The Military Insanity Defense

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This article describes the military insanity defense. The success of the litigated insanity defense is explored through the number of insanity acquittals over a 28-month period. A questionnaire distributed to all United States Army psychiatrists provided information on the number of forensic evaluations performed, the number of not criminally responsible (NCR) opinions made, and the disposition of noncontested NCR opinions. The questionnaire also tested the Army psychiatrists' knowledge about recent changes in the military insanity defense. This pilot study raises interesting questions about the military insanity defense that further research can address.

The insanity defense has a long tradition in the United States Military.[1] Despite such longevity however, a comprehensive description of the military insanity defense remains largely unknown. A world-wide court-martial system, a frequent turnover of key personnel, and a lack of centralized data collection have created barriers to information retrieval. Fortunately, the US Army and Air Force are now filling computerized data bases with certain basic trial court information. More importantly, the US Army and Air Force now list the insanity acquittal as a specific trial outcome. This development was critical to understanding the full impact of the military insanity defense. Describing the military insanity defense should also include: the volume of insanity pleas at the trial court level, the number of cases disposed of without a trial, the number of forensic evaluations performed plus the opinions provided, and the familiarity of the clinician with the insanity defense.

Although much information was collected in this pilot study, not all questions were answered. The US Navy, for example, does not differentiate the insanity verdict from other acquittals. For the US Army and Air Force however, in the 28 months this study encompassed, only one insanity acquittal occurred at the trial court level and only two through appellate intervention.

A survey of US Army psychiatrists produced data regarding the number of forensic evaluations performed, the number of not criminally responsible opinions provided, and familiarity with certain basic forensic psychiatry concepts.

What results from this pilot study is a still incomplete, but emerging picture, of the military insanity defense.

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Military Law

In 1987 the Uniform Code of Military Justice (UCMJ), the statute authorizing military discipline for service-related criminal conduct, was amended to incorporate new language for the insanity defense. The new military insanity defense parallels changes adopted by the federal justice system of 1984, with at least one notable exclusion. The current military standard of mental responsibility 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. Mental disease or defect does not otherwise constitute a defense.[2]
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> The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense."[3]

Conspicuously absent from the UCMJ is any discussion regarding disposition should the defense be successfully litigated.

The UCMJ also provides the structure for the request, conduct, and dissemination of the forensic evaluation through a sanity board "consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist."[4] Composition of the sanity board then has wide flexibility, permitting a psychiatrist, clinical psychologist, or even "a physician" to constitute sole membership. Certain safeguards, to support confidentiality and prevent unauthorized disclosure, do exist. The accused can refuse to discuss certain issues. The accused is forewarned however, that such omissions may affect the board's ultimate conclusions. To further safeguard confidentiality the full forensic report is released only to the defense counsel. The accused's commander, upon request, may also receive the full report. Only a statement of final opinions is submitted to the trial counsel.

In actual practice a written request for a forensic evaluation, or "sanity board" in military parlance, is delivered to the closest mental health facility. Local custom dictates whether one, two, or three clinicians perform the evaluation. Limited staffing at most military facilities ensures that the majority of evaluations are conducted by one person. In any case, one person is designated as the principal examiner and prepares the report. With multimember sanity boards, disagreements are discussed informally. Unresolved differences, which are rare, are noted in the written report. Unanimity of opinion is not unusual.[5] No military guidelines direct the exact format of forensic reports. Thus, written reports run the gamut from brief one page statements to exhaustive works. For guidance in performing the military forensic evaluation, the clinician is left to review an antiquated 1981 training manual entitled *Psychiatry in Military Law*. Unfortunately, this training manual predates the significant legal changes already mentioned.

The sanity board is routinely directed

to perform psychological testing and include the results in the written report. Actual inclusion is based on the clinician's judgment that testing is indicated. Medical tests, such as magnetic resonance imaging or computed tomography are not generally performed unless clinically indicated.

In some cases, the attorney may request a specific military clinician at another location perform the sanity board. Such requests are rarely granted, given the medical policy to utilize local resources and the need to control costs.

A unique feature of the military justice system is the court of military review.[6] The military justice system is sensitive to complaints of improper command influence. Reflecting this concern, the US Congress created an intermediate appellate court for each service. The court of military review is an additional safeguard to protect the defendant. A punitive discharge, death sentence, or confinement exceeding one year all receive an automatic review. The court of military review is granted unique authority to determine the factual sufficiency of evidence. The court of military review "may weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact."[6] In essence, the court of military review can reverse on issues of fact. If the court of military review determines that mental responsibility needs exploration, the court will order a sanity board. If convinced by the report that the defendant was not criminally responsible, the court of military review may dismiss the charges.

The United States Court of Military appeal, the highest military court, functions similarly to civilian appellate courts.

Finally, all military psychiatrists and clinical psychologists are potentially subject to mandatory participation in a sanity board. The military does not rely on a cadre of specially trained forensic experts. As such, the interest, experience, and philosophy of the participants will vary widely.

Methods

Both the military medical and legal systems were studied, using different approaches for each. Telephone contacts proved most efficient for studying the legal justice system. Distributing a written survey, documenting military attorneys' experience with the insanity defense, was originally contemplated. After discussions with senior judge advocates, the idea was dismissed. The large number of military attorneys, their wide geographic dispersion, and the frequent rotation of personnel, argued against this form of data collection. As this study progressed, reliable information became available at certain key locations. These primary sources included: the Clerk of the US Court of Military Appeal, the Clerks of the Army, Air Force, US Navy/Marine Corps, and US Coast Guard Courts of Military Review, the US Air Force automated military justice analysis and management system, the Judge Advocate Generals' Offices of the US Army and Air Force, the Judge Advocate General's School, and the chief judge of the US Coast Guard,

the chief prosecutor of the US Coast Guard, several trial judges from the US Army and US Air Force, and several military attorneys.

Only the US Army and Air Force have complete and accurate numbers of insanity acquittals. Since mid-1987, when the military insanity defense was revised, both the US Army and Air Force have tracked the rate of insanity acquittals. The presiding military judge completes a standard written form when the court-martial ends. These forms are centrally collected and processed by the respective clerks of the Army and Air Force Courts of Military Review. These same clerks initiate orders for a sanity board when requested from the appellate courts.

Strictly for comparison purposes, the Administrative Office of the United States District Courts supplied statistical data for the federal insanity defense from 1987–1989.[7]

The medical perspective on the insanity defense was explored by distributing a written questionnaire. The military mental health system is the point of entry for forensic evaluations. A questionnaire was considered feasible given the relatively small numbers of military psychiatrists. The written survey had several advantages. They included the use of standardized questions and the opportunity for the clinician to review records before completing the questionnaire. The questionnaire was structured to determine the number of forensic evaluations each psychiatrist performed, the number of not criminally responsible opinions provided, and the effects these opinions produced. A second part of the survey tested forensic knowledge and attitudes about the sanity board process. The knowledge assessment focused rather narrowly on the recent changes in the insanity defense. Of course, testing knowledge and attitudes is perilous, particularly if generalizations are drawn from limited data. To enhance reliability, this questionnaire was initially developed by the author and critiqued by the Walter Reed Army Medical Center research committee. The questionnaire was then distributed to the faculty within the Department of Psychiatry at Walter Reed Army Medical Center. After completing the form the faculty suggested minor changes. In addition, this preliminary data was analyzed to determine if the questionnaire adequately captured the desired information. The amended questionnaire was now ready for general distribution. Only US Army psychiatrists were surveyed. The US Army has the largest cadre of military psychiatrists of all the services, and was considered the logical sample choice.

A total of 184 questionnaires were mailed to all active duty staff psychiatrists, fourth-year psychiatry residents, and child fellows. Approximately two-thirds of the US Army psychiatrists completed the survey on the first mailing. After two months, the same questionnaire was redistributed to the remaining one-third. All respondents were requested to provide numerical data, such as the number of forensic evaluations performed in the preceding 18 month time period. This time was selected since

it corresponded to the recent change in the military insanity defense.

Results

This study encompassed the time period from June 1987 to the end of September 1989. During this time there were no insanity acquittals at the trial court level in the United States Army. There were 6,264 court-martials conducted in that 28-month time period. United States Air Force records indicate that 3,627 court-martials produced one insanity acquittal. Unfortunately, the United States Navy and Marine Corps do not maintain insanity acquittal statistics. The United States Coast Guard (USCG), by virtue of its small size and stability of key legal officers, furnished detailed information. In the 28-month time period since the military insanity defense was revised, the USCG conducted 152 court-martials. In two of these cases, the insanity defense was argued. One case ended unsuccessfully for the defense. The other case also failed at the trial court, but is currently under appeal.

The other source of insanity acquittals has been through military review courts. The US Army and US Air Force Courts of Military Review have ordered sanity boards in 11 separate cases. In two of these, both in the Army Court of Military Review, the sanity board supported an insanity defense. In both cases, the Army Court of Military Review reversed the trial court verdict and ordered a dismissal.

By point of comparison, the United States Federal Courts, in the two-year period from July 1, 1987 to June 30, 1989, generated 24 insanity acquittees.[7] A total of 104,434 defendants were processed through the federal court system in the same time period.[7] Only 0.02 percent of federal defendants' cases resulted in an insanity acquittal. If the two US Army appellate cases are counted, and the time span considered is the 2½ years since the law changed, only 0.03 percent of military litigation has resulted in a successful insanity defense. Again, the US Navy statistics are not included.

Survey of US Army Psychiatrists A total of 160 questionnaires were reviewed, representing 87 percent of US Army psychiatrists. In the preceding 18 months, 92 psychiatrists had performed forensic evaluations. Psychiatrists supporting large troop populations participated in more sanity boards. This regional concentration, in part, accounted for the fact that only half of all military psychiatrists have performed a forensic evaluation. Psychiatrists in nonclinical positions generally do not perform sanity boards either. These 92 psychiatrists as a group, provided 306 separate opinions regarding criminal responsibility. The US Army's four medical centers contributed only 44 opinions. This meager 14 percent is present despite a 22 percent allocation of US Army psychiatrists. All 19 fourth year postgraduate (PGY IV) residents and child psychiatry fellows completed the survey. Of this group, only 10 had participated in a sanity board.

An important measure the survey sought to define was the frequency that US Army psychiatrists found the de-

fendant not criminally responsible. The survey results indicated that US Army psychiatrists provided 36 opinions, or 11 percent of the total, finding the defendant not criminally responsible. The US Army psychiatrists further disclosed that their opinions resulted in dismissal of charges in 29 cases. For the remaining seven opinions the psychiatrists were unaware of the outcome. Disposition following dismissal generally meant medical retirement. In describing 16 cases, a medical board found the soldier unfit for further military duty and recommended medical retirement. In another eight cases the soldier was transferred to an unspecified state or federal medical treatment facility. In two cases, soldiers were awaiting an administrative separation from the US Army. For the remaining three cases the type of disposition was not described.

The second portion of the questionnaire tested awareness of recent changes in the military insanity defense, briefly surveyed perceptions, and solicited general comments. As previously noted, the military insanity defense was significantly revised in 1987. This fact was correctly identified by 64 percent of US Army psychiatrists. With regard to specific changes the law created, 73 percent of US Army psychiatrists noted correctly the shift in the burden of proof. The new law also permits clinical psychologists to independently perform the sanity board. Only 20 percent of US Army psychiatrists were aware of this. The revised law also eliminated the volitional prong. The volitional prong allowed the nonresponsibility defense to prevail if the accused could not conform his conduct to the requirements of the law. This important change was identified by 41 percent of US Army psychiatrists. The US Military does not have a formal system for disposition of the insanity acquittee.[8] This fact was recognized by 78 percent of US Army psychiatrists. Regarding perceptions, 45 percent of US Army psychiatrists believed they received too many requests for sanity boards. Another two-thirds did not believe military lawyers clearly articulated the reasons for doubting the defendant's sanity. A small group, 13 percent, believed the notion that military lawyers coach their clients on the "proper" psychiatric symptoms. The importance of the attorney providing detailed investigative reports to the sanity board was recognized by 94 percent of US Army psychiatrists.

The figures above reflect the entire group of respondents. This same data was further studied by concentrating on two subgroups. One group consisted of the PGY IV psychiatry residents and child fellows, while the other group included staff psychiatrists who had performed at least one forensic evaluation in the preceding 18-month time period.

For the 19 residents/fellows, 14 (74 percent) correctly identified the shift in burden of proof, two (11 percent) correctly identified the new autonomy permitted clinical psychologists, four (21 percent) noted the elimination of the volitional prong, four (21 percent) assumed an automatic disposition awaited the insanity acquittee, 10 (53 percent) believed military lawyers did not clearly specify the reasons for doubting the de-

fendant's sanity, and four (21 percent) believed military lawyers coach their clients on the "proper" psychiatric symptoms.

The second subgroup consisted of 76 staff psychiatrists. Each member of this group had conducted at least one sanity board. In addition, each person had completed the knowledge assessment portion of the survey. In this group of US Army psychiatrists, 57 (75 percent) correctly identified the shift in burden of proof, 25 (35 percent) correctly identified the new autonomy permitted clinical psychologists, 35 (46 percent) noted the elimination of the volitional prong, 18 (24 percent) assumed an automatic disposition awaited the insanity acquittee, 51 (67 percent) believed military lawyers did not clearly specify the reasons for doubting the defendant's sanity, and 8 (11 percent) believed military lawyers coach their clients on the "proper" psychiatric symptoms.

The survey concluded by offering the participant an opportunity to register concerns, comments, and suggest changes in the sanity board process. Slightly over a third (36 percent) of the psychiatrists did so. Concerns regarding disposition topped the list. Other oft-repeated themes included the need to improve psychiatrist-attorney communication, the need for periodic forensic training, the suggestion that the psychiatrist act as a strict consultant to the court, the desire that senior military attorneys triage sanity board requests for legal appropriateness, the use of a pretrial screening evaluation as an alternative to a full sanity board, and the desire to refer all sanity boards to a forensic psychiatrist.

Discussion

This pilot study sought to describe the military insanity defense. As the study progressed it became clear that a complete picture would not develop. Opportunities for further study exist. The volume of insanity pleas for example, would be an important addition to an overall characterization of the insanity defense. Data from the US Navy, particularly insanity acquittal numbers, is needed. Comparisons between the services could then be studied. In this study, the US Army, US Air Force and US Coast Guard, collectively recorded only three insanity acquittals. With only one acquittal occurring at the trial court level, the role of the military courts-of-review is better understood. These intermediate appellate courts, with direct fact finding authority, have independently explored the accused's mental state. As a result of this further investigation there were two dismissals based on the sanity board's findings. For the mentally-ill accused, these military courts-of-review represent an important legal safeguard. Still, only three successfully litigated cases may seem low. When compared with the US District Courts however, the statistical rate of acquittal is similar. As a whole then, any speculation that the insanity defense is harshly received by the military justice system would not seem justified.

What success the insanity defense enjoys is further characterized by the number of dismissals based on an uncon-

tested not criminally responsible opinion. The survey of US Army psychiatrists disclosed that of the 36 not criminally responsible opinions provided, 29 resulted in dismissal. The influence the sanity board exerts is obvious. Several factors may explain this influence. Prosecutors may find it difficult to discredit a supposedly neutral government evaluation. Perhaps military lawyers are unfamiliar with the insanity defense and defer to the psychiatrists' experience. The bulk of dismissals may simply reflect the severity of the accused's mental state. Further study is necessary to characterize the typical case dismissed. Regardless of the reason, a sanity board finding of not criminally responsible is essentially dispositive of the case in the US Army. The untested presumption exists that psychiatrists in the US Navy and US Air Force have the same influence.

The influence enjoyed by the sanity board requires that the members be familiar with basic concepts of military forensic psychiatry. The survey tested a small portion of knowledge regarding the recent changes with the insanity defense. Two subgroups of US Army psychiatrists, psychiatry residents/fellows, and staff psychiatrists who had performed a forensic evaluation in the last 18 months, were specifically studied. The responses of the psychiatry residents provided a glimpse of academic forensic psychiatry. The glimpse revealed limited clinical experience. Only one-half of Army psychiatry residents/fellow have participated in a sanity board. These same physicians will soon be performing independent forensic evaluations. The survey also disclosed some misunderstanding by the residents/fellows of the revised insanity defense. Staff psychiatrists who have performed a recent sanity board revealed similar misunderstandings. Of particular note was the failure of half the staff psychiatrists to identify the elimination of the volitional prong. An interesting study would review the noncontested dismissals. Such a study might provide clues to determine if the volitional prong was still used. Inclusion of the volitional prong could increase the number of not criminally responsible opinions.[9]

This survey also suggests the need for greater communication between attorneys and psychiatrists. Army psychiatrists want attorneys to more clearly justify the sanity board request. Army psychiatrists seemed particularly sensitive to this issue, as further documented by the many spontaneous written comments.

One means of increasing professional dialogue would be regular symposiums that focus on military mental health and the law. This approach has been adopted by Walter Reed Army Medical Center. The symposium brings the two military professional groups together. The meeting fosters an educational exchange that enhances professional interaction. Preconceived ideas can be tested and altered. The symposium expands bilateral professional awareness by addressing the myriad of topics where the law and psychiatry overlap. Another benefit this education can provide is greater personal

satisfaction in performing forensic evaluations.[10]

For the psychiatry resident, the marginal experience recorded by the survey indicates the need for additional clinical exposure to forensic psychiatry. Military residency programs must ensure that the graduate is capable of producing a thoughtfully prepared forensic evaluation. This is in turn requires that the core didactic curriculum be well organized and pragmatically oriented. Clinical rotations through civilian forensic facilities may be necessary to augment the resident's limited experience. With legal issues increasingly impacting general psychiatry, the resident must be prepared to interface with the law.[11]

Finally, Army psychiatrists would benefit by a revision of the US Army's antiquated training manual *Psychiatry and Military Law*. This small 1981 publication predates the revised military insanity defense. A new manual, expanded in scope and clinically oriented, is in the early draft stage. Distribution of this new training manual will be directed toward US Army psychiatrists, psychologists, attorneys, and commanders.

Summary

By examining the military system from several vantage points a picture emerges. First, the insanity defense is rarely successful at court-martial. There have been, for example, no recorded acquittals at the trial court level since mid-1987 in the United States Army. The unique role of the military courts-of-review was highlighted. These intermediate appellate courts can order the insanity acquittal based on a factual review of the evidence. This occurred in two cases. The dispositive role of the sanity board was emphasized. Uncontested opinions are the norm, usually producing a dismissal. Given this authority, the member of the sanity board must ensure that an adequate evaluation is performed. Specific suggestions to augment awareness of military forensic psychiatry were provided. The goal is to facilitate the interaction between psychiatry and the law, ultimately benefitting the military justice system.

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