Forensic Psychiatry in the United States Military

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Members of the U.S. military and their families represent a unique subsection of the American culture. The U.S. Constitution, federal law, and military regulations establish guidance for the conduct of service members during peacetime and wartime. This same hierarchy of law and regulation sets forth the legal rights and directs the provision of medical care for service members and their families. The fact that the military population is concurrently subject to a body of military law, as well as to the broader guidelines of the civilian sector, creates distinct roles for the military forensic psychiatrist. An understanding of the medical and legal framework in which the military forensic psychiatrist operates will facilitate the interactions of the civilian expert witness with the military justice system. In this report, the legal issues most relevant to the practice of forensic psychiatry in the military are discussed. In addition, the roles and responsibilities for psychiatrists specifically trained in aspects of military medical and mental health law are identified.

The U.S. military population—with active duty personnel, retirees, and dependent family members numbering in the millions—represents a significant subsection of American culture. One unique aspect of this group is the fact that the U.S. Constitution and Federal statutes have established legal and medical systems to provide for the military, which operate separately from those of the civilian population.[1] The military forensic psychiatrist functions at the interface between the military legal and medical systems. Although trained first and foremost as a physician and military officer, subsequent training in the principles of military and federal law establishes a number of roles and responsibilities for which the military forensic psychiatrist is particularly qualified.

This article will provide a brief summary of the medical and legal framework in which the military forensic psychiatrist operates. The various duties performed by the military forensic psychiatrist will be outlined. A comprehensive review of military law and medicine is beyond the scope of this article. It is hoped that a summary of the major principles defining the military medicolegal interface as it

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relates to mental health issues, and the roles this interface establishes for the appropriately trained physician, will permit an understanding of the scope of practice of the military forensic psychiatrist.

Military Law

Military criminal law, in one form or another, has existed as long as forces have been organized to wage wars. The birth of American military law can be traced to the enactment of the first American Articles of War on June 30, 1775.[1] From the original 69 articles, significant expansion and evolution have resulted in today's Uniform Code of Military Justice (UCMJ).[2] The federally enacted UCMJ establishes the three levels of courts-martial. General courts-martial can be compared to civilian felony trials, while special courts-martial are most similar to misdemeanor trials. The summary court-martial is a single-officer court with only limited authority.[3]

Although all of the armed forces grant an accused person the right to retain legal counsel at personal expense, the Rules for Courts-Martial (RCM), established by executive order, direct that any service member accused of a military crime is entitled to counsel free of charge for general and special courts-martial.[3] The U.S. Armed Services permit the accused to consult with defense counsel before the determination is made whether to accept trial by summary court-martial. An accused has the absolute right to refuse trial by summary court-martial, in which case charges will be referred to a higher-level court. This provision ensures free counsel by demanding a special court-martial.

While there is generally a preference to dispose of charges at the lowest possible level, the level at which charges are tried is a decision for the military commander. Once a commander determines that there is probable cause to believe an offense was committed by an accused, the commander may forward the charges through the chain of command to the court-martial convening authority. That authority is the appropriate higher level of command with the right and power to institute a court-martial; usually the Battalion Commander for a summary court-martial, the Brigade Commander for a special court-martial, and the Division or Squadron Commander for a general court-martial.[3]

The terms of the Fifth Amendment of the U.S. Constitution deny the right to grand jury indictment to military service members. Instead, the RCM provides that a service member may not be tried by general court-martial unless an Article 32 investigation establishes sufficient evidence to refer charges to trial. At this open hearing, both the accused and counsel are present. The accused has the right to cross-examine adverse witnesses and to present a defense. This process provides the defense with pretrial discovery of evidence that may be introduced by either side at trial. The opportunity for discovery, to confront adverse witnesses, and to present evidence distinguishes the Article 32 investigation as a more protective procedure than a grand jury affords. Another dissimilarity is that a grand jury's refusal to indict is final, subject only to a different decision by a subsequent grand jury. The recommendation of the Article 32 investigating officer is advi-

sory only and may be ignored by the court-martial convening authority.[3]

Although the constitutional terms of the Fifth Amendment limit its application to service members with regard to grand jury investigations, other rights and protections are furnished through a hierarchy of sources. The hierarchical sources of military law include the U.S. Constitution, federal statutes, the UCMJ, Executive Orders (which include the Military Rules of Evidence (MRE)), service directives, and common law.[4] The U.S. Constitution applies to service members absent military or operational necessity. The MRE cover relevancy, privilege, witnesses, and opinion testimony, among other things. The military adopted the Federal Rules of Evidence (FRE) verbatim as they apply to relevance and much of expert testimony. A recent presidential addition is MRE 707, which imposes a *per se* ban on the admission of polygraph reports as evidence. The U.S. Supreme Court granted certiorari on this issue in 1997, but has yet to render an opinion.[5]

MRE 702 provides that a witness may be qualified as an expert by reason of "knowledge, skill, experience, training, or education."[6] Expert testimony is admissible when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[6] MRE 703 provides that an expert's opinion may be based upon personal knowledge, assumed facts, documents supplied by other experts, or by listening to other testimony at trial.[7] Logically relevant and reliable expert testimony "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence," per MRE 403.[8] Unlike the FRE, an expert may testify freely as to the ultimate issue of the presence of a mental disease. The expert may testify in terms of opinion or inference and give reasons without first testifying to the underlying facts or data, unless the court requires otherwise.

Both the RCM and military case law address the boundary at which the accused person's right to withhold information and the government's interest in compelling disclosure compete. The solution balances the two interests and establishes safeguards. As an example of one such compromise, the written forensic opinion is subject to strict submission requirements. The full report with detailed data and analysis is presented to defense counsel and not to the prosecution. The prosecutor receives only the answers to specific written questions contained in the original order for inquiry into the mental state of the accused.[9]

Prior to trial, either defense counsel, prosecutor, judge, or commander who believes the accused may lack mental responsibility or competence to stand trial must transmit their concern to the court-martial convening authority. This results in the order for mental examination. The examination is conducted by a sanity board, which is directed by the RCM to include one or more physicians or a clinical psychologist.[9] Normally, at least one member of the board is a psychiatrist or a clinical psychologist. RCM 707 provides

for specific questions that must be answered by the board with regard to the military standard for lack of mental responsibility. RCM 916(b) explains that "the accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence,"[10] and Article 50a of the UCMJ states that "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 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." There is no volitional prong to the military insanity test.

RCM 909(a) directs that a person "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" may not be brought to trial.[11] Lack of competency may be established by the preponderance of evidence at pretrial, trial, or posttrial proceedings and may result in a suspension of proceedings until competency can be restored.[12]

UCMJ Article 67 directs the U.S. Court of Appeals for the Armed Forces (USCAAF) to oversee the military court system.[3] This court, composed of civilian judges nominated by the U.S. President and confirmed by the Senate, has recently been expanded from three to five members. Also established by the UCMJ is an intermediate appellate court within each branch of the armed forces. These courts are subordinate to the USCAAF.[3] This appellate system enhances fairness and establishes a check on the potential for abuse within the military justice system.

Military Medicine and Mental Health Care

The same Continental Congress that enacted the original American Articles of War issued an order establishing a military hospital on July 17, 1775.[1] This order created the Army Medical Department, which like its legal cousin has undergone substantial revision and expansion since its inception at the birth of the nation. Over the years the military has recognized the importance of prevention, early recognition, and treatment of mental disorders in the preservation of the fighting force and military readiness. Psychiatrists near combat zones are assigned to specific units called combat stress detachments. The military psychiatrist is responsible for establishing preventive mental health programs, assessing mental preparedness of combat units, providing stress management, and directing suicide prevention programs.[13] Psychiatrists in this capacity have participated in military operations in the Persian Gulf, Somalia, Haiti, and most recently, in the former Yugoslavia. Complex administrative and forensic issues tax the psychiatrist's creativity in these environments.

Establishing medical qualifications for various duties, as well as determining disability when injury intervenes, is a common task. The military has established provisions for the medical retirement of persons with medically disqualifying mental health conditions. Army Regulation (AR) 40-501 codifies medical conditions, including psychiatric disorders, that

are not compatible with further military service and establishes provisions for determining medical disability payments should these conditions have been acquired in the line of duty.[14] The clinical assessment of military disability bears strong resemblance to similar activities conducted in the civilian work force.

The military also recognizes the need for administrative separation of personnel with patterns of repeated misconduct or personality disorders and other conditions or circumstances that render separation a convenience for the government, the service member, or both. AR 635-200, Chapter 5-13, establishes the procedures for administrative separation due to personality disorder,[15] and a recently added Chapter 5-18 provides guidelines for the administrative separation of active duty personnel with other medical or mental conditions such as somnambulism.[16] These conditions do not necessitate medical retirement but nonetheless preclude further military duty. Similar provisions are included in Navy and Air Force regulations.

The Military Forensic Psychiatrist

At present, the Army, Navy, and Air Force all count among their ranks physicians specifically trained in forensic psychiatry. Like other military medical subspecialists, their practice is rarely limited to the scope of their subspecialty training. However, there are a number of military settings in which training in forensic psychiatry can be utilized.

Assessment of Competency and Mental Responsibility Although RCM 706 does not necessitate that determination of competency and mental responsibility require the presence of a forensic psychiatrist on the sanity board, the military forensic psychiatrist is best qualified to fulfill this role. Military forensic psychiatrists—particularly those located at teaching hospitals—can take advantage of the full range of medical diagnostic tools. In a recent case, for example, the authors obtained specific neurotransmitter levels to evaluate the biological component of a violent, seemingly impulsive act. The unfettered freedom of the sanity board from either economic constraints or administrative interference substantially promotes objective opinions. Military lawyers have recognized the special qualifications that the forensic psychiatrist brings to assessments of competency and mental responsibility and have increasingly requested that military judges name such specialists to sanity boards.

Court-Martial Consultant If a sanity board provides an opinion deemed favorable to the prosecution, the defense may request a second opinion, perhaps to establish mitigating factors. In the important case *United States v. Toledo*,[17] the U.S. Court of Military Appeals upheld a conviction that was partially established on the basis of incriminating testimony from the defense's expert witness. The court held that the defense did not request a confidential expert consultant; consequently, this expert's testimony was not protected by either the attorney-client privilege or the qualified privilege afforded to the product of the sanity board evaluation.[17] Subsequent to this decision, military lawyers have increasingly re-

quested appointment of confidential experts to the defense team. Such requests are not routinely granted; instead, they are often subject to intense pretrial arguments. The defense can also request expert testimony regarding mitigating factors in the sentencing phase of a court-martial. The defense of partial mental responsibility acknowledges misconduct, but seeks to establish that the accused did not possess mental state required for conviction of a specific intent crime. Expert psychiatric testimony regarding mental state at the time of an offense is thus sought to mitigate specific intent offenses. The military forensic psychiatrist is trained to understand the limitations of privilege and the implications of participation as an expert if appointment to the defense team is not granted.

If the sanity board reaches a conclusion that is not favorable to the prosecution, the prosecution may request expert consultation. In some situations, trial counsel may effectively challenge a sanity board's opinion based on thoroughness, timeliness, or misapplication of proper legal standards. In rare cases, the prosecution may request expert testimony regarding aggravating factors at sentencing. Because there is no requirement for an accused to submit to psychiatric evaluation beyond that of the sanity board, such testimony would likely be limited to conclusions gathered by review of available documents and observation during the court-martial. The weakness of conclusions not based on direct evaluations is evident, and for this reason such testimony is infrequently requested.

The role of the military forensic psychiatrist in the courtroom is not limited to expert witness testimony regarding evaluation of the accused. Either the prosecution or defense may request an expert to assist in framing questions for cross-examination of the other side's expert. This is an effective technique when the other side employs civilian experts, often embarrassingly unfamiliar with military procedures. The military forensic psychiatrist may be asked by the court to determine the competence of a witness to testify. He may be asked to explain a psychiatric principle or theory, such as the effects of sleep deprivation on judgment, or to provide explanations of apparently inconsistent behavior, such as delayed reporting after an alleged rape.

Military courts have permitted expert testimony regarding rape trauma, child abuse accommodation, battered spouse, and Vietnam and Gulf War Syndromes in military proceedings.[18]

Disability Evaluations Medical retirement of military members requires evaluation of the nature, extent, and anticipated duration of symptoms of the illness for the purpose of determining disability payments. Such evaluations are termed Medical Evaluation Boards (MEBs). Specialists in the medical field most closely related to the disabling illness or injuries perform these evaluations. For example, a cardiologist would be responsible for generating an MEB for a soldier being medically retired for hypertensive cardiomyopathy if this condition prevented the soldier from exerting the amount of physical strain required for routine military duty. Although there is clearly a role for forensic psychiatrists

being retired due to psychiatric disorders, other medical services may require forensic psychiatric input. The cardiologist in the example cited above might request a psychiatric addendum addressing the extent, nature, and duration of impairment that might be associated with the comorbid anxiety accompanying forced early military retirement because of this cardiac condition. After closed head injuries or in cases in which the service member's condition appears to be impaired by his refusal to follow treatment recommendations, the forensic psychiatrist may be consulted with regard to the medicolegal question of the patient's competence to make treatment decisions. Forensic psychiatric consultation has been requested to determine whether a medically retired service member is competent to manage his finances.

Independent Medical Evaluations and Occupational Health Consultation The military, in recent years, has hired many civilian contractors in administrative and technical roles. Such employees are entitled to compensation under the Federal Employees Compensation Act (FECA) for job-related medical or mental health disability. Under the provisions of FECA, claims of medical disability must be evaluated by an independent medical examination.[19] The military forensic psychiatrist may provide a second opinion as to the nature, extent, and expected duration of psychic injury. He may also provide information regarding the extent to which the injury represents an exacerbation or a preexisting condition or may have resulted from causes other than unreasonable work-related stresses. Such information may assist the government in preventing future claims or provide data that will lead to a more equitable settlement. In addition, the authors have been consulted on many occasions by military occupational health physicians to evaluate potentially dangerous workers. On other occasions, consultation has been sought and provided on interventions designed to prevent workplace violence and promote workplace safety.

Security Clearance Evaluations One aspect of military service or military-related contractual service is the likelihood of handling sensitive equipment, information, or documents. The capacity to exercise appropriate judgment with regard to sensitive material, with implications for national security, is an obvious concern to military and government leaders. Service members and government contractors applying for positions requiring security clearance are subjected to extensive background investigations.[20] If security clearance investigators discover evidence of a psychiatric illness that may render a person's judgment suspect, psychiatric evaluation will become integral to the clearance determination. Forensic psychiatrists frequently conduct these evaluations of judgment, reliability, and stability. They may also act as consultants to security clearance adjudicators in determining whether information from the background investigation necessitates a comprehensive medicopsychiatric evaluation. Finally, forensic psychiatrists may be called upon to offer an opinion as to the thoroughness or the extent to which another psychiatric evaluator's opinions are supported by the report submitted to

the security clearance adjudicating authority. The forensic psychiatric consultant may assist the adjudicators in framing more specific questions to general psychiatrists tasked with conducting security clearance evaluations.

The Military Forensic Psychiatrist as Educator All psychiatrist in the military must have knowledge of the regulations and legal principles that guide their practice. Currently, Senior Residents in the National Capital Region's Tri-Service Psychiatric Residency Program are required to attend on a weekly basis a yearlong course that introduces forensic medical and psychiatric principles such as informed consent, medical competency, practice standards, malpractice, and tort law. Residents in other military psychiatric training programs receive varying degrees of training in these principles. Without such training, military graduates would be ill prepared for their first duty assignments. Frequently, first duty assignments are to relatively remote locations where the recent graduate serves as the sole psychiatrist for a military post. In this capacity, he may be expected to perform security clearance evaluations, write recommendations for administrative separations, or conduct sanity boards. The military forensic psychiatrist is responsible for establishing and updating the forensic psychiatry curriculum in residency training programs and coordinating the involvement of appropriate guest lecturers.

Currently, psychiatric residents are assigned primary responsibility for coordinating and conducting sanity boards if such an evaluation is ordered for one of their inpatients. For most second-year residents, this assignment comes prior to formal education or training in relevant forensic psychiatric principles. Although inpatient attending staff have likely conducted sanity boards during previous duty assignments and can provide assistance, forensic psychiatrists serve as objective consultants, who unlike inpatient attending staff, are not primarily concerned with treatment responsibility and clinical outcome.

The military forensic psychiatrist also serves as educator to allied mental health services, occupational health services, and legal services. Military forensic psychiatrists provide in-service training to these agencies on subjects ranging from prevention and intervention in workplace violence, to the role of the comprehensive medicopsychiatric evaluation in security clearance, to psychiatric expert testimony.

Conclusion

The Government of the United States, from its colonial beginnings to the present day, has provided structure and guidance for legal proceedings and medical practice in the military. The U.S. Constitution and federal statutes established broad guidelines and principles. These have subsequently been interpreted in implementing regulations and through court opinions. The result is a system of justice similar to, but separate from, that of the civilian community. A medical system also has evolved designed specifically to provide care for the military population. This system overlaps with its civilian counterparts in nature, extent, and scope

of provided services, but is governed by regulations unique to the military.

The military forensic psychiatrist, like his civilian counterpart, operates at the interface of medicine and the law. Civilian psychiatrists must have an understanding of both broad principles of forensic psychiatry and issues and standards unique to their jurisdiction of practice. The military forensic psychiatrist is trained in the same broad principles as his civilian peers. In addition, he becomes experienced in the principles and standards of military law and the regulations governing general medical and psychiatric practice in the military.

Such training qualifies the military forensic psychiatrist for a number of roles within the military. The military forensic psychiatrist is best qualified to conduct assessments of competency and mental responsibility as defined in military law. Like his civilian counterpart, he may serve as courtroom consultant to the defense, prosecution, or trier of fact in courts-martial. Participation in security clearance evaluations, disability evaluations, and competency evaluations in noncriminal proceedings are also appropriate and frequent taskings for the military forensic psychiatrist. Experience and training also qualify the military forensic psychiatrist as a consultant to military and civilian law enforcement agencies in providing assistance in behavioral profiling assessments and crime scene analysis. The military forensic psychiatrist must serve as educator and advisor to military psychiatric trainees, to ancillary medical and mental health services, and to military legal authorities. Finally, the military forensic psychiatrist insures the appropriate updating of training manuals and instructs military regulators such that new regulations reflect the guidance afforded by court opinions.

Training in the principles and practice of forensic psychiatry is available to psychiatrists of all military service affiliations through the Military Forensic Psychiatry Program at Walter Reed Army Medical Center, Washington, DC. Active duty Army, Navy, and Air Force psychiatrists have received training through this program and presently perform the roles and duties outlined above.

Persons unfamiliar with the military mistakenly assume that the service culture is totally alienated from the broader civilian world. The military recognizes similar legal authorities, and within parameters dictated by a unique social role, has responded by respecting both civilian interests and military necessities. This creates a dynamic military law, ever sensitive to a balance of interests. Psychiatrists are trained to study, understand, and appreciate cultural diversity. Thoughtful pretrial preparation by civilian expert witnesses mindful of military traditions can only enhance personal credibility. The military legal system also benefits in the pursuit of justice.

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