Disposition of Insanity Acquittees in the United States Military

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Recent amendments to the United States Code of Military Justice have essentially adopted the federal mental nonresponsibility rule or insanity defense. The prior standard, as outlined in the American Law Institute's Model Penal Code, has been abandoned. Notably absent is a system to address the disposition of the military insanity acquittee. This raises concerns regarding recidivism and the military's role in mitigating potential dangerousness. Relevant civilian and military law is reviewed, two cases described, and possible remedies proposed.

Despite the recent tumult following the acquittal of John Hinckley, Jr., the insanity defense remains a viable element of the United States Criminal Law.[1] The intense scrutiny generated by that case, however, did not leave the insanity defense totally unchanged. In two states, Montana and Idaho, the traditional insanity defense has been abolished.[2] The Comprehensive Crime Control Act of 1984, and specifically the Insanity Defense Reform Act, overhauled many portions of the federal law.[3] Under the revised federal law the volitional element of the insanity defense, the inability "to conform (his) conduct to the requirements of the law," was eliminated.[4] Another change, and the subject of this article, reflects the disposition of the insanity acquittee. In federal jurisdictions a definite postacquittal statutory process follows the successful defense.[5] Before the Insanity Defense Reform Act of 1984, no such structure existed in the federal system.

Disposition of the acquittee has also been influenced in several states. In Oregon, for example, insanity acquittees are committed to the Psychiatric Security Review Board.[6] This program, which actually predates Hinckley, allows the Board full discretion in determining dispositions. In Montana and Idaho, substantial changes in the insanity defense have prompted procedural changes for hospitalizing defendants exculpated by psychiatric testimony.[2]

This article specifically examines the role the United States Military has adopted with respect to both the insanity defense and the disposition of the acquittee. After the Hinckley acquittal

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changes in the legal defense were adopted, but disposition of the acquittee remained unaddressed. By reviewing current military law, the recidivism of civilian insanity acquittees, and describing two military cases where the insanity defense was successful, an argument will be posed recommending specific changes in the disposition of future insanity acquittees.

Military Justice System

The Uniform Code of Military Justice delineates those activities prohibited while serving on active duty in the United States Military. Violation results in the referral of charges. Most offenses in the military are minor however and disposed of through a system of nonjudicial punishment. This is a flexible scheme allowing commanders to exercise quick corrective action. Even so, numerous safeguards protect the soldier. There is the opportunity to seek legal counsel, provide rebuttal evidence, and have witnesses testify before the commander. In some cases the soldier may elect to forego the nonjudicial system altogether. The case is then propelled into the courts-martial arena. The convening authority, through referral of charges, recommends the type of court-martial. Manifesting the command prerogative to maintain control and discipline, the convening authority is generally a high ranking military officer with wide prosecutorial and appellate discretion.

The nature of the offense will generally determine which of the four types of Courts-Martial the convening authority will recommend. Here, the military uses a four-tiered echelon with each succeeding courts-martial empowered to adjudicate greater punishment. The Summary Court-Martial is the least punitive. Next in ascendancy is the Special Court-Martial. There are two types of Special Courts-Martial, differing in the type of discharge that can be imposed. The General Court-Martial presides over the most serious offenses and maintains the widest sentencing discretion. Before any General Court-Martial an impartial officer is assigned to investigate the charges. This Article 32 Investigation is similar to a grand jury and collects sworn testimony.

All convictions by court-martial are reviewed by the convening authority. Avenues of appeal, some of which are automatic, include the Court of Military Review and ultimately the United States Court of Military Appeals. Occasional cases are heard in the United States Supreme Court.

The Military Insanity Defense

The insanity defense in the military has evolved in a manner similar to that of the civilian system.[7] The McNaughten standard, with the irresistible impulse appendage, was the prevailing rule through World War II and beyond. In 1977 the United States Court of Military Appeals, in the decision *United States v. Frederick*, adopted the American Law Institute standard.[8] This was the sole standard until President Reagan signed executive order 12586 in 1987. This order aligned the military insanity defense with the federal statute.

The guiding principles for mental state inquiries in the United States Military are described in the Rules of Court Martial.[9] Entry into the system for purposes of examination can be initiated by commanders, the Article 32 Officer, counsel, the military judge, or even jury members. Before referral of charges the convening authority, a high ranking military commander, authorizes mental examinations. After charges have been referred, however, the military judge may order a mental examination of the accused, regardless of any previous determination.

Once a request for mental state inquiry is approved, an order is generated and submitted through medical channels. This order directs the formation of a sanity board. This board is composed of one or more medical officers and usually includes either a psychiatrist or a clinical psychologist.[9] The board receives a statement containing the reasons for doubting the mental capacity or responsibility of the defendant. In addition, charge sheets, investigative reports, and a transcript of the Article 32 Investigation normally follow. The board is required to make findings to each of the following questions: (1) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (2) What is the clinical psychiatric diagnosis? (3) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct? (4) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?[9]

At the conclusion of the board's examination, two reports are prepared. The full report, with conclusions, is received by the defense counsel. If requested, the individual's commanding officer will see the same report. A statement with only the conclusions is sent to the military judge, government counsel, the Article 32 Officer, and the convening authority.

Should the insanity defense prevail, one of the unique features of the military justice system becomes evident. This is the lack of a systematized approach to the disposition of the insanity acquittee. Currently, there is an Army Regulation, "Notification of Release of Mentally Incompetent Army Members," which at least peripherally addresses the issue.[10] Mentally ill and potentially dangerous soldiers are the focus of this regulation. A complete description of the case is forwarded to the Department of the Army Headquarters. This is for the purpose of alerting civilian authorities, but it does not structure the actual disposition.

Characteristics of the Acquittee

Disposition of the insanity acquittee is not a problem unless significant criminal recidivism occurs. No demographics have been collected which describe the typical military acquittee, although a study is under way to address this issue. Until these data are available, extrapolation from civilian studies must suffice to determine if the insanity acquittee

represents a significant danger of recidivism.

Demographic characteristics of the typical civilian insanity acquittee provide a statistical picture.[11–16] The acquittee is usually a white male, who is older than his convicted counterpart. Both a prior arrest record and psychiatric hospitalization are common. The charge for which the acquittee successfully pleaded not guilty by reason of insanity was a violent one, usually homicide. The usual psychiatric diagnosis was a psychosis, mostly schizophrenia.

Several studies have examined criminal recidivism of the insanity acquittee. In two studies, low rearrest rates of around 10% were reported.[6,16] Other studies, however, have found much higher rearrest rates, exceeding 50% of the acquittees.[11,14,17]

Subsequent rehospitalization of the acquittee is also common, ranging from nearly half to almost two-thirds.[11,14,16,18]

Two Clinical Cases

The formation of a sanity board to explore the mental responsibility of a defendant is not a common event in the typical military psychiatrist's duty. Acquittal or dismissal of charges resulting from the board's findings is even less frequent. The author has had only two such cases, both described here, in a 12-year military career.

The first insanity acquittee was successful under the preexisting American Law Institute standard of mental responsibility. Compounding this case was the fact that it occurred overseas where resources are more limited. The subject of the initial investigation was a young soldier with less than a year of active duty. He had been drinking the night prior to the arrest, a not unusual activity as his history later disclosed. The soldier also had a most intense interest in fires. His arrest followed a small fire in the basement of his barracks. The soldier drew attention to himself by lingering around the fire and displaying an inordinate interest in the fire department's activities.

Defense counsel requested a psychiatric evaluation to determine mental responsibility. The interview developed a pattern of firesettings in a soldier who came from a severely disturbed family. Psychological testing and literature reviews solidified the interviewer's opinion. A written statement detailing the opinion of nonresponsibility, secondary to fulfillment of the volitional prong of the American Law Institute standard, was rendered. The opinion was accepted without rebuttal by the government prosecutor and the charges were dismissed. A lengthy, expensive overseas trial was avoided.

A few days later the author was surprised to receive a phone call from the prosecutor seeking disposition of the soldier. It became apparent that by dismissing legal charges the sole avenue of disposition remaining was either medical or administrative discharge. The interesting, but erroneous presumption, was the ability of the psychiatrist to adequately address concerns of future dangerousness. After extensive collaboration with the legal system, an administrative separation was performed. Upon discharge the soldier was referred to out-

patient psychiatric therapy near his home.

In a second case a soldier, near completion of his overseas assignment, murdered his immediate supervisor. The initial investigation was conducted by local authorities. It was immediately apparent that the soldier was mentally ill. Two evaluators were in full agreement on this issue. Consensus was mixed on the issue of mental responsibility. The soldier was returned to a United States military treatment facility to help resolve this issue. From the time of arrest, to stateside evaluation, three months had elapsed. Medications had been prescribed for only a few of these days.

The ensuing forensic evaluation confirmed the absence of current psychosis. The examiners concluded, however, that the soldier did have a paranoid delusional disorder when the murder was committed. Regarding mental responsibility, the sanity board concluded that the defendant was unable to appreciate the wrongfulness of his behavior, because of the prior severe mental disorder. The sanity board's opinion was transmitted to the overseas convening authority who still retained jurisdiction. With the board now supporting the insanity defense, various options were studied. Certainly the government prosecutor could challenge the board's opinion. However, the strength of the forensic report, the credibility of the sanity board, the cost of assembling the principals together overseas, the length of time the defendant had spent in pretrial detention, and the desire for medical treatment to assume primacy over punishment all influenced the ultimate dismissal of charges. All military criminal jurisdiction then ended.

The medical system, free of legal constraints, could now ostensibly focus solely on therapeutic management. The outstanding problem remaining, however, was the issue of future dangerousness and recidivism. Since the soldier was not actively delusional, or imminently dangerous, civil commitment was not warranted. The only recourse in this unusual case was a medical retirement from the military. A very brief hospitalization at a veterans' facility near the soldier's home completed the disposition.

Discussion

In United States Military criminal trials a successful plea of nonmental responsibility is rare. Yet regardless of frequency, the disposition of the insanity acquittee deserves more careful consideration. The possibility of recidivism of an insanity acquittee who has committed a violent act is an important social issue. Currently, the United States Military transfers this responsibility to the military medical system. There may be a certain logic to this position. The psychiatric input, after all, contributed greatly to the outcome. The task of disposition would certainly be simplified if military hospitals for the criminally insane existed, or if conditional release programs were available. The psychiatrist, lacking these resources, is left to exercise his own creativity. This can be a burdensome process. If the defendant needs secured hospitalization, for ex-

ample, the psychiatrist must seek either state or federal assistance. Neither is mandated to accept the defendant. A lengthy period of negotiation may be required to effect such a disposition.

Why this unstructured approach to disposition exists is open for speculation. Simple oversight may in part be accountable because successful insanity pleas in the military are rare. Because this is a low frequency event, the medico-legal system is likely to be inexperienced. This understandable naiveté will leave blindspots. In a benevolent fashion, the assumption may exist that the best interests of justice are served by treatment, not punishment. Allied with this premise, is the presumption that the medical system will treat both the mental disorder and the resultant dangerousness. This somewhat subtle transfer of social responsibility needs review.

From the start, an accused answers to the legal justice system for the alleged transgression. Control in the United States Military is exercised until judgment is rendered. If found guilty, for example, a range of punishments is available. The legal system is firmly engaged. Yet, if the defendant is found not guilty by reason of insanity, or certainly if the charges are dismissed for psychiatric reasons, the legal system defers to the medical. Clearly, the United States Military Justice system should have a range of dispositional alternatives for either verdict, where both treatment and public safety are considered. Several options are possible.

One idea is to retain certain acquittees on active duty. Where the charge and mental condition permits, the soldier could receive treatment and be closely monitored. A sort of conditional work-release would be approximated. The soldier in the first case could have potentially remained in the service and fulfilled this program.

Another possibility is to use the federal process for disposition. A successful insanity verdict would automatically insert the acquittee into the extant federal system. Those in need of secured hospitalization would follow this path. This has advantages of obviating the need for the military to adopt a new system.

A different, but certainly possible approach, is for a United States District Court to assume jurisdiction of all military insanity defense cases. This option is viable because military courts-martial are part of the federal judiciary. The infrequent litigation of the military insanity defense would not seemingly tax the federal judicial system. The successful verdict would follow the same path as a nonmilitary federal acquittee. Jurisdiction for incarceration would revert to the military in unsuccessful insanity defenses.

A final option would be reserved for those acquittees not in need of secured hospitalization but who would benefit from a conditional release program. This idea would target individuals who developed a medically disqualifying psychiatric illness and subsequently committed a crime. Medical disability would be awarded based on the severity of the illness. If present dangerousness was not a factor, such payments could be made provisional. Noncompliance with treat-

ment programs or rearrest, for example, could lead to revocation of benefits.

Summary

After the successful insanity verdict in the Hinckley trial, an exhaustive, emotional review of the defense was conducted. There were changes but the basic concept continues. The military realigned the insanity defense to correspond with its federal counterpart. Disposition of the military insanity acquittee, however, remained unsettled. This places the military in a unique position. The possibility that the acquittee may commit a new crime or need hospitalization should prompt concern when a codified, judicial approach to disposition is lacking. The individualized, totally medical approach to disposition should be replaced by a more structured system which may include legal restraints. Only then can the interests of society and the acquittee be fully realized.

References

1. Caplan L: Annals of law: the insanity defense. New Yorker 45–77, July 2, 1984
2. Steadman H, Callahan L, Robbins P, *et al:* Maintenance of an insanity defense under Montana's "abolition" of the insanity defense. Am J Psych 146:357–60, 1989
3. Carroll R: Insanity defense reform. Mil L Rev 114:183–224, 1986
4. U.S. Code. 1985 vol. 18, secs. 20 (supp. III 1985)
5. U.S. Code. 1985 vol. 18, secs. 4243 (supp. III 1985)
6. Rogers J, Bloom J, Manson S: Oregon's new insanity defense system: a review of the first five years, 1978–1982. Bull Am Acad Psych Law 12:383–402, 1984
7. Trant C: The American military insanity defense: a moral, philosophical, and legal dilemma. Mil L Rev 99:1–114, 1983
8. U.S. v. Frederick, 3 M.J. 230 United States Military Court of Appeal (1977)
9. Manual for Courts-Martial, United States, 1984 Rules for Courts Martial 706 (c) (2) (D)
10. Army Regulation 40-3 C3, HQ Dept of the Army Washington, DC, 1982
11. Bogenberger R, Pasewark R, Gudeman H, *et al:* Follow-up of insanity acquittees in Hawaii. Int J Law Psych 10:283–95, 1987
12. Wettstein R, Mulvey E: Disposition of insanity acquittees in Illinois. Bull Am Acad Psych Law 16:11–24, 1988
13. Steadman H: Insanity acquittals in New York state. Am J Psych 137:321–6, 1980
14. Phillips B, Pasewark R: Insanity plea in Connecticut. Bull Am Acad Psych Law 8:335–344, 1980
15. Pasewark R, Pantle M, Steadman H: Detention and rearrest rates of persons found not guilty by reason of insanity and convicted felons. Am J Psych 139:892–7, 1982
16. Hodgins S, Herbert J, Baraldi R: Women declared insane: a follow-up study. Int J Law Psych 8:203–16, 1986
17. Spodak M, Silver S, Wright C: Criminality of discharged insanity acquittees: 15-year experience in Maryland reviewed. Bull Am Acad Psych Law 12:373–82, 1984
18. Bloom J, Williams M, Rogers J, *et al:* Evaluation and treatment of insanity acquittees in the community. Bull Am Acad Psych Law 14:231–44, 1986