette concludes:

> [T]he absence of *mens rea* in insanity is of a more profound or radical kind than in the more typical cases where a person lacks . . . the mental state required by the definition of a particular crime. . . . In the more common case of absence of *mens rea* (and blamability), it is implicitly acknowledged that the defendant, though perhaps not criminally guilty, was nevertheless a responsible agent under the law. In the case of the insanity plea . . . the thesis of absence of *mens rea* cuts deeper than this: rather than amounting to a claim to be a responsible person under law who acted without guilty intent, it is in effect a claim that the person was not a responsible agent.

Id. at 131.

[226] LAFAVE, *supra* note 170, ¶ 7.2(b) (citations omitted).

the quoted language from *Martin*, seems to address the same concern that necessitated adoption of a broad definition for "appreciate"—the accused's awareness of his own conduct—must include recognition of the natural consequences of that conduct.[227]

Like the term "appreciate," military appellate courts have also avoided defining the term "wrongfulness." The *Martin* court cited a number of federal cases, but never arrived at a conclusion as to the meaning of "wrongfulness."[228] Without taking a firm position, the court observed, "Other federal circuits recognize that a defendant's delusional belief that his criminal conduct is morally or legally justified may establish an insanity defense under federal law."[229] Although inconsistent with the Army court's conclusion on the same question,[230] the CAAF's recognition that the term "wrongfulness" may include considerations of morality as well as legality is consistent with other federal decisions. For example, in *United States v. Danser*,[231] the District Court for the Southern District of Indiana suggested three possible meanings for the word "wrongfulness:" (1) "legally wrong or contrary to law," (2) "contrary to public morality," or (3) "contrary to one's own conscience."[232] Although never ruling which definition was correct, the *Danser* court entertained the possibility that "wrongfulness" includes some consideration of morality, whether that of society, the individual, or both.[233]

What then does the term "wrongfulness" mean, and how does a defense attorney argue that his client was unable to "appreciate" the "wrongfulness" of his conduct? Based on the two appellate decisions in *United States v. Martin*, one might conclude that an inability to "appreciate" the "wrongfulness" of one's conduct means nothing more than that the accused recognizes that the behavior is unlawful. In other words, ignorance of the law is an excuse, but only if it results from a severe mental disease or defect.[234] On the other hand, issues of morality, whether held by society or the individual, may also be relevant. Ultimately, the question remains unanswered, creating a tremendous opportunity for zealous advocacy by the defense counsel.

As the proceeding discussion reveals, the defense of lack of mental responsibility remains largely undefined. While predictability in the law is undoubtedly preferred, especially for the criminal defendant who must often choose between a plea bargain and an all-or-nothing trial on the merits, defense counsel must be prepared to confront the ambiguity within the standard for lack of mental responsibility. Depending upon the facts of the case, the absence of established definitions for the key terms, "appreciate," "nature and quality," and "wrongfulness," may result in a viable defense where none appeared to exist. Defense counsel should, therefore, aggressively seek to expand the law, where appropriate, by viewing the realm of relevant evidence broadly and requesting tailored panel instructions when appropriate.

Appendix B contains three suggested amendments to *Benchbook* instruction 6-4, each based upon the discussion of the law in this section. The first suggested amendment is a change to the definition of "severe" that omits the phrase "non psychotic behavior disorders and personality disorders."[235] Although not included in the appendix, the similar definition found in RCM 706 should also be amended so that the two are consistent. Absent the required Executive Order to amend RCM 706, defense counsel must carefully question sanity board members to determine whether they correctly applied the legal definition of the term "severe." The second suggested amendment is the inclusion of a definition for the phrase

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[227] *See also* United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).

[228] *Martin*, 56 M.J. at 109 (citing United States v. Hiebert, 30 F.3d 1005 (8th Cir. 1994), United States v. Reed, 997 F.2d 332 (7th Cir. 1993), United States v. Newman, 889 F2d 88 (6th Cir. 1989), United States v. Dubray, 854 F.2d 1099 (8th Cir. 1988), and United States v. Freeman, 357 F.2d 606 (2d Cir. 1966)).

[229] *Id.* (citing United States v. Dubray, 854 F.2d 1099 (8th Cir. 1988)).

[230] In the same case, the Army court stated, "Whether an accused sincerely believes that his conduct is morally justified is not relevant in establishing the affirmative defense, although it may be relevant as a matter in mitigation during sentencing." United States v. Martin, 48 M.J. 820, 825 (Army Ct. Crim. App. 1998), *aff'd*, 56 M.J. 92. This statement appears to contradict the language from Wharton's Criminal Law, and quoted by CAAF in *Martin*: "However, because of mental disease, he did not know that what he was doing was wrong. He believed, for example, that he was carrying out a command from God." *Martin*, 56 M.J. at 108 (quoting 2 Charles E. Torcia, WHARTON'S CRIMINAL LAW § 101 at 17 (15th ed. 1994)). *But see* FINGARETTE, *supra* note 219, at 154 ("It would undermine the foundations of the criminal law to allow that a person who violated the law should be excused from criminal responsibility just because, in his own conscience, his act was not morally wrong.").

[231] *Danser*, 110 F. Supp. 807 (S.D. Ind. 1999).

[232] *Id.* at 826; *see also* United States v. Segna, 555 F.2d 226 (9th Cir. 1977) (interpreting the Model Penal Code insanity provision to include the third possibility, the accused's subjective belief that the conduct did not violate his conscience).

[233] *Danser*, 110 F.Supp. at 826-27.

[234] *See* FINGARETTE, *supra* note 219, at 153 n.34 (summarizing the position of various legal scholars and courts on the meaning of "wrongfulness").

[235] The relevant text from Appendix B is the following: "The term severe mental disease or defect can be no better defined in the law than by the use of the term itself. However, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct ~~or by non-psychotic behavior disorders and personality disorders~~."

"appreciate the nature and quality," which increases the scope of the terms to include an understanding of the significance and meaning of the accused's acts.[236] The third suggested amendment is the inclusion of a definition for the phrase "appreciate the wrongfulness," which includes reference to the moral standards of society.[237] Although the law is entirely unsettled in this area, the examination of both history and case law in this section supports a conclusion that "wrongfulness" must include some concept of morality. The suggested definition, therefore, makes reference to an objective standard, the "moral standards of society." The alternate approach, which depends upon the accused's own sense of morality, would unacceptably allow the morally bankrupt to excuse their own conduct. Reference to society's moral standards, admittedly a vague litmus test, at least gives both the government and the defense a standard from which to argue. Without clarifying these definitions in the *Benchbook*, the government and the defense run the risk of letting the factfinder define the terms and phrases according to their own views on the scope of the insanity defense.

B. Procedural Rules Relating to Mental Responsibility

1. Pre-trial and Trial Procedures

As with competency, the accused is presumed mentally responsible for his actions until he establishes lack of mental responsibility by clear and convincing evidence.[238] Prior to trial, the defense must notify the trial counsel of their intent to raise the defense of lack of mental responsibility.[239] As a practical matter, both parties are generally aware of a potential insanity defense, either from the facts of the case or from the report of a sanity board. Nonetheless, lack of mental responsibility is an affirmative defense necessitating formal notice prior to trial.[240] In addition, defense counsel must comply with RCM 703's provisions regarding witness production and employment of expert witnesses.[241]

At trial, the accused will enter a plea as in any other case—guilty, not guilty, guilty to a lesser included offense, or guilty with exceptions and substitutions.[242] Even in cases in which the accused does not intend to rebut the elements of the offenses, instead focusing exclusively on the insanity defense, the accused may not plead "not guilty only by reason of lack of mental responsibility."[243] Because a guilty plea has the effect of waiving any defenses,[244] the accused must forego the potential benefits of a pretrial agreement in order to litigate the insanity defense. This choice creates a difficult decision for both the accused and counsel, even when the evidence strongly supports the accused's lack of mental responsibility.[245]

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[236] The relevant text from Appendix B is the following: "To appreciate the nature and quality of (his) (her) conduct, the accused must have knowledge that (he) (she) has engaged in the conduct, and an awareness of the legal and moral import of the conduct's natural consequences."

[237] The relevant text from Appendix B is the following: "To appreciate the wrongfulness of (his) (her) conduct, the accused must have an emotional awareness that the conduct is contrary to the accepted moral standards of society."

[238] MCM, *supra* note 3, R.C.M. 916(k)(3)(A); *see* United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986) (holding that placing the burden on the defendant to prove the insanity defense by clear and convincing evidence does not violate the Constitution).

[239] MCM, *supra* note 3, R.C.M. 701(b)(2).

[240] Rule for Courts-Martial 701(b)(2) does not expressly require written notice; however, the discussion to the rule states that "such notice should be in writing except when impracticable." *Id.* R.C.M. 701(b)(2) discussion. Furthermore, the current Army rules of practice require that,

> [u]nless the judge sets a different deadline, defense counsel will notify the trial counsel in writing at least 14 calendar days before trial of the intent to offer the defense of . . . lack of mental responsibility, or the intent to introduce expert testimony as to the accused's mental condition, and of all other notice required by RCM 701(b)(2).

UNITED STATES ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL para. 2b(4) (1 Jan. 2001).

[241] *See* MCM, *supra* note 3, R.C.M. 703.

[242] *Id.* R.C.M. 910(a)(1).

[243] *Id*. If, for tactical reasons, the defense wishes to acknowledge the elements of the offenses charged, while preserving the ability to litigate the insanity defense, counsel should consider the option of a confessional stipulation. *See* Major Steven E. Walburn, *Should the Military Adopt an* Alford*-Type Guilty Plea?*, 44 A.F. L. REV. 119. The decision of whether or not to employ this tactic may depend upon the degree to which the evidence presented on the elements would either support, or refute, insanity. *See, e.g.*, United States v. Martin, 56 M.J. 97, 103 (2001) (relying upon the testimony of the victims as evidence that the accused was mentally responsible at the time of the offenses). As always, a stipulation has the advantage of allowing creative counsel to shape the facts to support their case, especially when the government has reason to prefer the ease of stipulation over the burden of witness production.

[244] MCM, *supra* note 3, R.C.M. 910(c)(4), (j) (requiring the accused to admit all elements of the offenses to which he pleaded guilty and waiving any objection to his factual guilt).

[245] This situation could create a dilemma for the military judge as well as counsel. In the hypothetical case in which a sanity board finds that the accused is not mentally responsible, but the accused would prefer to plead guilty and accept minimal criminal punishment rather than risk indefinite hospitalization by the Attorney General, it is not clear whether a military judge would be permitted under current law to accept the accused's plea. *Id.* R.C.M. 910(e) discussion (requiring the military judge to elicit facts from the accused negating any defense potentially raised during the providence inquiry). The question for the military judge would be whether the accused is capable of bringing forth facts to negate the defense, in spite of the sanity board's findings. A possible solution would be for the accused to enter into a pretrial agreement with the convening authority that includes a promise to plead not guilty in return

Following the accused's entry of a plea, the trial proceeds in the normal fashion until some evidence of lack of mental responsibility is raised. At that point, the military judge may instruct the panel members on the law regarding the insanity defense.[246] As a practical matter, the panel will likely know from voir dire, and certainly after opening statements, that mental responsibility will be an issue in the case. Thus, the defense counsel may wish to request a preliminary instruction to the panel before the calling of witnesses so that the flow of evidence will not be unnecessarily disrupted. It is important for the defense counsel to remember that the presumption that the accused was mentally responsible at the time of the offenses continues throughout the trial until the accused proves lack of mental responsibility by clear and convincing evidence.[247]

Following the close of evidence, the military judge will instruct the panel on the law and the voting procedures it must follow when mental responsibility is in issue.[248] The military judge is required to instruct *sua sponte* on the insanity defense when "some evidence, without regard to it source or credibility, has been admitted upon which members might rely if they choose."[249] During deliberation, the factfinder, whether the military judge or a panel, must engage in a two-step process before a finding of guilty may be entered.[250] The members first vote on whether the government has proven the elements of the offenses beyond a reasonable doubt.[251] If fewer than two-thirds of the members answer in the affirmative, the panel must return a finding of not guilty. Otherwise, each panel member will cast a vote on whether the accused has proven the insanity defense by clear and convincing evidence.[252] If a majority of the members find the accused met his burden, a finding of not guilty only by reason of lack of mental responsibility will be entered for that specification.[253] If the accused fails to convince a majority, the panel returns a finding of guilty.

Because lack of mental responsibility must be proven to have existed at the specific time at which each offense was alleged to have occurred,[254] voting should be conducted separately for each specification.[255] Theoretically, an accused could be found not guilty of some offenses, guilty of other offenses, and not guilty only by reason of lack of mental responsibility of others.[256] The defense counsel should take note that the panel's vote on mental responsibility requires only a majority, rather than the supermajority required for a finding of guilty.[257]

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for a sentence limitation, but which also includes a confessional stipulation that admits the elements but negates the defense. Even this tactic might fail, however, depending on the degree to which the military judge inquires into the facts supporting the stipulation, and whether the judge views this approach as an end run on the providence inquiry.

[246] BENCHBOOK, *supra* note 9, para. 6-3. If the accused elects trial by military judge alone, the applicable instructions in the *Benchbook* will generally not be part of the record. Those instructions, however, remain highly relevant because they will undoubtedly inform the military judge's application of the facts to the law during deliberation. Therefore, in a case tried before a military judge sitting alone, the defense counsel should file a motion for clarification of the law that will be applied to the case, just as if requesting that a tailored instruction be given to a panel.

[247] MCM, *supra* note 3, R.C.M. 916(k)(3)(A). Clear and convincing is defined as "that weight of proof which 'produces in the mind of the factfinder a 'firm belief or conviction' that the allegations in question are true.'"

[248] *Id.* R.C.M. 920. The specific instructions are contained in chapter six of the *Military Judges' Benchbook*. BENCHBOOK, *supra* note 9, para. 6-4. *See also* text at Appendix B.

[249] MCM, *supra* note 3, R.C.M. 920(e)(3) discussion (requiring the military judge to instruct on any special defense under RCM 916 when some evidence has been admitted raising the defense); *id.* R.C.M. 916(a), (k) (defining the defense of lack of mental responsibility as a special defense).

[250] *Id.* R.C.M. 921(c)(4).

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *See* United States v. Martin, 56 M.J. 97, 103 (2001) (holding that the accused could theoretically prove insanity at the specific moment of the offense by demonstrating that the condition of insanity existed over an extended period of time encompassing that of the alleged offenses).

[255] MCM, *supra* note 3, R.C.M. 921(c)(4) discussion. This process is accurately described in paragraph 6-7 of the *Military Judges' Benchbook*. BENCHBOOK, *supra* note 9, para. 6-7.

[256] Given the general practice in courts-martial of alleging all known serious offenses at the time of charging, the possibility of such disparate findings is certainly not unlikely. *See* MCM, *supra* note 3, R.C.M. 307(c)(4). The procedures that will be discussed in the following paragraphs, however, fail to account for this possibility (i.e. disposition of an accused who has been sentenced to confinement on one charge, but for whom involuntary commitment is appropriate because of a successful insanity defense on another charge).

[257] UCMJ art. 50a(e) (2005). A finding of guilty requires the affirmative vote of two-thirds of the members, unless the death penalty is mandatory, in which case the vote must be unanimous. MCM, *supra* note 3, R.C.M. 921(c)(2).

2. Procedures Following Acquittal Due to Lack of Mental Responsibility

Following a finding of not guilty only by reason of lack of mental responsibility, the accused will be committed to a "suitable facility."[258] A "suitable facility" must have the capability of providing care and treatment to the accused, while taking into consideration the nature of both the accused and the offenses committed.[259] "Suitable facilities" are maintained by the Federal Bureau of Prisons under the supervision of the U.S. Attorney General; however, the general court-martial convening authority does not have the authority to commit the servicemember to the custody of the Attorney General until after the court-martial conducts a post-trial hearing regarding the accused's risk to society.[260] As a practical matter, the defense counsel should ensure that "suitable facility" is not, because of inadequate government resources, interpreted to be a jail cell.[261] A "suitable facility" must be something other than a jail cell and may often turn out to be the nearest military inpatient psychiatric ward, supplemented by military guards from the servicemember's unit, if necessary.

The remaining procedures are set out in RCM 1102A,[262] which implements Article 76b(b), UCMJ.[263] Within forty days of the court-martial's finding that the accused lacked mental responsibility, the military judge must conduct a hearing to determine whether release of the servicemember 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."[264] Prior to the hearing, the servicemember must undergo a psychiatric or psychological examination ordered by the military judge or general court-martial convening authority.[265] The result of the examination is forwarded to the military judge for consideration at the post-trial hearing. The servicemember is entitled to representation by defense counsel, "to testify, to present evidence, to call witnesses on his or her behalf,[266] and to confront and cross-examine witnesses who appear at the hearing."[267] The right to call witnesses would presumably include expert witnesses who may or may not agree with the court-ordered psychiatric or psychological examination report. At the hearing, the burden of proof is on the servicemember.[268] If the relevant offenses involved "bodily injury to another, or serious damage to the property of another, or . . . a substantial risk of such injury or damage," the accused has the burden of proof by clear and convincing evidence that his release would not 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.[269] For any other offenses, the accused has the burden of proof by a preponderance of the evidence.[270]

If the military judge finds that release of the accused would not violate the standard set out above, he "shall inform the general court-martial convening authority . . . and the accused shall be released."[271] If the military judge finds the contrary, he shall notify the general court-martial convening authority who may commit the accused to the custody of the Attorney

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[258] UCMJ art. 76b(b)(1); MCM, *supra* note 3, R.C.M. 1107(b)(4) ("When an accused is found not guilty only by reason of lack of mental responsibility, the convening authority . . . shall commit the accused to a suitable facility pending a hearing and disposition in accordance with R.C.M. 1102A.").

[259] 18 U.S.C.S. § 4247(a)(2) (LEXIS 2005). This section is made applicable to the armed services by Article 76b(c)(1), UCMJ. UCMJ art. 76b(c)(1).

[260] Article 76b(b), UCMJ, does not authorize the convening authority to commit the servicemember to the custody of the Attorney General until after the court-martial finds that his release would create "a substantial risk of bodily injury to another person or serious damage of property of another." UCMJ art. 76b(b)(4). The discussion following R.C.M. 1107(b)(4) states, "Commitment of the accused to the custody of the Attorney General is discretionary." MCM, *supra* note 3, R.C.M. 1107(b)(4) discussion.

[261] *See* U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 3-2*d* (5 Apr. 2004). "Hospitalized prisoners will be placed in a specifically designated medical treatment area for proper custody and control unless the hospital commander directs otherwise." *Id.* "Custody and control of hospitalized pretrial prisoners and OCONUS post-trial prisoners are the responsibility of the prisoner's parent unit commander. Inpatient psychiatric prisoner patients may be treated only in a military, Department of Veterans Affairs, State, or Federal prison approved by DAPM." *Id.* paras. 11-12. Paragraph 3-4*b*(1) provides further guidance for disposition of Army personnel who are mentally incompetent or who are found not guilty because of lack of mental responsibility. *Id.* para. 3-4*b*(1).

[262] MCM, *supra* note 3, R.C.M. 1102A.

[263] UCMJ art. 76b(b).

[264] MCM, *supra* note 3, R.C.M. 1102A. The provisions of RCM 1102A, as well as those that follow, mirror the federal statutes for hospitalization of a defendant following a finding of not guilty only by reason of insanity. *Id.* R.C.M. 1102A analysis, at A21-81. *See* 18 U.S.C.S. §§ 4243, 4247.

[265] *Id.* R.C.M. 1102A(b).

[266] This includes the right to have witnesses subpoenaed. *See* 18 U.S.C.S. § 4247(d).

[267] MCM, *supra* note 3, R.C.M. 1102A(c)(1).

[268] *See id.* R.C.M. 1102A(c)(3).

[269] *Id.*

[270] *Id.*

[271] *Id.* R.C.M. 1102A(c)(4).

General.[272] The Attorney General is required to hospitalize the servicemember under the provisions of 18 U.S.C. § 4243.[273] Once a servicemember has been hospitalized under the procedure described above, his continued hospitalization will be overseen by the U.S. district court for the district where he is hospitalized.[274]

Notwithstanding the detrimental consequences of a finding of not guilty only by reason of lack of mental responsibility (social stigma and involuntary hospitalization), the post-trial review procedures are generally the same as those for an acquittal.[275] There is not a rational basis, however, for applying the same post-trial review procedures to both findings—not guilty and not guilty only by reason of lack of mental responsibility—because the accused found not guilty only by reason of lack of mental responsibility—still burdened by the consequences of trial—loses several important safeguards: (1) a factual record of the proceedings;[276] (2) the convening authority's ability to review the trial for legal and factual error;[277] and (3) appellate review of the proceedings.[278] In circumstance in which the accused is otherwise guilty of the crime,[279] but for his successful insanity defense, these inconsistencies do not seem problematic. After all, how can the accused complain about not being able to appeal a "favorable" verdict?[280] Mentally insane individuals, however, are just as likely to be wrongly accused of a crime as are sane individuals. When an insane individual is wrongly accused, and later found not guilty only by reason of insanity, he lacks the ability to contest the factual or legal sufficiency of the trial process; whereas, the sane individual has complete access to the appellate process. For example, if a misapplication of law at trial results in a straight finding of guilty, the general court-martial convening authority has the authority to disapprove the findings and dismiss the charges;[281] or the servicemember has the possibility of receiving relief following appellate review.[282] If the same legal error at trial results in a finding of not guilty only by reason of lack of mental responsibility, the convening authority is expressly prohibited from disapproving the findings, and the servicemember is not entitled to any appellate review.[283] Although the convening authority could attempt to rectify the legal error by not committing the servicemember to the custody of the Attorney General, the servicemember has no ability to advocate for such relief because he is neither entitled to a verbatim record of trial nor the right to present post-trial submissions.[284]

One possible argument defense counsel may consider is that the difference in post-trial review procedures between servicemembers found guilty and servicemembers found not guilty only by reason of lack of mental responsibility is irrational, thus violating the Equal Protection Clause.[285] Under the Supreme Court's equal protection jurisprudence,

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[272] *Id.* It is arguably inconsistent that involuntary hospitalization is discretionary after a finding that the accused committed the offense and is dangerous; whereas hospitalization, albeit temporary, is mandatory after a finding that the accused lacks mental capacity without a finding of either wrongdoing or dangerousness. *Id.* R.C.M. 909(f).

[273] UCMJ art. 76b(b)(4)(B) (2005).

[274] *Id.* art. 76b(b)(5). The servicemember will remain hospitalized until such time as the director of the treatment facility determines that he "has recovered from his mental disease or defect to such an extent that his release . . . would no longer create a substantial risk of bodily injury to another person or serious damage to property of another." 18 U.S.C.S. § 4243(f) (LEXIS 2005). If the appropriate authority determines that the individual meets this standard, the court shall discharge the individual or the government can hold a hearing to determine whether or not the individual should be released, applying the same standard used to justify the original hospitalization.

[275] *See* MCM, *supra* note 3, R.C.M. 1103(e), 1107(b)(4).

[276] *See id.* R.C.M. 1103(e) (requiring preparation of only a summarized record of trial).

[277] *See id.* R.C.M. 1107(b)(4) (prohibiting the general court-martial convening authority from disapproving the findings).

[278] UCMJ art. 66.

[279] This phrase is meant to refer to an accused who actually committed the crime, in contrast to the accused who is found to have committed the crime as a result of legal error in the trial. Because the voting procedures used in insanity cases require an affirmative finding that the accused committed the elements of the offense before the factfinder determines whether the accused proved lack of mental responsibility, every case in which the accused is found not guilty only by reason of lack of mental responsibility will necessarily include a finding that the accused committed the elements of the crime. *See supra* note 250-253 and accompanying text. The problem that this paragraph attempts to highlight is the complete lack of procedures to guarantee the reliability of the first finding in the bifurcated procedure.

[280] Those who might ask this question assume that the accused was seeking a finding of not guilty only by reason of lack of mental responsibility rather than a full acquittal. Such an assumption may hold true in some cases, but certainly not all.

[281] *See* MCM, *supra* note 3, R.C.M. 1107(c).

[282] *Id.* R.C.M. 1203, 1204, and 1205 (authorizing appellate review by the Army Court of Criminal Appeals, Court of Appeals for the Armed Forces, and Supreme Court of the United States).

[283] *Id.* R.C.M. 1107(b)(4). Although certainly not as advantageous as a right to a direct appeal, § 4247 of title 18, United States Code, preserves the individual's right to seek a writ of habeas corpus in federal district court. 18 U.S.C.S. § 4247 (LEXIS 2005).

[284] MCM, *supra* note 3, R.C.M. 1105(a) (limiting the right to submit post-trial matters to the convening authority to cases in which a sentence has been adjudged).

[285] U.S. CONST. amend. XIV ("No State shall . . . deny any person within its jurisdiction the equal protection of the laws."). The Equal Protection Clause applies to actions by the federal government via the Fifth Amendment. *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995) (tracing the history of the

government action will not violate the Equal Protection Clause if the different treatment of individuals classification is "rationally related to a legitimate government purpose."[286] The defense's argument is that there is no rational basis for giving fewer post-trial rights to an individual found not guilty only by reason of lack of mental responsibility than to an individual found guilty. The government has an inherent interest in discovering and remedying trial defects, regardless of whether the defects result in confinement or involuntary commitment. Unfortunately this interest is actually thwarted by the RCM's unfavorable treatment of servicemembers found not guilty by reason of mental responsibility. This argument is also supported by Supreme Court precedent, *Vitek v. Jones*, in which the Court recognized:

> The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual' and that [whether] we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that in can have a very significant impact on the individual.[287]

Although none of the Supreme Court cases discussed earlier directly address an individual's right to an appellate process following a finding of not guilty because of insanity, the equal protection argument framed above has sufficient merit to warrant attention in a habeas proceeding authorized under 18 U.S.C. § 2427.[288]

IV. Evidence Negating Mens Rea v. Partial Mental Responsibility

Evidence of mental illness, whether presented by expert or lay witnesses, is not limited to the affirmative defense of lack of mental responsibility. To the contrary, theories under which evidence of mental illness may rebut the government's proof of mens rea, but still fall short of proving insanity, have a tortured history within the military justice system. The end result is a doctrine that is both misunderstood and confusing. Before discussing the law as it exists today, it is necessary to cover some recent history regarding the doctrine of partial mental responsibility.

A. History of the Doctrine of Partial Mental Responsibility

Within the military justice system, the doctrine of partial mental responsibility finds its origins in *United States v. Kunak*,[289] a case in which the court held that the panel members must be appropriately instructed if there is evidence that the accused possessed a mental illness short of insanity that might have interfered with his capacity to premeditate.[290] Although never actually appearing in the UCMJ, the doctrine continued to evolve, eventually allowing an accused to present evidence of mental illness to rebut any subjective state of mind required by a crime, including premeditation, specific intent, willfulness, or knowledge.[291] The doctrine first appeared in the *1969 Manual for Courts-Martial*, which stated:

> Partial mental responsibility. A mental condition, not amounting to a general lack of mental responsibility (120*b*), which produces a lack of mental ability, at the time of the offense, to possess actual knowledge or

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application of equal protection doctrine through the Fifth Amendment); Bolling v. Sharpe, 347 U.S. 497 (1954) (applying the equal protection provisions of the Fourteenth Amendment to the federal government via the Due Process Clause of the Fifth Amendment).

[286] This is the legal standard when the government action does not impact a suspect class, such as race or national origin. *See, e.g.*, United State v. Gray, 51 M.J. 1, 22 (1999) (requiring that "reasonable grounds exist" for a government classification that does not impact a protected class); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

[287] 445 U.S. 480 (1980) (citing Addington v. Texas, 441 U.S. 418 (1979)). For another example of how insanity acquittees are adversely affected by the findings, *see Jones v. United States*, 463 U.S. 354 (1983), holding that the determination by a criminal court that the insanity acquittee committed the elements of the crime is sufficient evidence of dangerousness to warrant a different standard for involuntary commitment than that guaranteed for civil commitment.

[288] *See also* Douglas v. California, 372 U.S. 353 (1963) (holding that the Equal Protection Clause guaranteed indigent defendant's the right to the assistance of counsel for their first appeal of right); Griffin v. Illinois, 351 U.S. 12 (1956) (holding that the Equal Protection Clause and the Due Process Clause guaranteed indigent defendants access to a trial transcript for use in preparing an appeal).

[289] 17 C.M.R. 346 (C.M.A. 1954)

[290] *Id.* at 362.

[291] *See, e.g.*, United States v. Vaughn, 49 C.M.R. 747, 750 (C.M.A. 1975) (holding that the doctrine of partial mental responsibility could reduce a premeditated murder charge all the way to involuntary manslaughter); United States v. Walker, 43 C.M.R. 81, 86 (C.M.A. 1971) (upholding the lower court's reversal because they were "not convinced beyond a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill.")

> to entertain a specific intent or a premeditated design to kill, is a defense to an offense having one of these states of mind as an element.[292]

In general, the paragraph above is a fair statement of the general concept referred to as partial mental responsibility, sometimes referred to as partial responsibility, diminished capacity, or partial insanity.[293] The *1984 Manual for Courts-Martial*, although reorganized into the Rules for Courts-Martial that military pratitioners recognize today, contained a substantially similar provision.[294] As stated above, the doctrine of partial mental responsibility fell clearly within the category of substantive defenses that excuse, rather than negate, the defendant's otherwise criminal conduct.[295]

The Military Justice Amendments of 1986,[296] following on the heels of the Insanity Defense Reform Act of 1984, made significant changes in the law of insanity, including the defense of partial mental responsibility. Specifically, RCM 916(k)(1) and (2) were amended to conform with the changes in Article 50a(a), UCMJ.[297] In contrast to the earlier language found in the 1969 and 1984 *Manuals for Courts-Martial*, the new RCM 916(k)(2) stated:

> *Partial mental responsibility*. A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.[298]

Both the effect, and the intent, of this new RCM 916(k)(2) was the abolition of the defense of partial mental responsibility as it previously existed.[299] Unlike the changes in RCM 916(k)(1), which amounted to a substantial restatement of Article 50a(a), UCMJ, the changes to RCM 916(k)(2) drew their only support from the legislative history of the Insanity Defense Reform Act of 1984.[300] In 1988, however, the COMA ruled in *Ellis v. Jacob*[301] that Article 50a(a) did not bar the accused from presenting psychiatric evidence for the purpose of rebutting specific intent.[302] Three years later, the COMA reiterated this conclusion, stating in *United States v. Berri*,[303] "If admissible evidence suggests that the accused, for whatever reason, including mental abnormality, lacked mens rea, the factfinder must weigh it along with any evidence to the contrary."[304] Together, these two cases effectively overruled RCM 916(k)(2). The President put the final nail in the coffin by amending RCM 916(k)(2) to state the following: "*Partial mental responsibility*. A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not an affirmative defense."[305]

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[292] 1969 MCM, *supra* note 13, ¶ 120*c*.

[293] *See generally* LAFAVE, *supra* note 170, at ¶ 9.2.

[294] In the 1984 *Manual for Courts-Martial*, RCM 916(k)(2) stated:

> Partial mental responsibility. A mental condition not amounting to a general lack of mental responsibility under subsection (k)(1) of this rule but which produces a lack of mental ability at the time of the offense to possess actual knowledge or to entertain a specific intent or a premeditated design to kill is a defense to an offense having one of these states of mind as an element.

1984 MCM, *supra* note 177, R.C.M. 916(k)(2).

[295] *See* United States v. Frederick, 3 M.J. 230 (C.M.A. 1977) (holding that lack of mental responsibility and partial mental responsibility are substantive defenses).

[296] Military Justice Amendments of 1986, Pub. L. No. 99-661, 100 Stat. 3905.

[297] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916(k) analysis, at A21-62 (1998).

[298] *Id.* RCM 916(k)(2).

[299] *Id.* R.C.M. 916(k) analysis, at A21-62.

[300] *Id.*

[301] 26 M.J. 90 (C.M.A. 1988).

[302] *Id.* at 93.

[303] 33 M.J. 336 (C.M.A. 1991).

[304] *Id.* at 343 n.11.

[305] Exec. Order. No. 13,365, 69 Fed. Reg. 71,333 (Dec. 8, 2004).

Although legal commentators,[306] and arguably the Army Court of Criminal Appeals,[307] interpreted *Ellis v. Jacob* and *United States v. Berri* as resurrecting the doctrine of partial mental responsibility, their conclusion is unsupported by the cases.[308] Their conclusion is further called into question by the recent amendment of RCM 916(k)(2), which did anything but restore the provision to the language that appeared in the 1969 and 1984 *Manuals for Courts-Martial*.[309] A cursory review of the *Ellis* and *Berri* opinions reveals that the COMA never referred to the permissible use of evidence of mental illness as partial mental responsibility or any of the many variants of that phrase.[310] Rather, the *Ellis* opinion relied heavily upon the other federal court's interpretation of 18 U.S.C. § 20.[311] The *Ellis* court expressly noted that "[t]he three decisions that have squarely addressed this issue are very clear in distinguishing attacks on *mens rea* from diminished-capacity defenses."[312] Assuming that the phrase "diminished-capacity defense" is interchangeable with "partial mental responsibility," an assumption that is supported by the way in which legal scholars use the terms,[313] the COMA did not restore the defense of partial mental responsibility. The court went to great lengths to distinguish the affirmative defense of partial mental responsibility from the very different purpose of negating mens rea.

To understand the rulings in *Ellis* and *Berri*, one must look at the supporting case law—*United States v. Pohlot*.[314] In *Pohlot*, the Third Circuit Court of Appeals addressed the question of whether "evidence of a criminal defendant's mental abnormality is admissible to prove the defendant's lack of specific intent to commit an offense, following the passage of the Insanity Defense Reform Act of 1984."[315] At trial, the defendant presented evidence of mental illness in support of his asserted defense of lack of mental responsibility, and also to rebut his specific intent to commit murder.[316] In deciding the case, the court came to a number of significant conclusions. First, "although Congress intended § 17(a) [Article 50a(a), UCMJ] to prohibit the defenses of diminished responsibility and diminished capacity, Congress distinguished those defenses from the use of evidence of mental abnormality to negate specific intent or any other mens rea, which are elements of the offense."[317] Second, the evidence presented by the defendant "and effectively excluded by the district court from the jury's consideration of mens rea could not, even if believed, demonstrate that Pohlot lacked the specific intent to contract for the killing of his wife."[318] And third, the defendant's "request for the jury to consider evidence of mental abnormality other than in the context of insanity therefore amounted to a request for a diminished responsibility defense that Congress has abolished."[319]

A fair reading of these conclusions is that the court believed that Congress had effectively abolished the defenses of diminished responsibility and diminished capacity, thus supporting their holding excluding the evidence. In doing so, however, the court distinguished the affirmative defense of partial mental responsibility from the accused's ability to present evidence relevant to his state of mind. Quoting from the legislative history of the Insanity Defense Reform Act of 1984, the *Pohlot* court stated:

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[306] *See* Lieutenant Colonel Donna M. Wright, *"Though this be madness, yet there is method in it": A Practitioner's Guide to Mental Responsibility and Competency to Stand Trial*, ARMY LAW., Sept. 1997, at 26 (concluding that *Ellis v. Jacob* and *United States v. Berri* restored the accused's ability to present evidence of partial mental responsibility); *Criminal Law Note: The Court of Military Appeals Reestablishes the Limited Defense of Partial Mental Responsibility*, ARMY LAW., July 1988, at 60.

[307] *See* United States v. Tarver, 29 M.J. 605, 608 (A.C.M.R. 1989).

> The Court [*Ellis v.* Jacob] reasoned that precluding attacks on the mens rea elements required to be proved by the government raised both constitutional issues and issues related to the President's rule making authority but held that these issues need not be addressed because it was clear that Congress had no intention of negating mens rea attacks in the form of diminished mental capacity.

Id.

[308] *See infra* notes 312-324 and accompanying text.

[309] *See supra* notes 292, 294 and accompanying text.

[310] *See supra* notes 301, 303 and accompanying text.

[311] Ellis v. Jacob, 26 M.J. 90, 93 (C.M.A. 1988) (citing United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988)).

[312] *Id*.

[313] *See* LAFAVE, *supra* note 170, at ¶ 9.2; WHARTON'S CRIMINAL LAW, *supra* note 165, § 107; Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).

[314] 827 F.2d 889 (3d Cir. 1987).

[315] *Id*. at 890.

[316] *Id.*

[317] *Id.*

[318] *Id.*

[319] *Id.* at 890-91.

> The use of mental disorder to negate mental state elements of crimes should not be confused with the "diminished capacity" defense as developed by the California courts during the 1960's and 1970's. Under that doctrine, a defendant could escape responsibility for a crime by demonstrating not that he or she lacked a required specific intent, but rather that his or her capability of entertaining that intent was not, because of mental disorder, commensurate with that of nondisordered persons.[320]

Interestingly, the description of diminished capacity in the quoted language above is essentially the same as the doctrine of partial mental responsibility in the 1969 and 1984 *Manuals for Courts-Martial*.[321] This observation reinforces the conclusion that the terms should be viewed as synonymous, at least with regard to the *Pohlot* court's analysis of 18 U.S.C. § 17. Finally, an entire section of the *Pohlot* opinion is dedicated to "Differentiating Mens Rea from Diminished Responsibility,"[322] a task that belies any conclusion that the opinion somehow supports a "resurrection" of the doctrine of partial mental responsibility.

Thus, the only logical conclusion to draw from *Ellis* and *Berri*, as supported by *Pohlot*, is that a military accused may present evidence of mental illness to demonstrate that he lacked the mens rea required by the charged offense, regardless of Congress having abolished the substantive defense of partial mental responsibility when it adopted Article 50a(a), UCMJ.[323] Furthermore, the President's recent amendment of R.C.M. 916(k)(2) makes clear that evidence of mental illness may not otherwise be offered as an affirmative defense, a classification that has historically applied to the doctrine of partial mental responsibility.[324] For defense counsel, the primary significance of this conclusion, as will be explained below, is that the instructions in the *Military Judges' Benchbook* for evidence negating mens rea and partial mental responsibility are incorrect.[325]

B. Partial Mental Responsibility after *Ellis v. Jacob*

What remains after abolition of the partial mental responsibility defense is an evidentiary rule that is undefined by the *Manual for Courts-Martial* and described only by the appellate court's decisions in *Ellis* and *Berri* and the various federal cases cited in support of those opinions.[326] The resulting concept is easily stated. The accused may present evidence of mental disease or defect, either through expert or lay testimony, to rebut the government's proof that the accused possessed the mens rea required by the charged offense. Stated in this form, the concept is more akin to a specific rule of relevance, much like that found in Military Rule of Evidence (MRE) 412[327] and MRE 707.[328] The distinction between partial mental responsibility and the evidentiary concept stated above is extremely significant.[329]

First, the doctrine of partial mental responsibility, as it existed prior to *Berri*, was a substantive defense that only Congress could change.[330] In contrast, the evidentiary concept described above is subject to the President's Article 36 rulemaking authority because it is essentially a rule of relevance,[331] limited only by constitutional considerations.[332] Second,

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[320] *Id.* at 898 (citing H.R. Rep. No. 98-577, 98th Cong. 1st Sess. 15 n.23 (1983)).

[321] *See supra* notes 292-294 and accompanying text.

[322] *Pohlot*, 827 F.2d at 903.

[323] The last sentence of Article 50a(a), UCMJ, states, "Mental disease or defect does not otherwise constitute a defense." UCMJ art. 50a(a) (2005). The *Pohlot* court interpreted this language, which also appears as the last sentence of 18 U.S.C. § 17 (2000), as implementing Congress's intent to abolish only affirmative defenses. *Pohlot*, 827 F.2d at 898.

[324] *See supra* notes 289-295 and accompanying text.

[325] *See infra* Part IV.C.

[326] *See* United States v. Berri, 33 M.J. 337, 342 (C.M.A. 1991) ("Regarding the elements of the offenses, the precise question was . . . does the psychiatric testimony make it 'more probable' or 'less probable' that the accused formed the necessary 'specific intent' to be found guilty 'beyond a reasonable doubt' of the charged offenses.").

[327] MCM, *supra* note 3, MIL. R. EVID. 412 (defining when evidence of a sexual assault victim's behavior or sexual predisposition will be relevant); *see* United States v. Andreozzi, 60 M.J. 727 (Army Ct. Crim. App. 2004) (stating that MRE 412 is "intended to 'safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping'").

[328] MCM, *supra* note 3, MIL. R. EVID. 707 (creating a blanket exclusion of evidence of the results of a polygraph examination); *see also* United States v. Scheffer, 523 U.S. 303 (1998) (upholding the President's authority under Article 36, UCMJ, to prescribe an evidentiary rule (RCM 707) that categorically excludes certain types of minimally relevant evidence).

[329] For an excellent discussion of the distinction between partial mental responsibility and psychiatric evidence relevant to mens rea, *see* Morse, *supra* note 313.

[330] *See* United States v. Frederick, 3 M.J. 230 (1977).

[331] *See Scheffer*, 523 U.S. at 46.

the evidentiary rule does not require a showing of incapacity; rather, it only requires that the evidence be relevant to whether the accused possessed the criminal mens rea at the moment of the offense. This distinction is the most significant to the practitioner. To illustrate, suppose the defense calls a psychiatrist who testifies that the accused suffered from an acute mental disorder making it extremely difficult for him to form the intent to carry out the complex acts that resulted in the alleged crime. On cross-examination, the psychiatrist is forced to admit that, although highly unlikely, it was not impossible for the accused to form intent. On this evidence, the defense has arguably failed to demonstrate incapacity, thereby making the doctrine of partial mental responsibility inapplicable. The defense, however, has very effectively demonstrated reasonable doubt as to whether the accused actually possessed the mens rea necessary for guilt. The impact of this evidence on the factfinder will largely be determined by the trial instructions. Unfortunately, neither the *Military Judges' Benchbook* nor military appellate decisions since *Berri* have captured the distinction illustrated above.

A number of appellate decisions since *Berri* have mentioned the use of mental illness to rebut mens rea.[333] One example is *United States v. Schap*,[334] in which the appellant presented a heat of passion defense to a charge of premeditated murder.[335] On appeal, one of the issues was whether the military judge improperly instructed the panel by giving the partial mental responsibility instruction from the *Benchbook*.[336] Citing the opinions in *Ellis* and *Berri*, the CAAF held that the instruction,

> was the very embodiment of the theory upon which the entire defense case was predicated—that because of appellant's agitated state of mind as a result of his discovery of his wife's infidelity, he was so reasonably provoked and in such a sudden heat of passion that he could not have premeditated murder or that, even if his acts were intentional, they were partially excusable due to his state of mind.

This holding implies two things: (1) the court, although citing to *Ellis* and *Berri*, did not recognize the distinction between partial mental responsibility and evidence negating mens rea; and (2) the court continued to view the doctrine as one of excuse, rather than a failure of proof. These two errors are significant because, as will be argued below, they support the continued use of a panel instruction that unnecessarily requires the accused to produce evidence of incapacity and improperly links evidence negating mens rea (a defense of failure of proof) to lack of mental responsibility (a defense of excuse).[337]

C. Proposed Changes to the *Military Judges' Benchbook*

Benchbook instructions 5-17, Evidence Negating Mens Rea, and 6-5, Partial Mental Responsibility, require the government to prove that the accused is mentally capable of forming the *mens rea* required by the offense charged.[338] A successful defense based on partial mental responsibility requires the accused to raise a reasonable doubt about his mental capacity. The key word in this instruction is capacity. The relevant issue for the factfinder is not whether the accused was mentally capable of forming mens rea, but whether he actually possessed the required mens rea.[339] As illustrated by the example earlier in this section, circumstances may arise where the defense failed to present evidence that the accused had an incapacity to form mens rea; but, yet, the evidence could be very persuasive that a mental disease or defect resulted in his failure to possess a criminal mens rea at the time of the criminal act. *Benchbook* instructions 5-17 and 6-4 fail to incorporate the significant changes of *Ellis* and *Berri* and, therefore, must be amended to make clear that the relevant legal issue is whether the accused possessed a criminal mens rea, and not whether he had the capacity to possess a criminal mens rea. *Benchbook* instruction 5-17, shown in Appendix C, captures this very important distinction.

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[332] *See, e.g.*, Rock v. Arkansas, 483 U.S. 44, 46 (invalidating a state statute that prohibited the defendant from presenting hypnotically refreshed testimony because it effectively barred the defendant from presenting her only available defense); Washington v. Texas, 388 U.S. 14 (1967) (holding that a Washington rule of evidence that prohibited the defendant from presenting exculpatory testimony from a co-defendant violated the Sixth Amendment); Hughes v. Mathews, 576 F.2d 1250 (7th Cir. 1978) (holding that exclusion of psychiatric evidence relevant to whether the defendant possessed specific intent violated the Due Process Clause).

[333] *See, e.g.*, United States v. Kreutzer, 59 M.J. 773 (2004) (stating that the defense counsel's failure to discover and present evidence of mental illness was relevant to the accused's "diminished capacity to form the requisite intent"); United States v. Tarver, 29 M.J. 605 (A.C.M.R. 1989) (resurrecting the diminished capacity language by interpreting *Ellis v. Jacob*, 26 M.J. 91 (C.M.A. 1988), to mean that "Congress had no intention of negating mens rea attacks in the form of diminished mental capacity").

[334] 49 M.J. 317 (1998).

[335] *Id.* at 322.

[336] *Id.* The language of the panel instruction quoted by the court is the same as that currently found in paragraph 5-17 of the *Military Judges' Benchbook*.

[337] *See* LAFAVE, *supra* note 170, § 9.1(b) ([T]oday it may be said without qualification that the partial responsibility defense is of the failure of proof type, for what is involved is using mental illness to negate a required mental state.").

[338] BENCHBOOK, *supra* note 9, paras. 5-17, 6-5. The complete text of instruction 5-17, with proposed amendments, is at Appendix C.

[339] *See* LAFAVE, *supra* note 170, § 5.1.

The second problem, although much less significant, is that both instructions limit the relevance of evidence to specific intent, knowledge, and willfulness.[340] This limitation comes directly from the doctrine of partial mental responsibility[341] and is inconsistent with the general concept of allowing the accused to present all evidence necessary to establish a defense.[342] In *United States v. Pohlot*, the Court of Appeals noted that Congress, in debating what is now 18 U.S.C. § 17(a), distinguished between the defense of diminished responsibility and "the use of evidence of mental abnormality to negate specific intent *or any other mens rea*," arguably including general intent.[343] The *Berri* opinion likewise noted the possibility that an accused could offer evidence of mental illness to rebut a general intent crime, but declined to address the issue because the record contained insufficient evidence.[344] And although *Berri* cannot be read as supporting a conclusion that evidence of mental illness may be relevant to rebut general intent, it certainly does not foreclose the possibility. Ultimately, the issue of whether psychiatric evidence is relevant to the accused's possession of general intent must be resolved by examining the ability of psychiatrists or psychologists to offer a reliable opinion on the matter.[345] Although it is difficult to imagine a circumstance in which the accused's mental illness would be so severe as to rebut general intent, and yet not amount to an insanity defense, the possibility should not be ignored by the inapposite reference to the abolished doctrine of partial mental responsibility. General intent is defined in Black's Law Dictionary as "usually tak[ing] the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)."[346] Theoretically, mental illness could have an effect on an individual's actual awareness (requiring some level of knowledge) of a known risk. Defense counsel should, therefore, actively seek expert evidence relevant to the accused's possession of mens rea, including general intent, and request appropriately tailored instructions based upon the evidence. Appendix C contains a suggested amendment of *Benchbook* instruction 5-17 that would allow for this type of evidence.

V. Evidence Relevant to Voluntary Act (Unconsciousness or Automatism)

Just as evidence negating mens rea may result in a complete acquittal, so may evidence negating the actus reus. Fundamental to the idea of criminal responsibility is that there has been a "concurrence of an evil-meaning mind with an evil-doing hand,"[347] reflected in criminal statutes by the presence of both a proscribed act and an attendant mental state. Under common law, and within the military justice system, the accused must commit the proscribed act voluntarily.[348] While the previous section focused on evidence of mental illness as it may affect an accused's possession of the prescribed mental state, this section focuses on how mental illness may result in a servicemember committing an involuntary act. The defense associated with the absence of a voluntary act is commonly referred to as either unconsciousness or automatism.[349] Automatism is defined "as connoting the state of a person who, though capable of action, is not conscious of what he is doing."[350] Examples include actions committed while sleepwalking (somnambulism), while hypnotized, during an epileptic seizure, or following extreme trauma.[351] Although automatism has a firm place within the common law and the general literature on criminal law,[352] its status within the military justice system is uncertain.[353]

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[340] BENCHBOOK, *supra* note 9, paras. 5-17, 6-5. Although the text of the instructions includes a blank in which to insert the mens rea, the prefatory language limits relevance to the elements of premeditation, specific intent, knowledge, or willfulness, citing *Ellis v. Jacob* and *United States v. Berri*.

[341] *See* United States v. Kunak, 17 C.M.R. 346, 365 (1954) ("While a mental disorder, something less than insanity, may interfere with the ability to premeditate, it does not exonerate an accused from the commission of a crime involving only a general intent.").

[342] *See* cases cited *supra* note 332.

[343] United States v. Pohlot, 827 F.2d 889, 890 (3d Cir. 1987) (emphasis added). *Compare id.*, *with* United States v. Gonyea, 140 F.3d 649 (6th Cir. 1988) (basing decision upon a conclusion that the defense of diminished capacity does not apply to general intent crimes).

[344] United States v. Berri, 33 M.J. 337, 339 n.3 (C.M.A. 1991).

[345] *See* Daubert v. Merrill Dow Pharmaceutical, 509 U.S. 579 (1993); MCM, *supra* note 3, MIL. R. EVID. 702.

[346] BLACK'S LAW DICTIONARY 813 (17th ed. 1999).

[347] Morissette v. United States, 342 U.S. 246 (1952).

[348] *Berri*, 33 M.J. at 341 n.9 ("An act is a *voluntary* movement.").

[349] *See* LAFAVE, *supra* note 170, § 9.4. Although the concepts of voluntariness, automatism, and unconsciousness are not equivalent, courts and commentators alike often use them interchangeably. *See* Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 281 (2002). This paper focuses on whether the absence of a voluntary act, regardless of whether it occurs during an automatic state or a period of unconsciousness, excuses otherwise criminal conduct in the military justice system.

[350] LAFAVE, *supra* note 170, § 9.4; *see also* BLACK'S LAW DICTIONARY 129 (17th ed. 1999) (defining automatism as "action or conduct occurring without will, purpose, or reasoned intention, such as sleepwalking; behavior carried out in a state of unconsciousness or mental dissociation without full awareness").

[351] Major Michael J. Davidson, United States v. Berri*: The Automatism Defense Rears Its Ugly Little Head*, ARMY LAW., Oct. 1993, at 19-23.

[352] LAFAVE, *supra* note 170, § 9.4, at 466.

This characterization of automatism as negating the actus reas, however, is highly debatable.[354] Some in the legal community argue that automatism is treated more properly as evidence either negating mens rea or as a form of the insanity defense.[355] Those favoring the actus reas analysis suggest that automatic behavior is often characterized by the lack of purposeful or willful behavior, such as sleepwalking, and thus occurs in individuals who may not suffer from a severe mental disease or defect at all.[356] The insanity defense, therefore, would not provide an affirmative defense to those individuals, making it underinclusive for the purpose of absolving someone who acts without conscious control of his behavior. The latter school of thought argues that automatic behavior should be treated as an excuse defense, like insanity, because, regardless of the cause, individuals who commit dangerous acts outside of their conscious control are no less dangerous to society than the criminally insane.[357] The heightened procedural requirements of the insanity defense, such as pretrial notice, a defense burden of proof, and involuntary commitment, are equally appropriate, it is argued, for cases involving automatism.[358] The distinction between automatism and the sanity defense is both procedurally and substantively significant. If automatism is treated as a means of attacking the government's proof of the elements, whether the actus reas or the mens rea, then the burden of proof never shifts to the accused, and defense success at trial will result in a complete acquittal.[359] If, however, automatism is regarded as a specialized form of insanity, then the accused would bear the burden of proof under the current rules and defense success would potentially result in involuntary commitment.[360]

A. History of Unconsciousness or Automatism in Military Case Law

Although military courts have referred to automatism as a viable defense, the CAAF has not provided a firm definition. One of the earliest military cases to mention automatism is *United States v. Olvera*.[361] In *Olvera*, the court examined whether the law officer erred by failing to give an instruction "on the effect of unconsciousness, or 'mental blackout,' on general criminal responsibility."[362] At trial, Private First Class (PFC) Olvera alleged that he suffered from amnesia at the time of the offense as a result of receiving several blows to the head, a type of trauma known to cause automatic behavior.[363] In its analysis, the court stated that the accused's head injury could result in acquittal, provided the injury "deprived him of the ability to distinguish right from wrong—as well as to remember the nature of his conduct."[364] Although the court used the term "automatism" in a number of instances, it did so in the context of the insanity defense, ultimately holding that "the accused signally failed to link his amnesia to any type of automatism, or to demonstrate that the deftly executed slashing of his victim was related in any way to a 'mental defect, disease or derangement' depriving him of legal responsibility."[365] While not conclusive, the *Olvera* opinion seems to support a conclusion that the court treated automatism as a form of

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[353] For a comprehensive discussion of the defense of automatism within the military justice system, *see* Davidson, *supra* note 351, at 17. Major Davidson concludes that automatism, although ill-defined, exists in the military justice system as a challenge to the actus reas that, if successful, justifies an acquittal. *Id*. at 26.

[354] *See* Denno, *supra* note 349, at 275; Emily Grant, Note*: While You Were Sleepwalking or Addicted: A Suggested Expansion of the Automatism Doctrine to Include an Addiction Defense*, 2000 U. ILL. L. REV. 997; Stephen J. Morse, Symposium*: Act & Crime: Acts, Choices & Coercion: Culpability and Control*, 142 U. PA. L. REV. 1587, 1641 n.145 (1994); Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191(1990); Eunice A. Eichelberger, *Annotation, Automatism or Unconsciousness as Defense to Criminal Charge*, 27 A.L.R. 4th 1067 (1984).

[355] *See* Denno, *supra* note 349, at 283 ("[T]he requirement [of a voluntary act] is unusual because it can apply to either the defendant's mental state or to the defendant's acts. That is, it is applicable to either the mens reqa or actus reus elements of a crime."); Grant, *supra* note 354, at 1003 ("The law is unsettled as to whether automatism constitutes a form of insanity.").

[356] *See* Corrado, *surpa* note 354, at 1191 (concluding that "[i]f automatism is a defense, it is because the action involved, while conscious and purposive, is not voluntary"); Fulcher v. State, 633 P.2d 142 (Wyo. 1981) ("Automatism may also be manifest in a person with a perfectly healthy mind.").

[357] *See* Morse, *supra* note 355, at 1641-52 (arguing that a "defendant who acted in a dissociated state [such as sleepwalking] is more like a legally insane actor than like an actor who harms as a result of a reflex movement or than like a rational defendant who made a mistake of fact that negated mens rea").

[358] *See id.* at 1641 n.145 (emphasizing the importance of the distinction as it effects the allocation of the burden of proof and the treatment of the defendant following acquittal).

[359] *See* In re Winship, 397 U.S. 358 (1970) (holding that the prosecution must prove all elements of a crime beyond a reasonable doubt); *see also* Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) (holding that the Due Process Clause requires that the prosecution prove each element of mens rea beyond a reasonable doubt).

[360] *See* MCM, *supra* note 3, R.C.M. 916(k)(1), 1102A.

[361] 15 C.M.R. 134 (C.M.A. 1954).

[362] *Id.* at 136.

[363] *Id*. A medical officer testified at trial that if someone were to receive several blows to the head in the area of the temple, "it is 'possible that the recipient of such a blow can be so dazed thereby momentarily or longer as to be deprived of any conscious intent to commit a particular act.'" *Id.* The appellant testified at trial that he did receive one or more blows to the head, and that subsequently lost memory of the events. *Id*.

[364] *Id.* at 139.

[365] *Id.* at 140.

insanity.[366] Aside from recognizing the general proposition that unconsciousness at the time of the offense would relieve an accused from criminal responsibility, the *Olvera* provides little authoritative guidance on the precise treatment of unconsciousness as a defense.

The most recent COMA case to address the defense of automatism is *United States v. Berri*.[367] In *Berri*, the appellant presented expert testimony that, at the time of the offense, he suffered from post-traumatic stress disorder, dissociative episodes, and paranoid explosive personality disorder.[368] Although automatism was not directly raised as an issue, the court noted that one of the defense's experts testified about the accused's level of consciousness at the time of the offense. Without citing to *Olvera*, or any other judicial decision, the court acknowledged in a footnote that unconsciousness could be raised as a defense.[369] In the same footnote, the court recognized that while the common law and the Model Penal Code treat consciousness as part of the actus reas, some jurisdictions instead regard it as an affirmative defense.[370] Having noted the existence of unconsciousness as a defense, the court concluded that insufficient evidence had been raised in the case to actually define the status of unconsciousness as a defense under military law.[371] The court's resolution of the issue is largely unsatisfying. Logically, one would need to know the definition of the defense before determining whether it has been raised by the evidence; nonetheless, the court declined to elaborate on the legal relevance of the accused's consciousness.

Although the military appellate courts have declined to provide any clear guidance on the defense of unconsciousness, at least one federal appeals court has directly addressed the issue. In *Government of the Virgin Islands v. Smith*,[372] the Third Circuit heard an appeal of a district court conviction for involuntary manslaughter.[373] At trial, the appellant presented expert testimony that he suffered an epileptic seizure at the time he lost control of his vehicle, striking and killing two women.[374] The court reversed the conviction, holding that the trial judge improperly placed the burden of proof on the accused.[375] According to the court, the accused's only burden at trial was to raise a reasonable doubt as to his consciousness at the time of the offense, after which the government was required to prove each element of the offense beyond a reasonable doubt.[376] Interestingly, the court characterized the appellant's lack of consciousness as negating his possession of mens rea, rather than his commission of a voluntary act.[377] In dicta, the court further noted that the *M'Naghten* Rule for insanity was in effect in

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[366] The court made other comments to support this conclusion. For example, citing *People v. Freeman*, 142 P.2d 435 (Cal. 1943), the *Olvera* court stated that if the accused where able to demonstrate that a "blackout" stemmed from acute epilepsy, they would have no trouble concluding that the defense of mental responsibility had been raised. This statement, however, is unsupported by the opinion in *Freeman*, which states that unconsciousness, when caused by epilepsy, "differs from insanity in that the latter generally meant an unsoundness of mental condition which modifies, or removes, individual responsibility because it 'is such a deprivation of reason that the subject is incapable of understanding and of acting with discretion in the ordinary affairs of life.'" *Id.* at 438. The *Freeman* court went on to hold that the defendant is not required to plead insanity in order to raise a defense of unconsciousness. *Id.* at 439. *Freeman*, therefore, does not support the proposition that a blackout resulting from an epileptic seizure would raise the insanity defense.

[367] 33 M.J. 337 (1991). The Army Court of Military Review has, in two relatively recent decisions, reviewed cases involving evidence of automatic behavior but failed to define the defense of automatism. In *United States v. Campos*, 37 M.J. 894 (A.C.M.R. 1993), the court rejected the appellant's assertion that "he lacked the required mens rea due to automatic and uncontrollable behavior brought on by claustrophobia." *Id.* at 901. Without ever deciding whether automatic behavior rebuts the actus reus, the mens rea, or supports an insanity defense, the court held simply that "we agree with the government and find the appellant's contention to be without merit." *Id.* at 902. The government's argument, as described by the court, was that the military judge, in a bench trial, "was not persuaded that the appellant's evidence about his lack of mental responsibility negated any intent elements of the offenses." This language further confuses the question of whether the military judge found the evidence relevant to the government's proof of mens rea, the accused's proof of an insanity defense, or perhaps both. The legal standard applied in *Campos*—whether the evidence was legally and factually sufficient to support the findings—could not be applied logically to the case without first determining the issues to which the evidence was relevant, i.e. government proof of actus reas and mens rea, or defense proof of insanity, in conjunction with the allocation of the burden of proof. Because the court's analysis does not include a discussion of the legal relevance of the evidence, the holding does not resolve any of the key issues regarding the applicability of automatism. *See also* United States v. Dock, 35 M.J. 627 (A.C.M.R. 1992) (holding that the evidence established beyond a reasonable doubt that the accused was mentally responsible at the time of the offenses, in part because the defense evidence that the accused suffered from "temporal lobe epilepsy" and "automatous behavior" lacked credibility).

[368] *Berri*, 33. M.J. at 338.

[369] *Id.* at 341 n.9.

[370] *Id.*

[371] *Id.* at 341.

[372] 278 F.2d 169 (3d Cir. 1960).

[373] *Id.* at 171.

[374] *Id.*

[375] *Id.* at 173.

[376] *Id.* at 173-74. The Third Circuit cites the same line of California cases cited by the COMA in *United States v. Olvera*, including *United States v. Freeman*, 142 P.2d 435 (Cal. 1943). *Id.* at 175. *See supra* note 366 discussing the COMA's erroneous interpretation of *Freeman*.

[377] *Smith*, 278 F.2d at 174.

that jurisdiction, but that the evidence of unconsciousness due to an epileptic seizure did not amount to a mental illness.[378] The *Smith* opinion is of particular importance to the military defense counsel because it is the only appellate decision interpreting the defense of unconsciousness under federal law.[379] Even if the *Smith* court's analysis is not controlling on the status of unconsciousness under military law, it certainly has persuasive value that can be argued by defense counsel.[380]

B. A Proposed Instruction for Evidence of an Involuntary Act

The good news for defense counsel is that the current ambiguity in the defense of automatism leaves much room for advocacy. The *Berri* decision, by failing to cite the court's decision in *Olvera* and seemingly giving greater weight to the common law and the Model Penal Code, seems to emphasize the practice of treating consciousness as part of the actus reas. From the accused's perspective, a defense on the elements, whether it be the actus reas or the mens rea, is nearly always preferable to the insanity defense because the accused need only raise reasonable doubt to secure an acquittal.[381] Furthermore, if evidence of automatism is treated as negating the government's proof of either a voluntary act or a required mental state, then it must be regarded as a rule of relevance, much like evidence negating mens rea.[382] This categorization has the great advantage, for the defense, of limiting the ability of either Congress or the President to restrict its scope and applicability without infringing upon the accused's constitutional right to present a defense.[383] Defense counsel, therefore, should strenuously argue that evidence of automatic behavior is not governed by the strict definition for lack of mental responsibility found in RCM 916(k)(1), and that the accused is entitled to a carefully tailored panel instruction appropriate to the evidence presented.

Unlike the defense of lack of mental responsibility and the use of evidence negating mens rea, the *Benchbook* does not contain an instruction applicable to evidence negating the government's proof of a voluntary act. Thus, a completely new instruction, "5-15a. Evidence Negating Voluntary Act," is proposed in Appendix D.[384] Although the language of the instruction will vary depending upon the nature of the charges and the evidence, the key point is that the factfinder must understand that the government must prove beyond a reasonable doubt that the actions of the accused were voluntary.

VI. Evidence Offered in Mitigation or Extenuation

Finally, evidence that the accused suffered from a mental illness, whether prior to, during, or after the commission of an offense, is often relevant as mitigation or extenuation evidence.[385] Extenuating evidence is that which "serves to explain the circumstances surrounding the commission of the offense, including those reasons for committing the offense which do not constitute a legal justification or excuse."[386] Evidence in extenuation is often backward looking, focusing on mental illness that existed prior to or contemporaneously with the offenses, potentially lessening the accused's culpability. Mitigating

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[378] *Id.*

[379] Although there are other federal decisions that mention the defense of unconsciousness, none define the defense as it exists under federal law or prescribe any protections afforded by the Fifth or Sixth Amendment. One example is *Williams v. Gupton*, 627 F. Supp. 669 (W.D.N.C. 1986), a case in which the petitioner alleged that his conviction in state court violated the Due Process Clause because the trial court had placed the burden upon the defense to prove automatism rather than requiring the state to disprove the defense beyond a reasonable doubt. *Id.* at 670. Although the district court cited two state court decisions distinguishing automatism from the insanity defense, the court denied the appellant's petition for a writ of habeas corpus because he had failed to preserve the issue both at trial and on direct appeal. *Id.* at 671.

[380] *See* United States v. Frederick, 3 M.J. 230 (1977) (looking to federal criminal law for definition of the insanity defense when UCMJ provided no specific provision).

[381] *See* In re Winship, 397 U.S. 358 (1970). *Cf.* Williams v. Gupton, 627 F. Supp. 669 (W.D.N.C. 1986) (noting that the Fifth Amendment does not preclude states from placing the burden of proof upon the defendant to prove affirmative defenses); North Carolina v. Jones, 595 S.E.2d 715 (N.C. 2004) (finding that unconsciousness is a complete defense, separate and apart from insanity, for which the accused has the burden of proof).

[382] *See supra* Part IV.

[383] *See, e.g.*, Rock v. Arizona, 483U.S. 44 (1987) (holding that the defendant's rights under the Fifth and Sixth Amendments were violated by a state evidentiary rule prohibiting the introduction of hypnotically refreshed testimony). *Cf.* Medina v. California, 505 U.S. 437 (1992) (holding that the Due Process Clause does not prohibit a state from placing the burden of proof on the defendant to prove mental incompetence); Patterson v. New York, 432 U.S. 197 (1977) (holding that it is not unconstitutional to require the defendant to prove affirmative defenses).

[384] In *United States v. Mallery*, a case tried in December 2003, detailed defense counsel requested a similar panel instruction after presenting evidence that the accused was sleepwalking at the time of the offense. The military judge agreed to give the requested instruction, and the panel returned a verdict of not guilty. This case has not been reviewed on appeal.

[385] MCM, *supra* note 3, R.C.M. 1001(c)(1) ("The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.").

[386] *Id.* R.C.M. 1001(c)(1)(A).

evidence, on the other hand, serves "to lesson the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency."[387] In contrast to extenuating evidence, mitigating evidence is generally forward looking, focusing on how the purposes for punishment can best be accomplished, taking into consideration the mental health of a particular accused.

Because mental illness is inherently related to human behavior, evidence that the accused suffered a mental illness may either explain the accused's commission of the offense or weigh in favor of a more lenient punishment. For example, in a case in which the accused's mental illness contributed to his motivation to commit an offense, evidence that the illness is treatable, coupled with a favorable prognosis, will be persuasive in contradicting a prosecution argument that criminal punishment is necessary to accomplish specific deterrence or rehabilitation.[388] On the other hand, if the accused is diagnosed with a mental disorder that is difficult or impossible to treat, such as an inadequate personality[389] or pedophilia,[390] then evidence of the disorder would logically not result in a reduced sentence. The point for defense counsel to remember is that evidence of mental illness, including relatively minor disorders, may have relevance to punishment that is completely distinct from relevance to mental capacity, mental responsibility, and other issues that arise in the case on the merits. What makes the evidence persuasive, as either mitigation or extenuation, is the defense counsel's ability to: (1) use the mental disorder to provide insight into the accused's motivation or compulsion to commit criminal acts; (2) establish that the disorder is treatable and that the accused has the characteristics that make him a good candidate for successful treatment; (3) shift the focus of the factfinder from retribution to rehabilitation; and (4) allow the accused, either through a sworn or unsworn statement, to convince the factfinder that he is committed to receiving all necessary treatment.

The importance of the defense counsel's duty to investigate and present evidence in mitigation and extenuation, including evidence of mental illness, is illustrated by *United States v. Kreutzer*.[391] After finding SGT Kreutzer guilty of premeditated murder, along with other offenses, a general court-martial sentenced him to death.[392] At trial, the defense team requested the assistance of a mitigation expert to gather evidence for use during presentencing, including evidence relevant to the accused's documented psychological problems.[393] Both the general court-martial convening authority and the military judge denied the defense's request.[394] The Army Court of Criminal Appeals ruled that the military judge abused his discretion, and that the lack of a mitigation expert contributed to the defense team's ineffectiveness during presentencing.[395] Underlying the court's decision was that the accused's mental state was central to the case, both on the merits and during presentencing.[396] Not only had the accused been evaluated and diagnosed by several mental health professionals, but one even noted that "mitigating mental health evidence concerning appellant would be central to any defense."[397] As a result of the government's failure to provide adequate expert assistance to the defense for the purpose of discovering and presenting mitigating evidence of the accused's mental health, the court reversed the findings on premeditated murder, set aside the sentence, and remanded the case for further proceedings.[398] The message from *Kreutzer* is fairly clear. In a capital case, the defense counsel has a heightened duty to present mitigating evidence of mental illness and the government has an obligation to provide reasonable expert assistance to gather that evidence.

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[387] *Id.* R.C.M. 1001(c)(1)(B).

[388] A more specific example that seems to arise with some frequency is the case in which the accused's decision to commit the offense was influenced by acute anxiety or depression. In this circumstance, expert testimony that the depression can be successfully treated, either through therapy or medication, could serve to reduce the sentence. In the author's experience, military judges have widely disparate views on the significance of this type of evidence; however, it is probably beyond cavil that presenting this type of extenuation is far better than presenting no extenuation at all.

[389] Inadequate personality is defined as a disorder "characterized by ineptness and emotional and physical instability, which renders the individual unable to cope with the normal vicissitudes of life." STEDMAN'S MEDICAL DICTIONARY 1172 (25th ed. 1990).

[390] Pedophilia is defined as "the love of children by an adult for sexual purposes." *Id.* at 1044.

[391] 59 M.J. 773 (2004).

[392] *Id.* at 774.

[393] *Id.* at 777. As noted by the court, a mitigation specialist would have done an extensive background search of the accused for the purpose of discovering "significant contributing events or factors in [appellant's] life that may have effected [sic] his mental health at the time of the offenses charged." *Id.*

[394] *Id.*

[395] *Id.* at 774-75.

[396] *Id.* at 777.

[397] *Id.*

[398] *Id.* at 784. The remedy imposed by the court was also based upon the ineffective assistance of defense counsel.

Although the *Kreutzer* decision is specific to capital litigation, the Army Court has imposed a similar duty on defense counsel acting in noncapital cases. In *United States v. Weathersby*,[399] a military judge sitting alone found the appellant guilty of attempted forcible sodomy, rape, and assault of his daughter.[400] Following the government's presentencing case, the defense called the appellant for a sworn statement that consisted of approximately fifty-four words, after which the defense rested without presenting any other evidence.[401] The military judge sentenced the accused to confinement for twenty-six years, a dishonorable discharge, total forfeiture of pay and allowances, and reduction to private E-1.[402] While accepting the defense counsel's assertions that the appellant failed to cooperate in either identifying potential defense witnesses or providing documentary evidence, the court still held that the defense counsel's performance during presentencing amounted to ineffective assistance of counsel.[403]

Although the *Weathersby* case did not involve extenuating or mitigating evidence of mental illness, the court's decision applies equally to the defense counsel's duty to discover and present all types of presentencing evidence. In general, the defense counsel has a duty to ensure that the factfinder is presented with "all relevant mitigating circumstances relating either to the offense or to the characteristics of the defendant which were not disclosed during the guilt phase of the case."[404] To accomplish this task, the defense counsel must: (1) make a reasonable effort to identify and gather evidence favorable to the accused; (2) exercise reasonable professional judgment in evaluating the information as it applies to a given case; and (3) make a reasonable determination as to whether to use the information in the case on the merits or during presentencing.[405] In *Weathersby*, a case involving sexual misconduct, the court reasoned that these three duties required, among other things, the defense counsel to consult "with psychiatric or other clinical experts to evaluate the appellant's sexual predilections."[406] This conclusion is significant because it creates an affirmative duty, like the *Kreutzer* decision, for the defense counsel to request expert assistance to gather evidence of mental illness. Although the decision in *Weathersby* lacks the constitutional underpinnings of the *Kreutzer* decision,[407] the language in *Weathersby* creates strong support for defense counsel to argue that they have a necessity for expert psychiatric assistance in preparation of the presentencing case.

VII. Conclusion

Although the issues in this paper are addressed predominantly from the perspective of a trial defense counsel, the legal analysis and conclusions are intended to be a balanced interpretation of the law as it exists today. The purpose of this paper has been to identify those areas of military law relevant to mentally ill servicemembers that are most in need of revision and clarification. In general, the effectiveness of law is lessened by ambiguity and strengthened by certainty and predictability. For this reason, the military justice system as a whole will benefit from correcting the deficiencies addressed in this paper.

The first of those deficiencies is found in R.C.M. 909, which allows the general court-martial convening authority, with the assistance of the Attorney General, to involuntarily hospitalize a servicemember prior to referral of charges. The provisions of R.C.M. 909 are unlawful for two reasons: (1) because the statute upon which R.C.M. 909 is based, Article 76(b), UCMJ, only applies to cases in which charges have been referred, and (2) because involuntary commitment is accomplished without ever giving the servicemember a hearing in front of a neutral decisionmaker, in violation of the Due Process Clause. Consequently, R.C.M. 909 must be amended as shown in Appendix A to prevent involuntary commitment of a servicemember prior to referral of charges and to restore the convening authority's discretion to dispose of charges as he sees fit.[408]

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[399] 48 M.J. 668 (Army Ct. Crim. App. 1998).

[400] *Id.* at 669.

[401] *Id.*

[402] *Id.*

[403] *Id.* at 671.

[404] *Id.* (citing AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, 18-6.3(f)(ii) (2d ed. 1980)) (internal quotations omitted).

[405] *Id.* at 673.

[406] *Id.*

[407] *See* United States v. Kreutzer, 59 M.J. 773, 776 (Army Ct. Crim. App. 2004) (relying on *Ake v. Oklahoma*, 470 U.S. 68 (1985), for the proposition that "the Sixth Amendment right to counsel mandates the provision of adequate resources, to include experts, in order to present an effective defense").

[408] The amendment recommended in Appendix A naturally raises difficult questions. What should a convening authority do with a mentally incompetent servicemember who is suspected of committing serious crimes? May an Article 32, UCMJ, investigation proceed against an accused servicemember who is mentally incompetent? Does the accused have a statutory or constitutional right to be mentally competent at the time of an Article 32, UCMJ, investigation? Is it permissible for a convening authority to refer charges to court-martial for an accused servicemember whom he believes to be mentally incompetent? These questions, although admittedly important, are beyond the scope of this article. The purpose of this paper has been to identify the statutory and

For cases that have been beef referred to trial, there is significant ambiguity in the insanity defense, the doctrine of partial mental responsibility, and the defense of unconsciousness. Within the law of mental responsibility, the *Military Judges' Benchbook* defines "severe mental disease or defect" too narrowly. Instruction 6-4 excludes "non psychotic behavior disorders and personality disorders" from the definition of "severe." This exclusionary language is unsupported by Article 50a, UCMJ, and is arguably contrary to military case law. Furthermore, Instruction 6-4 should be improved by defining the key terms of the mental responsibility defense, including "appreciate," "nature and quality," and "wrongfulness." These three terms must be defined in a way that captures two important principles. First, the accused must have more than a cognitive awareness of the circumstances surrounding an alleged offense—he must have an emotional awareness of the significance of his actions and their natural consequences. Second, the accused's actions, as he appreciates them, must be more than merely unlawful—wrongfulness must include an element of public morality. Although these two principles may be articulated in different ways, one possible solution is found in Appendix B.

While the insanity defense may be significantly improved merely by defining its key terms, the doctrine of partial mental responsibility must undergo a complete transformation in the way it is presented in the *Military Judges' Benchbook*. The Military Justice Amendments of 1986, along with a recent amendment of RCM 916(k)(2), abolished what was previously known as the doctrine of partial mental responsibility. Nevertheless, evidence of the accused's mental illness may still be relevant to whether or not he possessed a criminal mens rea at the time of the offenses. The distinction between the doctrine of partial mental responsibility and the use of evidence to negate mens rea is significant. The doctrine of partial mental responsibility, as reflected in *Benchbook* Instructions 5-17 and 6-5, provided a defense when the accused raised a reasonable doubt about his mental *capacity* to entertain the mens rea required by the charged offense. Reference to the accused's mental *capacity* to form a specific mens rea is a vestige of the doctrine that both Congress and the President have abolished. In contrast, the legal relevance of evidence of mental illness used to negate mens rea is whether the accused's mental illness makes it more or less likely that he possessed the mens rea required by the charged offense. The relevant issue is not the accused's mental capacity to form mens rea—the relevant issue is whether the accused actually possessed a criminal mens rea. This article proposes a revised *Benchbook* instruction that removes all remnants of the abolished doctrine of partial mental responsibility and clarifies the relevance of the accused's mental illness to the government's proof of mens rea.

Finally, the accused may present evidence of mental illness to demonstrate that his or her actions were involuntary. Commonly referred to as the defense of unconsciousness, or automatism, or as a failure of the government's proof that the accused committed a voluntary act, neither the *Manual for Courts-Martial* nor the *Military Judges' Benchbook* contain a provision defining the defense. Evidence that the accused's actions were involuntary, whether characterized as negating the mens rea or the actus reas, undermines the government's proof of the elements. Because military law requires the actions of an accused servicemember be voluntary to support a court-martial conviction, the accused should be entitled to a specific panel instruction when the evidence raises the issue of whether mental illness may have resulted in the accused's actions being involuntary. Appendix D contains a new panel instruction to be given when there is evidence that the accused's actions were involuntary.

The clarifications and revisions suggested in this article may be effected in a number of ways. Although defense counsel may bring about many of the changes by challenging the legal sufficiency of current provisions in court, such an approach is certainly not required. As stated earlier, all parties involved in the military justice system, including the convening authority, the staff judge advocate, the trial counsel, and the military judge, have an independent interest in seeing that justice is served and that the law is effective in accomplishing its purpose. Ultimately, it is irrelevant whether the changes proposed in this article favor either the government or the accused in an individual case. What is important is that the interests of justice are served, which requires certainty and predictability in the law as it applies to mentally ill servicemembers.

constitutional deficiencies in R.C.M. 909 that demand its amendment. The answers to the difficult questions posed above will be important in shaping more holistic changes to the UCMJ and the *MCM* to deal with mentally ill servicemembers.

Appendix A

RCM 909 Involuntary Commitment Amendments

Proposed Amendments to RCM 909

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

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

(b) *Presumption of capacity*. A person is presumed to have the capacity to stand trial unless the contrary is established.

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

(d) *Determination after referral*. After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either sua sponte or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with paragraph<u>s</u> (e) <u>and (f)</u> of this rule.

<u>(e) *Procedures applicable during hearings.*</u>

<u>(1) The accused shall be represented by defense counsel and shall have the opportunity to testify, present evidence, call witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing.</u>

<u>(2) The military judge is not bound by the rules of evidence except with respect to privileges.</u>

<u>(f)</u> *Incompetence determination hearing*.

(1) *Nature of issue*. The mental capacity of the accused is an interlocutory question of fact.

(2) *Standard*. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. ~~In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.~~

(3) If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who shall <u>take action in accordance with paragraph (g) of this rule</u> ~~commit the accused to the custody of the Attorney General~~.

<u>(g) *Hospitalization of the accused*.</u>

<u>(1) Upon receipt of a report from the military judge finding the accused incompetent to stand trial, the general court-martial convening may withdraw the charges from the court-martial, dismiss the charges without prejudice to the government, or commit the</u> ~~An~~ accused ~~who is found incompetent to stand trial under this rule shall be hospitalized by~~ <u>to the custody of t</u>he Attorney General as provided in section 876b(a)(1) ~~4241(d)~~ of title 1<u>0</u>~~8~~, United States Code.

<u>(2) If, following hospitalization by the Attorney General as provided in section 4241(d) of title 18, United States Code, the general-court martial convening authority receives notification</u> ~~is notified~~ that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused. <u>The military judge</u>

shall conduct a hearing in accordance with paragraphs (e) and (f) of this rule to determine the mental capacity of the accused before proceeding to trial.

(3) If, at the end of the period of hospitalization, the accused's mental condition has not so improved, then the general court-martial convening authority shall promptly take custody of the accused and order the military judge to conduct a hearing in accordance with paragraphs (e) and (h) of this rule. ~~action shall be taken in accordance with section 4246 of title 18, United States Code.~~

(h) *Dangerousness determination hearing.*

(1) *Nature of issue*. The dangerousness of the accused is an interlocutory question of fact.

(2) *Presumption*. A person is presumed not to be dangerous unless the contrary is established.

(3) *Standard*. The accused must be released unless it is established by clear and convincing evidence that the accused is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(4) If, after the hearing, the military judge finds that the government has satisfied the standard specified in subsection (3) of this paragraph, the military judge shall inform the general court-martial convening authority of this result and that authority, if he or she concurs, may withdraw the charges from the court-martial, dismiss the charges without prejudice to the government, or commit the accused to the custody of the Attorney General as provided in section 4246(d) of title 18, United States Code. If, however, the military judge finds after the hearing that the government has not satisfied the standard specified in subsection (3) of this paragraph, the military judge shall inform the general court-martial convening authority of this result and the accused shall be released.

Appendix B

Instruction 6-4 Mental Responsibility Amendments

Proposed Amendments to Benchbook Instruction 6-4

6-4. MENTAL RESPONSIBILITY AT TIME OF OFFENSE

NOTE 1: *Using these instructions*. Lack of mental responsibility (insanity) at the time of the offense is an affirmative defense which must be instructed upon, *sua sponte*, when the military judge presents final instructions. These instructions may be modified for use as preliminary instructions. See Instruction 6-3, *Preliminary Instructions on Sanity*. The following instruction is suggested:

MJ: The evidence in this case raises the issue of whether the accused lacked criminal responsibility for the offense(s) of (*state the alleged offense*(*s*)) as a result of a severe mental disease or defect. (In this regard, the accused (himself) (herself) has denied criminal responsibility because of a severe mental condition.)

You are not to consider this defense unless you have first found that the Government has proved beyond a reasonable doubt each essential element of the offense(s) of (*state the alleged offense*(*s*)). In other words, you should vote first on whether the Government has proved beyond a reasonable doubt each essential element of the offense(s). Unless at least two-thirds of the members, that is _____ members, find that each element has been proved, you should return a finding of NOT GUILTY (as to that specification) and you need not consider the issue of mental responsibility.

If, however, two-thirds of the members are convinced beyond reasonable doubt that the accused did the act(s) charged (in (the) Specification (___) of (the) (additional) Charge) (or committed a lesser included offense), then you must decide whether the accused was mentally responsible for the offense(s) (*state the alleged offense*(*s*)).

This will require a second vote, and each member must vote, regardless of your vote on the elements.

NOTE 2: *When a sanity determination might be required in spite of a NOT GUILTY finding*. It is possible to acquit of a greater offense and then find the accused NOT GUILTY only by reason of Lack of Mental Responsibility. Tailor instructions accordingly.

MJ: The accused is presumed to be mentally responsible. This presumption continues throughout the proceedings until you determine, by clear and convincing evidence, that (he) (she) was not mentally responsible. Note that, while the Government has the burden of proving the elements of the offense(s) beyond a reasonable doubt, the defense has the burden of proving by clear and convincing evidence that the accused was not mentally responsible. As the finders of fact in this case, you must first decide whether, at the time of the offense(s) of (*state the alleged offense*(*s*)), the accused actually suffered from a severe mental disease or defect. The term severe mental disease or defect can be no better defined in the law than by the use of the term itself. However, a severe mental disease or defect does not, in the legal sense, include an abnormality manifested only by repeated criminal or otherwise antisocial conduct ~~or by non-psychotic behavior disorders and personality disorders~~. If the accused at the time of the offense(s) of (*state the alleged offense*(*s*)) was not suffering from a severe mental disease or defect, (he) (she) has no defense of lack of mental responsibility.

If you determine that, at the time of the offense(s) of (*state the alleged offense*(*s*)), the accused was suffering from a severe mental disease or defect, then you must decide whether, as a result of that severe mental disease or defect, the accused was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct.

<u>To appreciate the nature and quality of (his) (her) conduct, the accused must have knowledge that (he) (she) has engaged in the conduct, and an awareness of the legal and moral import of the conduct's natural consequences.</u>
<u>To appreciate the wrongfulness of (his) (her) conduct, the accused must have an emotional awareness that the conduct is contrary to the accepted moral standards of society.</u>

If the accused was able to appreciate <u>both</u> the nature and quality<u>, and</u> ~~or~~[409] the wrongfulness of (his) (her) conduct, (he) (she) is criminally responsible; and this is so regardless of whether the accused was then suffering from a severe mental disease or defect, (and regardless of whether (his) (her) own personal moral code was not violated by the commission of the offense(s)).

[409] The change in this paragraph corrects an apparent mistake in the original drafting of this instruction. As corrected, the paragraph correctly reflects the fact that the legal standard is disjunctive from the perspective of the accused, but conjunctive from the perspective of the government.

(On the other hand, if the accused had a delusion of such a nature that (he) (she) was unable to appreciate the nature and quality or wrongfulness of (his) (her) acts, the accused cannot be held criminally responsible for (his) (her) acts, provided such a delusion resulted from a severe mental disease or defect.)

MJ: To summarize, you must first determine whether the accused, at the time of (this) (these) offense(s), suffered from a severe mental disease or defect. If you are convinced by clear and convincing evidence that the accused did suffer from a severe mental disease or defect, then you must further consider whether (he) (she) was unable to appreciate the nature and quality or the wrongfulness of (his) (her) conduct. If you are convinced by clear and convincing evidence that the accused suffered from a severe mental disease or defect, and you are also convinced by clear and convincing evidence that (he) (she) was unable to appreciate the nature and quality or wrongfulness of (his) (her) conduct, then you must find the accused not guilty only by reason of lack of mental responsibility. ~~On the other hand, you may not acquit the accused on the ground of lack of mental responsibility, absent the accused suffering from a severe mental disease or defect, or if you believe that (he) (she) was able to appreciate the nature and quality and wrongfulness of (his) (her) conduct.~~[410] Applying these principles to the accused's burden of establishing a lack of mental responsibility by clear and convincing evidence, you are finally advised that the accused, in order to be acquitted on the basis of lack of mental responsibility, is required to prove, by clear and convincing evidence, that the accused was not mentally responsible at the time of the offense(s). By clear and convincing evidence I mean that measure or degree of proof which will produce in your mind a firm belief or conviction as to the facts sought to be established. The requirements of clear and convincing evidence does not call for unanswerable or conclusive evidence. Whether the evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence. The facts to which the witnesses have testified must be distinctly remembered and the witnesses themselves found to be credible. In deliberating on this issue, you should consider all the evidence, including that from experts (and laypersons), as well as your common sense, your knowledge of human nature, and the general experience of mankind that most people are mentally responsible.

NOTE 3: *Other instructions*. See Instruction 6-5 for additional instructions which are frequently applicable when insanity is in issue.

[410] Although the deleted language in this paragraph is legally correct, it is an unnecessary restatement of the fact that the burden of proof is on the accused to prove lack of mental responsibility. As it stands, the deleted sentence is somewhat confusing, and ads no additional information for the panel. This change is meant to make the instruction more understandable from the perspective of the panel, rather than as a means of advocacy for the defense.

Appendix C—Evidence Negating Mens Rea Amendments

Proposed Amendment to Benchbook Instruction 5-17

5-17. EVIDENCE NEGATING MENS REA

> **NOTE 1:** ***Relationship between this instruction and the defense of lack of mental responsibility under Article 50a and RCM 916(k).*** **Notwithstanding RCM 916(k)(1) and (2), evidence of a mental disease, defect, or condition is admissible if it is relevant to the elements of the offenses charged. ~~premeditation, specific intent, knowledge, or willfulness~~.** ***Ellis v. Jacob*****, 26 M.J. 90 (C.M.A. 1988);** ***United States v. Berri*****, 33 M.J. 337 (C.M.A. 1991).**
>
> **NOTE 2:** ***When to use this instruction*****. ~~DO NOT use this instruction if the evidence has raised the defense of lack of mental responsibility. If the defense of lack of mental responsibility has been raised, use the instructions in Chapter 6 including, if applicable, Instruction 6-5,~~** ***~~Partial Mental Responsibility~~.*** **Use the instructions below when ~~premeditation, specific intent, willfulness, or knowledge is an element of an offense, and~~ there is evidence tending to establish a mental or emotional condition of any kind, which, although not amounting to lack of mental responsibility, may negate the mens rea element. The military judge has a *sua sponte* duty to instruct on this issue. When such evidence has been admitted, the following should be given:**

The evidence in this case has raised an issue whether the accused had a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) that may have affected (his) (her) formation or possession of ~~and~~ the required state of mind with respect to the offense(s) of (*state the alleged offense(s)*).
You must consider all the relevant facts and circumstances (including but not limited to (*here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides, to include any expert evidence admitted*).

One of the elements of (this) (these) offense(s) is the requirement of (premeditation) (the specific intent to _____) (that the accused knew that _____) (that the accused's acts were willful (as opposed to only negligent)) (that the accused deliberately disregarded a known risk) (_____).

An accused, because of some underlying (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____), may be less likely to ~~incapable of~~ (entertain ~~entertaining~~ (the premeditated design to kill) (possesses specific intent to _____)) (have ~~having~~ the knowledge that _____) (act ~~acting~~ willfully) (_____).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (character or behavior disorder) (_____) that affected (his) (her) formation or possession of the mens rea necessary to be guilty of the offense. ~~of such consequence and degree as to deprive (him) (her) of the ability to (act willfully) (entertain the (premeditated design to kill) (specific intent to _____)) (know that _____) (_____).~~

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless in light of all the evidence you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offenses(s) ~~was mentally capable of~~ (entertained ~~entertaining~~ (the premeditated design to kill) (possessed a specific intent to _____)) (knew ~~knowing~~ that _____) (acted ~~acting~~ willfully in _____) (_____), you must find the accused not guilty of (that) (those) offense(s).

> **NOTE 3:** ***Distinguishing mens rea negating evidence and a lack of mental responsibility defense*****. If there is a need to explain that mens rea negating evidence should not be confused with the defense of lack of mental responsibility (Article 50a), the following may be given:**

This evidence was not offered to demonstrate or refute whether the accused is mentally responsible for (his) (her) conduct. Lack of mental responsibility, that is, an insanity defense, is not an issue in this case. (What is in issue is whether the government has proven beyond a reasonable doubt that the accused ~~had the ability to~~ (acted willfully) (entertained the (premeditated design to kill) (possessed a specific intent to _____)) (knew ~~know~~ that _____) (_____).)

NOTE 4: *Expert witnesses*. When there has been expert testimony on the issue, Instruction 7-9, *Expert Testimony* should be given.

NOTE 5: *Evaluating testimony*. Evidence supporting or refuting the existence of mens rea negating evidence may be clear and the members may not need any special instructions on how the evidence should be evaluated. If additional instructions may be helpful in evaluating the evidence, the following may be given:

You may consider evidence of the accused's mental condition before and after the alleged offense(s) of (*state the alleged offense(s)*), as well as evidence as to the accused's mental condition on the date of the alleged offense. The evidence as to the accused's condition before and after the alleged offense was admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offense(s).

(You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (_____) who testified as expert witnesses. An expert in a particular field is permitted to give (his) (her) opinion. In this connection, you are instructed that you are not bound by medical labels, definitions, or conclusions. Whether the accused had a (mental condition) (_____) and the effect, if any, that (condition) (_____) had on the accused, must be determined by you.)

(There was (also) testimony of lay witnesses with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to their observations and knowledge, the basis for the witness' opinion and conclusions, and the time of their observations in relation to the time of the offense(s) charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness' observation of the accused and the nature and length of time of the witness' contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental condition and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

(You are not bound by the opinions of (either) (expert) (or) (lay) witness(es). You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.)

~~**NOTE 6: *Lesser included offenses*. When there are lesser included offenses raised by the evidence that do not contain a mens rea element, the military judge may explain that the mens rea negating evidence instruction is inapplicable. The following may be helpful:**~~

~~Remember that (*state the lesser included offense raised*) is a lesser included offense of (*state the alleged offense(s)*). This lesser included offense does not contain the element that the accused (had the premeditated design to kill) (specific intent to _____) (knew that _____) (willfully _____) (_____). In this regard, the instructions I just gave you with respect to the accused's mental ability to (premeditate) (know) (form the specific intent) (act willfully) (_____) do not apply to the lesser included offense of (*state the lesser included offense raised*).~~

Appendix D—Instruction for Evidence Negating a Voluntary Act

Proposed Benchbook Instructions 5-17a

5-17a. EVIDENCE NEGATING VOLUNTARY ACT

> **NOTE 1:** ***Use the instruction below when there is evidence tending to establish that, due to a mental or medical condition existing at the time of the offense, the accused's actions may not have been voluntary. Evidence of this nature generally arises in circumstances involving somnambulism (sleepwalking), epileptic seizures, hypnotic states, organic brain disease, or extreme trauma. United States v. Berri,*** **33 M.J. 337 (C.M.A. 1991);** ***Government of the Virgin Islands v. Smith,*** **278 F.2d 169 (3d Cir. 1960).**

The evidence in this case has raised an issue whether the acts alleged in (*state the alleged offense(s)*) were committed voluntarily. An accused may not be held criminally liable for his actions unless they are voluntary. If the accused, due to a (mental (disease) (defect) (impairment) (condition) (deficiency)) (medical condition) was (unconscious) (acting automatically) (incapable of acting voluntarily) at the time of the offense(s), then his actions were involuntary, and he may not be found guilty of the offense(s) prohibiting (that) (those) act(s).

You must consider all the relevant facts and circumstances (including but not limited to (*here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides, to include any expert evidence admitted*).

You should, therefore, consider in connection with all the relevant facts and circumstances, evidence tending to show that the accused may have been suffering from a (mental (disease) (defect) (impairment) (condition) (deficiency)) (medical condition) resulting in his (unconsciousness) (automatic behavior) (inability to act voluntarily) at the time of the offense(s).

The burden of proof is upon the government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Unless in light of all the evidence you are satisfied beyond a reasonable doubt that the accused, at the time of the alleged offenses(s) acted voluntarily, you must find the accused not guilty of (that) (those) offense(s).

> **NOTE 2:** ***Distinguishing evidence negating voluntary act and a lack of mental responsibility defense*****. If there is a need to explain that evidence negating voluntary act should not be confused with the defense of lack of mental responsibility (Article 50a), the following may be given:**

This evidence was not offered to demonstrate or refute whether the accused is mentally responsible for (his) (her) conduct. Lack of mental responsibility, that is, an insanity defense, is not an issue in this case. (What is in issue is whether the government has proven beyond a reasonable doubt that the accused acted voluntarily).

> **NOTE 3:** ***Expert witnesses*****. When there has been expert testimony on the issue, Instruction 7-9,** ***Expert Testimony*** **should be given.**

> **NOTE 4:** ***Evaluating testimony*****. Evidence supporting or refuting the existence of mens rea negating evidence may be clear and the members may not need any special instructions on how the evidence should be evaluated. If additional instructions may be helpful in evaluating the evidence, the following may be given:**

You may consider evidence of the accused's (mental) (medical) condition before and after the alleged offense(s) of (*state the alleged offense(s)*), as well as evidence as to the accused's (mental) (medical) condition on the date of the alleged offense. The evidence as to the accused's condition before and after the alleged offense was admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offense(s).

(You have heard the evidence of (psychiatrists) (and) (psychologists) (and) (physicians) (_____) who testified as expert witnesses. An expert in a particular field is permitted to give (his) (her) opinion. In this connection, you are instructed that you are not bound by medical labels, definitions, or conclusions. Whether the accused had a ((mental)(medica) condition) (_____) and the effect, if any, that (condition) (_____) had on the accused, must be determined by you.)

(There was (also) testimony of lay witnesses with respect to their observations of the accused's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts. In weighing the testimony of such lay witnesses, you may

consider the circumstances of each witness, their opportunity to observe the accused and to know the facts to which the witness has testified, their willingness and capacity to expound freely as to their observations and knowledge, the basis for the witness' opinion and conclusions, and the time of their observations in relation to the time of the offense(s) charged.)

(You may also consider whether the witness observed extraordinary or bizarre acts performed by the accused, or whether the witness observed the accused's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness' observation of the accused and the nature and length of time of the witness' contact with the accused. You should bear in mind that an untrained person may not be readily able to detect a mental condition and that the failure of a lay witness to observe abnormal acts by the accused may be significant only if the witness had prolonged and intimate contact with the accused.)

(You are not bound by the opinions of (either) (expert) (or) (lay) witness(es). You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight you believe it is fairly entitled to receive.)

Military Commission Law

Eugene R. Fidell,[1] *Dwight H. Sullivan*[2] *& Detlev F. Vagts*[3]

Introduction

Four years after President George W. Bush resurrected the "military commission" as a forum to try suspected terrorists,[4] it is still surprisingly unclear what procedures will be followed when trials are finally conducted. At least two factors lead to this uncertainty. First, the commission system's rules are subject to continuous change[5] and, in fact, have been revised in sometimes internally-inconsistent ways.[6] But perhaps more fundamentally, this procedural uncertainty exists because establishing a legal system from scratch is more difficult than its creators appear to have anticipated. Some method is needed to fill the procedural gaps that are inevitable in any legal system. In common law systems, these procedural gaps are filled by case law. How will they be filled in the military commission system? The answer to this question is important not only to those within the military legal establishment who are responsible for the conduct and review of commission trials, but also—perhaps especially—to civilian pro bono defense counsel struggling to negotiate their way through the Guantánamo maze.

Over the long history of military commissions, the norm has been that their procedures are tied closely to those prevailing in courts-martial. The rules under which courts-martial should refer to outside sources in filling procedural gaps were included. Actions taken by the Administration since the re-launching of commissions in November 2001 have made the question of what procedural rules apply much more complicated and confusing. Part I of this article surveys the pre-2001 legal situation and Part II examines the changes made by the new rules. Part III examines the developing case law in the field.

I. The Traditional Understanding

Article 36(a), Uniform Code of Military Justice (UCMJ) governs rule making for courts-martial and military commissions, as well as other military tribunals. Article 36 provides:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts, but which may not be contrary to or inconsistent with this chapter.[7]

The null hypothesis, therefore, is that district court practice, including the Federal Rules of Criminal Procedure and the Federal Rules of Evidence (FRE), apply to military commissions as well as courts-martial. Article 36(b) also requires that rules and regulations made under Article 36(a) "shall be uniform insofar as practicable."[8] One might argue that this uniformity clause implies that the rules and regulations must, "insofar as practicable," be uniform as between courts-martial,

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[4] Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001 comp.); 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter PMO].

[5] *See* U.S. Dep't of Defense, Military Commission Order No. 1 (Revised), Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism para. 11 (Aug. 31, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf ("The Secretary of Defense may amend this Order from time to time.") [hereinafter MCO No. 1].

[6] For example, *compare id.* ¶ 4A(5)(a) ("The Presiding Officer shall rule upon all questions of law, all challenges for cause, and all interlocutory questions arising during the proceedings."), *with* PMO, *supra* note 4, § 4(a)(2) (providing that the military commission shall "sit[] as the triers of both fact and law").

[7] 10 U.S.C. § 836(a) (2000).

[8] *Id.* § 836(b).

military commissions, and other military tribunals (such as provost courts),[9] but the better reading is that the uniformity referred to is uniformity among the various armed forces.[10] The rule making provision in Article 38 of the Articles of War (the Army's predecessor to Article 36 of the UCMJ) applied to courts-martial, courts of inquiry, military commissions, and other military tribunals, but included no uniformity clause. The uniformity clause first appeared when Congress enacted military justice legislation applicable to all of the services—the UCMJ—in 1950.

The President has, of course, issued rules of procedure and evidence for courts-martial. These rules are found in the *Manual for Courts-Martial* (*Manual*), and depart in numerous respects from the rules applied in the district courts. The President's broad rule making power in this respect has been recognized by the Supreme Court.[11] One commentator has suggested that the President, as Commander-in-Chief, could promulgate military justice rules even if Congress had not enacted Article 36.[12]

Although the *Manual* is, as its title indicates, directed to courts-martial, its short preamble contains the following language regarding military commissions and provost courts: "Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedure[] and evidence prescribed for courts-martial."[13]

This language is, in a sense, parallel to that of Article 36(a): just as Article 36(a) sets district court practice as the baseline against which departures must be judged, this paragraph (para. 2(b)(2)) sets up the *Manual* as the baseline against which, in the case of military commissions, departures must be judged. The language of paragraph 2(b)(2) is spongier than Article 36(a) to the extent that it merely treats the court-martial practice baseline as a guide, rather than binding the court-martial and commission in lock-step fashion. In addition, while presidentially-made rules under Article 36(a) may not be contrary to or inconsistent with provisions of the UCMJ, the application of court-martial procedures and rules of evidence to military commissions may not, under paragraph 2(b)(2), be contrary to "any applicable rule of international law or to any regulations prescribed by the President or by other competent authority."[14] Paragraph 2(b)(2) is itself an exercise of the President's Article 36(a) rule making power, and plainly reflects a decision to depart from district court practice in the case of military commissions.

In sum, and reading Article 36(a) and paragraph 2(b)(2) of the *Manual* together, military commission rules should follow, broadly if not in every particular, the procedures and rules for courts-martial.[15] The exceptions are those aspects that are governed by some "applicable rule of international law" or some regulation. Paragraph 2(b)(2) remains in force; it has not been amended, repealed, or suspended in any respect as the process of military commission rule making has proceeded.

Paragraph 2(b)(2) also has a long history. The Army's 1928 *Manual* included a similar clause providing that military commissions and provost courts "are summary in their nature, but so far as not otherwise provided have usually been guided

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[9] David W. Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2022 (2003).

[10] *Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong., 1st Sess. 1014-15 (1949), *noted in* David W. Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L., No. 1, at 77 & n.486 (2005), *available at* http://ssrn.com/author=504660. *See generally* Eugene R. Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 MIL. L. REP. 6049, 6057 (Pub. L. Educ. Inst. 1976).

[11] Loving v. United States, 517 U.S. 748, 770-74 (1996) (sustaining presidentially-articulated standards for capital sentencing); *see also* United States v. Scheffer, 523 U.S. 303, 314 (1998) (sustaining presidential ban on use of polygraph evidence in courts-martial).

[12] Gregory E. Maggs, *Judicial Review of the* Manual for Courts-Martial, 160 MIL. L. REV. 96, 100 & n.29, 132-35 (1999).

[13] MANUAL FOR COURTS-MARTIAL, UNITED STATES pmbl, para. 2(b)(2) (2005) [hereinafter MCM]. The language can be traced, in part, to chapter I, paragraph 2 of the 1928 *Manual*. MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. I, para. 2 (1928) [hereinafter 1928 MCM] ("Military Commissions and Provost Courts . . . are summary in their nature, but so far as not otherwise provided have usually been guided by the applicable rules of procedure and of evidence for courts-martial"), *quoted in* Glazier, *supra* note 10, at 64 & n.394. This paragraph's reference to international law first appeared in the 1951 *Manual*. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. I, para. 2 (1951).

[14] *See* MCM, *supra* note 13, at pmbl. para. 2(b)(2).

[15] This assumes that the accused is not entitled to prisoner of war (POW) status. An accused who is entitled to POW status is entitled to be tried by a court-martial using the same procedures as the United States applies in the trial of its military personnel. Geneva Convention Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see* Detlev F. Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 EUR. J. INT'L L. 313, 322 & n.51 (2003). A person whose status is in doubt must be treated as a POW until the matter is decided by a "competent tribunal" under Article 5 of the Third Geneva Convention. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 162 (D.D.C. 2004), *rev'd*, 415 F.3d 33, 43 (D.C. Cir. 2005) (military commission can serve as competent tribunal), *cert. granted*, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184).

by the applicable rules of procedure and of evidence prescribed for courts-martial."[16] Not surprisingly, unlike the current *Manual*, the 1928 *Manual* did not make commission practice subject to rules of international law.

The next step in consideration of this landscape is to identify what "applicable rule[s] of international law" or paragraph 2(b)(2) regulations there may be to further "guide" military commissions. This is critical because the rules the President issued are considered

> a departure from the presumptive rule and from long-standing military practice—and in failing to 'be guided by' the principles of law, and rules of evidence and procedure of *current* courts-martial, they fail to provide the degree of fairness and due process expected in criminal trials conducted by the United States in the 21st century.[17]

II. The New Rules on Gap-Filling

In the 13 November 2001 Presidential Military Order (PMO) establishing the new military commissions, the connection between commission practice and district court practice is broken:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.[18]

This language, however, suggests that the break is not complete. The President's language does not appear to have made an across-the-board finding of federal procedural inapplicability. Rather, the impracticability finding expressly applies only "to the extent provided by and under this order."[19] This standard appears to preclude, for example, incorporation of the FRE, since the rules are inconsistent with the evidence standard prescribed in PMO section 4(c)(3). But as to the many procedural questions about which the PMO is silent, the President's choice of words, read literally, indicates that he made no impracticability determination. This, in turn, suggests that officials entrusted with filling in the gaps should consider the congressional preference for aligning commission practice (like court-martial practice) with federal civilian criminal procedure.

It is certainly open to question whether the two factors cited in section 1(f) of the PMO—danger to the country's safety and the nature of international terrorism—indicate the impracticability of following district court practice. Section 1(e) adds nothing to the equation.[20] It simply recites that "it is necessary for individuals subject to this order . . . when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals,"[21] without attempting to explain *why* that is so. Curiously, PMO section 1(e) uses the term "military *tribunals*" whereas section 1(f) and section 4, which deals with trials, use the term "military *commissions*." This discrepancy[22] is presumably a result of hasty drafting, although it is possible to discern why it occurred.[23]

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[16] 1928 MCM, *supra* note 13, ch. I, para. 2.

[17] Kevin J. Barry, *Military Commissions: American Justice on Trial*, FED. LAW., July 2003, at 24, 26 (emphasis in original); *see also* Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1, 4. Discrepancies between contemporary court-martial practice and military commission practice under the current rules are also discussed in Glazier, *supra* note 9, at 2015-20.

[18] PMO, *supra* note 4, sec. 1(f).

[19] *Id.*

[20] Section 1(e) states:

> To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

Id. sec. 1(e).

[21] Glazier, *supra* note 9, at 2022 & n.71.

[22] Military commissions are a subset of the larger category of military tribunals. *Id.* at 2006 n.1. Regrettably, media coverage early on picked the broader term, and efforts to correct this in favor of the more precise term have been an uphill battle. Further confusing the matter have been references to "competent tribunals" under article 5, ¶ 2, of the Third Geneva Convention and the Administration's creation of Combatant Status Review Tribunals, which

Chief among the additional regulations issued by the Pentagon to implement the PMO are the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism. These procedures were originally issued as Military Commission Order (MCO) No. 1 on 21 March 2002.[24] Section 1 of the Procedures set forth their purpose, and stated in pertinent part: "Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein *and no others* shall govern such trials."[25] The "and no others" clause has received no attention, but it is important. Read literally, it would close the door on resort to either district court or court-martial practice as interstitial sources of law for military commissions.

The same impression is conveyed by Presiding Officers Memorandum (POM) No. 1-2, issued by Colonel Peter E. Brownback III on 12 September 2005. It provides:

> [Presiding Officers Memoranda], communications with counsel, and courtroom proceedings may use the term "Commission Law." Commission Law refers collectively to the President's Military Order of November 13, 2001, DoD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified, or supplemented. POMs shall be interpreted to be consistent with Commission Law and should there be a conflict, Commission Law shall control.[26]

The Defense Department has prepared other instructions which ought to clarify these directives but which have not in fact shed much light on the situation or provided guidance for counsel appearing in these proceedings. To date, the Department has not released a *Manual for Military Commissions*, although one has been prepared.[27] The National Institute of Military Justice requested a copy under the Freedom of Information Act, but its request has languished at the Pentagon. The Defense Department has, however, released a variety of other military commission regulations, mostly without notice-and-comment rule making.[28] In addition, the Army has issued detailed benchbooks for courts-martial of enemy prisoners of war within the meaning of the Third Geneva Convention[29] and provost courts trying civilian internees within the meaning of the Fourth Geneva Convention.[30] It is difficult to understand why work would proceed to completion and public release of those two books, covering obscure processes that have not been brought into play since long before 11 September 2001, while a comparable publication for military commissions that actually *are* being used remains under wraps. This may simply be a function of different approval chains within the Pentagon, but it seems odd nonetheless.

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are used to decide which of the Guantánamo detainees are "enemy combatants." *See* Memorandum, Paul Wolfowitz, Deputy Secretary of Defense, to Secretary of the Navy, subject: Order Establishing Combatant Status Review Tribunal (7 July 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

[23] The PMO blends features of President Franklin D. Roosevelt's Proclamation No. 2561, "Denying Certain Enemies Access to the Courts of the United States," and his Military Order of 2 July 1942. The former used the term "military tribunal" while the latter used the term "military commission."

[24] *See* U.S. Dep't of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism para. 11 (Mar. 21, 2002), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

[25] *Id.* para. 1.

[26] Office of the Presiding Officer, Military Commission, Presiding Officer Memorandum (POM) # 1-2 – Presiding Officers Memoranda (Sept. 12, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050914officers.pdf.

[27] *See* Tim Golden, *U.S. Is Examining Plan to Bolster Detainee Rights*, N.Y. TIMES, Mar. 27, 2005, at 1, col. 6 (referring to 232-page draft manual).

[28] *See generally* Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 LA. L. REV. 831 (2004); Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 2d 379 (2003).

[29] U.S. DEP'T OF THE ARMY, PAM. 27-9-1, MILITARY JUDGES' BENCHBOOK FOR TRIAL OF ENEMY PRISONERS OF WAR (4 Oct. 2004).

[30] U.S. DEP'T OF THE ARMY, PAM. 27-9-2, MILITARY JUDGES' BENCHBOOK FOR PROVOST COURTS (4 Oct. 2004).

III. Commission Practice

This article will now examine practice under the new commission rules. Decisions of the Review Panel[31] may ultimately serve the gap-filling function. Of course, as a result of a slow lift-off of the program, followed by extensive, continuing litigation in the federal courts, no trial on the merits has even begun in a commission case. But orders and instructions governing the military commission process do not provide for interlocutory appeals to the Review Panel. Before any case becomes complete, the Appointing Authority[32] is entrusted with ruling on "all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge."[33] Thus, the first opportunity to develop the military commission system's "common law" rests with the Appointing Authority. The Appointing Authority has already begun this function of filling in procedural gaps by issuing rulings on challenges for cause and the right of an accused to self-representation.[34] Review of the preliminary proceedings conducted to date suggests that in fact there is persistent reference by all concerned to military justice statutes, regulations, and jurisprudence. Although the record is inconsistent, conventional military justice and civilian jurisprudence are the theme music playing in the background.

For example, in the *Hamdan*[35] and *Hicks*[36] cases, the defense challenged the Presiding Officer, three of the four commission members, and the sole alternate member. In due course, Major General (retired) John D. Altenburg, Jr., the former Assistant Judge Advocate General of the Army serving (as a civilian) as the Appointing Authority, issued a lengthy but little-noticed decision on the challenges for cause.[37] The decision nowhere cited the "and no other" clause but did cite, albeit as a "compare," Article 25(a) of the UCMJ,[38] which defines who is eligible to serve on courts-martial. The decision also noted that the definition of "good cause" employed in *Military Commission Instruction No. 9*[39] "is the same definition of good cause that a convening authority or a military judge uses to excuse a court-martial member after assembly of the court."[40] The decision recited that defense counsel relied on Rule for Courts-Martial 912 and the decision of the United States Court of Appeals for the Armed Forces in *United States v. Strand*.[41] Remarkably (given the "and no other" clause), General Altenburg made the following observation:

> The parties cite no controlling standard for deciding challenges for cause before military commissions. Nevertheless, it is helpful to examine the challenge standards in courts-martial, United States federal

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[31] *See generally* Dep't of Defense, Military Commissions Factsheet, *available at* http://www.defenselink.mil/news/Sep2005/d20050915factsheet.pdf.

> After the panel has delivered its verdict and imposed a sentence. . . [a] three-member Review Panel of Military Officers, one of whom must have prior experience as a judge, will review all cases for material errors of law, and may consider matters submitted by the Prosecution and Defense. Review Panel members may be civilians who were specifically commissioned to serve on the panel. If a majority of the Review Panel members believe a material error of law has occurred, they may return the case to the Military Commission for further proceedings.

Id.

[32] The Appointing Authority exercises some, but not all, of the powers that a convening authority wields in a court-martial. "The Appointing Authority approves and refers appropriate charges to a Military Commission and appoints Military Commission members." *Id.* The Appointing Authority, however, does not have an initial review function in contrast to a convening authority's role under Article 60 of the UCMJ. 10 U.S.C. § 860 (2000).

[33] MCO No. 1, *supra* note 5, para. 4.A(5)(e).

[34] *See* Appointing Authority, Appointing Authority Decision on Challenges for Cause (Oct. 19, 2004), *available at* http://www.defenselink.mil/news/Oct 2004/d20041021panel.pdf [hereinafter Challenges for Cause Decision]; Appointing Authority, Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation (June 14, 2005), *available at* http://www.defenselink.mil/news/Aug2005/d20050811bahlul.pdf.

[35] United States v. Hamdan, No. 04-0004. *See generally* U.S. Dep't of Defense, Commission Transcripts, Exhibits, and Allied Papers, *available at* http://www.defenselink.mil/news/commissions_exhibits_hamdan.html (last visited Dec. 6, 2005).

[36] United States v. Hicks, No. 04-0001. *See generally* U.S. Dep't of Defense, Commission Transcripts, Exhibits, and Allied Papers, *available at* http://www.defenselink.mil/news/Oct2005/commissions_exhibits_hicks.html (last visited Dec. 6, 2005).

[37] Challenges for Cause Decision, *supra* note 34.

[38] 10 U.S.C. § 825(a) (2000).

[39] U.S. Dep't of Defense, Military Commission Instruction No. 9 (Dec. 26, 2003), *available at* http://www.defenselink.mil/news/Jan2004/d20040108mil cominstno9.pdf [hereinafter MCI No. 9].

[40] Challenges for Cause Decision, *supra* note 34, at 3 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 505 (2002).

[41] 59 M.J. 455 (2004).

practice, and under international practice when deciding the appropriate challenge standard for military commissions.[42]

The decision goes on to explain the legal framework for military commission procedures, citing Articles 21 and 36 of the UCMJ and the President's impracticability determination.[43] After noting that several provisions of the UCMJ expressly apply to military commissions as well as courts-martial, General Altenburg noted that Article 41, which discusses challenges for cause, "is expressly applicable only to trials by court-martial and does not prescribe the standard to use when deciding a challenge for 'cause.'"[44] He proceeded to discuss historical military jurisprudence concerning challenges,[45] challenges for cause in the federal courts,[46] military justice case law,[47] a proposed American Bar Association standard,[48] and international standards.[49] In the end, "[c]onsidering all of the above," including the PMO's requirement for a "full and fair trial, with the military commission sitting as the triers of both fact and law,"[50] General Altenburg announced a standard for deciding challenges for cause against commission members.

In the remainder of the Challenges for Cause Decision, General Altenburg cited Supreme Court authority arising in a civilian context,[51] a decision of the Virginia State Bar,[52] UCMJ provisions on, among other things, certification of military judges,[53] and further military case law.[54] Rejecting the defense's claim that Colonel Brownback and he had a friendly relationship that gave rise to an appearance of unfairness, General Altenburg observed that his finding "is consistent with federal cases [of which he cited six] reflecting that the mere fact that a judge is a friend, or even a close friend, of a lawyer involved in the litigation does not, by that fact alone, require disqualification of the judge."[55] Four more civilian federal cases were cited in the course of rejecting the defense's claim that Colonel Brownback was predisposed to deny a speedy trial motion.[56]

Additional evidence of the contemplated breadth of the sources of law that may properly be invoked in the military commissions is found in POM No. 14-1, which deals with the Commissions Library and was issued by the Presiding Officer and the Chief Clerk for Military Commissions.[57] According to this POM, "[t]he Commissions Library is an electronic collection of cases, resources, and other writings of benefit to counsel, the Presiding Officers, the Review Panel (should that body become involved), and others."[58] It will contain "[p]otentially, anything useful as a reference or resource to the practice before a Military Commission."[59]

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[42] Challenges for Cause Decision, *supra* note 34, at 3.

[43] *Id*. at 4-5.

[44] *Id*. at 5.

[45] *Id*. at 5-6.

[46] *Id*. at 6-7.

[47] *Id*. at 7.

[48] *Id*. at 7 (quoting American Bar Association, Standards Relating to Jury Trials (2004) (draft)).

[49] *Id.* at 8-9.

[50] *Id*. at 10 (quoting PMO, *supra* note 4, sec. 4(c)(2) (Nov. 16, 2001)). The 31 August 2005 revision of MCO No. 1 seems to be inconsistent with this provision of the PMO since it removes the members' power to overrule decisions of the presiding officer on legal issues other than the admissibility of evidence. *See supra* note 6. *See generally* Neil A. Lewis, *U.S. Alters Rules for War Crime Trials*, N.Y. TIMES, Sept. 1, 2005, at A14, col. 4.

[51] Challenges for Cause Decision, *supra* note 34, at 10, 14 (citing and quoting Irvin v. Dowd, 366 U.S. 717 (1961)).

[52] *Id.* at 17.

[53] *Id*.

[54] *Id*. at 20 (quoting United States v. Hagen, 25 M.J. 78, 86-87 (1987) (Sullivan, J., concurring); United States v. Davis, 58 M.J. 100, 101, 103 (2003)).

[55] *Id*. at 24.

[56] *Id*. at 25.

[57] Office of the Presiding Officer Military Commission, Presiding Officer Memorandum (POM) # 14-1: Commissions Library (Sept. 8, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050911POM14-1.pdf.

[58] *Id.* para. 1.

[59] *Id.* para. 4c.

> Ordinarily the Commissions Library contains: cases other than those readily available as a published opinion on Lexis-Nexis or similar services; large references to alleviate users from having to have the book with them (MCM or the Military Judges Benchbook, for example)[;] items that appear on the Internet so the correct document is preserved before the document is changed or removed from the Internet; "hard-to-find" items (such as decisions of international tribunals and similar writings); treaties and treatises; law review articles; and like items.[60]

What emerges from the Challenges for Cause Decision and POM 14-1 is that, notwithstanding the ostensible rejection of both civilian federal practice and court-martial practice, those two bodies of law remain central to the administration of justice in military commissions. Moreover, General Altenburg's reference to international legal developments and POM 14-1's inclusion of such materials in the Commissions Library not only fly in the face of the "and no other" clause, but put the military commission apparatus squarely on one side in the current debate over the propriety of reference to international jurisprudence in United States courts.[61] Whether this expansive approach will be followed by the Review Panel, which is the closest thing to a court of appeals for the military commissions,[62] remains to be seen. However, given that none of the four members of the Review Panel have had recent military justice experience, and all have had distinguished careers in the civilian legal world,[63] it is highly doubtful that they will apply the blinders implicit in the "and no others" clause when the time comes for them to review cases.

Conclusion

In the earliest years of the modern military justice system, it was suggested by Judge Paul W. Brosman, one of the first three members of what was then known as the Court of Military Appeals (now the United States Court of Appeals for the Armed Forces), that the court was "freer than most" to select the best rule of decision and "find its law where it will, to seek, newfledged and sole, for *principle*, unhampered by the limiting crop of the years."[64] That approach was problematic. But in time the significance of the Brosman Doctrine decreased as presidentially promulgated rules reduced the court's opportunity to make law.[65] One wonders—regardless of one's views as to the wisdom of reviving military commissions in the first place—if the early evidence suggests that those responsible for the administration of justice by military commissions may chafe against the implications of the "and no others" clause, and if we are witnessing an Altenburg Doctrine that may take the place of the Brosman Doctrine in the annals of military law.

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[60] *See id*. para. 4c.

[61] *Compare* Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 1198-1200 (2005) (defending reference "to the laws of other countries and to international authorities as instructive" for interpreting the Eighth Amendment), *with id.* at 1227-29 (Scalia, J., dissenting) (criticizing judicial invocation of "alien law'). Reference to international materials is unavoidable because the substantive law of offenses is plainly inspired by international doctrines on war crimes. *See generally* Crimes and Elements of Trials by Military Commission, 32 C.F.R. Pt. 11 (2005); Eugene R. Fidell & Michael F. Noone, Jr., *Discussion in* NAT'L INST. OF MIL. JUST., MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 99-100 (2003) (discussing Military Commission Instruction No. 2); Melissa J. Epstein & Richard Butler, *The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions*, 179 MIL. L. REV. 68 (2004). The official statement of crimes and elements for trials by military commissions includes the following provision on "effect of other laws:" "No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this part as compared to other articulations of law." 32 C.F.R. § 11.3(b). This certainly suggests that the drafters were aware that reference to "other bodies of law" was, notwithstanding the "and no others" clause (which refers to procedure), inevitable. Indeed, any other outcome is inconceivable on matters of substantive law, given the Constitution's recognition of the "Law of Nations." U.S. CONST. art. I, § 8, cl. 10.

[62] As of this article's publication, Congress was considering legislation to vest direct appellate jurisdiction over commission cases (mandatory in some cases, discretionary in others) in the United States Court of Appeals for the District of Columbia Circuit. *See* National Defense Authorization Act for Fiscal Year 2006, S. 1042, 109th Cong. § 1092(d) (2005). *See generally* Deborah Funk, *Senate Votes to Restrict Detainees' Access to Courts*, ARMY TIMES, Nov. 28, 2005, at 20. Congress's failure, years after the PMO, to confer appellate jurisdiction over military commissions on the United States Court of Appeals for the Armed Forces, the highest court of the military justice system, is inexplicable, but that is another article.

[63] The Review Panel includes former Secretary of Transportation William T. Coleman, Jr., former Circuit Judge and Attorney General Griffin B. Bell, Rhode Island Chief Justice Frank J. Williams, and Pennsylvania Court of Common Pleas Judge and former Congressman Edward G. Biester, Jr. Review Panel members are appointed for unrenewable terms, the length of which is prescribed by the Secretary of Defense but "normally shall not exceed two years." MCI No. 9, *supra* note 39, para. 4.B(2).

[64] Paul W. Brosman, *The Court: Freer Than Most*, 6 VAND. L. REV. 166, 167-68 (1953).

[65] *See generally* Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1214-19 (1997); Eugene R. Fidell, *"If a Tree Falls in the Forest . . .": Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law*, 32 JAG J. 1, 9 n.55 (1982).

Prosecuting Raskolnikov: A Literary and Legal Look at "Consciousness of Guilt" Evidence

Dan E. Stigall[1]

In all literature, there is perhaps no more vivid example of a man wrestling with the knowledge of his own guilt than that of Raskolnikov in Dostoyevsky's *Crime and Punishment*.[2] The nineteenth century Russian novel begins with the brutal murder of an old pawnbroker and her sister, and then unfolds into a remarkable tragedy in which the author explores the nature of crime, the human condition, and a young law student's guilt. Literary scholars have noted that what separates this novel from Dostoyevsky's later works is the author's obsessive focus on the murder.[3] That focus, however, does more than add to the artistic economy and structural cohesion of the novel, it emphasizes the importance of Raskolnikov's guilt and the way in which it drives him and influences his actions.

> The commission of a crime leaves usually upon the consciousness a moral impression that is characteristic. The innocent man is without it; the guilty man usually has it. Its evidential value has never been doubted. The inference from consciousness of guilt to "guilty" is always available in evidence. It is a most powerful one, because the only other hypothesis conceivable is the rare one that the person's consciousness is caused by a delusion, and not by the actual doing of the act.[4]

It is sometimes remarked that Raskolnikov felt no guilt or was not, at least, conscious of his guilt.[5] This article disputes the notion that Raskolnikov was not consciously aware of his guilt, while addressing and explaining the use of 'consciousness of guilt' evidence in contemporary criminal practice. The reader is invited to cast an inquisitorial eye upon a nineteenth century literary murder and prosecute Raskolnikov—illuminating not only a great work of literature, but also an area of the law that is critical for successful prosecution of the modern malevolent.[6]

Raskolnikov's crime is an exceptionally apt subject, not only because the novel is replete with evidence of guilty behavior, but also because his heinous crime was committed in the nineteenth century—before the availability of fingerprint evidence[7] or DNA evidence.[8] Further, the crime was committed in such a way as to leave no living witnesses who could

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[2] *See* FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (Jessie Coulson trans., 1989) (1866). Raskolnikov, the main character of the book, wrestles with guilt after killing an old pawnbroker and her sister. Raskolnikov eventually confesses to the crime to free himself from his guilt.

[3] *See, e.g.*, Phillip Rahv, *Dostoyevsky in Crime and Punishment*, 27 PARTISAN REV. 393-425 (1960).

> The crime is murder. But in itself this is in no way exceptional, for the very same crime occurs in nearly all of Dostoyevsky's novels. . . . Where this novel differs, however, from the works following it is the totality of the concentration on that obsessive theme. Virtually everything in the story turns on Raskolnikov's murder of the old pawnbroker and her sister Lizaveta, and it is this concentration which makes the novel so fine an example of artistic economy and structural cohesion.

Id.

[4] *See* United States v. Baldwin, 54 M.J. 551, 555-56 (Army Ct. Crim. App. 2000) (citing 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 173 (1983 ed.)).

[5] *See* A. Bem, *Das Schuldproblem bei Dostojevskij*, 12 ZEITSCHRIFT FUR SLAVISCHE PHILOLOGIE 251, 273-77 (Irene Verhovskoy trans., 1935).

> [The] fact [of his guilt] does not penetrate Raskolnikov's soul and conscious mind, but conceals itself in his subconscious as a potential force of his conscience. His intellect feels no repentance until the very end; even after being sentenced compulsory labor Raskolnikov is still under the spell of the idea which justified the murder. Yet his whole being, his moral structure, is shaken by the moral aspect of murder.

Id.

[6] Such an exercise is one of which Dostoyevsky would doubtlessly have approved. *See* Richard Weisberg, *The Brilliant Reactor: The Inquisitor in Crime and Punishment*, from *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* 48-54 (1984) ("Foreshadowing the theme fully expressed in his final work, and in Camus' novels about the law, Dostoevski indicates that the process of legal investigation contains the potential for imaginative artistry.").

[7] *See* GlobalSecurity.org, Homeland Security: Fingerprint Identification Systems, http://www.globalsecurity.org/security/systems /fingerprint.htm (last visited Nov. 16, 2005) (noting that first known systematic use of fingerprint identification began in the United States in 1902).

[8] *See* Chemical Science and Technology Laboratory, Brief History of Forensic DNA Typing, http://www.cstl.nist.gov/ biotech/strbase/ppt/intro.pdf (last visited Nov. 16, 2005) (noting that the use of DNA for forensic purposes began in the 1980s).

testify as to what occurred.[9] Therefore, without a great deal of physical evidence or direct evidence, a prosecutor would need to turn elsewhere to adduce enough proof to assure a conviction. It is in such situations that the effective use of "consciousness of guilt evidence" is critical.

I. Consciousness of Guilt Evidence

Evidence of consciousness of guilt has long been admissible in criminal trials for the purpose of proving the guilt of an accused. As early as 1896, the U.S. Supreme Court spoke of its use as a foregone conclusion, though warned of attaching to it too much significance.[10]

American criminal courts have continued to recognize the validity of such evidence, consistently allowing into evidence facts that tend to establish an accused's consciousness of guilt.[11] In federal criminal courts, evidence of an accused's consciousness of guilt is admitted under Federal Rule of Evidence 404(b).[12] Rule 404(b) expressly allows the use of evidence of other crimes, wrongs, or acts for purposes of proving things other than character or propensity to commit crime (such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).[13] While rule 404(b) does not expressly list consciousness of guilt as a permissible purpose for introducing evidence of other crimes or acts, the list of factors articulated within the language of the rule is illustrative rather than exclusive. Accordingly, other crimes, wrongs, or acts are admissible for other purposes—such as demonstrating consciousness of guilt.[14]

Military courts have also long recognized that evidence showing an accused's consciousness of guilt can be used as circumstantial evidence of guilt.[15] In courts-martial, evidence of other misconduct, crimes, or acts that show an accused's consciousness of guilt is admissible under the military counterpart to the federal rule, Military Rule of Evidence 404(b).[16] The analysis of MRE 404(b) in Appendix 22 of the Uniform Code of Military Justice expressly states, "Rule 404(b) provides examples rather than a list of justifications for admission of evidence of other misconduct. Other justifications, such as the tendency of *such evidence to show the accused's consciousness of guilt of the offense charged*, . . . remain effective."[17] There is a three-part test for determining the admissibility of consciousness of guilt evidence. The evidence must reasonably support a finding by the court members that the accused committed the prior crimes, wrongs or acts; the evidence must make a fact of consequence more or less probable; and the probative value of the evidence must substantially outweigh the danger of unfair prejudice.[18] Consciousness of guilt evidence is inadmissible if it does not satisfy all three requirements.

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[9] Raskolnikov brutally murdered Alena Ivanovna by striking her multiple times with an axe. He then murdered her sister, Lizavetta, who happened upon her sister's corpse while Raskolnikov was still in Ivanovna's apartment.

[10] *See* Hickory v. United States, 160 U.S. 408 (1896).

[11] *See* United States v. Smith, 1997 U.S. Dist. LEXIS 1392 (1997) (noting that there is a lengthy history, in American criminal courts, of allowing evidence of an accused's consciousness of guilt.); *see also* United States v. Martinez, 681 F.2d 1248 (1982).

[12] *See, e.g.*, United States v. Hayden, 85 F.3d 153, 159 (4th Cir. 1996); United States v. Guerrero-Cortez, 110 F.3d 647, 652 (8th Cir.) (acknowledging that "an effort to intimidate a witness tends to show consciousness of guilt" and therefore is admissible under Rule 404(b)); United States v. Mickens, 926 F.2d 1323, 1329 (2d Cir. 1991) (holding that an effort to intimidate a key Government witness is relevant to the issue of the defendant's state of mind and therefore admissible under Rule 404(b)).

[13] *See* FED. R. EVID. 404(b).

[14] *See supra* note 11; *see also* United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998).

> [Federal Rule of Evidence] 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith. Such evidence may be admissible, however, for other purposes. These include, but are not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Because this list is illustrative, rather than exclusive, Rule 404(b) is considered a rule of inclusion.

Id.

[15] *See* United States v. Hurt, 27 C.M.R. 3, 21 (C.M.A. 1958) (holding statements appellant made that later proved false were "clear-cut evidence of a consciousness of guilt."); *see also* United States v. Daniels, 56 M.J. 365 (2001) (noting that subsequent false statements by an accused were admissible evidence demonstrating an accused's consciousness of guilt.); United States v. Cook, 48 M.J. 64 (1998) (noting that non-testimonial acts can demonstrate consciousness of guilt and are, therefore, admissible under Military Rule of Evidence 404(b)).

[16] *See* United States v. Johnson, 1991 CMR LEXIS 386 (CMR 1991).

> [Military Rule of Evidence] 404(b) states that evidence of other acts are admissible to establish . . . proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The rule offers examples, rather than an exclusive list, of bases for admission of evidence of other misconduct. Other justifications remain effective, such as the tendency of such evidence to show the accused's *consciousness of guilt* of the offense charged.

Therefore, there is a firm legal foundation for the admissibility of evidence of consciousness of guilt in federal criminal practice and courts-martial. Trial and defense counsel should acutely observe the accused's post-crime activity—even the most seemingly banal acts—to discover those actions that may be indicative of a criminal's consciousness of guilt.

Throughout *Crime and Punishment*, Dostoyevsky provides examples of physical actions and reactions that demonstrate Raskolnikov's consciousness of his guilt. Some of these examples, such as Raskolnikov's psychosomatic illness and his internal monologue, are not things ordinarily susceptible to proof in a criminal trial and, therefore, are not extensively addressed in this article. Rather, this article focuses on those clearly discernable reactions and overt acts by Raskolnikov that demonstrate his knowledge that he committed a brutal crime. This article examines four separate categories of action that are, and have historically been, considered admissible for purposes of demonstrating a criminal's consciousness of guilt: disposing of the evidence, giving false exculpatory statements, flight, and evidence of the accused's demeanor.

II. Disposing of the Evidence

The admissibility of evidence of an accused's attempt to cover up a crime is not new to the law. In 1896, the U.S. Supreme Court noted the following:

> It is undoubted that acts of concealment by an accused are competent to go to the jury as tending to establish guilt, yet they are not to be considered as alone conclusive, or as creating a legal presumption of guilt; they are mere circumstances to be considered and weighed in connection with other proof with that caution and circumspection which their inconclusiveness when standing alone require.[19]

A number of federal court decisions interpreting Federal Rule of Evidence 404(b) have ruled that evidence of subsequent conduct, in which an accused attempts to obfuscate the facts surrounding his initial crime, is admissible to show the accused's consciousness of guilt. "Elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing."[20] Military courts have also held that such evidence is admissible to prove an accused's guilt.[21]

Turning to Dostoyevsky's novel, the reader can identify several incidences of deceptive behavior in the immediate aftermath of the crime that are clear examples of the perpetrator's consciousness of guilt. The first and most obvious act was Raskolnikov washing the blood from his hands, from the blade of the axe, and from his boots.[22] Next, Raskolnikov returned to his apartment, examined his clothing, and cut from his clothing the blood-stained portions.[23] He also hid all the sundry

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Id. (emphasis added).

[17] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) analysis, at A22-34 (2005) (emphasis added).

[18] United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).

[19] *See* Hickory v. United States, 160 U.S. 408 (1896).

[20] United States v. Olson, 925 F.2d 1170, 1176 (9th Cir. 1991) (quoting United States v. Dial, 757 F.2d 163 (7th Cir. 1985); *see also* United States v. Glass, 128 F.3d 1398 (10th Cir. 1997) (noting that an accused's use of an alias to conceal his identity from law enforcement officers is relevant as proof of consciousness of guilt); Willingham v. Johnson, 2000 U.S. Dist. LEXIS 21688 (2000) (noting that an accused's attempt to conceal drug or alcohol use immediately after the death of his three daughters in a fire that he managed to escape from with only minor injuries would be relevant as evidence of consciousness of guilt).

[21] *See, e.g.*, United States v. Garland, 39 M.J. 618 (A.C.M.R. 1994).

[22] *See* DOSTOYEVSKY, *supra* note 2, at 68-69.

> [W]hen he glanced into the kitchen and saw a pail half full of water on a bench, it gave him the idea of washing his hands and the axe. His hands were sticky with blood. He put the head of the axe in the water, then took a piece of soap that lay in a broken saucer on the window-sill, and began to wash his hands in the pail. When he had washed them he drew out the axe and washed the blade and then spent some three minutes trying to clean the part of the handle that was blood-stained, using soap to get the blood out. After this he wiped it with a cloth which was drying on a line stretched across the kitchen, and then spent a long time examining it carefully at the window. There were no stains left, but the handle was still damp. With great care, he laid the axe in the loop under his coat. Then, as well as the dim light in the kitchen allowed, he examined his overcoat, trousers, and boots. At first glance there was nothing to give him away, except for some stains on his boots. He wiped them with a damp rag.

Id.

[23] *Id.* at 75-76.

items that he took from the dead pawnbroker's apartment in a hole in his wall.[24] Such actions were clearly designed to conceal the facts surrounding his crime—clearly demonstrating that Raskolnikov knew that he was guilty of a criminal act.

In *United States* ex rel. *Foster v. De Robertis*,[25] the Seventh Circuit considered its own salacious murder prosecution, in which the defendant murdered his former lover and then disposed of her 300-pound body by dismembering it, wrapping the pieces in sheets, and hiding the pieces of her corpse in the trunk of a car. The court held that evidence demonstrating that the defendant concealed evidence (the body) was probative of his consciousness of guilt and could be used against him.[26] Other federal decisions echo the general consensus of this view.[27]

In *United States v. Garland*, the Army Court of Military Review considered the case of a rape suspect who clipped his fingernails and attempted to hide his bed linen to avoid the inculpatory use of such physical evidence.[28] The Court of Military Review held that the lower court was correct in ruling that such conduct was admissible under Military Rule of Evidence 404(b) as evidence of consciousness of guilt. Likewise, in *United States v. Bridges*, the Air Force Court of Criminal Appeals faced a situation in which an accused, immediately after stabbing a man in the chest, hid the knife he used to commit the crime. The court stated that such an act showed the accused's consciousness of guilt and served to corroborate his confession.[29]

There would be no reason for Raskolnikov to wash the blood from the murder weapon if he did not know that what he had done was criminal. Further, there would be no need for Raskolnikov to hide evidence if he did not know that evidence could lead to his conviction. Because Raskolnikov knew he committed a crime, however, he intentionally covered up potentially inculpating facts and evidence. Such acts were clearly designed to obfuscate the facts surrounding his crime. Therefore, under both federal and military law, Raskolnikov's conduct would be admissible as proof of his guilt.

> [H]e undressed completely and examined his clothes again. He scrutinized them minutely, down to the last thread, turning them over and over, and, unable to trust himself, repeated the process three times. But there seemed to be nothing, not a trace, except that the ragged fringes at the bottom of his trouser legs were covered stiff and clotted with dried blood. He took out his big clasp-knife and cut off the fringes.

Id.

Raskolnikov goes on to tear out the stained lining of his pocket and the loop that he had sewn into his coat. *Id.*

[24] *Id.*

> Suddenly he remembered that the purse and all the things he had stolen from the old woman's trunk were still in his pockets. Till that moment it had not even occurred to him to take them out and hide them. He had not remembered them even while he was inspecting his clothes. How could that be? He hurriedly began to pull them out and throw them on the table. When he had emptied his pockets and even turned them inside out to satisfy himself that there was nothing left in them, he carried the whole heap into a corner. There, near the floor, the wallpaper was torn where it had come loose from the wall; hastily he crammed everything under the paper, into this hole; it all went in.

Id.

[25] *See* United States *ex rel.* Foster v. De Robertis, 741 F.2d 1007 (7th Cir. 1984).

[26] *Id.*

> Finally, petitioner claims that his actions in concealing Patterson's body do not support an inference that he committed the murder. We cannot agree. Petitioner's concealment of the murder, coupled with his bizarre and inconsistent explanations of the murder, support the inference that he was responsible for the death of Patterson. We have long recognized that a defendant's attempt to conceal a crime is probative of a consciousness of guilt. That petitioner offered an explanation for his involvement in concealing the body that was consistent with his claim of innocence of the murder is irrelevant on review of the jury's verdict. The jury was not required to believe petitioner and could instead reasonably infer that his actions were indicative of guilt.

Id. (internal citations omitted).

[27] *See* Lewis v. Anthony Wayne Buick Co., 1992 U.S. Dist. LEXIS 3494 (1992) ("It is a general principle of law applicable in criminal cases, which this certainly is not, as well as civil cases, that concealing evidence, the concealing of evidence, hiding of evidence, is some evidence of consciousness of guilt.").

[28] *See* United States v. Garland, 39 M.J. 618 (A.C.M.R. 1994).

[29] *See* United States v. Bridges, 24 M.J. 915 (A.F. Ct. Crim. App. 2001).

III. Lying to Law Enforcement

American criminal courts have historically ruled that an accused's false exculpatory statements are admissible as evidence of the accused's consciousness of guilt. In 1896, Chief Justice Shaw was quoted in the Webster case, as saying the following:

> To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion without just cause on other persons; all or any of which tend somewhat to prove consciousness of guilt, and when proved exert an influence against the accused.[30]

Since that early pronouncement of the law, and assuredly long before it, federal courts have held that false exculpatory statements may be used as circumstantial evidence of consciousness of guilt and may strengthen inferences supplied by other pieces of evidence—though they do not alone prove guilt.[31] Military courts have echoed this rule of law, noting that "the fabrication of false and contradictory accounts by an accused criminal, for the sake of diverting inquiry or casting off suspicion is a circumstance always indicatory of guilt."[32] Both Federal and military jurisprudence, however, have distinguished between false exculpatory statements and general denials of guilt, noting that the latter are not considered admissible.[33]

The key distinction between the two types of statements is that general denials of guilt have never been considered admissible in American criminal law. "If a defendant is charged with crime, and unequivocally denies it, and this is the whole conversation, it cannot be introduced in evidence against him as an admission."[34] In contrast, false statements in which a suspect actually articulates falsehoods, rather than merely denying culpability, are admissible against him.

An examination of Raskolnikov's interaction with law enforcement reveals examples of various statements, some of which would be admissible as evidence of his consciousness of guilt, and some that would not.

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[30] *See* Hickory v. United States, 160 U.S. 408 (1896) (citing Commonwealth v. Webster, 5 Cush. 295, 316 (1850)). It should also be noted, however, that the same court tempered its language with the following cautionary advice:

> But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs. Such was the case often mentioned in the books and cited here yesterday, of a man convicted of the murder of his niece, who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as the niece. The deception was discovered and naturally operated against him, though the actual appearance of the niece alive afterwards proved conclusively that he was not guilty of the murder.

Id. at 417.

[31] *See* United States v. Glenn, 312 F.3d 58 (2d Cir. 2004); *see also* United States v. Gordon, 987 F.2d 902, 907 (2d Cir. 1993) (finding that "circumstantial evidence may include acts that exhibit a consciousness of guilt, such as false exculpatory statements").

[32] United States v. Elmore, 31 M.J. 678 (A.C.M.R. 1990); *see* United States v. Daniels, 56 M.J. 365 (2002) (noting, "[t]he variations in [statements made by the accused] could be viewed by the members as evidence of his consciousness of guilt."); United States v. Phillips, 53 M.J. 758 (A.F. Ct. Crim. App. 2000) (plainly noting, "A false statement is evidence of consciousness of guilt."); United States v. Potosky, 2001 CCA LEXIS 135 (A.F. Ct. Crim. App. 2001); United States v. Lepresti, 52 M.J. 644 (N-M Ct. Crim. App. 1999); United States v. Baldwin, 54 M.J. 551 (Army Ct. Crim. App. 2000) (holding that subsequent false statements were admissible evidence of consciousness of guilt). The *Military Judges' Benchbook* offers, in part, the following evidentiary instruction concerning false exculpatory statements:

> If an accused voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his/her innocence.

U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-22 (2002).

[33] *See* United States v. McDougald, 650 F.2d 532 (4th Cir. 1981) (noting that "general denials of guilt later contradicted are not considered exculpatory statements. . . ."); *see also* United States v. Colcol, 16 M.J. 479 (C.M.A. 1983) ("unlike a false explanation or alibi given by a suspect when he is first confronted with a crime, his general denial of guilt does not demonstrate any consciousness of guilt.").

[34] Commonwealth v. Trefethen, 157 Mass. 180 (1892) (citing Fitzgerald v. Williams, 148 Mass. 462 (1889)).

A. Raskolnikov's statement to Ilya Petrovich

Raskolnikov's first post-murder encounter with law enforcement comes shortly after the commission of the crime, but for reasons unrelated to it. Raskolnikov is summoned to the local police station because of an unpaid debt to his landlord.[35] At the police station, a police officer notices that Raskolnikov is ill, which results in quick, informal questioning on his health and (incidentally) his whereabouts:

> *Ilya Petrovich*: Did you go out yesterday?
> *Raskolnikov*: Yes.
> *Ilya Petrovich*: When you were ill?
> *Raskolnikov*: Yes.
> *Ilya Petrovich*: At what time?
> *Raskolnikov*: Eight o'clock in the evening.
> *Ilya Petrovich*: Where, may I ask?
> *Raskolnikov*: Along the street.
> *Ilya Petrovich*: Short and plain.[36]

In fact, Raskolnikov went out much earlier than eight o'clock in the evening. He had gone out to the old pawnbroker's residence almost an hour before that time and, by eight o'clock, would have been completing his gruesome act or returning home to dispose of the evidence rather than just going out.[37] Further, he did not just go out along the street, but went to the apartment of Alena Ivanovna where he murdered both her and her sister.[38] This statement, therefore, by Raskolnikov to Ilya Petrovich constitutes a false, exculpatory statement given for the purpose of fabricating an alibi—attempting to convince law enforcement that he was somewhere else, doing something other than murdering and stealing.

It is generally acknowledged, in criminal law, that an attempt to create a false alibi constitutes evidence of the defendant's consciousness of guilt.[39] Like any other false statement designed to obfuscate the facts surrounding the crime and divert inquiry, such lies are admissible to prove the guilt of an accused criminal.[40] Thus, the misleading statements by Raskolnikov to Ilya Petrovich would be admissible to establish his consciousness of guilt.

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[35] *See* DOSTOYEVSKY, *supra* note 2, pt. 2, ch. 1, at 79-83.

[36] *Id.* at 89.

[37] *Id.* at 62 ("Glancing casually into a shop, he saw from the clock that hung on the wall that it was already ten minutes past seven. He would have to hurry; he wanted to go round about, so as to approach the house from the other side."); *id.* at 63 ("Somewhere a clock struck once. 'What, can it possibly be half-past seven? Surely not; time is really flying!").

[38] *See id.* pt. 1, ch. 7, at 64-69.

[39] *See* Henry v. Poole, 409 F.3d 48 (2d Cir. 2005) (citing People v. Loliscio, 593 N.Y.S.2d 991, 994 (N.Y. App. Div. 1993)); *see also* United States v. Parness, 503 F.2d 430, 438 (2d Cir. 1974) ("It is axiomatic that exculpatory statements, when shown to be false**,** are circumstantial evidence of guilty consciousness and have independent probative force."); 2 F. BAILEY & K. FISHMAN, CRIMINAL TRIAL TECHNIQUES § 32:21 (2002) ("Maintaining false alibis to meet a false charge is the way many defendants end up in prison. If the prosecution can establish the falsity of an alibi . . ., your case is as good as lost. Many jurors regard a false alibi as an admission of guilt."); 2 G. SCHULTZ, PROVING CRIMINAL DEFENSES P 6.08 (1991) ("There is nothing as dangerous as a poorly investigated alibi. An attorney who is not thoroughly prepared does a disservice to his client and runs the risk of having his client convicted even where the prosecution's case is weak. A poorly prepared alibi is worse than no alibi at all.").

[40] *See supra* note 26.

B. Raskolnikov's Statements to Porfiry

When Raskolnikov first meets Porfiry, the judicial investigator[41] who is charged with ferreting out the truth, the investigator and suspect engage in a colloquy regarding the crime. Raskolnikov is not, however, immediately (or at least expressly) identified by Porfiry as the suspect at that time.[42] This dialogue, however, does not amount to a classic interrogation and Raskolnikov is not placed in the position of having to confirm or deny his involvement in the murder.[43] In fact, Porfiry's theory of interrogation seems to eschew such direct confrontation in favor of a more asymmetrical approach.[44] Thus, in their initial encounter, Porfiry and Raskolnikov discuss Raskolnikov's health and Porfiry's theory of crime, only obliquely touching on the topic of the old pawnbroker's murder.

Porfiry does, however, confront Raskolnikov later in the novel, directly and dramatically telling him that he knows that he murdered the old woman and her sister:

> "Who was the murderer?" he repeated, as though he could not believe his own ears. "But it was *you*, Rodion Romanovich![45] You murdered them!" he went on, almost in a whisper, but his voice was full of conviction.
>
> Raskolnikov sprang up from the sofa, stood still for a few seconds, and sat down again without a word. His whole face twitched compulsively.
>
> "Your lip is trembling again, as it always does," murmured Porfiry Petrovich almost sympathetically. "I don't think you quite understand me, Rodion Romanovich," he added after a short pause; "That is why you are so thunderstruck. I came on purpose to tell you everything, and bring everything out into the open."
>
> "It was not I who murdered her," whispered Raskolnikov, like a frightened small child caught red-handed in some misdeed.[46]

Obviously, when Raskolnikov denies that he murdered the two women, he is lying. This lie, however, is not one in which Raskolnikov fabricates details or invents new facts in order to divert inquiry into his wrongdoing. Rather, unlike the statement Raskolnikov gave to Ilya Petrovich, his statement to Porfiry is a general denial of guilt.

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[41] *See* RICHARD WEISBERG, THE BRILLIANT REACTOR: THE INQUISITOR IN CRIME AND PUNISHMENT, *in* THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION 48-54 (1984).

> The lay apprehension that Porfiry is a police official, instead of a lawyer and officer of the court, is representative of the public confusion about criminal procedure in general, which contributed to the reforms that Porifiry specifically mentions to Raskolnikiv later—"inquisitors are all at any rate to be called something different soon." Here as elsewhere in his works, Dostoekvski demonstrates through these variations on the inquisitor's title both interest and competence in procedural law. Indeed, the Code of 1864 denominates the position *sudebni sledovatel'* (literally 'judicial investigator'), a clearer title which Dostoekvski uses only for the inquisitor in *The Brothers Karamazov*, published fifteen years later.

Id.

[42] *See* DOSTOYEVSKY, *supra* note 2, pt. 3, ch. 5, at 210. Porifiry initially asks Raskolnikov to make a statement regarding possessions of his that were left with the murdered pawnbroker. *Id.*

[43] *Id.*

[44] *Id.* at 287.

> But you ought to bear it in mind, my dear Rodion Romanovich, that the average case, the case for which all the legal forms and rules are devised, which they are calculated to deal with, when they are written down, does not exist at all, because every case, every crime, for example, as soon as it really occurs, at once becomes a quite special case, and sometimes it is absolutely unlike anything that has ever happened before. Very comical things of that kind sometimes occur. Now, if I leave one gentleman quite alone, if I don't arrest him or worry him in any way, but if he knows, or at least suspects every minute of every hour, that I know everything down to the last detail, and am watching him day and night with ceaseless vigilance, if he is always conscious of the weight of suspicion and fear, he is absolutely certain to lose his head. He will come to me of his own accord, and perhaps commit some blunder, which will provide, so to speak, mathematical proof, like two and two make four – and that is very satisfactory.

Id.

[45] Raskolnikov's full name is Rodion Romanovich Raskolnikov.

[46] *See* DOSTOYEVSKY, *supra* note 2, pt. 6, ch. 2, at 385.

The law recognizes that, "unlike a false explanation or alibi given by a suspect when he is first confronted with a crime, his general denial of guilt does not demonstrate any consciousness of guilt."[47] Therefore, in merely denying that he was the one responsible, Raskolnikov does not give any evidence that can be used to prove his consciousness of guilt. In giving a false alibi to Ilya Petrovich, however, Raskolnikov does provide evidence admissible to prove his consciousness of guilt.

IV. Fleeing the Scene

In 1896, the United States Supreme Court quoted the Circuit Court for the Western District of Arkansas as informing jurors of the following concerning an individual's flight:

> [T]he law recognizes another proposition as true, and it is, that 'The wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it in this case. Therefore, the law says that if after a man kills another that he undertakes to fly, if he becomes a fugitive from justice, either by hiding in the jurisdiction, watching out to keep out of the way of the officers, or of going into the Osage country out of the jurisdiction, that you have a right to take that fact into consideration, because it is a fact that does not usually characterize an innocent act.[48]

Though the Supreme Court found fault with this rather partisan instruction,[49] the text does articulate, even if a bit too strongly, the fundamental rationale behind the admissibility of evidence of flight.

Contemporary federal courts have consistently ruled that evidence of flight is admissible as evidence of an accused's consciousness of guilt.[50] Military jurisprudence, likewise, has long recognized the applicability of such evidence at courts-martial.[51] As one legal commentator has noted, while evidence of flight does not give rise to a presumption of guilt, it is "a circumstance which when considered together with all the facts of the case may justify the inference of the accused's guilt."[52]

Federal jurisprudence has set up a four-part test the government must meet before a jury can be instructed that they may consider evidence of flight as consciousness of guilt. The evidence must support the following four inferences: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt, to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged, to actual guilt of the crime charged."[53] Military courts have not adopted this test, but instead have ruled that the factfinder must be fully advised that evidence of flight does not give rise to a presumption of guilt, but is a circumstance that when considered together with all the facts of the case may justify the *inference* of the accused's guilt.[54]

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[47] *See* United States v. Colcol, 16 M.J. 479 (C.M.A. 1983); United States v. McDougald, 650 F.2d 532 (4th Cir. 1981) (noting that "general denials of guilt later contradicted are not considered exculpatory statements. . .").

[48] Hickory v. United States, 160 U.S. 408 (1896).

[49] *Id.* at 421.

> This instruction was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive, that it was the duty of the jury to act on it as an axiomatic truth. On this subject, also, it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have, that is, as creating a legal presumption so well settled as to amount virtually to a conclusive proof of guilt.

Id at 422.

[50] *See* Ventura v. AG, 2005 U.S. App. LEXIS 16605 (11th Cir. 2005) ("As we have noted repeatedly, "evidence of resistance to arrest and flight is admissible to demonstrate consciousness of guilt and thereby guilt"); United States v. Frazier, 387 F.3d 1244 (11th Cir. 2004) (en banc) (finding that defendant's flight from police "was strong evidence of consciousness of guilt"); *see also* United States v. Solomon, 688 F.2d 1171, 1176 (7th Cir. 1982); United States v. Jackson, 572 F.2d 636, 639 (7th Cir. 1978); United States v. Myers, 550 F.2d 1036 (5th Cir. 1977).

[51] *See* United States v. Buchana, 41 C.M.R. 394 (C.M.A. 1970); United States v Harris, 21 C.M.R. 58 (C.M.A. 1956).

[52] *See* 1 FRANCIS WHARTON, CRIMINAL EVIDENCE § 139 (12th ed. 1955).

[53] United States v. Halwood, 2005 U.S. App. LEXIS 13545 (9th Cir. 2005).

[54] *See Buchana*, 41 C.M.R. at 397.

Raskolnikov never "skips town" after committing his crime, though he does consider that particular course of action.[55] In the immediate aftermath of his crime, however, Raskolnikov does flee the scene of the crime—a hurried effort to get out of the old pawnbroker's apartment before being found.[56] That kind of evasive conduct—flight from the scene of a crime—would likely be admissible in federal or military courts as evidence of Raskolnikov's consciousness of guilt.[57]

When determining whether such facts would give rise to a flight instruction, the U.S. Supreme Court in *United States v. Halwood* stated the following:

> Here, one of the group who assaulted the victim testified that the defendant was involved in beating the victim, and that both he and the rest of the group, including the defendant, fled the scene in order to avoid the police. Another witness testified that he heard the defendant yelling as he ran away from the scene of the crime. The defendant himself admitted that when he left the scene he was aware the victim was seriously injured. That evidence is sufficient to support the flight instruction.[58]

In Dostoyevsky's novel, by comparison, Raskolnikov murdered two women and then hid behind a locked door until unexpected visitors departed. He then slipped out of the old pawnbroker's residence and hid in an empty apartment until the coast was clear, before skulking back to his own apartment—actively concealing himself as he fled the scene.[59] Such actions would be admissible against Raskolnikov in any modern court.

V. Demeanor

Raskolnikov, a law student, when speaking to himself in the police office, understood that his demeanor might be considered as evidence: "Do they know about the flat? I shan't go away without finding out! Why did I come? But I am getting agitated, and that, perhaps, is evidence!"[60] His speculation was correct.

Like the disposal of evidence, false exculpatory statements, and flight to avoid apprehension, evidence of an accused's demeanor can be used to prove his consciousness of guilt.[61] Evidence of demeanor for such purposes has a long history in American criminal law. As a court in 1910 noted,

> It is truthfully said by learned counsel that there is no standard as to how a defendant upon trial for an infamous crime ought to demean himself; that exhibitions of shame, temperament, and nervous strain are likely to be interpreted as signs of a guilty conscience. The same observation, however, may be made as to a person's demeanor when arrested or suddenly charged with crime. There is no standard as to how a person ought to behave under such circumstances. Conduct will vary according to sex, age, temperament, and past experience. Still demeanor on such occasions has always been held competent evidence as bearing on the question of the defendant's consciousness of guilt.[62]

Military courts have, likewise, recognized the validity of such evidence.[63]

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[55] *See* DOSTOYEVSKY, *supra* note 2, pt. 2, ch. 3, at 107-08 (Raskolnokov thinks, "I must run away at once (…) It would be better to run away altogether…a long way . . . to America, and be damned to them! I must take the bill as well…it will come in useful there."); *see also id.* pt. 6, ch. 2 (asking "What if I run away?" when confronted by Porfiry).

[56] *Id.* pt. 1, ch. 7, at 70-74.

[57] *See* United States v. Henry, 1998 U.S. App. LEXIS 13185 (4th Cir. 1998).

[58] *Halwood*, 2005 U.S. App. LEXIS 13545.

[59] *See* DOSTOYEVSKY, *supra* note 2, pt. 1, ch. 7, at 70-74.

[60] *Id.* pt. 3, ch. 5, at 216.

[61] *See, e.g.*, United States v. Diaz-Carreon, 915 F.2d 951 (5th Cir. 1990); United States v. Gutierrez-Farias, 294 F.3d 657 (5th Cir. 2002) (noting that, based on [the defendant's] demeanor at the checkpoint and the vagueness of his answers, the jury could have inferred that he knew the marijuana was in the tires but was trying to hide that fact).

[62] *See* Waller v. United States, 179 F. 810 (8th Cir. 1910).

[63] *See* United States v. Daniels, 2001 CCA LEXIS 89 (Army Ct. Crim. App. 2001).

Immediately after commission of the crime, Raskolnikov becomes ill and agitated. When called to the police station on the matter of an unpaid debt, he is visibly ill in the presence of law enforcement officials discussing the crime, and answers the most benign questions sharply.[64] Similarly, when first encountering Porfiry, Raskolnikov becomes extremely agitated, feverish, and animated.[65] As noted above, Raskolnikov is quite aware that his unusual demeanor could be evidence of his guilt. It should also be noted, however, that Porfiry, the judicial investigator, is also very interested in Raskolnikov's demeanor— especially his demeanor during the period of time immediately following the crime.[66]

The court in *United States v. Schlesinger*,[67] considered a similar situation in a case involving an arsonist. In that case, the New York City Fire Marshal was investigating the part-owner of a clothing company who was suspected of starting a fire that destroyed a large building in Brooklyn. "After commencing the investigation he attempted to interview the Defendant. Fire Marshal Santangelo stated that the Defendant repeatedly changed the date of the interview and delayed his appointment on several occasions. When the Defendant finally met with Fire Marshal Santangelo, the Defendant tape recorded the meeting without Fire Marshal Santangelo's knowledge. In the interview, Schlesinger told Fire Marshal Santangelo that he was the "Manager of financial operations" and held no official position in the company or on the board of directors. The Defendant also refused to answer several questions and seemed irritated. The Defendant responded to several questions by asking questions back such as "who are you?"[68] It is worth noting that this real-life encounter between Schlesinger and Fire Marshal Santangelo shares dramatic similarities with Raskolnikov's literary encounter with Porfiry.

The *Schlesinger* court stated that a suspect's nervous behavior could be considered as evidence of his consciousness of guilt. "Here, although it may not rise to the level of consciousness of guilt that flight represents, the jury had the right to consider evidence that Schlesinger acted in a suspicious manner when questioned about the fire by Fire Marshal Santangelo."[69]

Military jurisprudence has also addressed cases involving an oddly-behaved suspect. In *United States v. Daniels*,[70] the Air Force Court of Criminal Appeals considered the case of a suspect who exhibited a strange demeanor during an interrogation, acting noticeably "cocky" during the first part of the interview, then becoming "somber, more reserved" when discussing the possibility of trace evidence from his gloves.[71] The court noted that the trial court did not err when admitting evidence of the accused's behavior, finding that it was relevant to his consciousness of guilt.[72]

Like the suspects in the cases discussed above, Raskolnikov displayed agitation, nervousness, and extremely unusual behavior after his crime. This unusual behavior was displayed in—and, perhaps, exacerbated by—the presence of law enforcement officials. Raskolnikov's innate understanding of the criminal process allowed him to understand that such odd behavior in their presence could be used as evidence against him. Modern jurisprudence reveals that his understanding still holds true today.

> The trial judge admitted evidence of the appellant's demeanor as evidence of consciousness of guilt. He found the evidence to be relevant, conducted a balancing test pursuant to Mil. R. Evid. 403, and determined the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the appellant.

Id.

[64] *See* DOSTOYEVSKY, *supra* note 2, pt. 2, ch. 1, at 79-83.

[65] *Id.* pt. 3, ch. 5, at 213-15.

[66] *Id.*

[67] *See* United States v. Schlesinger, 372 F. Supp. 2d 711 (E. D. N.Y. 2005).

[68] *Id.*

[69] *Id.* at 724.

[70] *See* United States v. Daniels, 2001 CCA LEXIS 89 (Army Ct. Crim. App. 2001).

[71] *Id.*

[72] *Id.*

VI. Conclusion

In all literature, there is perhaps no better example of a man wrestling with the knowledge of his own guilt than that of Raskolnikov in Dostoyevsky's *Crime and Punishment*. Within the struggles of the main character, the reader sees numerous examples of behavior that demonstrate a suspect's consciousness of guilt: disposing of the evidence, giving false exculpatory statements, fleeing the scene, and displaying an unusually nervous demeanor. Modern jurisprudence reveals that such behavior is admissible in contemporary criminal trials for the purpose of establishing guilt, highlighting the importance of acute observation of an accused's actions while demonstrating definitively Dostoyevsky's unique insight into the human condition and the criminal mind.[73] Perhaps that is why "[n]o other novelist's work has been so widely drawn upon by fields and disciplines that do not normally draw on fiction for their sources."[74]

The behavioral categories emphasized in this article are by no means an exhaustive list of behaviors that might be considered evidence of consciousness of guilt—there are perhaps as many of such categories as there are human reactions to guilt.[75] The four categories discussed above, however, are firmly rooted in American criminal jurisprudence and are of great utility to practitioners of criminal law. Just as Dostoyevsky used such behavior to convey to the reader the psychological distress and torment of Raskolnikov, so may the modern prosecutor identify such behavior in contemporary criminals and reveal to the factfinder why and how such actions, though silent or even defiant, are pregnant with admissions of guilt.

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[73] *See* NOCHOLAS BERDYAEV, DOSTOYEVKSY (1934) ("Dostoievsky was more than anything an anthropologist, an experimentalist in human nature, who formulated a new science of man and applied to it a method of investigation hitherto unknown.").

[74] *See* Simon Karlinsky, *Dostoyevsky as Rorschach Test*, N.Y. TIMES, June 13, 1971.

[75] *See, e.g.*, United States v. Chauncey, 2005 U.S. App. LEXIS 18291 (8th Cir. 2005); United States v. Montano-Gudino, 309 F.3d 501 (8th Cir. 2002) (noting that evidence of threatening a witness is admissible to show an accused's consciousness of guilt).

TJAGLCS Practice Notes

Tax Law Note

Update for 2005 Federal Income Tax Returns

This note highlights changes that might be relevant or of interest to military taxpayers. Its goal is to inform legal assistance attorneys of updates in inflation-adjusted income tax provisions and changes for the upcoming tax season, as well as provide information to help clients plan for future tax years. This note lists the changes generally in the order in which they appear on the Form 1040 tax return.

There were relatively few major changes to federal income tax laws and regulations for the 2005 tax year. Most changes related to relief afforded to victims of Hurricanes Katrina, Rita, and Wilma.[1] Definitions of dependents were updated to incorporate the new uniform definition of child.[2] Beginning 31 December 2005, taxpayers will be able to request an automatic six-month tax-filing extension, which replaces the four-month automatic extension and the two-month additional extension that taxpayers used to have to request.[3] From a professional responsibility standpoint, the Internal Revenue Service (IRS) published Treasury Department Circular No. 230, which governs the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and appraisers before the IRS.[4] Finally, beginning 31 December 2005, servicemembers in Turkey will no longer be entitled to the tax benefits associated with service in an area providing direct support to a combat zone.[5]

Key Changes for 2005

Uniform Definition of a Child

Beginning with tax year 2005, the Working Families Tax Relief Act of 2004[6] standardized the definition of a child for five common tax benefits: head of household filing status, dependent exemptions for children, the dependent care credit, the earned income tax credit, and the child and additional child tax credits.[7]

Exemptions

The test for claiming a child as a dependent has changed from a support to a residency one. For tax year 2004 and earlier, a child could be claimed as a dependent if the taxpayer provided more than one-half of the child's support.[8] Under the new definition of a qualifying child, the child must have the same principal place of abode as the taxpayer for more than one-half of the year.[9] Also, if a child provides more than one-half of his or her own support, then the child is not a qualifying child and cannot be claimed as a dependent.[10]

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[1] Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 101, 119 Stat. 2016 (2005); *see also* Gulf Opportunity Zone Act of 2005, H.R. 4440, 109th Cong. (presented to the President on Dec. 19, 2005).

[2] I.R.C. § 152 (LEXIS 2005).

[3] T.D. 9229, 2005-48 I.R.B. 1051.

[4] 31 C.F.R., subtit. A, pt. 10 (2005).

[5] American Forces Press Service, *U.S. Troops in Turkey No Longer Receive Tax Exclusion*, Nov. 10, 2005, http://www.defenselink.mil/news/Nov2005/2005 t1110_3312.html.

[6] Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, 118 Stat. 1166 (2004).

[7] *Id*. § 201 (codified at I.R.C. § 152).

[8] *See* I.R.C. § 152 (LEXIS 2004).

[9] *Id*. § 152(c)(1)(B) (LEXIS 2005).

[10] *Id.* § 152(c)(1)(D).

In situations in which more than one taxpayer can treat a child as a qualifying child (for example, if the child lives with both parents for more than six months and then lives with only one of them after a separation), there are tie-breaking rules to determine who is entitled to the dependent exemption.[11] If one of the taxpayers is the child's parent and the other is not, then the parent may claim the exemption.[12] If both taxpayers are the child's parents, then the one with whom the child resides the longest may claim the exemption.[13] If the child has resided the same amount of time with both parents, then the one with the higher adjusted gross income (AGI) may claim the exemption.[14] Finally, if neither taxpayer is the child's parent, then the one with the higher AGI may claim the exemption.[15]

Additional Exemption for Housing Hurricane Katrina Displaced Individuals

For 2005 and 2006, any natural person who houses a Hurricane Katrina displaced individual may claim an exemption of $500 for each displaced individual.[16] A displaced individual is a natural person whose principal place of abode on 28 August 2005 was in the Hurricane Katrina disaster area, and the person was displaced from that abode because of evacuation or damage to the abode.[17] The taxpayer must have provided the displaced person with housing free of charge in the principal residence of the taxpayer for a period of sixty consecutive days within the taxable year.[18] The total amount of the exemptions may not exceed $2,000, and the taxpayer may not have used the displaced person as an exemption for any prior tax year.[19]

Income

Tax-Favored Withdrawals from Retirement Plans for Hurricane Victims

Victims of Hurricanes Katrina,[20] Rita, and Wilma[21] may take a qualified hurricane distribution of up to $100,000 from their retirement plans without incurring the ten percent penalty for early withdrawal imposed by I.R.C. § 72(t). A qualified hurricane distribution is one taken by a person who sustained an economic loss by reason of the hurricane and whose principal place of abode was located in one of the hurricane disaster areas.[22] The distribution must be taken after the hurricane struck and before 1 January 2007.[23] In the case of any qualified hurricane distribution, any amount required to be included in gross income shall be included ratably over the three-taxable-year period beginning with the taxable year of the distribution.[24] Finally, individuals who receive a qualified hurricane distribution may re-contribute to the qualified retirement plan up to the entire distribution amount at any time during the three-year period beginning the day after the distribution.[25]

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[11] *Id.* § 152(c)(4).

[12] *Id.* § 152(c)(4)(A)(i).

[13] *Id.* § 152(c)(4)(B)(i).

[14] *Id.* § 152(c)(4)(B)(ii).

[15] *Id.* § 152(c)(4)(A)(ii).

[16] Katrina Emergency Tax Relief Act of 2005; Pub. L. No. 109-73, § 302, 119 Stat. 2016 (2005).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* § 101.

[21] The Gulf Opportunity Zone Act of 2005, H.R. 4440, 109th Cong. § 201 extends certain emergency tax relief for Hurricane Katrina to Hurricanes Rita and Wilma victims (signed by the President on 21 December 2005).

[22] Katrina Emergency Tax Relief Act of 2005 § 101; H.R. 4440, 109th Cong. § 201 (2005).

[23] Katrina Emergency Tax Relief Act of 2005 § 101; H.R. 4440, § 201.

[24] Katrina Emergency Tax Relief Act of 2005 § 101; H.R. 4440, § 201 (The taxpayer may also elect to include the entire distribution in income in the year of distribution.).

[25] Katrina Emergency Tax Relief Act of 2005 § 101; H.R. 4440, § 201.

Itemized Deductions

General Sales Tax Deduction

For tax year 2005, individuals will again be able to choose whether to deduct state and local income taxes or state and local sales taxes.[26] Taxpayers should compare the amount spent on sales tax, especially when a large purchase was made, to the amount of state income taxes withheld and also consider the amount of any state income tax refund that must be included as income in the following year. Taxpayers who do not pay state income tax or who have a low state income tax liability are likely to benefit from this provision. Taxpayers have the choice of deducting the exact amount of sales tax paid (based on accumulated receipts) or the Optional State Sales Tax Tables provided in the Instructions for Form 1040, Schedule A.[27] If the Optional State Sales Tax Tables are used, then the amount of the deduction is based on the state where the taxpayer actually resides, not necessarily where he or she is domiciled.[28] Taxpayers who live overseas for the entire year are not entitled to the deduction.

Vehicle, Boat, and Plane Donations—Gifts to Charity

Beginning 1 January 2005, the deduction rules for contributions of used motor vehicles, boats, and planes to charities changed. The deduction is now limited to the actual sales price of the vehicle when the donee charity sells it, unless (a) the charity makes a significant intervening use of the vehicle (such as using it to deliver meals on wheels); (b) the charity makes a material improvement to the vehicle (major repairs that significantly increase its value and not mere painting or cleaning); (c) the charity donates or sells the vehicle to a needy individual at a significantly below-market price provided the transfer furthers the charitable purpose of helping a poor person in need of a means of transportation; or (d) the fair market value of the vehicle is $500 or less.[29] To claim the deduction, the donor must get an acknowledgement from the donee organization within thirty days of the contribution or disposition by the charity.[30] Internal Revenue Service Form 1098-C may be used to satisfy the acknowledgement requirement.

Calculating Taxable Income and Tax Payments and Credits

Additional Child and Earned Income Tax Credit for Katrina Victims

To be entitled to the Child Tax Credit (CTC) or the Earned Income Tax Credit (EITC), a taxpayer must have a certain level of earned income.[31] The devastation caused by Hurrican Katrina destroyed or interfered with many taxpayers' ability to earn income. Therefore, those who lived in the Hurricane Katrina disaster area or who were displaced because of Hurricane Katrina may make an election to calculate their additional CTC or the EITC, or both, for 2005 using their earned income from 2004.[32] Qualified individuals can only make this election if their earned income for 2005 is less than their earned income for 2004.[33]

Lieutenant Colonel Noël Woodward

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[26] I.R.C. § 164 (LEXIS 2005).

[27] Internal Revenue Service, Form 1040, Schedule A, Instructions, *available at* www.irs.gov (last visited 27 Dec. 2005).

[28] *Id.*

[29] I.R.C. § 170(f).

[30] *Id.*

[31] *Id.* § 32.

[32] Pub. L. No. 109-73, § 406, 119 Stat. 2016 (2005).

[33] *Id.*

Appendix

There are six different marginal tax brackets for tax year 2005, and they are 10%, 15%, 25%, 28%, 33%, and 35%.[34]

1. Married Individuals Filing Joint Returns and Surviving Spouses:

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	14,600	10%
14,600	59,400	$1,460 + 15% of amount over $14,600
59,400	119,950	$8,180 + 25% of amount over $59,400
119,950	182,800	$23,317.50 + 28% of amount over $119,950
182,800	326,450	$40,915.50 + 33% of amount over $182,800
326,450		$88,320 + 35% of amount over $326,450

2. Unmarried Individuals (other than Surviving Spouses and Heads of Households):

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	7,300	10%
7,300	29,700	$730 + 15% of amount over $7,300
29,700	71,950	$4,090 + 25% of amount over $29,700
71,950	150,150	$14,652.50 + 28% of amount over $71,950
150,150	326,450	$36,548.50 + 33% of amount over $150,150
326,450		$94,727.50 + 35% of amount over $326,450

3. Heads of Households:

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	10,450	10%
10,450	39,800	$1,045 + 15% of amount over $10,450
39,800	102,800	$5,447.50 + 25% of amount over $39,800
102,800	166,450	$21,197.50 + 28% of amount over $102,800
166,450	326,450	$39,019.50 + 33% of amount over $166,450
326,450		$91,819.50 + 35% of amount over $326,450

4. Married Individuals Filing Separate Returns:

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	7,300	10%
7,300	29,700	$730 + 15% of amount over $7,300
29,700	59,975	$4,090 + 25% of amount over $29,700
59,975	91,400	$11,658.75 + 28% of amount over $59,975
91,400	163,225	$20,457.75 + 33% of amount over $91,400
163,225		$44,160 + 35% of amount over $163,225

[34] I.R.C. § 1(a)(-(d), (i)(2); Rev. Proc. 2004-71, 2004 I.R.B. 970.

5. Estates and Trusts:

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	2,000	15%
2,000	4,700	$300 + 25% of amount over $2,000
4,700	7,150	$9,755 + 28% of amount over $4,700
7,150	9,750	$1,661 + 33% of amount over $7,150
9,750		$2,519 + 33% of amount over $7,150

The 2005 Standard Deduction amounts are:

a. Married filing jointly or qualifying widow(er) – $10,000.
b. Single – $5,000.
c. Head of household – $7,300.
d. Married filing separately – $5,000.[35]

Otherwise allowable itemized deductions are reduced if AGI in 2005 exceeds:

a. Married filing separately - $72,975;
b. All other returns - $145,950.[36]

The 2005 Personal and Dependent Exemption deduction amount is $3,200.[37] The 2005 Phase-Out Amounts for personal exemptions are:

Taxpayer	Begins After	Fully Phased Out*
Married filing jointly	$218,950	$341,450
Single	$145,950	$268,450
Head of Household	$182,450	$304,950
Married filing separately	$109,475	$170,725[38]

*Phase-out occurs at rate of 2% for each $2,500 or part of $2,500 ($1,250 in both cases for married filing separately) by which the taxpayer's adjusted gross income exceeds the "Begins After" amount.

To begin planning for tax year 2006, the following inflation-adjusted items are provided from Rev. Proc. 2005-70:[39]

The 2006 Standard Deduction amounts are:

a. Married filing jointly or qualifying widow(er) – $10,300.
b. Single – $5,150.
c. Head of household – $7,550.
d. Married filing separately – $5,150.

The 2006 Personal and Dependent Exemption deduction amount is $3,300.

[35] I.R.C. § 63(c)(2); Rev. Proc. 2004-71, 2004 I.R.B. 970.

[36] I.R.C. § 68; Rev. Proc. 2004-71, 2004 I.R.B. 970.

[37] I.R.C. § 151; Rev. Proc. 2004-71, 2004 I.R.B. 970.

[38] *Id.*

[39] 2005 I.R.B. 47.

Administrative and Civil Law Note

Thrift Savings Plan Update

I'm living so far beyond my income that we may almost be said to be living apart.[1]

Recent changes affect the Thrift Savings Plan (TSP). Open seasons have been eliminated, and additional investment options are available to servicemembers.

The Basics

The TSP is a retirement savings and investment plan sponsored by the Federal Government. Congress established the TSP in the Federal Employees' Retirement System Act of 1986.[2] The TSP, which was originally only for Federal civilian employees, was offered to servicemembers as a result of the National Defense Authorization Act for Fiscal Year 2001.[3]

The TSP is a defined contribution plan that is similar to private sector 401(k) plans.[4] The amount available from the TSP at retirement will depend upon how much the servicemember contributed during his working years and the earnings on those contributions.[5]

Servicemembers may elect to contribute a percentage of their basic pay, incentive pay, or special pay and must indicate into which fund(s) the money is invested. The TSP offers several different investment funds: Government Securities Investment ("G" Fund); Fixed Income Index Investment ("F" Fund); Common Stock Index Investment ("C" Fund); Small Capitalization Stock Index Investment ("S" Fund), and International Stock Index Investment ("I" Fund). If a servicemember does not make a contribution allocation, all contributions will be invested in the G Fund.

Recent Changes

The TSP now offers professionally managed life cycle funds that diversify investments throughout the five existing TSP funds through various asset allocations.[6] Fund allocations are tailored to different groups of participants according to their projected date of retirement or the date when individuals plan to withdraw their money.

In addition, open seasons have been eliminated, and servicemembers can now enroll or change their contribution amount at any time.[7] New contribution elections are effective the first full pay period after they are filed. There is also a new election form, TSP-U-1, which is a combination of both the Uniform and Federal service forms.[8]

Beginning January 2006, there will be no limit on the percentage of pay servicemembers can contribute to the TSP.[9] Tax-deferred contributions are still limited by the Internal Revenue Service's elective deferral limit, which is currently

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[1] E.E. Cummings (1894-1962), *available at* www.quotations.com/money.htm (last visited Dec. 20, 2005).

[2] Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986) (codified at 5 U.S.C. §§ 8431-8840 (2000)).

[3] Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000).

[4] I.R.C. § 401(k) (LEXIS 2005); Thrift Savings Plan, What is the Thrift Savings Plan?, http://www.tsp.gov/uniserv/features/chapter01.html (last visited Dec. 13, 2005) [hereinafter TSP Website].

[5] TSP Website, *supra* note 4.

[6] Thrift Savings Plan, *L Funds* (2005), http://www.tsp.gov/rates/fundsheet-lfunds.pdf.

[7] *See* TSP Website, *supra* note 4, at What's New, http://www.tsp.gov/curinfo/plannews.html.

[8] *See* Thrift Savings Plan, TSP-U-1, Thrift Savings Plan Election Form (July 2005), *available at* http://www.tsp.gov/cgi-bin/byteserver.cgi/uniserv/forms/tsp-u-1.pdf.

[9] TSP Website, *supra* note 4, at What's New, http://www.tsp.gov/curinfo/plannews.html.

$15,000 per tax-year.[10] The IRS elective deferral limit does not apply to tax exempt pay (*i.e.* combat pay); however, the IRS still limits the total amount of contributions to a plan to $44,000 for tax-year 2006.[11]

For more information, servicemembers can visit the TSP website, http://www.tsp.gov/, or contact their local service representative.

Captain Anita J. Fitch

[10] *See id*; I.R.C. § 402(g) (LEXIS 2005); *see also* Thrift Savings Plan, *Annual Limit on Elective Deferrals* (2005), http://www.tsp.gov/forms/oc91-13w.pdf.

[11] News Release, Internal Revenue Service, IRS Announces Pension Plan Limitations for 2006 (Oct. 14, 2005) (stating that the limitation for defined contribution plans under 26 U.S.C. § 415(c)(1)(A) is increased for 2006 from $42,000 to $44,000).

Book Review

THE BOYS OF POINTE DU HOC: RONALD REAGAN, D-DAY AND THE U.S. ARMY 2ND RANGER BATTALION[1]

REVIEWED BY MAJOR MICHAEL FREYERMUTH[2]

Behind me is a memorial that symbolizes the Ranger daggers that were thrust into the tops of these cliffs. And before me are the men who put them there.

These are the boys of Pointe du Hoc. These are the men who took the cliffs. These are the champions who helped free a continent. These are the heroes who helped end a war.

Gentlemen, I look at you and I think of the words of Stephen Spender's poem. You are men who in your lives fought for life . . . and left the vivid air signed with your honor.[3]

On 6 June 1944 General Dwight D. Eisenhower, Supreme Commander of the Allied Expeditionary Force, gave the final order that set in motion the largest coalition of ships in naval history.[4] He stated in his remarks to the thousands of Soldiers, Sailors, and Airmen who served under him, that they were to "embark upon the Great Crusade,"[5] a movement that even today remains "the largest sea borne invasion in history, involving almost three million troops."[6] From this date, D-Day, eighty-five days of fighting left its mark on Normandy and on the heart of a nation. In *The Boys of Pointe du Hoc*, historian Douglas Brinkley offers insight into one particular "band of brothers,"[7] the 2nd Ranger Battalion, whose courage and bravery was relived and remembered by President Ronald Reagan in his famous D-Day anniversary speeches at Pointe du Hoc and Omaha Beach some forty years later.[8] At first, it may seem inconceivable that the story of the 2nd Ranger Battalion, amidst a hundred or even a thousand stories of World War II bravery, would be the foundation for what one biographical resource referred to as a period of "national self-confidence" under President Reagan.[9] But as Brinkley articulates early on, this particular narrative resonated with people, not only because it was "something you could get your hands around," but also because it was a story that "opened the window" and made the events of D-Day all the more accessible and relevant to the American public.[10]

As Tom Brokaw notes in his book, *The Greatest Generation*,[11] "[f]or most of the younger Americans, D-Day has been a page or two in their history books or some anniversary ceremony on television. . . ."[12] Brinkley, however, brings D-Day and the efforts of the 2nd Ranger Battalion to the twenty-first century. In *The Boys of Pointe du Hoc*, Brinkley used the

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[1] DOUGLAS BRINKLEY, THE BOYS OF POINTE DU HOC: RONALD REAGAN, D-DAY, AND THE U.S. ARMY 2ND RANGER BATTALION (2005).

[2] U.S. Air Force. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] BRINKLEY, *supra* note 1, at 226, 227 (citing to President Ronald Reagan, Speech at Pointe du Hoc (June 6, 1984), The Official Website of the Ronald Reagan Presidential Library and Foundation, Speeches, http://www.reaganfoundation. org/reagan/speeches (follow the Fortieth Anniversary of D-Day (Omaha Beech) hyperlink or the Fortieth Anniversary of D-Day (Pointe du Hoc) hyperlink) [hereinafter Reagan Speeches].

[4] *See* U.S. Army Center of Military History, *The U.S. Army Campaigns of World War II: Normandy*, http://www.army.mil/cmh-pg/brochures/Normandy/nor-pam.htm (last visited Sept. 18, 2005).

[5] BRINKLEY, *supra* note 1, at 61.

[6] Reference.com, Battle of Normandy, http://www.reference.com/browse/wiki/Battle_of_Normandy (last visited Dec 1, 2005).

[7] BRINKLEY, *supra* note 1, at 144 (quoting WILLIAM SHAKESPEARE, KING HENRY THE FIFTH act 4, sc. 3).

[8] *Id*. at 225-36 (citing to President Ronald Reagan, Speech at Pointe du Hoc and Omaha Beach (June 6, 1984)); *see also* Reagan Speeches, *supra* note 3].

[9] *See* The Whitehouse, *Biography of Ronald Reagan,* http://www.whitehouse.gov/history/presidents/rr40.html (last visited Dec. 1, 2005).

[10] BRINKLEY, *supra* note 1, at 14.

[11] TOM BROKAW, THE GREATEST GENERATION xxx (1998) ("The Greatest Generation" is a term coined by Tom Brokaw that is used to describe the generation of individuals who participated in World War II).

[12] *Id.* at 27.

experiences of the 2nd Ranger Battalion to highlight the individual stories of leadership, loyalty, and bravery that defined a generation, and inspired the next.

In the first half of the book, Brinkley offers a detailed and illuminating history of the 2nd Ranger Battalion known affectionately as "Rudder's Rangers."[13] During the planning phase of the D-Day invasion, General Omar Bradley tasked Lieutenant Colonel (LTC) James E. Rudder and his 2nd Ranger Battalion with scaling a strategic promontory, the Pointe du Hoc. A mission President Reagan stated was "one of the most difficult and daring of the invasion."[14] Pointe du Hoc is a series of hundred-foot-tall cliffs located four miles north of Omaha Beach on the coast of Normandy, France.[15] After climbing the seaside cliffs, "Rudder's Rangers" were then supposed to locate and disable a battery of six 155-mm guns guarded by the Germans.[16] Brinkley notes that if the Germans had ever fired the six 155-mm guns on Omaha and Utah Beaches during the Allied landing, the number of casualties would have increased exponentially.[17]

While some historians tend to focus more on military strategy, Brinkley appeals to the military novice by focusing on people with whom the reader can relate. For example, Brinkley describes a time when the Ranger physician rejected Private (PVT) William Petty because a physical examination revealed that Petty had false teeth.[18] Private Petty bravely approached LTC Rudder and insisted that it was unfair to disqualify him saying, "Hell, sir! I don't want to eat'em. I want to fight'em."[19] Brinkley recounts how LTC Rudder eventually allowed PVT Petty to join the Rangers and how the young Soldier would later receive a Silver Star for his actions at Pointe du Hoc.[20] Similarly, Brinkley features LTC Rudder, a decorated Ranger who Brinkley describes as a "gridiron leader," tough but fair.[21] Brinkley illustrates LTC Rudder's brave, example-setting leadership by describing how his landing craft was the first to land on the beaches at Normandy.[22] Brinkley, like Reagan himself, is able to portray both PVT Petty and LTC Rudder in a way that is accessible and inspirational to his audience.

Although LTC Rudder is not specifically named in President Reagan's speech at Pointe du Hoc, Brinkley takes great care to identify LTC Rudder's role in history. Lieutenant Colonel Rudder demonstrated exemplary service as a leader from the time he began training the 2nd Ranger Battalion for combat operations to the moment they set foot on the beaches of Normandy.[23] When LTC Rudder began training the Rangers, he told them, "I'm going to work you harder than you've ever worked."[24] Lieutenant Colonel Rudder's exceptional leadership helped motivate and unite "Rudder's Rangers" under his command in such a way that they were able to accomplish the mission and save the lives of many who likely would have otherwise perished. For example, while the Rangers were training in England, LTC Rudder routinely ordered the team to get to a far away British town, at a designated time, by any means available.[25] Lieutenant Colonel Rudder's goal in administering the test was to help the Rangers develop initiative, a trait the LTC Rudder valued most in his Rangers.[26] After all, LTC Rudder knew that the ultimate test of initiative would come on D-Day when the Rangers would have to move around German-occupied France, relying on their compass and initiative to keep themselves alive once they successfully scaled the cliffs at Pointe du Hoc.[27]

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[13] BRINKLEY, *supra* note 1, at 39.

[14] *Id.* at 226; *see* Reagan Speeches, *supra* note 3 (follow the Fortieth Anniversary of D-Day (Pointe du Hoc) hyperlink).

[15] BRINKLEY, *supra* note 1, at 50.

[16] *Id.* at 48.

[17] *Id.* at 94.

[18] *Id.* at 40.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 37.

[22] *Id.* at 79.

[23] *Id.* at 37, 79.

[24] *Id.* at 37.

[25] *Id.* at 46.

[26] *Id.*

[27] *Id.*

Brinkley uses "Rudder's Rangers" to demonstrate the valuable professional characteristic of loyalty. As Brinkley writes, "Anybody who underestimates mock battles-thinking they're something akin to recreational paintball matches held by weekend warriors all across America-is dead wrong."[28] Despite frequent relocations, grueling trainings, and personal hardships, Brinkley shows how "Rudder's Rangers" persevered because of their unbending loyalty to LTC Rudder and their country.

Loyalty can often drive people to perform brave and heroic deeds. Those brave Rangers who took to the beaches and climbed the cliffs of Pointe du Hoc were young, but they carried with them an understanding of the world beyond their years. They were eager to liberate Europe, and as Ranger Gerald Heaney recalled, "It was as if we were so well trained and so well prepared that nothing could stand in our way."[29] The Rangers had only enough time to catch their breath at "Rudder's cave," an outpost at the base of the cliff, before climbing Pointe du Hoc, and that's when the "insanity of their mission" truly sank in.[30] As the Germans high above hurled grenades, fired their weapons, and cut the Ranger's ropes, the 2nd Ranger Battalion pressed forward with one goal in mind, to survive the climb.[31]

In 1984, President Reagan hailed the 2nd Ranger Battalion's story of heroic leadership, loyalty, and bravery during the fortieth anniversary of D-Day.[32] President Reagan used the same professional principles exhibited by "Rudder's Rangers" to inspire all Americans and simultaneously warn the Soviet Union of America's unending devotion to freedom. President Reagan successfully made the story of "Rudder's Rangers" about the celebration of basic American values and professional principles, which helped create a new patriotic sentiment in America.[33]

In *The Boys of Pointe du Hoc*, Brinkley utilizes personal anecdotes to demonstrate how President Reagan's political views came to be. Through in-depth research, Brinkley bridges the years between the events of D-Day and the speeches that commemorated them over forty years later. Using a narrative style, Brinkley shows how President Reagan's political views evolved over time. Beginning with President Reagan's early years as a second lieutenant in the cavalry reserve, and continuing through the time Reagan served as Commander in Chief, Brinkley makes President Reagan's story accessible to readers. As further background into President Reagan's political outlook, Brinkley illustrates how President Reagan was a student and admirer of both Franklin D. Roosevelt and President Eisenhower.

President Reagan's affiliation with the "Greatest Generation" was evident early in his life. In the late 1940s, when President Reagan finished an anti-fascist speech at the Hollywood Beverly Christian Church, a pastor responded by stating, "[D]on't just deride Fascists, also add the imploding danger of global communism to your pulpit speech."[34] President Reagan prophetically replied, "[i]f I ever find evidence that communism represents a threat to all that we believe and stand for . . . I'll speak out just as harshly against communism as I have fascism."[35] Here Brinkley poignantly captures a budding politician whose aversion to isolationism is reminiscent of Roosevelt and Eisenhower. While Brinkley employs the personal vignette for effect, his respect for historical accuracy is nothing new. As a prolific scholar and writer, Brinkley has written several biographies, such as *Tour of Duty: John Kerry and the Vietnam War* and *Wheels for the World: Henry Ford, His Company and a Century of Progress*.[36] In his works, Brinkley consistently relies on personal anecdotes to help analyze important figures in a way that provides his readers with a better overall understanding of history. Brinkley's proclivity to humanize otherwise legendary icons can easily be attributed to his professional background. At present, Brinkley serves as a

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[28] *Id.* at 42.

[29] *Id.* at 51, 52.

[30] *Id.* at 80.

[31] *Id.* at 84.

[32] *See* Reagan Speeches, *supra* note 3.

[33] BRINKLEY, *supra* note 1, at 217.

[34] *Id.* at 112.

[35] *Id.* at 113.

[36] DOUGLAS BRINKLEY, TOUR OF DUTY: JOHN KERRY AND THE VIETNAM WAR (2004); DOUGLAS BRINKLEY, WHEELS FOR THE WORLD: HENRY FORD, HIS COMPANY AND A CENTURY OF PROGRESS, 1903-2003 (2003); *see also* BRINKLEY, *supra* note 1, at book jacket; TIMES-PICAYUNE (New Orleans, LA), Apr. 4, 2004, *available at* LEXIS.

distinguished professor of history and director of the Theodore Roosevelt Center for American Civilization at Tulane University.[37]

By effectively weaving together historical fact with individual portraits, Brinkley presents an interesting and vivid narrative. Brinkley utilizes this technique throughout the book when he portrays "Rudder's Rangers" and describes the key players of Reagan's administration. Several speechwriters, such as Peggy Noonan and Anthony Dolan, helped President Reagan earn the title "The Great Communicator." Brinkley describes how Noonan's diligence and research ultimately led to the penning of the now famous Pointe du Hoc speech.[38] Brinkley also describes how Dolan crafted President Reagan's foreign policy "voice," and thus brought into the spotlight one of history's most pivotal political figures. "Because Peggy Noonan had so effectively marketed herself in the 1990s and beyond as Reagan's official wordsmith, the speechwriting efforts of Dolan have been largely ignored. That is an historical oversight in need of remedying."[39] Throughout the book, Brinkley consistently shows a sensitivity and awareness of portraying historical truths, all the while with an appreciation for those whom he writes about.

Moreover, Brinkley uses his extensive historical background and research to refute certain commonly held misconceptions about the assault on Pointe du Hoc. For example, one of the greatest widespread misconceptions was that the assault on Pointe du Hoc was unnecessary because the six 155-mm guns were not immediately found atop the cliffs.[40] In fact, First Sergeant Len Lomell and his best friend Sergeant Jack Kuhn scaled the cliffs, located the 155-mm guns nearby, and rendered them inoperable.[41] Unfortunately, Cornelius Ryan's nonfiction classic *The Longest Da*y adhered to the misconception and portrays the assault on Pointe du Hoc as a mistake because the guns were not at the top of the cliffs.[42] Due to the accurate, revised history of events provided by Brinkley, however, this myth of unnecessary sacrifice at Point du Hoc is dispelled.

Obtained from museums, libraries, and private collections across the country, the primary sources (i.e. diaries, letters, notes, and memoirs) and secondary sources (i.e. biographies, books, and articles) Brinkley relies upon, and the photographs Brinkley incorporates into his text are another testament to Brinkley's adherence to historical accuracy. For those readers who are unfamiliar with Pointe du Hoc or the stark imagery of the crosses at the Normandy American Cemetery, the photographs make for a silent, but compelling companion to Brinkley's narrative.[43] When Lisa Zanatta Hen wrote to President Reagan about her father, Private First Class (PFC) Peter Zanatta, she wanted to honor her deceased father's memory by fulfilling his last wish of traveling to Normandy and "seeing the beach, the barricades, and the graves."[44] As a symbol and subject of President Reagan's speech at Omaha Beach, PFC Zanatta represented the many forgotten heroes of World War II who risked their lives to liberate the European continent. A picture of PFC Zanatta as well as another of Lisa Zanatta Henn with the President affirms Brinkley's contention that it was the individual heroes who truly inspired President Reagan.[45]

Some critics of Brinkley's work argue that he unduly credits President Reagan's D-Day speeches as *the* catalyst for the "New Patriotism," a movement that cemented President Reagan's re-election in 1984 and defined his presidency.[46] Luther Spoehr, an instructor at Brown University, argues that Brinkley fails to prove the connection between Reagan's D-Day anniversary speeches and the country's new found "sparked appreciation for the Greatest Generation."[47] Brinkley states:

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[37] HarperCollins, *Douglas Brinkley Biography*, http://www.harpercollins.com/global_scripts/product_catalog/author_xml.asp?authorid=14213 (last visited Dec. 1, 2005).

[38] *Id.* at 124, 125.

[39] *Id.* at 160.

[40] *Id.* at 93.

[41] *Id.* at 91.

[42] *Id.* at 93.

[43] *Id.* at 35, 194.

[44] *Id.* at 169.

[45] *Id.* at 167, 200.

[46] *See* Luther Spoehr, *Review of Douglas Brinkley's The Boys of Pointe du Hoc: Ronald Reagan, D-Day, and the U.S. Army 2nd Ranger Battalion*, http://hnn.us/roundup/entries/13076.html (last visited Sept. 18, 2005).

[47] *Id.*

"Riding on a 'D-Day' remembered wave, Reagan, like Eisenhower, easily defeated his democratic opponent to win a second term as president."[48] Brinkley, however, never intended his book as a political statement, but rather as a historical piece.[49] In an interview on *Book World Live*, Brinkley stated, "the point of the book is that I combine World War II history with World War II memory. The media's been talking more about the Ronald Reagan aspect of my book, but it really should be shelved under military history."[50] Later in the same interview, in response to a question about whether he was "one of those who think Reagan brought down the Soviet Union," Brinkley replied "No, that's far too simplistic . . . Reagan deserves some credit, but I'm not willing to go so far as to say he's the one responsible for the breakup of the Soviet Union."[51] Brinkley makes it clear that he is not willing to overreach and try to attribute more to Reagan and his presidency than is apparent to him based on the historical data.

Despite any points of contention, military personnel and civilians alike should read *The Boys of Pointe du Hoc*. The relevance of this story is rooted in core values inherent in military life both then and now: leadership, loyalty, and bravery. When the images of our Soldiers, Sailors, and Airman fighting global terrorism flash across our television sets, we are reminded of "Rudder's Rangers" who fought extensively for their country on enemy terrain and on foreign soil. The story of Pointe du Hoc resonates now because there are Soldiers who, at this very moment, are scaling walls, dodging bullets, and dying for their country. Like the Rangers themselves, they are young, and they are heroes. As U.S. Soldiers are patrolling abandoned buildings in Fallujah or riding in convoys along Baghdad's airport road, we hope that there are individuals like LTC Rudder leading the way.

The military reader will also appreciate Brinkley's perspective on the President's role and the power of rhetoric to motivate and inspire. Brinkley often refers to President Reagan's deference to President Roosevelt and President Eisenhower because they took ownership of their words. They were not merely props that spoke from rehearsed scripts, but "statesmen."[52] The Pointe du Hoc speech, while emotionally provocative, was not merely a fitting tribute for these World War II veterans, but also a reminder that like those who served before President Reagan, he would stand fearless and undaunted against anyone injurious to the United States. President Reagan's underlying meaning is clear: "We learned that isolationism never was and never will be an acceptable response to tyrannical governments with an expansionist intent."[53] Brinkley's argument is also clear, and Reagan's standing as the "Great Communicator" is affirmed. Brinkley concludes *The Boys of Pointe du Hoc* by stating, "The story of D-Day as the pervasive metaphor for American bravery and goodness, in part because of his presidential voice, endures for the ages to ponder."[54]

After the terrorist attacks of 11 September 2001, the United States became focused on ending global terrorism, both here and abroad. Never in recent years has the self-sacrifice of our military men and women been so real, so close, or so profound. Just as the images of our own warriors liberating Iraq has become a symbol of U.S.-led War on Terror, the image of the 2nd Ranger Battalion climbing the cliffs on D-Day is symbolic of World War II and their generation. Through Brinkley's powerful and effective anecdotal narratives, leadership, loyalty, and bravery are attributes easily recognized and make the story of "Rudder's Rangers" all the more compelling. Although some readers may be disappointed that the book is not all about "Rudder's Rangers" and the events of D-Day, others will be just as equally pleased by Brinkley's balanced approach that includes speeches that paid tribute to "Rudder's Rangers'" heroic actions and the manner in which the rangers were honored and received by President Reagan.

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[48] BRINKLEY, *supra* note 1, at 217.

[49] Online Interview with Douglas Brinkley, Author and Historian, Book World Live (June 7, 2005), http://www.washingtonpost.com/wp-dyn/content/discussion/2005/06/06/DI2005060600802.html?nav=rss_nation/special.

[50] *Id.*

[51] *Id.*

[52] BRINKLEY, *supra* note 1, at 117.

[53] *Id.* at 230.

[54] *Id.* at 223.

THE BOYS OF POINTE DU HOC: RONALD REAGAN, D-DAY AND THE U.S. ARMY 2ND RANGER BATTALION[1]

REVIEWED BY MAJOR MICHAEL FREYERMUTH[2]

Behind me is a memorial that symbolizes the Ranger daggers that were thrust into the tops of these cliffs. And before me are the men who put them there.

These are the boys of Pointe du Hoc. These are the men who took the cliffs. These are the champions who helped free a continent. These are the heroes who helped end a war.

Gentlemen, I look at you and I think of the words of Stephen Spender's poem. You are men who in your lives fought for life . . . and left the vivid air signed with your honor.[3]

On 6 June 1944 General Dwight D. Eisenhower, Supreme Commander of the Allied Expeditionary Force, gave the final order that set in motion the largest coalition of ships in naval history.[4] He stated in his remarks to the thousands of Soldiers, Sailors, and Airmen who served under him, that they were to "embark upon the Great Crusade,"[5] a movement that even today remains "the largest sea borne invasion in history, involving almost three million troops."[6] From this date, D-Day, eighty-five days of fighting left its mark on Normandy and on the heart of a nation. In *The Boys of Pointe du Hoc*, historian Douglas Brinkley offers insight into one particular "band of brothers,"[7] the 2nd Ranger Battalion, whose courage and bravery was relived and remembered by President Ronald Reagan in his famous D-Day anniversary speeches at Pointe du Hoc and Omaha Beach some forty years later.[8] At first, it may seem inconceivable that the story of the 2nd Ranger Battalion, amidst a hundred or even a thousand stories of World War II bravery, would be the foundation for what one biographical resource referred to as a period of "national self-confidence" under President Reagan.[9] But as Brinkley articulates early on, this particular narrative resonated with people, not only because it was "something you could get your hands around," but also because it was a story that "opened the window" and made the events of D-Day all the more accessible and relevant to the American public.[10]

As Tom Brokaw notes in his book, *The Greatest Generation*,[11] "[f]or most of the younger Americans, D-Day has been a page or two in their history books or some anniversary ceremony on television. . . ."[12] Brinkley, however, brings D-Day and the efforts of the 2nd Ranger Battalion to the twenty-first century. In *The Boys of Pointe du Hoc*, Brinkley used the experiences of the 2nd Ranger Battalion to highlight the individual stories of leadership, loyalty, and bravery that defined a generation, and inspired the next.

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[1] DOUGLAS BRINKLEY, THE BOYS OF POINTE DU HOC: RONALD REAGAN, D-DAY, AND THE U.S. ARMY 2ND RANGER BATTALION (2005).

[2] U.S. Air Force. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] BRINKLEY, *supra* note 1, at 226, 227 (citing to President Ronald Reagan, Speech at Pointe du Hoc (June 6, 1984), The Official Website of the Ronald Reagan Presidential Library and Foundation, Speeches, http://www.reaganfoundation. org/reagan/speeches (follow the Fortieth Anniversary of D-Day (Omaha Beech) hyperlink or the Fortieth Anniversary of D-Day (Pointe du Hoc) hyperlink) [hereinafter Reagan Speeches].

[4] *See* U.S. Army Center of Military History, *The U.S. Army Campaigns of World War II: Normandy*, http://www.army.mil/cmh-pg/brochures/Normandy/nor-pam.htm (last visited Sept. 18, 2005).

[5] BRINKLEY, *supra* note 1, at 61.

[6] Reference.com, Battle of Normandy, http://www.reference.com/browse/wiki/Battle_of_Normandy (last visited Dec 1, 2005).

[7] BRINKLEY, *supra* note 1, at 144 (quoting WILLIAM SHAKESPEARE, KING HENRY THE FIFTH act 4, sc. 3).

[8] *Id*. at 225-36 (citing to President Ronald Reagan, Speech at Pointe du Hoc and Omaha Beach (June 6, 1984)); *see also* Reagan Speeches, *supra* note 3].

[9] *See* The Whitehouse, *Biography of Ronald Reagan,* http://www.whitehouse.gov/history/presidents/rr40.html (last visited Dec. 1, 2005).

[10] BRINKLEY, *supra* note 1, at 14.

[11] TOM BROKAW, THE GREATEST GENERATION xxx (1998) ("The Greatest Generation" is a term coined by Tom Brokaw that is used to describe the generation of individuals who participated in World War II).

[12] *Id.* at 27.

In the first half of the book, Brinkley offers a detailed and illuminating history of the 2nd Ranger Battalion known affectionately as "Rudder's Rangers."[13] During the planning phase of the D-Day invasion, General Omar Bradley tasked Lieutenant Colonel (LTC) James E. Rudder and his 2nd Ranger Battalion with scaling a strategic promontory, the Pointe du Hoc. A mission President Reagan stated was "one of the most difficult and daring of the invasion."[14] Pointe du Hoc is a series of hundred-foot-tall cliffs located four miles north of Omaha Beach on the coast of Normandy, France.[15] After climbing the seaside cliffs, "Rudder's Rangers" were then supposed to locate and disable a battery of six 155-mm guns guarded by the Germans.[16] Brinkley notes that if the Germans had ever fired the six 155-mm guns on Omaha and Utah Beaches during the Allied landing, the number of casualties would have increased exponentially.[17]

While some historians tend to focus more on military strategy, Brinkley appeals to the military novice by focusing on people with whom the reader can relate. For example, Brinkley describes a time when the Ranger physician rejected Private (PVT) William Petty because a physical examination revealed that Petty had false teeth.[18] Private Petty bravely approached LTC Rudder and insisted that it was unfair to disqualify him saying, "Hell, sir! I don't want to eat'em. I want to fight'em."[19] Brinkley recounts how LTC Rudder eventually allowed PVT Petty to join the Rangers and how the young Soldier would later receive a Silver Star for his actions at Pointe du Hoc.[20] Similarly, Brinkley features LTC Rudder, a decorated Ranger who Brinkley describes as a "gridiron leader," tough but fair.[21] Brinkley illustrates LTC Rudder's brave, example-setting leadership by describing how his landing craft was the first to land on the beaches at Normandy.[22] Brinkley, like Reagan himself, is able to portray both PVT Petty and LTC Rudder in a way that is accessible and inspirational to his audience.

Although LTC Rudder is not specifically named in President Reagan's speech at Pointe du Hoc, Brinkley takes great care to identify LTC Rudder's role in history. Lieutenant Colonel Rudder demonstrated exemplary service as a leader from the time he began training the 2nd Ranger Battalion for combat operations to the moment they set foot on the beaches of Normandy.[23] When LTC Rudder began training the Rangers, he told them, "I'm going to work you harder than you've ever worked."[24] Lieutenant Colonel Rudder's exceptional leadership helped motivate and unite "Rudder's Rangers" under his command in such a way that they were able to accomplish the mission and save the lives of many who likely would have otherwise perished. For example, while the Rangers were training in England, LTC Rudder routinely ordered the team to get to a far away British town, at a designated time, by any means available.[25] Lieutenant Colonel Rudder's goal in administering the test was to help the Rangers develop initiative, a trait the LTC Rudder valued most in his Rangers.[26] After all, LTC Rudder knew that the ultimate test of initiative would come on D-Day when the Rangers would have to move around German-occupied France, relying on their compass and initiative to keep themselves alive once they successfully scaled the cliffs at Pointe du Hoc.[27]

Brinkley uses "Rudder's Rangers" to demonstrate the valuable professional characteristic of loyalty. As Brinkley writes, "Anybody who underestimates mock battles-thinking they're something akin to recreational paintball matches held by

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[13] BRINKLEY, *supra* note 1, at 39.

[14] *Id.* at 226; *see* Reagan Speeches, *supra* note 3 (follow the Fortieth Anniversary of D-Day (Pointe du Hoc) hyperlink).

[15] BRINKLEY, *supra* note 1, at 50.

[16] *Id.* at 48.

[17] *Id.* at 94.

[18] *Id.* at 40.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 37.

[22] *Id.* at 79.

[23] *Id.* at 37, 79.

[24] *Id.* at 37.

[25] *Id.* at 46.

[26] *Id.*

[27] *Id.*

weekend warriors all across America-is dead wrong."[28] Despite frequent relocations, grueling trainings, and personal hardships, Brinkley shows how "Rudder's Rangers" persevered because of their unbending loyalty to LTC Rudder and their country.

Loyalty can often drive people to perform brave and heroic deeds. Those brave Rangers who took to the beaches and climbed the cliffs of Pointe du Hoc were young, but they carried with them an understanding of the world beyond their years. They were eager to liberate Europe, and as Ranger Gerald Heaney recalled, "It was as if we were so well trained and so well prepared that nothing could stand in our way."[29] The Rangers had only enough time to catch their breath at "Rudder's cave," an outpost at the base of the cliff, before climbing Pointe du Hoc, and that's when the "insanity of their mission" truly sank in.[30] As the Germans high above hurled grenades, fired their weapons, and cut the Ranger's ropes, the 2nd Ranger Battalion pressed forward with one goal in mind, to survive the climb.[31]

In 1984, President Reagan hailed the 2nd Ranger Battalion's story of heroic leadership, loyalty, and bravery during the fortieth anniversary of D-Day.[32] President Reagan used the same professional principles exhibited by "Rudder's Rangers" to inspire all Americans and simultaneously warn the Soviet Union of America's unending devotion to freedom. President Reagan successfully made the story of "Rudder's Rangers" about the celebration of basic American values and professional principles, which helped create a new patriotic sentiment in America.[33]

In *The Boys of Pointe du Hoc*, Brinkley utilizes personal anecdotes to demonstrate how President Reagan's political views came to be. Through in-depth research, Brinkley bridges the years between the events of D-Day and the speeches that commemorated them over forty years later. Using a narrative style, Brinkley shows how President Reagan's political views evolved over time. Beginning with President Reagan's early years as a second lieutenant in the cavalry reserve, and continuing through the time Reagan served as Commander in Chief, Brinkley makes President Reagan's story accessible to readers. As further background into President Reagan's political outlook, Brinkley illustrates how President Reagan was a student and admirer of both Franklin D. Roosevelt and President Eisenhower.

President Reagan's affiliation with the "Greatest Generation" was evident early in his life. In the late 1940s, when President Reagan finished an anti-fascist speech at the Hollywood Beverly Christian Church, a pastor responded by stating, "[D]on't just deride Fascists, also add the imploding danger of global communism to your pulpit speech."[34] President Reagan prophetically replied, "[i]f I ever find evidence that communism represents a threat to all that we believe and stand for . . . I'll speak out just as harshly against communism as I have fascism."[35] Here Brinkley poignantly captures a budding politician whose aversion to isolationism is reminiscent of Roosevelt and Eisenhower. While Brinkley employs the personal vignette for effect, his respect for historical accuracy is nothing new. As a prolific scholar and writer, Brinkley has written several biographies, such as *Tour of Duty: John Kerry and the Vietnam War* and *Wheels for the World: Henry Ford, His Company and a Century of Progress*.[36] In his works, Brinkley consistently relies on personal anecdotes to help analyze important figures in a way that provides his readers with a better overall understanding of history. Brinkley's proclivity to humanize otherwise legendary icons can easily be attributed to his professional background. At present, Brinkley serves as a distinguished professor of history and director of the Theodore Roosevelt Center for American Civilization at Tulane University.[37]

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[28] *Id.* at 42.

[29] *Id.* at 51, 52.

[30] *Id.* at 80.

[31] *Id.* at 84.

[32] *See* Reagan Speeches, *supra* note 3.

[33] BRINKLEY, *supra* note 1, at 217.

[34] *Id.* at 112.

[35] *Id.* at 113.

[36] DOUGLAS BRINKLEY, TOUR OF DUTY: JOHN KERRY AND THE VIETNAM WAR (2004); DOUGLAS BRINKLEY, WHEELS FOR THE WORLD: HENRY FORD, HIS COMPANY AND A CENTURY OF PROGRESS, 1903-2003 (2003); *see also* BRINKLEY, *supra* note 1, at book jacket; TIMES-PICAYUNE (New Orleans, LA), Apr. 4, 2004, *available at* LEXIS.

[37] HarperCollins, *Douglas Brinkley Biography*, http://www.harpercollins.com/global_scripts/product_catalog/author_xml.asp?authorid=14213 (last visited Dec. 1, 2005).

By effectively weaving together historical fact with individual portraits, Brinkley presents an interesting and vivid narrative. Brinkley utilizes this technique throughout the book when he portrays "Rudder's Rangers" and describes the key players of Reagan's administration. Several speechwriters, such as Peggy Noonan and Anthony Dolan, helped President Reagan earn the title "The Great Communicator." Brinkley describes how Noonan's diligence and research ultimately led to the penning of the now famous Pointe du Hoc speech.[38] Brinkley also describes how Dolan crafted President Reagan's foreign policy "voice," and thus brought into the spotlight one of history's most pivotal political figures. "Because Peggy Noonan had so effectively marketed herself in the 1990s and beyond as Reagan's official wordsmith, the speechwriting efforts of Dolan have been largely ignored. That is an historical oversight in need of remedying."[39] Throughout the book, Brinkley consistently shows a sensitivity and awareness of portraying historical truths, all the while with an appreciation for those whom he writes about.

Moreover, Brinkley uses his extensive historical background and research to refute certain commonly held misconceptions about the assault on Pointe du Hoc. For example, one of the greatest widespread misconceptions was that the assault on Pointe du Hoc was unnecessary because the six 155-mm guns were not immediately found atop the cliffs.[40] In fact, First Sergeant Len Lomell and his best friend Sergeant Jack Kuhn scaled the cliffs, located the 155-mm guns nearby, and rendered them inoperable.[41] Unfortunately, Cornelius Ryan's nonfiction classic *The Longest Da*y adhered to the misconception and portrays the assault on Pointe du Hoc as a mistake because the guns were not at the top of the cliffs.[42] Due to the accurate, revised history of events provided by Brinkley, however, this myth of unnecessary sacrifice at Point du Hoc is dispelled.

Obtained from museums, libraries, and private collections across the country, the primary sources (i.e. diaries, letters, notes, and memoirs) and secondary sources (i.e. biographies, books, and articles) Brinkley relies upon, and the photographs Brinkley incorporates into his text are another testament to Brinkley's adherence to historical accuracy. For those readers who are unfamiliar with Pointe du Hoc or the stark imagery of the crosses at the Normandy American Cemetery, the photographs make for a silent, but compelling companion to Brinkley's narrative.[43] When Lisa Zanatta Hen wrote to President Reagan about her father, Private First Class (PFC) Peter Zanatta, she wanted to honor her deceased father's memory by fulfilling his last wish of traveling to Normandy and "seeing the beach, the barricades, and the graves."[44] As a symbol and subject of President Reagan's speech at Omaha Beach, PFC Zanatta represented the many forgotten heroes of World War II who risked their lives to liberate the European continent. A picture of PFC Zanatta as well as another of Lisa Zanatta Henn with the President affirms Brinkley's contention that it was the individual heroes who truly inspired President Reagan.[45]

Some critics of Brinkley's work argue that he unduly credits President Reagan's D-Day speeches as *the* catalyst for the "New Patriotism," a movement that cemented President Reagan's re-election in 1984 and defined his presidency.[46] Luther Spoehr, an instructor at Brown University, argues that Brinkley fails to prove the connection between Reagan's D-Day anniversary speeches and the country's new found "sparked appreciation for the Greatest Generation."[47] Brinkley states: "Riding on a 'D-Day' remembered wave, Reagan, like Eisenhower, easily defeated his democratic opponent to win a second term as president."[48] Brinkley, however, never intended his book as a political statement, but rather as a historical piece.[49] In

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[38] *Id.* at 124, 125.

[39] *Id.* at 160.

[40] *Id.* at 93.

[41] *Id.* at 91.

[42] *Id.* at 93.

[43] *Id.* at 35, 194.

[44] *Id.* at 169.

[45] *Id.* at 167, 200.

[46] *See* Luther Spoehr, *Review of Douglas Brinkley's The Boys of Pointe du Hoc: Ronald Reagan, D-Day, and the U.S. Army 2nd Ranger Battalion*, http://hnn.us/roundup/entries/13076.html (last visited Sept. 18, 2005).

[47] *Id.*

[48] BRINKLEY, *supra* note 1, at 217.

[49] Online Interview with Douglas Brinkley, Author and Historian, Book World Live (June 7, 2005), http://www.washingtonpost.com/wp-dyn/content/discussion/2005/06/06/DI2005060600802.html?nav=rss_nation/special.

an interview on *Book World Live*, Brinkley stated, "the point of the book is that I combine World War II history with World War II memory. The media's been talking more about the Ronald Reagan aspect of my book, but it really should be shelved under military history."[50] Later in the same interview, in response to a question about whether he was "one of those who think Reagan brought down the Soviet Union," Brinkley replied "No, that's far too simplistic . . . Reagan deserves some credit, but I'm not willing to go so far as to say he's the one responsible for the breakup of the Soviet Union."[51] Brinkley makes it clear that he is not willing to overreach and try to attribute more to Reagan and his presidency than is apparent to him based on the historical data.

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[50] *Id.*

[51] *Id.*

[52] BRINKLEY, *supra* note 1, at 117.

[53] *Id.* at 230.

[54] *Id.* at 223.

Announcement

The Office of The Judge Advocate General is seeking a U.S. Army Reserve (USAR) Judge Advocate in the rank of captain or major to attend the Graduate Course at TJAGLCS in-residence in 2006.

The Graduate Course is the School's "flagship" course. Accredited by the American Bar Association, the Graduate Course prepares experienced attorneys for supervisory duties and other positions of increased responsibility within their respective services. Students who successfully complete the course are awarded a Master of Laws degree in Military Law. Selection for attendance at the Graduate Course is competitive and successful applicants for this position will normally have served as a judge advocate for a minimum of five years.

The Graduate Course covers a full resident academic year, from 14 August 2006 to 24 May 2007. Each class consists of students selected from the Army, Navy, Air Force, and Marine Corps, as well as international military students and Department of the Army civilian attorneys. All students are attorneys who generally have five to eight years of experience. The Graduate Course consists of four academic quarters of instruction. Electives are offered in the second, third, and fourth quarters. Students may select from approximately fifty electives offered by the School's five academic departments. Students may specialize in Contract and Fiscal Law, International and Operational Law, Criminal Law, or Administrative and Civil Law. To qualify for a specialty, a student must either write a thesis in the area of specialization or earn at least ten elective credit hours and write an extensive paper in the area of specialization.

SUSPENSE for applications is 15 FEBRUARY 2006.

Applicants' packets must include:

- Military Biography
- ORB or DA Form 2-1
- Copy of applicant's current DA Form 705 (APFT Scorecard), applicant's height and weight at the time of APFT must be entered in the appropriate blocks. Include copy of DA Form 5500-R (Male) or 5501-R (Female) (Body Fat Composition Worksheet) if applicant's recorded height and weight statistics exceed AR 600-9 screening table standards. Include copy of DA Form 3349 (Physical Profile) if applicant had a permanent or temporary profile at the most recent APFT.
- DA Form 7349 (Initial Medical Review)
- One recommendation from next higher JA supervisor and two additional recommendations
- Memorandum explaining reasons for applying to attend in residence

Applicants should ensure that their official photo is viewable in their official on-line records and that all OERs have been profiled and inserted into their PERMS.

Send completed packets to:

The Judge Advocate General
ATTN: DAJA-PT, MAJ Howie Reitz
1777 North Kent Street, 10th Floor
Rosslyn, VA 22209-2194

National Guard officers interested in applying should refer to the National Guard announcement in the National Guard Forum. Point of contact is MAJ Chris Rofrano at chris.rofrano@ngb.ang.af.mil.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visisble.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, 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, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (June 2005 - September 2007) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS No.	Course Title	Dates
	GENERAL	
5-27-C22	54th Graduate Course	15 Aug 05 – thru 25 May 06
5-27-C22	55th Graduate Course	14 Aug 06 – thru 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – thru 23 May 08
5-27-C20	168th Basic Course	13 Sep – 7 Oct 05 (Phase I – Ft. Lee)
		7 Oct – 15 Dec 05 (Phase II – TJAGSA)
5-27-C20	169th Basic Course	3 Jan – 27 Jan 06 (Phase I – Ft. Lee)
		27 Jan – 7 Apr 06 (Phase II – TJAGSA)
5-27-C20	170th Basic Course	30 May – 23 Jun 06 (Phase I – Ft. Lee)
		23 Jun – 31 Aug 06 (Phase II – TJAGSA)
5-27-C20	171st Basic Course	12 Sep – 6 Oct 06 (Phase I – Ft. Lee)
		6 Oct – 14 Dec 06 (Phase II – TJAGSA)
5-27-C20	172d Basic Course	2 Jan – 2 Feb 07 (Phase I – Ft. Lee)
		2 Feb – 6 Apr 07 (Phase II – TJAGSA)
5-27-C20	173d Basic Course	29 May – 22 Jun 07 (Phase I – Ft. Lee)
		22 Jun – 30 Aug 07 (Phase II – TJAGSA)
5-27-C20	174th Basic Course	11 Sep – 5 Oct 07 (Phase I – Ft. Lee)
		5 Oct – 14 Dec 07 (Phase II – TJAGSA)
5F-F70	37th Methods of Instruction Course	30 May – 2 Jun 06

5F-F70	38th Methods of Instruction Course	29 May – 1 Jun 07
5F-F1	190th Senior Officers Legal Orientation Course	30 Jan – 3 Feb 06
5F-F1	191st Senior Officers Legal Orientation Course	27 – 31 Mar 06
5F-F1	192d Senior Officers Legal Orientation Course	12 – 16 Jun 06
5F-F1	193d Senior Officers Legal Orientation Course	11 – 15 Sep 06
5F-F1	194th Senior Officers Legal Orientation Course	13 – 17 Nov 06
5F-F1	195th Senior Officers Legal Orientation Course	5 – 9 Feb 07
5F-F1	196th Senior Officers Legal Orientation Course	26 – 30 Mar 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07
5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-F3	12th RC General Officers Legal Orientation Course	25 – 27 Jan 06
5F-F3	13th RC General Officers Legal Orientation Course	24 – 26 Jan 07
5F-F52	36th Staff Judge Advocate Course	5 – 9 Jun 06
5F-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	9th Staff Judge Advocate Team Leadership Course	5 – 7 Jun 06
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-F55	2006 JAOAC (Phase II)	8 – 20 Jan 06
5F-F55	2007 JAOAC (Phase II)	7 – 19 Jan 07
5F-JAG	2006 JAG Annual CLE Workshop	10 – 13 Oct 06
JARC-181	2006 JA Professional Recruiting Seminar	11 – 14 Jul 06
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	5th Advanced Law of Federal Employment Course	25 – 27 Oct 06
5F-F22	60th Law of Federal Employment Course	23 – 27 Oct 06
5F-F23	58th Legal Assistance Course	15 – 19 May 06
5F-F23	59th Legal Assistance Course	30 Oct – 3 Nov 06
5F-F23	60th Legal Assistance Course	14 – 18 May 07
5F-F24	30th Admin Law for Military Installations Course	13 – 17 Mar 06
5F-F24	31st Admin Law for Military Installations Course	26 Feb – 2 Mar 07
5F-F28	Tax Year 2005 Basic Income Tax CLE	12 – 16 Dec 05
5F-F28	Tax Year 2006 Basic Income Tax CLE	11 – 15 Dec 06
5F-F280	1st Advanced Income Tax CLE	14 – 16 Dec 05
5F-F29	24th Federal Litigation Course	31 Jul – 4 Aug 06
5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	4th Ethics Counselors Course	17 – 21 Apr 06
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F24E	2006 USAREUR Administrative Law CLE	11 – 14 Sep 06
5F-F24E	2007 USAREUR Administrative Law CLE	10 – 13 Sep 07
5F-F26E	2005 USAREUR Claims Course	28 Nov – 2 Dec 05
5F-F26E	2006 USAREUR Claims Course	27 Nov – 1 Dec 06

5F-F28E	Tax Year 2005 USAREUR Basic Income Tax CLE	5 – 9 Dec 05
5F-F28E	Tax Year 2006 USAREUR Basic Income Tax CLE	4 – 8 Dec 06
5F-F28H	Tax Year 2005 Hawaii Basic Income Tax CLE	9 – 13 Jan 06
5F-F28OE	1st USAREUR Advanced Income Tax CLE	7 – 9 Dec 05
5F-F28P	Tax Year 2005 PACOM Basic Income Tax CLE	3 – 6 Jan 06
5F-F28P	Tax Year 2006 PACOM Basic Income Tax CLE	8 – 12 Jan 07
CONTRACT AND FISCAL LAW		
5F-F10	156th Contract Attorneys Course	17 – 28 Jul 06
5F-F10	157th Contract Attorneys Course	23 Jul – 3 Aug 07
5F-F11	2005 Government Contract Law Symposium	6 – 9 Dec 05
5F-F11	2006 Government Contract Law Symposium	5 – 8 Dec 06
5F-F12	74th Fiscal Law Course	1 – 5 May 06
5F-F12	75th Fiscal Law Course	30 Oct – 3 Nov 06
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	2d Operational Contracting Course	10 – 14 Apr 06
5F-F13	3d Operational Contracting Course	12 – 16 Mar 07
5F-F14	18th Comptrollers Accreditation Course (Ft. Bragg)	21 – 24 Feb 06
5F-F101	7th Procurement Fraud Course	31 May – 2 Jun 06
5F-F102	6th Contract Litigation Course	16 – 20 Apr 07
5F-F103	7th Advanced Contract Law	12 – 14 Apr 06
5F-F15E	2006 USAREUR Contract & Fiscal Law CLE	28 – 31 Mar 06
5F-F15E	2007 USAREUR Contract & Fiscal Law CLE	27 – 30 Mar 07
N/A	2006 Maxwell AFB Fiscal Law Course	6 – 9 Feb 06
N/A	2007 Maxwell AFB Fiscal Law Course	5 – 8 Feb 07
CRIMINAL LAW		
5F-F31	12th Military Justice Managers Course	21 – 25 Aug 06
5F-F31	13th Military Justice Managers Course	20 – 24 Aug 07
5F-F33	49th Military Judge Course	24 Apr – 12 May 06
5F-F33	50th Military Judge Course	23 Apr – 11 May 07
5F-F34	25th Criminal Law Advocacy Course	13 – 24 Mar 06
5F-F34	26th Criminal Law Advocacy Course	11 – 22 Sep 06
5F-F34	27th Criminal Law Advocacy Course	12 – 23 Mar 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	29th Criminal Law New Developments Course	29 Nov – 2 Dec 05
5F-F35	30th Criminal Law New Developments Course	14 – 17 Nov 06

5F-301	9th Advanced Advocacy Training	16 – 19 May 06
5F-301	10th Advanced Advocacy Training	15 – 18 May 07
INTERNATIONAL AND OPERATIONAL LAW		
5F-F42	85th Law of War Course	30 Jan – 3 Feb 06
5F-F42	86th Law of War Course	10 Jul – 14 Jul 06
5F-F42	87th Law of War Course	29 Jan – 2 Feb 07
5F-F42	88th Law of War Course	16 – 20 Jul 07
5F-F44	1st Legal Aspects of Information Operations Course	26 – 30 Jun 06
5F-F44	2d Legal Aspects of Information Operations Course	25 – 29 Jun 07
5F-F45	6th Domestic Operational Law Course	30 Oct – 3 Nov 06
5F-F47	45th Operational Law Course	27 Feb – 10 Mar 06
5F-F47	46th Operational Law Course	31 Jul – 11 Aug 06
5F-F47	47th Operational Law Course	26 Feb – 9 Mar 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07
LEGAL ADMINISTRATORS COURSES		
7A-270A1	17th Legal Administrators Course	19 – 23 Jun 06
7A-270A1	18th Legal Administrators Course	18 – 22 Jun 07
7A-270A2	7th JA Warrant Officer Advanced Course	10 Jul – 4 Aug 06
7A-270A2	8th JA Warrant Officer Advanced Course	9 Jul – 3 Aug 07
7A-270A0	13th JA Warrant Officer Basic Course	30 May – 23 Jun 06
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
PARALEGAL AND COURT REPORTING COURSES		
512-27DC4	11th Speech Recognition Training	23 Oct – 3 Nov 06
512-27DC5	19th Court Reporter Course	30 Jan – 31 Mar 06
512-27DC5	20th Court Reporter Course	24 Apr – 23 Jun 06
512-27DC5	21st Court Reporter Course	31 Jul – 29 Sep 06
512-27DC5	22d Court Reporter Course	29 Jan – 30 Mar 07
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC6	6th Court Reporting Symposium	31 Oct – 4 Nov 05
512-27DC6	7th Court Reporting Symposium	30 Oct – 3 Nov 06
512-27D/20/30	17th Law for Paralegal NCOs Course	27 – 31 Mar 06
512-27D/20/30	18th Law for Paralegal NCOs Course	26 Mar – 6 Apr 07
512-27DCSP	2d Combined Sr. Paralegal NCO Course	12 – 16 Jun 06
512-27DCSP	3d Combined Sr. Paralegal NCO Course	11 – 15 Jun 07
5F-F58	Paralegal Sergeant Majors Symposium Course	9 -13 Jan 06

3. Naval Justice School and FY 2006 Course Schedule

Please contact Monique, E. L. Cover, Other Services Quota Manager/Analyst, SRA International, Inc., Naval Personnel Development Command, Code N72, NOB, 9549 Bainbridge Ave., N-19, Room 121, at (757) 444-2996, extension 3610 or DSN 564-2996, extension 3610, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010)	17 Oct – 16 Dec 05
0257	Lawyer Course (020)	17 Jan – 17 Mar 06
0257	Lawyer Course (030)	5 Jun – 4 Aug 06
0257	Lawyer Course (040)	7 Aug – 6 Oct 06
NA	Brigade Oriented Legal Team (020)	9 – 13 Jan 06 (NJS)
NA	Brigade Oriented Legal Team (010)	20 – 24 Mar 06 (USMC)
NA	Brigade Oriented Legal Team (030)	7 – 11 Aug 06 (NJS)
0259	Legal Officer Course (010)	6 -24 Feb 06
0259	Legal Officer Course (202)	12 – 30 Jun 06
900B	Reserve Lawyer Course (010)	1 – 5 May 06
900B	Reserve Lawyer Course (020)	11 – 15 Sep 06
914L	Law of Naval Operations (010)	8 – 12 May 06
914L	Law of Naval Operations (020)	18 – 22 Sep 06
850T	SJA/E-Law Course (010)	30 May – 9 Jun 06
850T	SJA/E-Law Course (020)	24 Jul – 4 Aug 06
786R	Advanced SJA/Ethics (010)	27 – 31 Mar 06 (San Diego)
786R	Advanced SJA/Ethics (020)	24 – 28 Apr 06 (Norfolk)
850V	Law of Military Operations (010)	12 – 23 Jun 06
961D	Military Law Update Workshop (Officer) (010)	20 – 21 May 06 (East)
961D	Military Law Update Workshop (Officer) (020)	17 – 18 Jun 06 (West)
961M	Effective Courtroom Communications	5 – 9 Dec 05 (Norfolk)
961M	Effective Courtroom Communications	27 – 31 Mar 06 (San Diego)
961J	Defending Complex Cases (010)	17 – 21 Jul 06
525N	Prosecuting Complex Cases (010)	10 – 14 Jul 06
4048	Estate Planning (010)	14 – 18 Aug 06
7487	Family Law/Consumer Law (010)	22 – 26 May 06
7485	Litigation National Security (010)	6 – 8 Mar 06 (Washington, DC)
748K	National Institute of Trial Advocacy (010)	24 – 28 Oct 06 (Camp Lejeune)
748K	National Institute of Trial Advocacy (020)	30 Jan – 3 Feb 06 (San Diego)
748K	National Institute of Trial Advocacy (030)	22 – 26 May 06 (Hawaii)
748B	Naval Legal Service Command Senior Officer Leadership (010)	21 – 25 Aug 06

2205	Defense Trial Enhancement (010)	9 – 13 Jan 06
3938	Computer Crimes (010)	3 – 7 Apr 06
0258	Senior Officer (NewPort) (020)	23 – 27 Jan 06
0258	Senior Officer (NewPort) (030)	13 – 17 Mar 06
0258	Senior Officer (NewPort) (040)	8 – 12 May 06
0258	Senior Officer (NewPort) (050)	10 – 14 Jun 06
0258	Senior Officer (NewPort) (060)	14 – 18 Aug 06
0258	Senior Officer (NewPort) (070)	25 – 29 Sep 06
2622	Senior Officer (Fleet) (030)	12 – 16 Dec 05 (Pensacola)
2622	Senior Officer (Fleet) (040)	13 – 17 Feb 06 (Pensacola)
2622	Senior Officer (Fleet) (050)	27 – 31 Mar 06 (Camp Lejeune)
2622	Senior Officer (Fleet) (060)	3 – 7 Apr 06 (Quantico)
2622	Senior Officer (Fleet) (070)	17 – 21 Apr 06 (Pensacola)
2622	Senior Officer (Fleet) (080)	8 – 12 May 06 (Pensacola)
2622	Senior Officer (Fleet) (090)	10 – 14 Jul 06 (Pensacola)
2622	Senior Officer (Fleet) (100)	28 Aug – 1 Sep 06 (Pensacola)
7878	Legal Assistance Paralegal Course (010)	22 – 26 May 06
3090	Legalman Course (010)	17 Jan – 17 Mar 06
932V	Coast Guard Legal Technician Course (010)	11 – 22 Sep 06
846L	Senior Legalman Leadership Course (010)	24 – 28 Jul 06
049N	Reserve Legalman Course (Phase I) (010)	10 – 21 Apr 06
056L	Reserve Legalman Course (Phase II) (010)	24 Apr – 5 May 06
846M	Reserve Legalman Course (Phase III) (010)	8 – 19 May 06
5764	LN/Legal Specialist Mid-Career Course (020)	24 Apr – 5 May 06
961G	Military Law Update Workshop (Enlisted) (010)	TBD
961G	Military Law Update Workshop (Enlisted (020)	TBD
4040	Paralegal Research & Writing (010)	20 – 31 Mar 06 (Newport)
4040	Paralegal Research & Writing (020)	24 Apr – 5 May 06 (Norfolk)
4040	Paralegal Research & Writing (030)	17 – 28 Jul 06 (San Diego)
4046	SJA Legalman (020)	30 May – 9 Jun 06 (Newport)
627S	Senior Enlisted Leadership Course (040)	30 Nov – 2 Dec 05 (Norfolk)
627S	Senior Enlisted Leadership Course (050)	10 – 12 Jan 06 (Pendleton)
627S	Senior Enlisted Leadership Course (060)	11 – 13 Jan 06 (Jacksonville)
627S	Senior Enlisted Leadership Course (070)	21 – 23 Feb 06 (San Diego)
627S	Senior Enlisted Leadership Course (080)	22 – 24 Feb 06 (Norfolk)
627S	Senior Enlisted Leadership Course (090)	21 – 23 Mar 06 (Hawaii)
627S	Senior Enlisted Leadership Course (100)	4 – 6 Apr 06 (Bremerton)
627S	Senior Enlisted Leadership Course (110)	12 – 14 Apri 06 (Naples)
627S	Senior Enlisted Leadership Course (120)	2 – 4 May 06 (San Diego)
627S	Senior Enlisted Leadership Course (130)	22 – 24 May 06 (Norfolk)
627S	Senior Enlisted Leadership Course (140)	19 -21 Jul 06 (Millington)
627S	Senior Enlisted Leadership Course (150)	1 – 3 Aug 06 (San Diego)
627S	Senior Enlisted Leadership Course (160)	16 – 18 Aug 06 (Norfolk)

627S	Senior Enlisted Leadership Course (170)	12 – 14 Sep 06 (Pendleton)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (020)	30 Jan – 17 Feb 06
0376	Legal Officer Course (030)	6 – 24 Mar 06
0376	Legal Officer Course (040)	24 Apr – 12 May 06
0376	Legal Officer Course (050)	5 – 23 Jun 06
0376	Legal Officer Course (060)	24 Jul – 11 Aug 06
0376	Legal Officer Course (070)	11 – 29 Sep 06
0379	Legal Clerk Course (020)	5 – 16 Dec 05
0379	Legal Clerk Course (030)	23 Jan – 3 Feb 06
0379	Legal Clerk Course (040)	6 –17 Mar 06
0379	Legal Clerk Course (050)	3 – 14 Apr 06
0379	Legal Clerk Course (060)	5 – 16 Jun 06
0379	Legal Clerk Course (070)	31 Jul – 11 Aug 06
0379	Legal Clerk Course (080)	11 – 22 Sep 06
3760	Senior Officer Course (020)	12 – 16 Dec 05
3760	Senior Officer Course (030)	9 – 13 Jan 06 (Jacksonville)
3760	Senior Officer Course (040)	27 Feb – 3 Mar 06
3760	Senior Officer Course (050)	15 –19 May 06
3760	Senior Officer Course (060)	26 – 30 Jun 06
3760	Senior Officer Course (070)	17 – 21 Jul 06 (Millington)
3760	Senior Officer Course (080)	28 Aug – 1 Sep 06
4046	Military Justice Course for SKA/Convening Authority/Shipboard Legalman (030)	10 – 21 Jul 06
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (020)	28 Nov – 16 Dec 05
947H	Legal Officer Course (030)	17 Jan – 3 Feb 06
947H	Legal Officer Course (040)	27 Feb – 17 Mar 06
947H	Legal Officer Course (050)	8 – 26 May 06
947H	Legal Officer Course (060)	12 – 30 Jun 06
947H	Legal Officer Course (070)	14 Aug – 1 Sep 06
947J	Legal Clerk Course (020)	28 Nov – 9 Dec 05
947J	Legal Clerk Course (030)	6 – 17 Feb 06
947J	Legal Clerk Course (040)	27 Feb – 10 Mar 06
947J	Legal Clerk Course (050)	17 – 28 Apr 06
947J	Legal Clerk Course (060)	8 – 19 May 06
947J	Legal Clerk Course (070)	12 – 23 Jun 06
947J	Legal Clerk Course (080)	14 – 25 Aug 06
3759	Senior Officer Course (030)	9 – 13 Jan 06 (Pendleton)
3759	Senior Officer Course (040)	13 – 17 Feb 06 (San Diego)
3759	Senior Officer Course (050)	3 – 7 Apr 06 (Bremerton)
3759	Senior Officer Course (060)	24 – 28 Apr 06 (San Diego)
3759	Senior Officer Course (070)	5 – 9 Jun 06 (San Diego)
3759	Senior Officer Course (080)	24 – 28 Jul 06 (San Diego)
3759	Senior Officer Course (090)	11 – 15 Sep 06 (Pendleton)
2205	CA Legal Assistance Course (010)	6 – 10 Feb 06 (San Diego)

4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (010)	17 – 27 Jan 06

4. Air Force Judge Advocate General School Fiscal Year 2006 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445) for information about attending the listed courses.

Air Force Judge Advocate General School Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 06-A	11 Oct – 15 Dec 05
Deployed Fiscal Law & Contingency Contracting Course, Class 06-A	28 Nov – 2 Dec 05
Senior Reserve Forces Paralegal Course, Class 06-A	5 – 9 Dec 05
Paralegal Apprentice Course, Class 06-B	9 Jan – 22 Feb 06
Trial & Defense Advocacy Course, Class 06-A	9 – 20 Jan 06
Total Air Force Operations Law Course, Class 06-A	20 – 22 Jan 06
Homeland Defense Workshop, Class 06-A	23 – 27 Jan 06
Environmental Law Course, Class 06-A	23 – 27 Jan 06
Claims & Tort Litigation Course, Class 06-A	30 Jan – 3 Feb 06
Reserve Forces Judge Advocate Course, Class 06-A	6 – 10 Feb 06
Legal Aspects of Sexual Assault Workshop, Class 06-A	8 – 10 Feb 06
Fiscal Law Course (DL) , Class 06-A	13 – 17 Feb 06
Judge Advocate Staff Officer Course, Class 06-A	13 Feb – 14 Apr 06
Paralegal Craftsman Course, Class 06-B	22 Feb – 31 Mar 06
Paralegal Apprentice Course, Class 06-C	3 Mar – 14 Apr 06
Accident Investigation Board Legal Advisors' Course, Class 06-A	19 – 21 Apr 06
Advanced Trial Advocacy Course, Class 06-A	24 – 28 Apr 06
Military Judges' Seminar, Class 06-A	25 – 28 Apr 06
Paralegal Apprentice Course, Class 06-D	24 Apr – 6 Jun 06
Military Justice Administration Course, Class 06-A	1 – 5 May 06

Reserve Forces Judge Advocate Course, Class 06-B	8 – 12 May 06
Advanced Labor & Employment Law Course, Class 06-A	8 – 10 May 06
Operations Law Course, Class 06-A	15 – 25 May 06
Negotiation & Appropriate Dispute Resolution Course, Class 06-A	22 – 26 May 06
Air National Guard Annual Survey of the Law (Class 06-A & B) (Off-Site)	2 – 3 Jun 06
Air Force Reserve Annual Survey of the Law (Class 06-A & B) (Off-Site)	2 – 3 Jun 06
Staff Judge Advocate Course, Class 06-A	12 – 23 Jun 06
Law Office Management Course, Class 06-A	12 – 23 Jun 06
Paralegal Apprentice Course, Class 06-E	19 Jun – 1 Aug 06
Environmental Law Update Course, Class 06-A	28 – 30 Jun 06
Computer Legal Issues Course, Class 06-A	10 – 14 Jul 06
Legal Aspects of Information Operations Law Course, Class 06-A	12 – 14 Jul 06
Reserve Forces Paralegal Course, Class 06-A	17 – 28 Jul 06
Judge Advocate Staff Officer Course, Class 06-C	17 Jul – 15 Sep 06
Paralegal Craftsman Course, Class 06-C	1 Aug – 26 Sep 06
Paralegal Apprentice Course, Class 06-F	14 Aug – 8 Sep 06
Trial & Defense Advocacy Course, Class 06-B	18 – 29 Sep 06

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2005 issue of *The Army Lawyer*.

6. Attendance at January 2006 RC-JAOAC (Phase II Resident)

The 2006 Judge Advocate Officer Advanced Course (JAOAC) Phase II (Resident Phase) is scheduled for 8-20 January 2006. To be eligible to attend the 2006 JAOAC, the deadline for submission of all JAOAC Phase I (Correspondence Phase) materials was 1 November 2005. Students who have not completed all Phase I correspondence courses, to include submission of all JA 151 (Fundamentals of Military Writing), are NOT cleared to attend the 2006 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase. Students who were required to retake any subcourse examination or "re-do" any writing exercises are NOT cleared to attend 2006 JAOAC unless they have received a passing grade and have been approved for attendance by the course manager.

Registration and weigh-in for the 2006 JAOAC is from 1100-1600, Sunday, 8 January 2006, followed by a mandatory orientation briefing at 1600. Classes end at 1200, 20 January 2006. We cannot issue certificates of completion for students who depart early or miss class sessions. Students should bring Class A (graduation) and Class B (classroom instruction) uniforms, as well as the PT uniform (for weigh-in).

Questions regarding the January 2006 RC-JAOAC should be directed to LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

7. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2007

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2006***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2007. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2007 JAOAC will be held in January 2007, and is a prerequisite for most judge advocate captains to be promoted to major.

A 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, TJAGLCS, for grading by the same deadline (1 November 2006). If the student receives notice of the need to re-do any examination or exercise after 1 October 2006, 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 1 November 2006 will not be cleared to attend the 2007 JAOAC. 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 additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

8. 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	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually

Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year

Utah	31 January annually
Vermont	2 July annually
Virginia	31 October completion deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005).

21-22 Jan 06	Decatur, GA 213th LSO	No support requested	COL Bernard Pfeiffer (706) 545-1130 Bernard.pfeiffer@us.army.mil
28-29 Jan 06	Seattle, WA 70th RRC	ADA/ADK	LTC Lloyd Oaks (253) 301-2392 lloyd.d.oaks@us.army.mil
11-12 Feb 06	Miami, FL 174th LSO/12th LSO	ADA/ADC	MSG Timothy Stewart (305) 779-4022 tim.stewart@usar.army.mil
25-26 Feb 06	Draper, UT 115th En Grp UTARNG/ 87th LSO	ADA/ADC	CPT Daniel K. Dygert (115th En Grp) (435) 787-9700 (435) 787-2455 (fax) daniel.k.dygert@us.army.mil SFC Matthew Neumann (87th LSO) (801) 656-3600 (801) 656-3603 (fax) matthew.neumann@us.army.mil
4-5 Mar 06	Fort Belvoir, VA 10th LSO	ADC/ADA	CPT Eric Gallun (202) 514-7566 frederic.gallun@usdog.gov
11-12 Mar 06	San Francisco, CA 75th LSO	No support requested	LTC Burke Large (213) 452-3954 burke.s.large@us.army.mil
18-19 Mar 06	Cincinnati, OH 9th LSO	ADA/ADK	MAJ Charles Ellis (973) 865-6800 charles.ellis@us.army.mil
18-19 Mar 06	Fort McCoy, WI WIARNG	ADI/ADK	CW3 Ty Letto (608) 261-2292 (608) 242-3082 (fax) tyrone.letto@doa.state.wi.us
7-8 Apr 06	Oakbrook, IL 91st LSO	ADA/ADI	MAJ Douglas Lee (312) 338-2244 (offiice) (630) 728-8504 (cell) (630) 375-1285 (home Douglas.lee1@us.army.mil
22-23 Apr 06	Indianapolis, IN INARNG	ADI/ADK	COL George Thompson (DSN) 369-2491 george.thompson@in.ngb.army.mil
22-23 Apr 06	Boston, MA 94th RRC	ADI/ADK	MAJ Angela Horne (978) 784-3940 angela.horne@usar.army.mil

6-7 May 06	Columbia, SC 12th LSO	ADI/ADK	MAJ Lake Summers (803)413-2094 lake.summers@us.army.mil
19-21 May 06	Kansas City, MO 8th LSO/89th RRC	ADC/ADK	COL Meg McDevitt SFC Larry Barker (402) 554-4400, ext. 227 mmcdevitt@bqlaw.com larry.r.barker@us.army.mil
20-21 May 06	Nashville, TN 139th LSO	ADC & ADI	COL Gerald Wuetcher (502) 564-3940, ext. 259

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available through the Defense Technical Information Center (DTIC)

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

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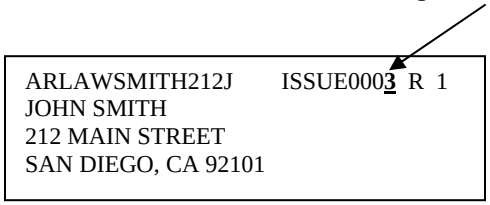

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