Volume 208 **Summer 2011**

MILITARY LAW REVIEW

ARTICLES

RECLAIMING THE REHABILITATIVE ETHIC IN MILITARY JUSTICE: THE SUSPENDED PUNITIVE DISCHARGE AS A METHOD TO TREAT MILITARY OFFENDERS WITH PTSD AND TBI AND REDUCE RECIDIVISM

Major Evan R. Seamone

IN PURSUIT OF JUSTICE, A LIFE OF LAW AND PUBLIC SERVICE: UNITED STATES DISTRICT COURT JUDGE AND BRIGADIER GENERAL (RETIRED) WAYNE E. ALLEY (U.S. ARMY, 1952–1954, 1959–1981)

Colonel George R. Smawley

BOOK REVIEWS

Department of Army Pamphlet 27-100-208

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MILITARY LAW REVIEW

Volume 208 Summer 2011

RECLAIMING THE REHABILITATIVE ETHIC IN MILITARY JUSTICE: THE SUSPENDED PUNITIVE DISCHARGE AS A METHOD TO TREAT MILITARY OFFENDERS WITH PTSD AND TBI AND REDUCE RECIDIVISM

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Preface

After ten years of sustained combat operations, a legal system has emerged in response to the special needs of servicemembers who have sustained Posttraumatic Stress Disorder (PTSD) and other unseen injuries in combat. Recognizing that these wounded warriors experience symptoms that often manifest in criminal conduct, this justice system incorporates advanced "problem-solving" strategies in its sentencing practices. It provides offenders with a second chance to escape the disabilities of a conviction by dismissing or expunging their charges upon successful completion of a demanding treatment program. In contrast to the problem-solving approach, an alternative justice system adjudicates cases for combat veterans with the same mental conditions. However, it considers treatment as collateral to the sentencing task. In this second system, the prosecutor diminishes the wounded warrior's injuries and experiences in efforts to downplay the bases for mitigation and extenuation. While one would expect courts-martial to foster the

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I would like to acknowledge the following individuals for their generous assistance in obtaining historical materials for this article. My heartfelt thanks go to Colonel (COL) (Ret.) Daniel Lavering, TJAGLCS Librarian; Brigadier General (Ret.) Tom Cuthbert; Kathy West, Assistant Military Police Historian, U.S. Army Military Police History Office; Deborah Childers, California State University Stanislaus Library Special Collections; Angie Henson, Pentagon Library; and Heather Enderle, Professional Communications Program, TJAGLCS.

For their valuable suggestions and input regarding the ideas expressed in this article, I would like to extend special gratitude to my Thesis Advisor, Professor (Major) Andrew Flor; Major (Ret.) Brian Clubb (USMC), National Association of Drug Court Professionals, Coordinator, Justice for Vets; Hon. Robert T. Russell, Jr., Buffalo Veterans Treatment Court; Hon. Wendy Lindley, Orange County Veterans Treatment Court; Hon. Steven V. Manley, Santa Clara County Veterans Treatment Court; Hon. Brent A. Carr, Tarrant County Veterans Treatment Court; COL (Ret.) Stephen R. Henley; COL (Ret.) Malcolm Squires, Jr., U.S. Army Court of Criminal Appeals, Clerk of Court; Lieutenant Colonel (LTC) (Ret.) Pete Grande, Chief of Staff, Military Correctional Complex; COL (Ret.) Fred Borch, Judge Advocate Gen.'s Corps Regimental Historian; Roger Miller, Ph.D., Air Force Historian; Major Jeremy Larchick; Professor James Smith, Washburn University School of Social Work; Professor (Major) Tyesha L. Smith; Professor (LTC) Jeff Bovarnick; LTC John A. Hughey, Command Judge Advocate, U.S. Disciplinary Barracks; Major Paul A. White, Clinical Psychologist, U.S. Disciplinary Barracks; Mr. John Moye, Senior Partner, Moye White LLP; Hon. Charles Zimmerman, Kansas District Court; Robyn Highfill-McRoy, Behavioral Science and Epidemiology Program, Naval Health Research Center; Major Kelli A. Hooke; Major Frank D. Rosenblatt; Major Mark T. Schnakenberg (USMC); Lieutenant Commander (select) Ben Gullo (USCG); Major Andrew Gillman (USAF); Major Sean Gleason (USMC); Major E. John Gregory; Major Iain Pedden (USMC); Captain Madeline F. Gorini; Mr. Charles J. Strong; and all persons who contributed comments in the attributed interviews, telephone conversations, and e-mails.

problem-solving approach based on the active duty origin of these mental conditions, the initial legal approach resides exclusively in the domain of civilian Veterans Treatment Courts (VTCs).

As it relates to offenders with these unseen injuries, the military justice system is at odds with more than VTCs; it is at odds with itself—in the way it undermines the stated sentencing philosophy of rehabilitation of the offender, the way it erodes the professional ethic by denying core values, and the way it defies the moral obligation to advance the interests of both the veteran and the society he will rejoin. By perpetuating the belief that treatment has no place in military sentencing, the military justice system also undermines Major General (MG) Enoch Crowder's very basis for instituting the suspended court-martial sentence at the time of its origin in the early 1900s. In contrast to problem-solving courts, which target the illness underlying criminal conduct, courts-martial function as problem-*generating* courts when they result in punitive discharges that preclude mentally ill offenders from obtaining Veterans Affairs (VA) treatment. Such practices create a class of individuals whose untreated conditions endanger public safety and the veteran as they grow worse over time.

This article proposes convening authority clemency as a method to implement treatment-based suspended punitive discharges for combat-traumatized offenders. Without re-writing the law, military justice practitioners can make slight modifications to their practices that promote intelligent sentencing consistent with the historical notion of the "second chance." Recognizing that panels, military judges, and convening authorities have consistently attempted to implement treatment-based sentences, this article proposes a comprehensive framework to embody the innate rehabilitative ethic in military justice. Carefully drafted pretrial agreement terms indicate how offenders can enroll in existing VTCs within the convening authority's jurisdiction. A modified Sentence Worksheet provides an additional section alerting panel members to their right to recommend treatment-based suspended sentences. Specially tailored panel instructions expand on this system by addressing treatment considerations. At a time when both The Commander-in-Chief and a Chairman of the Joint Chiefs of Staff have endorsed VTCs, military justice practitioners should consider the ways in which these programs promote individualized sentencing, protect society, and honor the sacrifices of wounded warriors with unseen injuries.

I. Introduction: Divergent Approaches in the Sentencing of Similarly Situated Offenders with PTSD

> *The following hypothetical account mirrors actual events now unfolding across the United States.*[1]

Sergeant Bradley Davis greets his mentor on the stairs of the Merle County Court Building, a relatively simple structure that looks identical to the other tall, nondescript buildings at the intersection of East 23rd and Vineland. This is the second time Davis has met Mr. Paul Phillips, a retired Air Force Lieutenant Colonel, who volunteers to provide support, encouragement, and counseling to veterans who have been charged with criminal offenses.[2] "After you check in with the Veterans Affairs representative, you'll sit with the other veterans who are on the docket. You can clap for them when they are praised by the judge; they'll do it for you—that's the way it works here."[3] In twenty minutes, Sergeant

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[1] While the depicted locations—a county Veterans Treatment Court (VTC) and a military courtroom located thirty miles apart—are purely fictional, they easily reflect El Paso County, Colorado's VTC, located only 7.82 miles from Fort Carson's courtroom, WWW.MAPQUEST.COM (calculating the distance between the El Paso County's Veterans Treatment Court, 270 South Tejon, Colorado Springs, Colo. 80901, and Fort Carson's Courtroom, 1633 Mekong Avenue, Fort Carson, Colo. 80913); El Paso, Texas's VTC, located only 6.03 miles from Fort Bliss's courtroom, WWW.MAPQUEST.COM (calculating the distance between the El Paso County's Court, 500 E. San Antonio, El Paso, Tex. 79901, and Fort Bliss, Tex. 79906); Orange County, California's VTC, located 58.76 miles from Camp Pendleton Marine Base, WWW.MAPQUEST.COM (calculating the distance between the Orange County Court, 700 Civic Center Drive West, Santa Ana, Cal. 92701, and Camp Pendleton Marine Base, Cal. 92055); and Tucson, Arizona's VTC, located only 7.51 miles from Davis-Monthan Air Force Base's courtroom, WWW.MAPQUEST. COM (calculating the distance between the Tucson City Court, 103 E. Alameda Street, Tucson, Ariz. 85701, and Davis-Monthan Air Force Base, Ariz. 85707). These are only a few representative examples of numerous civilian VTCs operating in states with active duty installations from one or more of the Armed Forces. *See generally* Nat'l Ass'n of Drug Court Prof'ls, *Justice for Vets: The National Clearinghouse for Veterans Treatment Courts*, WWW.NADCP.ORG, http://www.ndacp.org/JusticeForVets (last visited Sept. 7, 2011) (listing established VTCs throughout the Nation). For a graphic depiction of VTCs in the United States, see *infra* app. A.

[2] Peer mentorship is an essential component in every VTC. *See, e.g.*, Hon. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 565 (2010) (observing the undeniable value of "shared experience" and noting that some VTCs may "restrict participation to military veterans who have served in or near areas of active combat").

[3] This description summarizes the common experience of participants in most VTCs, who are praised and encouraged in a number of ways. In Judge Wendy Lindley's Orange County chambers, for example, members of the veterans docket rise for applause and encouragement as their names are called. Observers remark, "There's a lot of clapping in

Davis observes the practice with his own eyes. Judge David Shaw is a district judge who presided over a substance abuse treatment court before adopting a docket solely devoted to veterans.[4] Judge Shaw welcomes Sergeant Davis and thirty other veterans to the day's session of the Merle County VTC, an innovative court program, modeled after at least 88 similar programs in 27 states.[5] After Sergeant Davis rises to the call of

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Lindley's veterans court." Megan McCloskey, *Veterans Court Takes a Chance on Violent Offenders*, STARS & STRIPES, Sept. 14, 2010, WWW.STRIPES.COM, http://www.stripes.com/veterans-court-takes-a-chance-on-violent-offenders-1.118182. In Judge Mike Snipes's Dallas, Texas, VTC, he provides praise to Air Force veteran Carlos Melendez, who remained clean on drug tests and has held gainful employment since his entry, "You're probably our No. 1 success story." Sam Merten, *Running on "Bubble Gum and Duct Tape," A New Court Aims to Keep Damaged Vets Out of Jail*, DALLAS OBSERVER (Tex.), Oct. 7, 2010, WWW.DALLASOBSERVER.COM, http://www.dallasobserver.com/2010-10-07/news/running-on-bubble-gum-and-duct-tape-a-new-court-aims-to-keep-damaged-vets-out-of-jail/. Yet, VTC judges also impose sanctions for noncompliance with individual treatment plans, like "jail therapy"—brief incarceration without the right to appeal—which is another hallmark of Veterans Treatment Courts. *Id*. (citing Judge Snipes). As Judge Wendy Lindley explained to a noncompliant veteran in her court,

> [D]on't give me any garbage about how you were in the room and someone else was smoking marijuana, because that doesn't cut it. I really need you to examine yourself as to why you thought it was a better option to lie than to just own up to it and deal with it. You are going to get an overnight, you'll get out tomorrow at 6:00 a.m.

The Situation Room (CNN television broadcast Oct. 28, 2010).

[4] While some state statutes do not require VTC judges to have particular prior experience, many of the presiding judges have already maintained mental health or drug court dockets. *See, e.g.*, Hawkins, *supra* note 2, at 564 (recognizing that many VTCs are either "springing out of or even part of existing drug treatment courts").

[5] R. Norman Moody, *Veterans Court Focuses on a Trend of Treatment: Center Seeks Behavioral Help for Vets Who End Up on Wrong Side of* Law, FloridaToday.com (Jan. 10, 2012 9:02 AM), http://www.floridatoday.com/article/20120111/NEWS01/301110012/Veterans-court-focuses-trend-treatment (observing that "88 [VTCs] have been established nationwide in the past four years"). *See also* Telephone Interview with Major (Ret.) Brian Clubb, Veterans Treatment Court Project Dir. for the Nat'l Ass'n of Drug Court Prof'ls (Sept. 6. 2011) (further estimating that there will be 100 VTCs in operation at the start of 2012 based on current trends). United States Circuit Judge Michael Daly Hawkins, of the 9th Circuit Court of Appeals, observes how VTCs, which are continually growing in number, are "becoming a fixture of many state criminal justice systems." Hawkins, *supra* note 2, at 571. Although there are now over 2400 drug treatment courts in operation nationally, General (Ret.) Barry McCaffrey, who has been influential in supporting VTCs, observes that "Veterans Treatment Courts are growing at three times the rate Drug Courts grew twenty years ago." JUSTICE FOR VETS, SITREP 005-10 (Nov. 11, 2010) [hereinafter Justice SITREP], *available at* NADCP.ORG, http://www.nadcp.org/sites/default/files/nadcp/SITREP%20005-10%20FINAL_2.pdf. Buffalo's program and other states' VTCs have also paved the way for congressional

his name and assumes the customary position of parade rest like the other program participants,[6] Judge Shaw introduces the program. "Here," he explains, "we will work with you to get you the treatment that you need. All we ask is that you give your treatment plan a chance to work. The district attorney, social workers, and your mentor are here with me to help you get through your treatment and gain the skills to use for the rest of your life."[7] Sergeant Davis is relieved and grateful to be a part of the program, especially because he expected an entirely different experience.

Sergeant Davis, who served three combat tours in the last nine years, including a 2008 rotation in Bagram, Afghanistan, is in court for driving while intoxicated, child endangerment, and resisting an officer—offenses stemming from an incident in which Davis grabbed his son and drove from the house in an alcoholic stupor while haunted by memories of a

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legislation to fund the establishment of additional courts across the Nation. Notably, the Services Education & Rehabilitation for Veterans (SERV) Act, S. 3379, 110th Cong. § 11 (2008), reintroduced as S. 902, 111th Cong. § 11 (2009), would provide $25 million in annual grant funding for the development of local veterans treatment programs, limited to participants who are not charged with crimes of violence and who were separated from the service under conditions above dishonorable. *See also* Services, Education, and Rehabilitation for Veterans Act, H.R. 2138, 111th Cong. (2009) (proposing parallel legislation in the House).

[6] Along with the respectful comments "Yes sir," or "Yes ma'am," observers of VTCs instantly recognize the ingrained customs and courtesies of defendants like Sergeant Davis as factors that make them distinguishable from offenders in different programs. *See, e.g.*, Neil Steinberg, *Veterans Court Assists Vets the Rest of Us Forget*, CHI. SUN-TIMES, Nov. 10, 2010, at 20 (relating the observations of Cook County, Ill., VTC Judge John P. Kirby, that program participants' "service to the country implies that—at least at one point—they had more on the ball than the average street criminal"). To many, this practice is a refreshing reminder that veterans bring a different perspective to court treatment programs. Based on military service eligibility criteria, most veterans are far more educated and experienced than the repeat offenders who normally occupy criminal courts. LYNN K. HALL, COUNSELING MILITARY FAMILIES: WHAT MENTAL HEALTH PROFESSIONALS NEED TO KNOW 28 (2008) ("[T]he ranks are filled with the upwardly mobile working class, 96% of whom graduated from high school, compared to only 84% of the rest of Americans."). Many, in fact, have had no prior criminal arrests or convictions before returning from their deployments. *See, e.g.*, Lewis Griswold, *Move for Veterans Courts Increasing: Program Bypasses a Jail Sentence in Favor of Mental Health Treatment*, MODESTO BEE (Cal.), June 27, 2010, at B7 (describing prosecutors' recent observations of "an upsurge in [2010] in veterans being arrested for vandalism, drug use, and domestic violence, yet their backgrounds showed no history of wrongdoing before going to war").

[7] For a real VTC judge's introductory statements, see, e.g., Jack Leonard, *Plan Aims to Help Veterans Avoid Jail*, L.A. TIMES, Sept. 14, 2010, at AA1 (reporting comments of Superior Court Judge Michael A. Tynan, "This is not a get-out-of-jail-free card. Your issues may or may not be your fault, but your recovery is totally your responsibility.").

deadly ambush in which his squad suffered several casualties.[8] After his civilian arrest within the county lines, the public defender recognized that these sorts of charges were common among returning veterans and believed he would be a prime candidate for the VTC.[9] Like some federal

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[8] In a similar series of events, former Marine Marty Gonzalez, a recipient of three purple hearts and two bronze stars with valor for actions in Iraq, faced felony charges for abusing pain pills during marital difficulty and driving his truck into a house while his three-year-old son was a passenger. His case formed the impetus for Houston, Tex., Judge Marc Carter to develop a VTC there. *See* "Uniform Justice," *Need to Know* (PBS television broadcast July 9, 2010), *available at* www.pbs.org/wnet/need-to-know/culture/uniform-justice/2135/. Servicemembers suffering from Posttraumatic Stress Disorder (PTSD) commonly become excitable in response to recurring traumatic memories. Triggering events include being cut-off by a vehicle on the road, perceiving that someone is staring-down the veteran, or even seeing a Middle-Eastern person. THE GROUND TRUTH (Focus Features 2006) (featuring firsthand accounts of veterans with PTSD who explained the situations that caused them to become physically violent). Other triggers commonly include the anniversary dates of traumatic events or news of other servicemembers killed in action. KEITH ARMSTRONG ET AL., COURAGE AFTER FIRE: COPING STRATEGIES FOR TROOPS RETURNING FROM IRAQ AND AFGHANISTAN AND THEIR FAMILIES 17–18 (2006). They often turn to alcohol in an effort to blunt the emotional effects of such reminders or simply to sleep. *See, e.g.*, THE GROUND TRUTH (Focus Features 2006). Criminal conduct often stems from incidents that occur while veterans with PTSD are in these excitable states or subject to bouts of alcoholic rage. In response to this widespread and growing phenomenon, law enforcement officers have adopted specialized programs to divert persons with conditions like PTSD to mental health centers rather than jails. *See infra* discussion accompanying note 70.

[9] Although VTCs have different eligibility criteria, aggravated assault is an offense that commonly leads to enrollment in such programs. *See, e.g.*, McCloskey, *supra* note 3 (describing how the Orange County, Cal., VTC accepted cases "involving a veteran who had been shot in Iraq and was charged with domestic violence for dragging his wife out of the house by her ankles" and in which a former Marine struck a man repeatedly in the face, leaving him with $14,000 in medical bills); Vezner, *supra* note 2 (describing VTC participation by a veteran who was arrested for drunk driving and had "clipped a police officer's arm with one of his truck's side mirrors," all "while driving the wrong way on a Minneapolis street at night"); Merten, *supra* note 3 (describing VTC participation by a "22-year-old charged with stealing a car from a 77-year-old man after putting him in a headlock and demanding the keys . . . "). *See also* Justin Holbrook & Sara Anderson, *Veterans Courts: Early Outcomes and Key Indicators for Success* 26 (Widener Law Sch. Legal Studies Research Paper Series No. 11-25), *available at* http://ssrn.com/abstract=1912655 (observing how "eligible offenses [in 14 surveyed VTCs] included DUI, fleeing from police, terroristic threats, and misdemeanor and felony domestic assaults"). In Orange County and some other VTCs, violent cases are not precluded from diversion because "combat veterans' PTSD issues often manifest in aggressive behavior." McCloskey, *supra* note 3.

Some have gone further to suggest that precluding violent offenders in VTCs is like having "a Veterans Court without veterans." John Baker, *We Need Veterans Courts in Minnesota. Here's Why*, ST. PAUL PIONEER PRESS (Minn.), Aug. 28, 2010 (further observing that "domestic-abuse . . . , bar fights, assault and battery, hit and run cases that result in injury, and DWI cases that result in injury" are largely "the types of cases that

civilian courts have begun to do in recent times,[10] Davis's attorney transferred the case to Judge Shaw's Court with the support of the court's treatment team.[11]

Sergeant Davis's cautious expectations were based on the experiences of fellow soldiers stationed only thirty miles away at Fort Ligget-Jordan, the home of the 128th Division. On this same day in Ligget-Jordan, Staff

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bring veterans into the criminal justice system in the first place"). *See also* Jillian M. Cavanaugh, Note, *Helping Those who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 466 (2011) (observing how violent veteran offenders "are the ones most in need of rehabilitation"); Tiffany Cartwright, *"To Care for Him who Shall Have Borne the Battle": The Recent Development of Veterans Treatment Courts in America*, 22 STAN. L. & POL'Y REV. 295, 309 (2011) ("[T]he common limitation to non-violent crimes might fence out many of the veterans whose crimes are most tied to their combat trauma."). When VTCs do enroll violent offenders, many programs can, and do, require victim input prior to the admittance decision. *See* Holbrook & Anderson, *supra*, at 26 (observing how, "[o]f the ten courts [in a sample of 14 VTC respondents] that heard violent offenses, seven courts (70%) required prior victim consent").

[10] *See infra* Part VIII.B (describing the program established by the U.S. Attorney's Office in the Western District of New York to send offenders to the Buffalo VTC, even if they committed exclusively federal offenses).

[11] All VTCs use team approaches in which the judge and members of various professional disciplines collaborate in the participant's course of treatment. *See, e.g.*, Katherine Mikkelson, *Veterans Courts Offer Hope and Treatment*, PUB. LAW., Winter 2010, at 2, 3 (describing the "unique" team format "consisting of the veteran and his or her family, the defense attorney and prosecutor, court staff, mental and physical health care professionals, VA staff, peer mentors, and, of course, the judge who orchestrates the entire ensemble"). A journalist recently epitomized the synergy of the treatment team environment:

> The real work of Veterans Court does not take place when Circuit Court Judge John P. Kirby enters his courtroom and all rise; rather, the heavy lifting of helping these vets get back on track goes on an hour beforehand, at a pre-court meeting, in a room so crowded with staff—I count 19 people—there isn't room for them to sit around the table. Representatives from the states attorney, public defender and sheriff's offices are here, along with those from the U.S., Illinois and Chicago offices of veterans affairs, plus probation offices, drug counselors, homeless coordinators, legal clinics.

Steinberg, *supra* note 6, at 20. Judge Kirby, like many VTC and therapeutic court judges, explains how the court's job is more one of streamlined coordination: "Every program here was in existence. We just put everybody in the same room and said, 'How can we work with veterans the best that we know how?'" *Id*. For statistics regarding the participation of various "stakeholders" in the supervision and coordination of individual VTC cases, see Holbrook & Anderson, *supra* note 9, at 28–29 (reporting on survey results from fourteen VTCs).

Sergeant Brent Keedens, an active duty noncommissioned officer (NCO) appears for his General Court-Martial facing charges of aggravated assault on a military police officer in the performance of his duties, driving while intoxicated, and willfully damaging government property in excess of $500, offenses that occurred within the limits of Fort Ligget-Jordan's exclusive jurisdiction.[12] Like Sergeant Davis, Sergeant Keedens has undergone a psychiatric evaluation which has diagnosed him with PTSD,[13] though not at a level that would render him incompetent to stand trial.[14] After his plea, Sergeant Keedens's Trial Defense Counsel

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[12] Since the U.S. Supreme Court's 1987 *Solorio* opinion, military commanders have retained the ability to prosecute servicemembers for state or federal offenses of a nonmilitary nature without the assistance of the U.S. Attorney or District Attorney or the involvement of civilian courts. Solorio v. United States, 483 U.S. 435 (1987) (permitting the military courts to exercise jurisdiction over a servicemember based solely on the accused's status as a member of the Armed Forces, rather than the nature of the offense).

[13] Posttraumatic Stress Disorder is currently diagnosed based on seventeen diagnostic criteria in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, which require the person to have experienced an overwhelming event, such as a threat to one's life, and to re-experience that event with multiple distressing side effects for a period of at least one month. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 467–68 (text rev., 4th ed. 2000). Although the list appears like a cookbook, the reality is that "[n]o single psychiatric diagnosis characterizes the service member's response to war," which may explain why the criteria are currently under revision. Colonel Stephen J. Cozza et al., *Topics Specific to the Psychiatric Treatment of Military Personnel*, *in* NAT'L CTR. FOR POST-TRAUMATIC STRESS DISORDER, IRAQ WAR CLINICIAN GUIDE 4, 12 (2d ed. 2004). As lived by servicemembers, PTSD is "a day-to-day experience of living with memories [sufferers] want to forget, staying constantly alert to dangers others don't pay any attention to, enduring sleepless nights, and reacting to things at home as if still in the warzone." COLONEL (RET.) CHARLES W. HOGE, *Introduction* to ONCE A WARRIOR ALWAYS A WARRIOR: NAVIGATING THE TRANSITION FROM COMBAT TO HOME INCLUDING COMBAT STRESS, PTSD, AND MTBI 3 (2010).

[14] *See, e.g.*, Vanessa Baehr-Jones, *A "Catch-22" for Mentally-Ill Military Defendants: Plea-Bargaining Away Mental Health Benefits*, 204 MIL. L. REV. 51, 55 (2010) ("Even where the accused is shown to suffer from PTSD symptoms, a sanity board is unlikely to find that the condition deprived the accused of mental capacity at the time of the charged offenses."). The diagnosis of PTSD likewise rarely equates to a finding of insanity at trial. *See, e.g.*, Major Jeff Bovarnick & Captain Jackie Thompson, *Trying to Remain Sane Trying an Insanity Case:* United States v. Captain Thomas S. Payne, ARMY LAW, June 2002, at 13, 13 n.4 (describing the low frequency of verdicts in which an accused was judged not guilty only by reason of lack of mental responsibility); Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorder on Trial*, 191 MIL. L. REV. 67, 104 (2007) (recognizing the accused's "slim" chances of prevailing on a PTSD defense at courts-martial); Daniel Burgess et al., *Reviving the "Vietnam Defense"?: Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 79 (2010) (observing the difficulty of prevailing on a defense of PTSD involving evidence of a dissociative state based on the difficulty of establishing a "necessary causal link between the disorder and the crime" in civilian courts).

addresses the court, providing details of his PTSD symptoms and the traumatic experiences he suffered as a member of Sergeant Davis's squad. Like Sergeant Davis, Sergeant Keedens has problems sleeping—often waking with night sweats, self-medicates with alcohol in an attempt to "numb" himself to the vivid realities of these haunting memories, and has withdrawn from his family, who recently left him after observing his transformation into an entirely "different person" since his return from Afghanistan.[15]

Rather than applauding Sergeant Keedens's recognition of the need for major life change, as the Assistant District Attorney had done during Sergeant Davis's appearance,[16] the military prosecutor (Trial Counsel) responds in an entirely different manner. In a well rehearsed summation—refined during years of practice in similar PTSD-related cases—the prosecutor argues:

> Your honor, over 15,000 128th Division soldiers deployed to Afghanistan in the last nine years, most more than twice.[17] Many of these soldiers witnessed horrible events; they saw friends die; they lost limbs and faces; they went without sleep or food for days at a time.[18] They have dealt with the same demons as the

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[15] For a survey of these and other unwanted common symptoms of PTSD, see, e.g., Laura Savitsky et al., *Civilian Social Work: Serving the Military and Veteran Populations*, 54 SOCIAL WORK 327, 333 (2009) (exploring the dangers of untreated PTSD symptoms as they relate to "divorce, substance abuse, family violence," and other familial and societal calamities).

[16] *See, e.g.*, McCloskey, *supra* note 3 (describing how "[e]ven the prosecutor joins in to give encouragement" as each participant is greeted with applause at the commencement of the veterans' docket). Prosecutors who participate in VTCs explain that their new role requires "a paradigm shift from trying to get the appropriate sentence which generally is how much jail time, how much prison time to more of a rehabilitation [paradigm]." *The Situation Room* (CNN television broadcast Oct. 28, 2010) (relating comments of Orange County, Cal., Deputy District Attorney Wendy Brough).

[17] Actual statistics for the U.S. Army indicate that "most of the active-duty soldiers in the Army (67 percent) have deployed to OIF or OEF—and most of those soldiers have deployed for a second or third year." TIMOTHY BONDS ET AL., RAND ARROYO CENTER DOCUMENTED BRIEFING: ARMY DEPLOYMENTS TO OIF AND OEF, at x (2010), *available at* http://www.rand.org/pubs/documented_briefings/2010/RAND_DB587.sum.pdf. Significantly, "[o]ver 121,000 have deployed for their first year, 173,000 for their second year, and 79,000 for their third year or longer. Of this last group, over 9,000 are deploying for their fourth year." *Id*.

[18] Colonel Hoge describes common experiences, in which brigade and regimental combat teams in the Marines and Army had been ambushed (89 and 95 percent, respectively), handled or uncovered human remains (50 and 57 percent), knew "someone seriously

> accused, and yet they have resisted alcohol and drugs. The accused is asking you to hold him to a different standard. Send a message to the others who have suffered. Give them a reason to stay the course and resist the temptation. Don't let Sergeant Keedens use PTSD as an excuse to violate the law and put others at risk. This time, he damaged a wall. Next time, who knows? The Government asks for a Dishonorable Discharge and three years confinement, because justice demands as much.[19]

On this same day, two soldiers began a journey through the criminal justice system. One will undergo intensive treatment through the VA, with the potential to have his criminal charges dismissed based on adherence to a mental health treatment plan.[20] The other will enter confinement at a military facility, where he will be able to see a counselor regarding emergency care and handle some aspects of anxiety,[21] but where he has little incentive to undergo mental health treatment,[22] and where military courts have questioned limitations on

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injured or killed" (86 and 87 percent), or saw "dead or seriously injured Americans" (65 and 75 percent). HOGE, *supra* note 13, at 18 tbl.1 (providing statistics from the initial ground invasion of Iraq). Contemporary nonfiction books have begun to explore the ways these experiences have translated to later criminal offenses. Author David Philipps ends the eighth chapter, "Heart of Darkness," in his book *Lethal Warriors*, which describes many of the deployed experiences of later felons, this poignant way: "Five hundred shops reopened in the Dora market and a handful of the neighborhood Christians returned to rebuild their church. But in the grim process of peacemaking a number of soldiers lost their minds." DAVID PHILIPPS, LETHAL WARRIORS: WHEN THE NEW BAND OF BROTHERS CAME HOME 150 (2010). *See also* JIM FREDERICK, BLACKHEARTS: ONE PLATOON'S DESCENT INTO MADNESS IN IRAQ'S TRIANGLE OF DEATH, at viii (2010) (investigating conditions within a platoon, especially psychological tolls, that contributed to "one of the most nefarious war crimes known to be perpetrated by U.S. soldiers in any era").

[19] Although this argument is hypothetical, see *infra* Part IV.C for similar arguments in the actual case of *United States v. Miller*. Trial Transcript, United States v. Miller 70–74 (10th Mountain Div., Fort Drum, Apr. 23, 2010) [hereinafter Trial Transcript] (on file with author).

[20] For an overview of the operation and key components of VTCs and other treatment courts, see *infra* Part II & app. A.

[21] The Army regulation on corrections sets minimum standards for the nature of treatment available at corrections facilities, but explains that "no right is afforded by this regulation to any prisoner regarding participation in any particular counseling or treatment program." U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM ¶ 5-5, at 9 (15 June 2006) [hereinafter AR 190-47].

[22] *Infra* discussion accompanying notes 86–88.

comprehensive mental health treatment at military prisons.[23] The thirty miles that separate these two NCOs might as well be light years apart.

A. Convening Authority Clemency as the Method to Incorporate PTSD Treatment for Active Duty Military Offenders

After ten years of sustained combat operations and repeated combat deployments, the civilian justice system has developed VTCs as a "problem-solving" approach, which targets the mental condition underlying the veteran's criminal conduct through an interdisciplinary treatment team.[24] In January of 2011, President Barack Obama recommended expansion of VTCs because of their tremendous value in addressing the "unique needs" of returning veterans with PTSD and Traumatic Brain Injury (TBI).[25] In February, Admiral Michael Mullen, then-Chairman of the Joint Chiefs of Staff, observed that VTCs "are having a significant impact across the country."[26] He further noted, "I have seen these courts make a real difference, giving our veterans a second chance, and significantly improving their quality of life."[27] The key concern is whether courts-martial can implement similar treatment-based approaches for active duty offenders. Because PTSD and other mental health conditions originate from active duty service,[28] this article argues that many courts-martial are problem-*generating*—rather than problem-solving—courts when they preclude treatment considerations as tangential matters, lack a coherent framework for evaluating the benefit of treatment vice incarceration, and result in punitive discharges that preclude offenders from future VA treatment.[29]

This article proposes that the military can immediately use convening authority clemency to implement a treatment-based approach for

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[23] *See, e.g.*, United States v. Best, 61 M.J. 376, 381 n.6 (C.A.A.F. 2005) ("[T]he military does not have adequate facilities to provide long-term inpatient psychiatric treatment for its prisoners . . . .").
[24] *Infra* Part II.
[25] PRESIDENT BARACK H. OBAMA, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA'S COMMITMENT ¶ 1.6.1, at 12 (Jan. 2011).
[26] Letter from Admiral Michael G. Mullen, Chairman of the U.S. Joint Chiefs of Staff, to Hon. Eric K. Shinseki, Sec'y of the Dep't of Veterans Affairs 1 (Feb. 15, 2011) [hereinafter Admiral Mullen Letter].
[27] *Id*.
[28] *See supra* notes 13 and 18 (describing diagnostic criteria for PTSD and common experiences of active duty personnel that can lead to a diagnosis).
[29] *Infra* Part I.C.

offenders with PTSD, TBI, or other service-related mental conditions. Specifically, a commander can condition the remission of a suspended sentence of discharge and confinement on successful completion of a functioning civilian VTC program or a military program developed along similar lines. Because treatment for service-connected mental health disorders can often continue throughout a veteran's life,[30] the main objective is to enable future health care from the VA. While it would be valuable for the military to retain an offender with experience and training, mental illness poses special considerations. Chiefly, the return to combat could compound existing mental injuries or create new ones, essentially reversing the beneficial effects of a course of completed treatment.[31]

Military justice practice provides many avenues to convening authority clemency. From the inception of criminal charges through the review of a court-martial sentence, the commanding officer (court-martial convening authority) exercises decisional authority in a system of "command control."[32] Under this system, military judges and panels may

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[30] Psychiatrist and retired COL Charles Hoge, who has studied PTSD and combat-related trauma throughout his military career, explains that "there's no clear definition of what the normal 'transition/readjustment' period is" for a veteran suffering from PTSD, and further that it may take up to decades after the return from combat and the trauma for readjustment to occur. HOGE, *supra* note 13, at xv–xvi.

[31] Judge Wendy Lindley, who has presided over Orange County, California's VTC since 2008, is concerned with a "philosophical dilemma" for active duty servicemembers like those now in her court:

> If it is true, as some studies have shown, that some individuals are more susceptible to PTSD than others then why would my team and I spend 18 months (the length of our program) restoring the individual to the person he or she was before they served, only to have them re-deployed once again to face the trauma that statistically might result in PTSD all over again. Would it not be better for them to separate from the military and pursue a civilian career, as difficult as that may be?

E-mail from Hon. Wendy Lindley, Veterans Treatment Court, Orange Cnty., Cal., to Captain Evan R. Seamone, Student, 59th Graduate Course (Sept. 20, 2010, 17:50 EST) (on file with author).

[32] This term connotes the commander's "unique" direction over the military justice process from the time of initial "investigation into alleged misconduct," through all essential stages until the "action on the finding and sentence of courts-martial," such involvement offering necessary "flexibility" to meet military objectives. Lieutenant Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief?*, 54 NAVAL L. REV. 169, 172–73 (2007).

only recommend suspended sentences or other forms of clemency.[33] Accordingly, a military treatment court program could be implemented through recommendations of panel members or military judges, in pre- or post-trial agreements, through the support of staff judge advocates (SJAs) and chiefs of military justice—all ultimately vesting in the decision of the convening authority. While some could criticize the convening authority's broad and unfettered powers in the area of clemency, these very abilities make treatment programs possible prior to appellate review, *before* the servicemember is indelibly marked with a conviction or punitive discharge.[34]

Appendix G offers a template containing treatment-based pretrial agreement terms. Appendix D offers a modified Sentence Worksheet which, through only a slight modification, can transform the very nature of panel sentencing by alerting the panel members that they have the right to recommend different forms of clemency contemporaneously with the adjudged sentence. Appendixes E and F provide accompanying instructions to empower the members with insight on evaluating mental conditions for the purpose of recommending treatment-based clemency. Together, the elements of this normative framework, which complies with existing law, will enable the military to achieve as much as or more than the innovative VTCs discussed in the introduction.

Realistically, a method to improve sentencing of mentally ill offenders will remain useless if there is no justification or desire to implement it in practice. The challenge is more difficult because the suspended discharge, though permitted by the *Manual for Courts-*

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[33] For specific examples of court-martial clemency recommendations involving suspensions, see *infra* Part IV.A. Based on command control over the court-martial process, "[d]espite the agony that a panel or military judge may endure in determining an appropriate sentence for an accused, a court-martial's sentence is simply a 'recommendation' to the convening authority." Major Tyesha E. Lowery, *One "Get out of Jail Free" Card: Should Probation Be an Authorized Courts-Martial Punishment?*, 198 MIL. L. REV. 165, 190 (2008).

[34] "Repeatedly," the military's highest court has "noted that the accused's best chance of relief rests with the convening authority's power to grant clemency." Marinello, *supra* note 32, at 169. This is likely because the court-martial convening authority possesses "unfettered discretion" beyond that of even a military court of review, and can eradicate a conviction or sentence for any reason, including no reason. *See, e.g.*, United States v. Catalani, 46 M.J. 325, 329 (C.A.A.F. 1997) ("The convening authority has virtually unfettered power to modify a sentence in an accused's favor, including disapproval of a punitive discharge, on the basis of clemency or any other reason."); UCMJ art. 60(c)(2) (2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(1) (2008) [hereinafter MCM].

Martial, is seen by many as no more than a fossil in petrified wood, preserved only as an artifact after generations of nonuse.[35] History reveals the misleading nature of this limited view. Notably, the Armed Forces developed suspended sentences and discharge remission programs for reasons that have not changed since the early 1900s. Far from a thing of the past, suspended punitive discharges represent a form of compassion and clemency that is engrained in the very DNA of the military justice system—most evident in those many cases, both reported and unreported, where panel members have attempted to effect such sentences without having received any instructions on their abilities to do so. Exploring the contours of this innate military justice ethic is as vital to commanders and military justice practitioners as senior leaders' efforts to identify and "own" the Army's ethic; the two are simply indivisible.[36]

To explore the gulf that exists between court-martial and treatment court sentencing, Part II explores key attributes of specialized courts and reports on the effectiveness of these court programs. Part II also distinguishes VTCs and mental health treatment courts (MHCs) from other specialized courts. Despite various differences between such programs, often dictated by the individual personalities of judges and treatment team members, this Part identifies the ten "essential elements" and "key components" to which all problem-solving courts basically adhere.

While recent cases provide significant insights into the optimal structure and format of a treatment-based approach, the Armed Forces' historical experiences with formal restoration-to-duty programs offer many lessons that are valuable today. Part III charts restoration-to-duty

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[35] On first glance, some statistics may seem to support this position. *See, e.g.*, Marinello, *supra* note 32, at 169–70, 195 (describing how the exercise of convening authority clemency is rare and calculating a rate of only "4 percent" for Navy and Marine Corps cases between 1999 and 2004); Major John A. Hamner, *The Rise and Fall of Post-Trial—Is It Time for the Legislature to Give Us All Some Clemency?*, ARMY LAW., Dec. 2007, at 1, 16 (observing how, for all Army cases in which the accused contested charges between 2001 and 2006, "clemency was given at a rate of 1.7%"). Yet, these statistics do not tell the complete story. *See infra* Part III.A (discussing the distorting influence of the "history effect" on interpretations of past military clemency programs); *infra* discussion accompanying note 485 (describing how recent statistics do not capture successfully remitted punitive discharges).

[36] *See* Major Chris Case et al., *Owning Our Army Ethic*, MIL. REV.: THE ARMY ETHIC 2010, at 3, 10 (describing how Army's then-Chief of Staff, General George Casey, Jr., "charged the Army to . . . . better articulate a framework for the Army Ethic and a strategy of how we inculcate and regulate it in our Army professionals").

programs from the early 1800s, exploring the underlying philosophies for investing time and energy into the rehabilitation of punitively discharged servicemembers, including those with service-connected mental health disorders. This Part also identifies the legal lessons learned from appellate review of these military programs over generations, all of which provide crucial touchstones for the implementation of any modern discharge remission program, regardless of its format. These forgotten lessons provide guidance on the nature of testimony an accused may offer at sentencing, the content of panel instructions regarding how members might recommend enrollment in such a program, and the manner in which a convening authority should view an offender's participation in such programs. Part IV then considers how judges and panel members have implemented the same rehabilitative ethic in their own sentencing practices.

Part V applies the historical lessons to the contemporary military plea-bargaining and sentencing framework. While, in some cases, commanders may want to implement pretrial diversion programs contemplating treatment, this article recommends post-conviction discharge suspensions as the preferable therapeutic model. At this stage, military offenders have the best incentive to comply with their treatment plans and better measures to ensure due process if the servicemember is later terminated from a treatment program for noncompliance. Drawing on recent military decisions, this Part first explores the issue of treatment-based clemency recommendations by panel members in contested cases. After proposing modifications of the standard Sentence Worksheet and accompanying instructions concerning permissible clemency considerations, Part VI addresses plea terms relating to treatment program participation. This Part concludes with a model template containing legally permissible pretrial (and post-trial) agreement terms for participation in a state VTC.

With these new components of an enlightened sentencing process in military justice, Part VII discusses functional considerations for its implementation at the defense counsel, SJA, military judge, and convening authority levels. If the convening authority decides to grant clemency in the form of a suspended sentence, the major question is whether to use the resources of an existing civilian treatment court or to incorporate aspects of the problem-solving court model through purely military settings. Although a military, installation-based program would not operate exactly like a civilian treatment court with its designated treatment team and regular meetings before a judge empowered to grant

probation, these alternative methods could successfully incorporate the essential and effective attributes of problem-solving courts.

Part VIII concludes by recognizing the authority that permits state VTCs to respond to conduct that occurred within the exclusive federal jurisdiction of the military. Here, treatment court participation does not necessarily amount to a transfer of jurisdiction to the state. On a view adopted by the U.S. Department of Justice, treatment court participation can rightfully be seen as one of many conditions in an agreement with the convening authority, reducing participation to a matter of contract rather than constitutional interpretation. Alternatively, even on the view that the state exercises its jurisdiction through a VTC, such participation is still constitutionally permissible under the principle of "noninterference" first articulated by the Supreme Court in *Howard v. Commissioners of the Sinking Fund of the City of Louisville*, which permits state involvement in such matters as long as there is no conflict between the objectives of the two entities.[37]

The tools in the appendices provide a treatment-based alternative to incarceration and discharge that permits SJAs, convening authorities, and military judges to serve the interests of both the servicemember and society at large. By accessing the servicemember at his or her greatest time of need and treating the underlying condition that led to the charged offense(s), the military can meaningfully reduce recidivism and restore veterans to a status where they can contribute to society, even if they are unable to continue their military service. As a preliminary matter, however, the sections immediately below describe the risk that accompanies abandonment of the suspended punitive discharge as a clemency tool.

B. Military Justice Myopia: The Reason for Concern

While VTCs operate in a galaxy of programs that divert mentally ill offenders into clinical treatment programs rather than confinement, military justice operates within a far smaller constellation dominated by the concept of "good order and discipline."[38] At first blush, the two

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[37] 344 U.S. 624, 627 (1953).

[38] In a recent edition of *The Reporter*, an Air Force publication for military legal practitioners, the Air Force Judge Advocate General described the crucial role of "***discipline***, often referred to as 'military discipline' or, more expansively as 'good order

systems might appear entirely incompatible. Most military judges face logistical challenges revisiting cases because they often commute to different installations, lacking a single fixed place of duty as do sitting civilian judges.[39] Furthermore, unlike civilian judges, military judges and court-martial panels are prohibited from adjudging suspended sentences.[40] Yet, civilian VTCs exist to address the identical issues underlying many active duty offenders' trials by court-martial.[41] The divergence in sentencing methodology poses a number of concerns, most of which are completely hidden to military justice practitioners.

The military justice system, which has long been built on the notion of individualized sentencing,[42] encounters a problem in cases that concern service-connected mental health disorders. Although standard

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and discipline'": "The best people, training and equipment will fail without discipline to mold these elements into an effective fighting force. Without discipline, a fighting force is little more than a dangerous mob." Lieutenant General Richard C. Harding, *A Revival in Military Justice*, REP., Summer 2010, at 4, 5 (emphasis in original). This concept has not changed since the inception of the U.S. Armed Forces, mainly because military justice must be mobile enough for administration wherever and whenever servicemembers are needed to fight. *See, e.g.*, Marinello, *supra* note 32, at 172–74 (describing the historical necessity of discipline in military operations).

[39] *See, e.g.*, Major Steve D. Berlin, *Clearing the High Hurdle of Judicial Recusal: Reforming RCM 902(a)*, 204 MIL. L. REV. 223, 254–55 (2010) (describing logistical difficulties unique to the military judiciary); Captain Charles A. Zimmerman, Pretrial Diversion from the Criminal Process: A Proposed Model Regulation 32–33 (Apr. 1975) (unpublished thesis, The Judge Advocate Gen.'s Sch., U.S. Army, Charlottesville, Va.) (addressing identical considerations that would limit judicial supervision of pretrial diversion plans).

[40] *See, e.g.*, Lowery, *supra* note 33, at 166–67.

[41] Whether in the VTCs' mission statements or the text of their enabling legislation, it is quite clear that these state programs exist to address issues related exclusively to the offender's active duty military service. *See, e.g.*, CAL. PEN. CODE § 1170.9 (2011) (directing treatment programs as diversionary alternatives offenses committed "as a result of post-traumatic stress disorder, substance abuse or psychological problems stemming from service in a combat theatre in the United States military"). *See also* Sean Clark et al., *Development of Veterans Treatment Courts: Local and Legislative Initiatives*, 7 DRUG CT. REV. 171, 189–92 tbl.2 (2010) (describing similar statutes in Virginia, Minnesota, Nevada, Texas, Connecticut, and Colorado, all conditioning state programs on active duty federal service or injuries).

[42] *See, e.g.*, United States v. Mamaluy, 27 C.M.R. 176, 180 (C.M.A. 1959) ("[A]ccused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment."); United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982) ("Generally sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'") (internal citations omitted).

instructions tell panel members to consider mental illness,[43] they do not indicate precisely how to weigh and balance these concerns.[44] Based on the adversarial nature of court-martial sentencing, largely considered to be a "trial within a trial," the process leaves little opportunity for agreement on the nature of a mental illness or its connection to the charged offense(s).[45] Evident in Sergeant Keedens's case, military

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[43] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK instr. 2-5-23, at 71 (1 Jan. 2010) [hereinafter DA PAM. 27-9] (noting, among other factors to be considered at sentencing, "[t]he accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder)").

[44] Air Force Colonel (Col) James A. Young III, who spent time as a Staff Judge Advocate [SJA] and a military trial judge, observes:

> The military judge instructs the members on, among other things, the goals of sentencing, the maximum sentence they may adjudge, and the requirement to consider all factors in aggravation, extenuation, and mitigation. But no one tells the members how these factors are to be evaluated or what to apply them to.

Colonel James A. Young III, *Revising The Court Member Selection Process*, 163 MIL. L. REV. 91, 111 (2000). Based on his own experiences, "court members readily admit that they are uncomfortable with the sentencing function":

> While serving as the staff judge advocate at Laughlin Air Force Base, Texas . . . several officers who sat on courts-martial complained that military judges did not provide them realistic guidance on how to determine an appropriate sentence. While sitting as a trial judge, on at least two occasions, I was approached, after trial, by court members who voiced similar complaints. The president of one court-martial, in which the possible sentence was well over 50 years, asked, on the record, if I could provide the court with a ball-park figure of what an appropriate period of confinement would be for the offenses of which the accused was convicted, to which the court members could then apply the aggravating and mitigating factors to reach an appropriate sentence.

Id. at 111 n.112. *See also* Major Russell W.G. Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, ARMY LAW., July 1988, at 26, 27–33 (describing various reasons why panel sentencing presents the "risk of a 'hipshot' sentence by an uninformed court"). These general observations of sentencing do not even specifically touch upon the unique problem of mental illnesses like PTSD, which can stupefy even trained clinicians. For a representative example, see, e.g., ALLAN YOUNG, THE HARMONY OF ILLUSIONS: INVENTING POST-TRAUMATIC STRESS DISORDER 145–75 (1995) (revealing divergence of clinician diagnoses of PTSD in cases based on slight variations in the facts of hypothetical scenarios that involve criminal behavior).

[45] In conflict with federal sentencing procedures and recommendations of the American Bar Association, military sentencing has consistently remained an adversarial process. *See* Captain Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the*

prosecutors who refute PTSD as the cause of an offense have an incentive to belittle a soldier for raising such conditions in extenuation or mitigation.[46]

Additionally, the military justice system—like its concept of rehabilitation in general—largely focuses on the past, rather than the future. During court-martial sentencing, the defense may ask witnesses whether, based on the conduct of the accused, they would want to serve with him again; the prosecution might call a senior leader to evaluate rehabilitative potential based on the accused's past performance in the unit.[47] To avoid the appearance of eliciting prohibited euphemisms for punitive discharge and related appellate issues, military judges have suggested a scripted colloquy that elicits little more than a response that the accused either has or does not have rehabilitative potential in society, as to keep all the members "on the same sheet of music."[48] These formulaic scripts provide little room for testimony regarding the suitability of the accused for specific treatment programs—how he might benefit from a specific type of therapy, medication, or lifestyle

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Military Justice System, 114 MIL. L. REV. 87, 135 n.253 (1986) ("The concept that the sentencing hearing should take on the characteristics of a mini-trial, to include full confrontation and cross-examination rights is rejected in the introduction to the ABA Sentencing Standards. The federal procedure certainly cannot be characterized as a separate trial on the issue of punishment, contrary to the military practice.").

[46] For a telling example of this incentive, see the trial counsel's arguments in *United States v. Miller*, reproduced in Part IV.C. The same influence exists in the civilian courts. In a 2011 federal case in Spokane, Wash., the prosecutor claimed that the defendant was faking PTSD and, alternatively, "if he did have PTSD it was not a result of combat." William B. Brown, *From War Zones to Jail: Veteran Reintegration Problems*, 8 JUST. POL'Y J. 1, 30 n.27 (2011). After VA psychologists confirmed the veteran's diagnosis originated from combat and the defense provided documentation to confirm the award of the Combat Infantryman's Badge, the prosecutor then "proceeded to raise the concern that the award was perhaps fraudulently issued." *Id*.

[47] *See, e.g.*, United States v. Eslinger, 69 M.J. 522, 531–34 & 534 n.12 (A. Ct. Crim. App. 2010); Edward J. O'Brien, *Rehabilitative Potential Evidence: Theory and Practice*, ARMY LAW., Aug. 2011, at 5, 5–8 (discussing "basic" considerations for the prosecution and the defense). In laying the necessary foundation for opinions of rehabilitative potential counsel need only "establish that the witness knows the accused more thoroughly than as just a face in formation." Colonel Mike Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier,"* ARMY LAW., Mar. 2010, at 91, 92–93.

[48] Hargis, *supra* note 47, at 93, 93 n.18. For example, Judge Hargis recommends, "Do you recall reading the definition of rehabilitative potential in the *Manual for Courts-Martial (MCM)*? Applying that definition to all you know about the accused, what is your opinion of the accused's rehabilitative potential?" *Id*.

modifications.[49] These scripts make it easy to assume that corrections facilities will provide all necessary and "appropriate" care without the slightest attention to individual needs, even during a sentencing proceeding that is supposed to be tailored to the individual.[50]

Mental health conditions require far more than script-based sentencing for two reasons. First, even though an accused who has been cleared by a sanity board may appreciate the wrongfulness of his acts, this does not alleviate the concern that his mental condition contributed in some palpable way to the offense or that the offense would not have occurred in the absence of the service-connected psychological influence.[51] Second, service-connected mental illness should make

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[49] Official publications and treatises on military law have adopted a limited view of sentencing evidence on rehabilitative potential, confining discussions to prosecution evidence and omitting discussion of clinical treatment. *See, e.g.*, U.S. DEP'T OF ARMY, JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, at C-7-8 to C-7-10 (2008); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 16-5 (7th ed. 2008); Guy B. Roberts & Brian D. Robertson, *Defense of Servicemembers*, *in* 3 CRIMINAL DEFENSE TECHNIQUES § 61.17 (Robert M. Cipes et al. eds., 2010 rev. ed.). In fact, many defense counsel would rather not call a mental health professional at sentencing to avoid their exposure to cross-examination on matters discussed with the accused during interviews. Baehr-Jones, *supra* note 14, at 58 (discussing factors which "discourage defense counsel from calling a psychiatrist to testify to the accused's mental state").

[50] In *United States v. Duncan*, for example, over the defense objection, the military judge instructed the members as follows in response to their request for information about treatment programs available to the accused if confined:

> Now, I'm turning to your second question, which is: Will rehabilitation/therapy be required if PFC Duncan is incarcerated? Members of the court, you are advised that there are appropriate alcohol and sex offense rehabilitation programs available to the accused should he be confined as a result of the sentence in this case. The accused is not required to participate in any program of rehabilitation and treatment, but there are strong and usually effective incentives for him to do so while confined.

53 M.J. 494, 499 (C.A.A.F. 2000) (citing the trial record). Despite the fact that this response failed to provide a single criterion for appropriateness of programs, the Court of Appeals for the Armed Forces upheld the instruction on the basis that the military judge permissibly drew upon "a body of information that is reasonably available and which rationally relates to . . . sentencing considerations." *Id.* at 500.

[51] At its core, the nationwide VTC movement has emerged "in response to the realization that veterans['] . . . military experiences may be contributing factors for why they are in court." Mark Brunswick, *Veterans Get Hearing in Court of Their Own*, STAR TRIB. (Minneapolis, Minn.), Sept. 28, 2010, at 1A. Even if the connection is not direct, veterans' collective experience has revealed that "PTSD symptoms can indirectly lead to

commanders, military judges, and panels more concerned about the future than the past because it strongly suggests that offenders will continue to find themselves in the same circumstances that led to the offense if they fail to obtain necessary cognitive tools.[52] When there is an indication that the accused has experienced problems maintaining self-control, the focus on punishment of the crime in the court-martial system too often bypasses the issue of *how* the accused or society can prevent the same influences from leading to future crimes.

Posttraumatic Stress Disorder, a "signature disorder"[53] of Iraq and Afghanistan service, affects between ten[54] and thirty-five percent of veterans,[55] making these servicemembers more likely to commit criminal offenses.[56] Studies reveal that this diagnosis is

> related to perpetrating more types of violence (e.g., physical fights, property damage, using weapons, and/or threats) . . . as well as higher incidence of owning more handguns and "combat" type knives, aiming guns at family members, considering suicide with firearms,

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[various forms] of criminal behavior." Bradley Schaffer, *A Problem of Magnitude: Pennsylvania Veterans and the Criminal Justice System*, PA. LAW., Jan.–Feb. 2011, at 16, 17.

[52] *See, e.g.*, David Loveland & Michael Boyle, *Inclusive Case Management as a Jail Diversion Program for People with a Serious Mental Illness: A Review of the Literature*, 51 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 130, 132 (2007) ("[I]nvolvement in the criminal justice system is a strong predictor of future arrests and incarceration for people with a psychiatric disability.").

[53] Hillary S. Burke et al., *A New Disability for Rehabilitation Counselors: Iraq War Veterans with Traumatic Brain Injury and Post-Traumatic Stress Disorder*, 75 J. REHABILITATION 1, 1 (2009) ("[Traumatic Brain Injury] and PTSD are commonly referred to as the 'signature injuries' of military personnel serving in the Iraq war.").

[54] *See, e.g.*, Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, FED. LAW., Sept. 2010, at 42, 46 (observing ranges of studies indicating PTSD rates from 10 to 29 percent, and concluding that the rate "hover[s] around 20 percent").

[55] Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 89 (2010) (explaining why estimates for the current conflicts are significantly higher than data from prior conflicts).

[56] While statistics on the occurrence of PTSD are debatable, the connection between PTSD symptoms and criminal behavior is far clearer. *See, e.g.*, Clark et al., *supra* note 41, at 174 ("[A] significant proportion of [servicemembers] returning from current wars either as a result of mental health problems or as a result of their military training are at a high risk for contact with the criminal justice system.").

> loading guns with the purpose of suicide in mind, and patrolling their property with loaded weapons.[57]

Recently, a cohort study of 13,944 non-war-deployed and 77,881 war-deployed Marines who served from 2001 to 2007 revealed that "[c]ombat deployed Marines with a PTSD diagnosis were 11 times more likely to engage in the most serious forms of misconduct than were combat deployed Marines without a psychiatric diagnosis."[58] Reflecting awareness of these trends, in a February 15, 2011 letter to the Secretary of Veterans Affairs, Admiral Mullen recognized that "[m]any of our returning veterans and Service members experience life-changing events, some of which may cause them to react in adverse ways and get into trouble with the law."[59]

The connection between combat service and future criminality is the same as it has been in most major wars. In its 2009 *Porter v. McCollum* opinion, the unanimous Supreme Court bridged across time, citing early studies of this crime connection in support of the Nation's "long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines."[60] Even while lacking

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[57] Eric B. Elbogen et al., *Improving Risk Assessment of Violence Among Military Veterans: An Evidence-Based Approach for Clinical Decision-Making*, 30 CLINICAL PSYCHOL. REV. 595, 599 (2010). Based on this research, psychologists have even created matrices to predict the likelihood that combat veterans with PTSD might resort to a violent act, especially when their condition is untreated. *Id*. at 602 tbl.2 ("Prototype of Checklist for Assessing Violence Risk Among Veterans").

[58] Robyn M. Highfill-McRoy et al., *Psychiatric Diagnoses and Punishments for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, 10 BMC PSYCHIATRY 1, 6 (2010), http://www.biomedcentral.com/1471-244x/10/88. *See also* Stephanie Booth et al., *Psychosocial Predictors of Military Misconduct*, 198 J. NERVOUS & MENTAL DISEASE 91, 97 (2010) (describing the connection between combat PTSD and criminal behaviors in a similar study).

[59] Admiral Mullen Letter, *supra* note 26, at 1.

[60] 130 S. Ct. 447, 455 n.8 (2009). Public concern for Service-connected criminal offenses dates back centuries. Writing in the sixteenth century, Sir Thomas More observed the natural consequences of warfare on criminal behavior of veterans in his book *Utopia*:

> [W]hen they had no war, peace nothing better than war, by reason that their people in war had so inured themselves to corrupt and wicked manners, that then had taken a delight and pleasure in robbing and stealing; that through manslaughter they had gathered boldness to mischief; that their laws were had in contempt, and nothing set by or regarded.

refined diagnostic criteria for PTSD in the 1940s, corrections professionals observed the "crime wave"[61] perpetrated by returning "problem veterans," who suffered trauma during the course of a war that rapidly degenerated their mental abilities.[62] Similar concerns sounded during Vietnam, most clearly in the public's fears that it would be terrorized by returning "troubled" veterans who had become "walking time bomb[s]" in civilian society.[63] Little has changed for veterans or society at large.

Today, however, faced with recurring broadcasts of severe veteran meltdowns[64] and exploding rates of veteran suicide,[65] government

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SIR THOMAS MORE, UTOPIA (2d rev. ed., Ralph Robinson trans., 1556), *reprinted in* UTOPIA; NEW ATLANTIS; THE ISLE OF PINES 1, 36 (Susan Bruce ed., 1999). Later, Voltaire cited an Italian proverb in concluding that "[w]ar is but too great a corrupter of morals": "War makes thieves," it began, "and peace finds them gibbets." 6 THE COLLECTED WORKS OF VOLTAIRE: A CONTEMPORARY VERSION 216 (William F. Flemington trans., 1901). For additional examination of continued historical recognition through the centuries, see, e.g., Justin G. Holbrook, *Veterans' Courts and Criminal Responsibility: A Problem-Solving History & Approach to the Liminality of Combat Trauma*, *in* TREATING YOUNG VETERANS: PROMOTING RESILIENCE THROUGH PRACTICE AND ADVOCACY 259, 268–69 (Diann E. Cameron-Kelly et al. eds., 2011); Holbrook & Anderson, *supra* note 9, at 7–9 (reviewing additional historical sources).

[61] *See, e.g.*, Symposium, *Must There Be a Postwar Crime Wave?*, PRISON WORLD, Nov.–Dec. 1944, at 13–14 (exploring perceptions of increased crimes committed by veterans during the Second World War).

[62] Doctor Harold S. Hulbert, a psychiatrist, developed a rough calculus to approximate the tolls of combat on young veterans, in which a "day of battle ages a man several months," a "campaign ages a man ten or more years," and a "retreat ages a man half way to seventy years." Harold S. Hulbert, *The War-Modified Combat Veteran and the Law*, *in* SOCIAL CORRECTIVES FOR DELINQUENCY: 1945 NATIONAL PROBATION ASSOCIATION YEARBOOK 30, 34–35 (Marjorie Bell ed., 1946).

[63] BARRY LEVIN & DAVID O. FERRIER, DEFENDING THE VIETNAM COMBAT VETERAN: RECOGNITION AND REPRESENTATION OF THE MILITARY HISTORY AND BACKGROUND OF THE COMBAT VETERAN LEGAL CLIENT 40–41 (Susan Caney-Peterson ed., 1989) (exploring various "commonly held public concepts" regarding returned Vietnam veterans).

[64] A prominent example is the *New York Times* website "War Torn," hailed as an "interactive" "series of articles and multimedia about veterans of the wars in Iraq and Afghanistan who have committed killings, or been charged with them after coming home." Deborah Sontag & Lizette Alvarez, *War Torn*, WWW.NYTIMES.COM, http://topics.nytimes.com/topics/news/us/series/war_torn/index.html (last visited Nov. 7, 2010). Lately, Fort Carson, Colo., has been a location of interest, since "the arrest rate for troops in the city tripled, compared to peacetime levels." PHILIPPS, *supra* note 18, at 6. Ultimately, "[o]n any given day approximately 9.4 percent, or 223,000, of the inmates in the country's prisons and jails are veterans." U.S. DEP'T OF HEALTH & HUM. SERVS., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NAT'L GAINS CTR., RESPONDING TO THE NEEDS OF JUSTICE-INVOLVED COMBAT VETERANS WITH SERVICE-RELATED TRAUMA AND MENTAL HEALTH CONDITIONS 6 (2008), *available at*

agencies responsible for public protection have recognized heightened risks to safety. The Department of Homeland Security, for example, recently cited the national security threat posed by veterans with untreated mental illness, noting that homegrown terrorist groups are targeting these emotionally vulnerable veterans "in order to exploit their skills and knowledge derived from military training and combat."[66] While concerning, the more acute problem rests in the fact that it may only take a random reminder of combat to unleash the bottled fury that accounted for the veteran's very survival while deployed in harm's way. Disaster psychologist George Everly, Jr., has also envisioned the consequences of PTSD in terms of homeland security, analogizing its symptoms as a "psychological pathogen" that, without proper treatment, "might cripple, or even lead to a loss of life through suicide, substance abuse, and domestic violence."[67]

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http://www.gainscenter.samhsa.gov/pdfs/veterans/CVTJS_Report.pdf (citing studies). In a ninety-day period, between September and November 2008, for example, law enforcement officers in Travis County, Tex., arrested and booked 458 veterans. TRAVIS CNTY. ADULT PROB. DEP'T ET AL., REPORT OF VETERANS ARRESTED AND BOOKED INTO THE TRAVIS COUNTY JAIL 4 (2009). Reporters have likewise taken interest in the community surrounding Joint Base Lewis-McChord in Washington. *See* Kim Murpy, *A 'Base on the Brink,' As Is the Community: Lewis-McChord's Washington State Neighbors are Feeling the Psychic Toll of War*, L.A. TIMES, Dec. 26, 2011, at 1, 1 (suggesting "a local crime wave [that] became apparent as early as 2004" and citing incidents including combat veterans' violent offenses against their children, such as "waterboarding" and other forms of "torture" in response to trivial matters).

[65] According to the Department of Veterans Affairs' own estimates, eighteen veterans under the VA's care complete suicide each day while another 1000 attempt suicide each month. Bob Egelko, *Federal Court Hears Vets' Appeal on Mental Health*, S.F. CHRON., Aug. 13, 2009, at A7. Active duty suicide rates have also steadily increased in recent years among the Army and the Marine Corps. *See, e.g.*, Captain Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 150–51 (2009) (discussing various statistical trends).

[66] U.S. DEP'T OF HOMELAND SEC., OFFICE OF INTELLIGENCE AND ANALYSIS, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 7 (Apr. 7, 2009) (addressing the problem of "disgruntled military veterans" who are "suffering from the psychological effects of war").

[67] George S. Everly, Jr. & Cherie Castellano, *Fostering Resilience in the Military: The Search for Psychological Body Armor*, J. OF COUNTERTERRORISM & HOMELAND SECURITY INT'L, Winter 2009, at 12, 13.

First-responders to emergencies are not waiting on definitive statistics on the nature of these links to tell them what they already know: Awareness of untreated veteran mental health conditions and de-escalation of their symptoms can save not only the veteran in crisis, but the lives of police officers and innocent bystanders as well. For these reasons, large police departments are currently dispatching combat veteran volunteers on emergency calls to provide immediate consolation through camaraderie from someone who has walked in their shoes.[68] The state of Georgia has gone even further, giving veterans the option of indicating diagnosed PTSD on their drivers' licenses to avoid potential confrontations with officers during traffic stops.[69] And, many veterans who would otherwise have been arrested and confined are being diverted by police to mental health centers in lieu of arrest.[70]

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[68] *See, e.g.*, Penny Coleman, *Why Are We Locking Up Traumatized Veterans for Their Addictions Instead of Offering Them Treatment?*, WWW.ALTERNET.ORG (Nov. 11, 2009), http://www.alternet.org/world/143867/why_are_we_locking_up_traumatized_veterans_for_their_addictions_instead_of_offering_them_treatment (describing programs in Chicago and Los Angeles involving "veterans who are specifically trained to ride along with police when they get disturbance calls").

[69] *See* GA. CODE ANN. § 40-5-38 (2011). The statutory revision to the Motor Vehicle Code, titled, "Notation of post traumatic stress disorder," indicates, in part, that "[m]embers of the armed services and veterans who have been diagnosed with post traumatic stress disorder may request to have a notation of such diagnosis placed on his or her driver's license," so long as they provide sworn verification from a clinician. *Id*. at §40-5-38(a). Despite objection from various veterans organizations, Georgia Governor Sonny Perdue signed the senate bill in June of 2010 after it "passed the state House and Senate with overwhelming approval," making Georgia the first state in the Nation "with a driver's license that denotes a specific health problem other than poor eyesight." Lily Gordon, *Gov. Sonny Perdue Signs PTSD License Bill*, COLUMBUS LEDGER-ENQUIRER, Jun. 10, 2010, www.ledger-enquirer.com. One of the law's co-sponsors, State Senator Ed Harbison explained its intent to "protect both law enforcement officers and veterans from potentially volatile situations." *Id*. Another senator, John Douglass, himself an Army veteran, explained the dynamic of "a safer encounter": "The police officer would know that a sudden move [by the motorist] wasn't necessarily an offensive move." Nancy Badertscher, *Disorder Could Be Listed on License; Post-traumatic Stress Option Would Be Only for the Military*, ATLANTA J.-CONST., May 12, 2010, at 1B. In addition to Georgia, since July 1, 2011, Utah has permitted drivers to indicate veteran status on their licenses and identification cards. *See* UTAH CODE ANN. § 53-3-805(1)(a)(vii) (West 2011) (limiting the privilege to honorably discharged veterans upon verification of their status). Utah's legislation similarly seeks to enable law enforcement officers "to potentially diffuse the tension" by providing "a little bit of background on what [a driver may be] dealing with" at an emotional level. Jared Page, *Driver's License Honoring Vets Could Diffuse Tense Situations*, DESERET NEWS (Utah), Jul. 7, 2011 (4:22 MDT), www.deseretnews.com.

[70] *See, e.g.*, Guy Gambill, *Justice-Involved Veterans: A Mounting Social Crisis*, L.A. DAILY J., May 5, 2010, at 6 (describing the establishment of "six state veterans' jail diversion pilots" and "12 federally-funded jail diversion efforts" since 2008); DRUG

C. The Societal Cost of Military Indifference

Society suffers when the punishment of military misconduct trumps the demonstrated need for mental health treatment. In the Army, soldiers who are flagged for misconduct are barred from participating in a Warrior Transition Unit, even if they would otherwise qualify for comprehensive care based on the severity of their mental health disorder.[71] The Navy is similar.[72] Once pending court-martial, even for accused servicemembers with suspected or confirmed mental conditions, most sanity boards focus only on whether the accused is fit to stand trial, with little concern for treatment recommendations—this despite the fact that sanity board members are eminently qualified to make treatment recommendations.[73] The lack of concern for treatment is troublesome

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POLICY ALLIANCE, HEALING A BROKEN SYSTEM: VETERANS BATTLING ADDICTION AND INCARCERATION 9 (Nov. 4, 2009) (exploring how "a number of law enforcement agencies have become involved in designing pre-booking diversions that are veteran-specific"). These frameworks build on methods established to address the problems of mentally ill offenders in general. *See* Loveland & Boyle, *supra* note 52, at 132–33 (describing "prebooking, police-based programs that provide mental health treatment in lieu of arrests" as one of five contemporary criminal justice diversion programs).

Even for veterans who are sentenced to confinement, the Florida Department of Corrections has begun a new trend of assigning veterans to be housed together to enhance the prospect of successful treatment and recovery. *See* Barbara Liston, *Florida Debuts New Prison Dorms for U.S. Veterans*, WWW.REUTERS.COM (Nov. 9, 2011), http://www.reuters.com/article/2011/11/10/us-florida-prisons-veterans-idUSTRE7A90HA20111110 (describing the institution of five veterans dormitories, including one devoted to female veterans, with maximum capacity of 400 veterans located throughout the state). Administrators have learned that, "[g]rouping veterans allows prisons to tailor pre-release services to their specific needs, such as [PTSD] counseling, and to formalize inmates with military benefits and supports available to them on the outside . . . ." *Id.*

[71] Citing to various provisions in a collection of consolidated guidance, LTC Christopher G. Jarvis, Battalion Commander of the Warrior Transition Unit at Fort Campbell, Ky., explains how many commanders attempt to evade these prohibitions by removing the electronic notifications regarding soldier misconduct and transferring them for a treatment program with purged physical files. Interview with LTC Christopher G. Jarvis, Battalion Commander, in Charlottesville, Va. (Oct. 22, 2010) (notes on file with author). To prevent violation of admission requirements, he routinely conducts independent investigations of soldiers' criminal status prior to admitting new participants. *Id.*

[72] Telephone Interview with Captain Key Watkins, U.S. Navy, Commander, U.S. Navy Safe Harbor Program (Oct. 21, 2010) [hereinafter Watkins Interview] (discussing the extreme difficulty he faced in repeated efforts to enroll a sailor with serious combat trauma in the Navy's rehabilitative program after the sailor admitted to using cocaine).

[73] *See, e.g.*, Baehr-Jones, *supra* note 14, at 62–63 (describing the current limited practice of responding solely to the four backward-looking questions in Rule for Court-Martial (RCM) 706(c)(2), and contrasting the ease with which sanity boards could permissibly contemplate "a broader set of questions in evaluating the accused, to include recommended treatment," which is now an exceptional practice, if and when it happens at

because of its inherent assumption that *somebody else*, outside of the military, will someday be responsible for dealing with aggravated psychological problems. Too often, this assumption is undermined by an undeniable truth of which panels are reminded at every court-martial: A punitive discharge "deprives one of substantially all benefits administered by the Department of Veterans Affairs and the [military] establishment."[74]

In its philosophy and practice, the military justice system is masking a major consequence of its sentencing procedures, which civilian courts have learned over the last two decades: Incarceration without adequate mental treatment leads to repeat offenses at a rate so alarming and harmful to society that it has created a "national public health crisis" of "epidemic" proportion.[75] Civilian judges call this phenomenon the "revolving door syndrome" because many offenders with mental illness return to prison shortly after their release.[76] After civilian courts continually observed this familiar pattern of repeat incarceration, judges responded by developing sentencing alternatives to divert the mentally ill

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all). The premium on quickly replacing a "problem soldier" can easily downplay his or her legitimate mental health concerns or needs for treatment. *See, e.g.*, Bill Murphy, Jr., *Critics: Fort Carson Policy Targeted Troubled Wounded Soldiers*, STARS & STRIPES, Nov. 15, 2011, http://www.stripes.com/critics-fort-carson-policy-targeted-troubled-wounded-soldiers-1.160871 (citing e-mail communications to suggest that commanders and judge advocates used the court-martial process to "get wounded, troubled soldiers out of the Army fast").

[74] DA PAM. 27-9, *supra* note 43, instr. 2-5-22, at 70 ("Types of Punishment"). The case will be different if the servicemember has been in the military long enough to have obtained an honorable discharge for a term of service prior to the one in which he has received a punitive discharge. *Id*.

[75] Jacques Baillargeon et al., *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 103, 103 (2009). As a noteworthy statistic, in "June 2007, there were at least 360,000 persons with major psychiatric disorders, and perhaps as many as half a million, in [U.S.] jails and prisons." H. Richard Lamb, *Reversing Criminalization*, 166 AM. J. PSYCHIATRY 8, 8 (2009).

[76] The "revolving door" defines a sentencing approach which, through its emphasis on incarceration and obliviousness to treatment, transforms jails and prisons into "surrogate mental hospitals." *See, e.g.*, LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 225, 258 (2001). Before the establishment of mental health courts, judges noted how, as a result of the revolving door syndrome, defendants were "doing life in prison," only "thirty days at a time." GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 15 (2005) (citing Judge Alex Calabrese).

into treatment programs.[77] Whether labeled as "treatment courts,"[78] "therapeutic courts,"[79] or "problem-solving courts,"[80] these new programs all exist to "merge intensive treatment with the power of a court."[81] Through these treatment programs, judges have also learned something important that separates veteran offenders from other participants. While failure to treat mentally ill offenders may very well amount to a crisis in public health, the failure to treat mentally ill combat veteran offenders amounts to far more; by virtue of military training and experience that depends on the sustained direction and outlet of rage and emotion,[82] it constitutes a threat to public safety.[83]

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[77] *See, e.g.*, Kondo, *supra* note 76, at 260 (describing "the establishment of mental health courts . . . as a partial solution to the perplexing societal problem that relegates mentally ill offenders to a 'revolving door' existence, in and out of prisons and jails").

[78] *See, e.g.*, GOV'T ACCOUNTABILITY OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS 22 (July 1997), http://www.gao.gov/archive/1997/gg97106.pdf (defining a treatment court as a program that "increase[s the offender's] *likelihood for successful rehabilitation through early, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions and other rehabilitation services*") (emphasis added).

[79] *See, e.g.*, Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1517 n.10 (2003) (defining a therapeutic court as "a court that handles cases which traditionally would have been adjudicated in criminal court, but in which 'helping' rather than punitive outcomes are contemplated. The term 'therapeutic' has a medical tone to it, and for the most part the rhetoric of recovery is applicable to court operations, particularly with drug courts and mental health courts.").

[80] Judith Kaye, the Chief Judge of the State of New York, explained the concept this way:

> What these courts have in common is an idea we call problem-solving justice. The underlying premise is that courts should do more than just process cases—really people—who we know from experience will be back before us again and again with the very same problem, like drug offenders. Adjudicating these cases is not the same thing as resolving them. In the end, the business of courts is not only getting through a day's calendar, but also dispensing effective justice. That is what problem-solving courts are about.

Hon. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 128 (2004).

[81] Hon. William P. Keesley, *Drug Courts*, S.C. LAW., July/Aug. 1998, at 32, 34.

[82] As various VTC program administrators have learned, "veterans, unlike the general population, were taught directly to be violent." Editorial, *New Court Set to Serve Vets*, DAILY NEWS (L.A.), Sept. 13, 2010, at A1 (relating comments of California veterans center team leader Jason Young). Vietnam veteran Ray Essenmacher, President of the Bay County Veterans Council, puts it this way: "If you come up behind [some combat veterans] and tap them on the shoulder, they're liable to come around swinging. They're

Although commanders and courts-martial sentencing authorities may be blind to the revolving door syndrome and its results,[84] these actors play a definite part in the syndrome. While discharged servicemembers may be gone and forgotten to their units, the military justice system sometimes promotes future civilian offenses. Senior U.S. District Judge John L. Kane, who has confronted the problem of sentencing veterans with untreated mental conditions, commented that "[w]e dump all kinds of money to get soldiers over there and train them to kill, but we don't do anything to reintegrate them into our society."[85] The punitive discharge

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hyper-alert, always trying to keep up with everything going on around them and always ready to go into combat at a moment's notice. We were trained to do one thing, and some of us were trained rather well. It takes a lot to 'untrain' someone." Lania Coleman, *Idea Floated to Create Court for Special Needs of Returning Veterans*, BAY CITY TIMES (Mich.), July 9, 2010, at A1. Marine Lieutenant General Chesty Puller put it best when he said, "Take me to the brig. I want to see the real Marines," meaning "that a certain amount of aggression and acting out, such as drinking and fighting, must be tolerated (despite official sanctions against such behavior) because it is an unfortunate side effect of maintaining a proper level of aggression." Don Catherall, *Systemic Therapy with Families of U.S. Marines*, *in* FAMILIES UNDER FIRE 99, 103 (R. Blaine Everson & Charles R. Figley eds., 2011). For additional exploration of the effect of lethal training on military members, see generally LIEUTENANT COLONEL DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1996).

[83] *See, e.g.*, Steinberg, *supra* note 6, at 20 (observing the conclusions of Cook County, Ill., VTC Judge John P. Kirby, that, "[n]ot only is Veterans Court the right thing to do, but it works as a crime-fighting tool"); Editorial, *The Public and Veterans Benefit from Special Court*, SPOKESMAN REV. (Spokane, Wash.), Sept. 21, 2010, at A9 (relating the comments of Spokane County VTC Judge Vance Peterson, "[w]e have the ability to take people who might be felons and pre-empt them"). The converse is also true. Judge Wendy Lindley poses this question, "Are we safer as a community if we simply process these human beings through the system and send them off to prison and have them come back into our community? Because they will come back to our community, and if they come back and their PTSD has not been treated, what is the likelihood that they're going to have another violent act in our community?" *The Situation Room* (CNN television broadcast Oct. 28, 2010). *See also* Holbrook & Anderson, *supra* note 9, at 21 (observing that the methodology of VTCs implicitly recognizes that "the risk factors for criminal behavior exhibited by some veterans—including alcohol and substance use, homelessness, broken relationships, unemployment, and mental health [conditions]—would, if left unaddressed, likely result in future involvement with the criminal justice system").

[84] The primary reason for this result is the fact that, "[u]nlike the civilian world, the Army can maintain communal stability even though it fails to reform the criminal offender." Major Thomas Q. Robbins & Captain Harry St. G. T. Carmichael III, Sentencing Handbook 36 (Mar. 1971) (unpublished thesis, The Judge Advocate Gen.'s Sch., U.S. Army, Charlottesville, Va.).

[85] Amir Efrati, *Judges Consider New Factor at Sentencing: Military Service*, WALL ST. J., Dec. 31, 2009, WWW.WSJ.COM, http://online.wsj.com/article/SB12622169110969.html (citing Judge Kane).

builds on this quagmire in two ways. First, confinement tends to aggravate mental illness,[86] and PTSD becomes more difficult to manage when effective treatment is delayed.[87] Although an inmate with PTSD may be able to see a therapist when confined in a military facility, such treatment is not optimal.[88]

The second problem is the likelihood that the punitively discharged offender will not be able to obtain quality care from the VA upon release from confinement after the aggravation of his symptoms based on his incarceration. Although military courts have noted the fact that the VA can provide care to certain convicts despite punitive discharges,[89] there is

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[86] Not only is "being sent to prison" considered a traumatic event, the magnitude of this trauma is comparable to "rape," "acts of terrorism," and "being held hostage." DIANA SULLIVAN EVERSTINE & LOUIS EVERSTINE, STRATEGIC INTERVENTIONS FOR PEOPLE IN CRISIS, TRAUMA, AND DISASTER, at xiv (2006 rev. ed.). *See also* Lamb, *supra* note 75, at 8 (observing that "[i]ncarceration poses a number of important problems and obstacles to treatment and rehabilitation" for the mentally ill).

[87] *See, e.g.*, Joseph I. Ruzek et al., *Treatment of the Returning War Veteran*, *in* NAT'L CTR. FOR POST-TRAUMATIC STRESS DISORDER, IRAQ WAR CLINICIAN GUIDE 33, 39 (2d ed. 2004), http://www.ptsd.va.gov/professional/manuals/manual-pdf/iwcg/iraq_clinician_guide_v2.pdf (describing the importance of early intervention in addressing and preventing PTSD).

[88] Generally, "[e]ven when quality psychiatric care is provided, the inmate/patient still has been doubly stigmatized—as both a mentally ill person and a criminal." Lamb, *supra* note 75, at 8. Major Paul A. White, who works as a clinical psychologist at the U.S. Disciplinary Barracks, explains some of the additional considerations facing inmates with service-connected disorders like PTSD. First, for effective therapeutic treatment, the inmate must be willing to participate in therapy voluntarily. One disincentive is the inmate's concern about the disclosure of incriminating information related to the combat trauma. Notably, Major White has had patients who desired to clear issues with their attorneys before raising them in therapy, refused to write as part of an exercise that required written journaling, and ultimately left the program. Separately, inmates receive consideration for clemency based on a series of standard training blocks, none of which provide credit for participation in treatment of disorders like PTSD. Third, the very nature of confinement, with constant monitoring, often limits the degree of openness between a therapist and an inmate with a mental disorder. Interview with Major Paul A. White, Clinical Psychologist, U.S. Disciplinary Barracks, in Fort Leavenworth, Kan. (Oct. 6, 2010).

[89] Older convicts with a prior honorable discharge in their service record may be eligible for VA care, despite a punitive discharge on a later term. *See, e.g.*, United States v. Goodwin, 33 M.J. 18, 18 (C.M.A. 1991). Additionally, the courts have also noted exceptions to statutory bars on benefit eligibility, especially for inmates who received Bad-Conduct Discharges (BCDs) at Special Courts-Martial. *See, e.g.*, Waller v. Swift, 30 M.J. 139, 144 (C.M.A. 1990) ("Both a dishonorable and a bad-conduct discharge adjudged by a general court-martial automatically preclude receipt of veterans' benefits, based on the terms of service from which the accused is discharged, *see* 38 USC § 3103;

great danger in assuming that *all* inmates can avail themselves of these limited exceptions.[90] The success of new programs for veterans who are involved in the civilian justice system and the rapid establishment and funding of VTCs rest entirely on the presumption that incarcerated veterans are still eligible for VA benefits and that they received discharges under honorable conditions.[91] Veterans Affairs representatives encounter substantial problems when the case is different, conceding that the Other Than Honorable conditions discharge, the Dishonorable Discharge (DD), and the Bad-Conduct Discharge (BCD) are largely disqualifiers.[92] Thus, while it is theoretically possible for a punitively discharged combat veteran to appeal a denial of VA benefits or request an exception, it may take years of litigation before such servicemembers could obtain the right to seek treatment.[93] Civilian programs without VA

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but the effect on a veteran's benefits of a bad-conduct discharge adjudged by a special court-martial must be determined on a case-by-case basis.").

[90] Studies of PTSD reveal that younger servicemembers are far more susceptible to the disorder and far more likely to engage in violent behavior when so afflicted. *See, e.g.*, Elbogen et al., *supra* note 57, at 599. Those who have successfully completed prior enlistment periods under honorable conditions, thus entitled to VA benefits, are likely to be older noncommissioned officers.

[91] State VTCs have tremendous financial incentive to condition enrollment on the possession of a discharge under honorable conditions due to participants' automatic eligibility for VA treatment at a time when states lack independent funding for PTSD treatment. *See, e.g.*, Merten, *supra* note 3 (describing these as Judge Snipes's reasons for mandating an honorable discharge for participation in Dallas's VTC "which is not required by the legislation").

[92] Letter from Michael J. Kussman, Veterans Affairs Undersec'y for Health: Information and Recommendations for Services Provided by VHA [Veterans Health Administration] Facilities to Veterans in the Criminal Justice System ¶ 3.a, at 2 (Apr. 30, 2009) (explaining how eighteen percent of incarcerated veterans in the civilian system are ineligible for care from the Veterans Administration based on the nature of their discharge). In a recent study, for example, of 645 offenders referred to VTCs, discharge characterizations precluded 200 of them from receiving VA services as part of the program. Schaffer, *supra* note 51, at 16, 19. *But see* Holbrook & Anderson, *supra* note 9, at 25–26 (noting that ten of the 14 VTCs in their sample population "did not require program participants to be eligible for VA benefits," but acknowledging that "VA involvement [still] remained critical" in such cases).

[93] *See, e.g.*, Major Tiffany M. Chapman, *Leave No Solider Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1, 26–33 (2010) (reviewing various cases in which the VA denied servicemembers benefits for PTSD treatment based on the nature of their discharges and interpretation of statutory bars following years of litigation).

funding may not prioritize treatment for veterans and are rarely able to provide the same quality of care.[94]

Thus, by expecting that treatment will be available from some unknown entity at an equally uncertain date, the military is oblivious to the possibility it has created a double wound, first by placing the servicemember in a situation that caused the mental illness, and, second, by preventing necessary treatment in the future.[95] This is as much a wound to society; rather than closing the revolving door, the court-martial is responsible for the first revolution of the door, sending the discharged veteran into the streets, and locking the treatment door behind him. The position adopted in the military—to ensure that the accused gets his "just deserts"—is ultimately undermining America's public safety because mentally ill offenders who have difficulty controlling their behavior are in greatest need of treatment. Such treatment is not just a concern to protect the veteran, but, moreover, for the well-being of the Nation that all active duty military members are sworn to protect and defend.[96]

Because there is ample room in military justice to develop solutions without changing military law, military justice practitioners should consider recent developments in civilian treatment courts over a decade of innovation that has rightly been characterized as nothing less than a

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[94] *See, e.g.*, Brunswick, *supra* note 51, at 1A (observing the need for the VA to supplement state VTCs as "state court funding becomes more sparse and federal funding remains flush").

[95] Preclusion from benefits is often "arbitrary" when commanders, separation boards, and courts-martial panels remain oblivious to future treatment needs in individual cases:

> For example, if a veteran had PTSD that led to infractions while he was still in the military, he might receive a less-than-honorable discharge and thus be ineligible for treatment in a veterans court. However, if the same soldier received a medical discharge for his PTSD, or if he did not start showing negative behavioral symptoms until he had been discharged, he would remain eligible.

Cartwright, *supra* note 9, at 309.

[96] *See* Stephanie Simmons, Note, *When Restoration to Duty and Full Rehabilitation is Not a Concern: An Evaluation of the United States Armed Forces*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 105, 128 (2008) (describing a blurred distinction in which the untreated soldier, discharged from the Service, who "suffers from PTSD and commits crimes outside the military scope . . . . again finds himself indirectly serving time under the U.S. government for criminal activity that was a result of his service in the United States government" when he is later convicted through the civilian court system).

legal "revolution."[97] Likewise, civilian court administrators and judges should consider how partnerships with active duty and reserve installations might advance their goals. This sharing would reflect the military's longstanding practice of turning to civilian courts and corrections professionals to model its own rehabilitative programs.[98] Such a symbiotic relationship springs from shared concerns for the future of the military inmate after he rejoins the civilian community. Today, there should be even greater concern over punitively discharged inmates with mental health disorders because, here, the military's interest and society's interest are indistinguishable.[99]

II. The Common Aims of the Treatment Court Movement

Scholars fear that the rehabilitative ideal has given way to retributive theories of justice.[100] Regular reporting on wardens who aim to make prison as painful and humiliating an experience as possible and candidates who run for office on a "tough on crime" platform may cast a bleak view of modern corrections and its aims.[101] However, even if retribution is a common denominator, the widespread adoption of treatment courts throughout the Nation has proved an important exception.

The rapid expansion of specialized treatment courts is noteworthy. As of 2012, there are over 3648 problem-solving courts in the United

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[97] BERMAN & FEINBLATT, *supra* note 76, at 3 (characterizing the phenomenon of therapeutic courts as a "quiet revolution among American criminal courts").

[98] *See infra* Part III (describing civilian influences on the development of active duty rehabilitative programs).

[99] *See supra* note 41 (describing indivisible interests for criminally involved servicemembers with mental conditions).

[100] *See, e.g.*, Jonathan Harris & Lothlórien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 CRIM. L. BRIEF 2, 7 (2007) ("[R]ehabilitation has been widely discarded as a goal of the penal system. In its place, a retributive theory of justice—of 'just deserts'—where the measure of the punishment should be a function of the seriousness of the crime and the culpability of the offender, has largely taken over.").

[101] *See, e.g.*, Tracy Idell Hamilton, *Bexar County Tent Jail Idea "Get Tough" or Gimmick?*, SAN ANTONIO EXPRESS-NEWS (Tex.), Oct. 30, 2006, at 1A (discussing the notoriety of "controversial Sheriff [Joe Arpaio, who] forces jail inmates to wear pink underwear, eat 15-cent meals, work on chain gangs and live in un-air-conditioned, Korean war-era tents that can heat up past 120 degrees in the summer").

States[102]—an increase of more than 500 since 2009[103]—including at least 2459 drug treatment courts,[104] 250 MHCs,[105] and 88 VTCs.[106] In Dallas, Texas, alone, the inauguration of its first VTC marked the 14th type of treatment court, among the ranks of specialized programs for prostitutes and perpetrators of domestic violence, to name a few.[107] Recognizing the success of drug court approaches, the Conference of Chief Justices and the Conference of State Court Administrators endorsed the development of problem-solving courts in all jurisdictions.[108] The American Bar Association further encouraged "the development of Veterans Treatment Courts, including but not limited to specialized court calendars or the expansion of available resources within existing civil and criminal court models focused on treatment-oriented proceedings."[109] As a noteworthy break from traditional adversarial court relationships, the National District Attorney's Association also endorsed VTC programs in its 2010 Resolution 26B.[110]

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[102] WEST HUDDLESTON & DOUGLAS B. MARLOWE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 37 (July 2011).

[103] JOANN MILLER & DONALD C. JOHNSON, PROBLEM-SOLVING COURTS: NEW APPROACHES TO CRIMINAL JUSTICE 53 (2009).

[104] HUDDLESTON & MARLOWE, *supra* note 102, at 19.

[105] *See, e.g.*, Henry J. Steadman, *Effect of Mental Health Courts on Arrests and Jail Days: A Multisite Study*, ARCHIVES GEN. PSYCHIATRY, Oct. 4, 2010, at 1, http://archpsyc.ama-assn.org/cgi/content/abstract/archgenpsychiatry.2010.134v1.

[106] *Supra* note 5 (discussing the rapid development of VTCs).

[107] Merten, *supra* note 3 (describing "13 other specialty courts," in addition to VTCs). *See also* HUDDLESTON & MARLOWE, *supra* note 102, at 43–47 (defining the attributes of different types of problem-solving courts, including VTCs). Additional programs are now in the developmental stages, such as a specialized court to address the unique problem of animal abuse under similar principles. *See generally* Debra L. Muller-Harris, *Animal Violence Court: A Therapeutic Jurisprudence-Based Problem-Solving Court for the Adjudication of Animal Cruelty Cases Involving Juvenile Offenders and Animal Hoarders*, 17 ANIMAL L. 313 (2011).

[108] Conference of Chief Justices & Conference of State Court Adm'rs, CCJ Resolution 22/COSCA Resolution 4, In Support of Problem-Solving Courts (Aug. 2000), *available at* http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/resolutionproblemsolvingcts.html.

[109] Am. Bar Ass'n, ABA Resolution 105A (2010).

[110] Nat'l Dist. Attorneys Ass'n, National District Attorney's Association Resolution 26b (2010), *available at* http://www.nadcp.org/sites/default/files/nadcp/NDAA%20 Endorsement_0.pdf (endorsing the development of VTCs and recognizing, "[f]or soldiers, mental trauma and debilitating stress are part of the job description. When veterans go astray, they deserve every reasonable effort to get them back where they began: clean, sober and on the right side of the law").

To aid in identifying common features of the treatment court "movement," Appendix B reprints Ninth Circuit Appellate Judge Michael Daly Hawkins's visual depiction of the operation of Anchorage, Alaska's VTC.[111] The diagram reveals characteristics that help to distinguish why a court-martial is not simply a de facto "veterans court" based on the military status of participants tried in the setting: Problem-solving courts involve much more than suspended sentences with treatment requirements and routine contact with probation officers. In the therapeutic court setting, the judge assumes the monitoring role that would normally fall on the shoulders of the probation officer, but with enforcement powers several times greater.[112]

Any attempt to describe all problem-solving courts comprehensively would be necessarily incomplete because much of their structure is based on individual personalities of presiding judges and treatment teams. They have flourished over the years, mainly at the state level,[113] because they have operated outside the *Federal Sentencing Guidelines*, which limited the federal courts' ability to develop innovative rehabilitative alternatives prior to the Supreme Court's 2005 *Booker* opinion[114] and very recent *Guidelines* amendments by the U.S. Sentencing Commission.[115] However, amid the great variance, all treatment courts adhere to certain

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[111] Hawkins, *supra* note 2, at 573.

[112] *See infra* note 124 (describing the heightened requirements of judicial oversight in VTCs).

[113] Although nearly all VTCs are state-operated programs, Federal Magistrate Judge Paul Warner operates at least one federal VTC program in the District of Utah. *See* Dennis Romboy, *Veterans Court Deals with 'Root of Problem,'* DESERET NEWS (Utah), Jan. 2, 2011 (12:26 MST), http://www.deseretnews.com (describing the judge's "monthly veterans calendar," which is similar to many state programs and recognized as "the only one of its kind on a federal level in the nation").

[114] *See, e.g.*, David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, *in* REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 20, 28 (David B. Wexler ed., 2008) (observing how treatment-based and problem-solving sentencing options exist mainly "in state and local courts, where there is typically greater flexibility than under the federal guidelines"). The Supreme Court's holding in *United States v. Booker*, 543 U.S. 220, 245 (2005), finding the *Federal Sentencing Guidelines* advisory rather than mandatory in nature, has led the U.S. Sentencing Commission to consider alternative sentencing programs, including drug treatment courts as options in federal sentencing practice. Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209 (2009).

[115] *See* Cartwright, *supra* note 9, at 314 (noting amendments to the *Federal Sentencing Guidelines* that would permit judges to assign greater significance to military service and psychological conditions and enable alternatives to incarceration in certain "unusual" cases).

unifying principles, normally fashioned as "Key Components"[116] or "Essential Elements."[117] With slight variations, the principles remain constant through different program types; all feature "ongoing judicial interaction with each [participant],"[118] use interdisciplinary teams to respond to the offender's individual needs,[119] hold the offender accountable for lack of adherence to specifically-designed treatment plans,[120] and require both the willingness to innovate in treatment approaches and to incorporate lessons learned.[121] A list of the Ten Key Components of Veterans Treatment Courts appears in Appendix C for further illumination.[122] In comparison with existing military and civilian treatment programs, these problem-solving, treatment-based courts reflect an entirely novel approach, which differs mainly in the number of interactions the offender has with a judicial officer[123] and the demanding responsibilities required for the offender to remain in the program.[124]

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[116] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997) (providing ten key components of drug courts).

[117] *See, e.g.*, MICHAEL THOMPSON ET AL., IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESS: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT 1 (2007) (providing detailed discussion of ten essential elements of mental health courts, but noting how the ten key components of drug courts "provided the foundation in format and content" for the mental health elements).

[118] Hon. Robert T. Russell, Jr., *Veterans Treatment Court: A Proactive Approach*, 35 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 366, Key Component 7 (2009).

[119] *See id*., Key Component 6 ("A coordinated strategy governs Veterans Treatment Court responses to participants' compliance.").

[120] THOMPSON ET AL., *supra* note 117, at 9, Essential Element 9 ("Criminal justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants' recovery.").

[121] Russell, *supra* note 118, at 367, Key Component 8 ("Monitoring and evaluation measures the achievement of program goals and gauges effectiveness."); THOMPSON ET AL., *supra* note 117, at 10, Essential Element 10 ("Data are collected and analyzed to demonstrate the impact of the mental health court, its performance is assessed periodically (and procedures are modified accordingly), court processes are institutionalized, and support for the court in the community is cultivated and expanded.").

[122] *Infra* app. C.

[123] *See, e.g.*, Allison D. Redlich et al., *The Use of Mental Health Court Appearances in Supervision*, 33 INT'L J. L. & PSYCHIATRY 272, 272 (2010) (noting mental health treatment courts' requirements to appear at court, sometimes "four times a week").

[124] James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1555 (2003) (describing how "noncompliance" with treatment plans "may result in more serious sanctions than would be experienced in a traditional court").

Within the broad parameters of basic treatment court principles, common attributes of these programs have led to program success.[125] Studies reveal that drug courts reduce recidivism and save more costs than traditional probation or prison.[126] As applied to the treatment of mental illness, where detection of program effectiveness is not as easy as obtaining urinalysis results, there are strong indicators that the basic drug court principles work equally well.[127] Even at their current infantile stages, VTCs too show promising results.[128] While these general gains do

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[125] Numerous studies address the essential role of the treatment court judge, whose frequent contact with the offender and the treatment team produce specific positive results. *See, e.g.*, Heathcote W. Wales, *Procedural Justice and the Mental Health Court Judge's Role in Reducing Recidivism*, 33 INT'L J. L. & PSYCHIATRY 265, 265 (2010):

> (1) the judge provides a quality of interpersonal treatment of participants that accords them dignity, respect and voice, builds trust by showing a concern for their best interests, and repeatedly emphasizes their control over their choice to participate; (2) the judge holds participants, attorneys and service providers alike accountable for their respective roles in participants' rehabilitation and resolution of their legal problems; and (3) the judge provides transparency, carefully explaining the reasons for all decisions.

[126] *See, e.g.*, Dwight Vick & Jennifer Lamb Keating, *Community-Based Drug Courts: Empirical Success. Will South Dakota Follow Suit?*, 52 S.D. L. REV. 288, 303–04 (2007) (noting studies of recidivism and cost savings and how "most studies have found that drug court clients who participated in treatment were considerably less likely to recidivate than both untreated drug court clients and control subjects"); Clark et al., *supra* note 41, at 177 (observing how "[f]our meta-analyses indicated that drug courts reduced crime by an average of 17 to 14 percentage points").

[127] Redlich et al., *supra* note 123, at 272 ("Several studies on individual MHCs [mental health courts] have demonstrated that the courts can be effective in reducing the rate of new arrests either in comparison to a control group or in comparison to participants' rates pre-MHC involvement.").

[128] *See, e.g.*, William H. McMichael, *The Battle on the Home Front: Special Courts Turn Vets to Help Other Vets*, ABAJOURNAL.COM (Nov. 1, 2011 4:10 AM CST), http://www.abajournal.com/magazine/article/the_battle_on_the_home_front_special_courts_turn_to_vets_to_help_other_vets/ (reporting general statistics for all VTCs that "70 percent of defendants finish the program and 75 percent are not rearrested for at least two years after"); Cartwright, *supra* note 9, at 315 ("The Anchorage [Veterans Treatment C]ourt had only one re-arrest out of thirty-four graduates in two years."); Holbrook, *supra* note 60, at 259, 279 (concluding that the results of Buffalo's VTC are "promising," with "only 2 of more than 100 veterans who had participated in the program . . . return[ing] to regular criminal court" and explaining that no participants had been re-arrested since the first graduation in May 2010); William H. McMichael, *Finding a New Normal: Special Courts Help Vets Regain Discipline, Camaraderie by Turning to Mentors Who've Served*, ARMY TIMES, Feb. 21, 2011, at 10, 11 ("None of the 41 graduates to date has been rearrested. And only 25 of the 181 total veterans admitted to the program have dropped out before graduation."). In a more recent attempt to overcome

not guarantee the success of any program for a given offender, they suggest that local problem-solving courts can be a tremendous resource to commanders and military justice practitioners. These courts not only have unmatched experience in the evaluation of offenders' rehabilitative potential, but have developed best practices in the management of mental illness and substance dependence.[129] Given the high level of community involvement in these courts, which draw on both public and private organizations to aid in offenders' recovery, local problem-solving courts can provide access to many more treatment alternatives than standard probationary programs.

Part III, below, reveals that the military has historically employed a problem-solving approach in its own disciplinary system that makes it well suited to incorporate veterans, mental health, or drug courts—and their major lessons—in the current practice of military justice.

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the "lack of evaluative data" on the effectiveness of VTCs, Professor Justin Holbrook and his Widener Law School colleague Sara Anderson examined participation records in 14 VTCs, concluding not only that "veterans court outcomes are at least as favorable as those of other specialized treatment courts," but also that, "[o]f the 59 reported graduates among all responding courts, only one had re-offended following graduation, a recidivism rate under 2 percent." Holbrook & Anderson, *supra* note 9, at 4, 39, 30.

[129] For example, the administrators of these programs often participate in, and at least have awareness of trends in, the effective supervision of probationers with mental health disorders and can potentially share these lessons with military personnel responsible for supervising offenders with suspended discharges. *See, e.g.*, Jennifer Eno Louden et al., *Supervising Probationers with Mental Disorder: How Do Agencies Respond to Violations?*, 35 CRIM. JUST. & BEHAV. 832, 843–45 (2008) (describing attributes of specialized supervision techniques, as opposed to traditional ones). Within VTCs, specifically, scholars have also very recently identified "'best practices' essential to veterans courts' success," some of which include:

- "An integrated stakeholder team committed to veterans' rehabilitative interests";
- "a willingness to maximize the offenses available to be heard in veterans court, provided the interests of the state and any victim are appropriately served";
- "a reliable network to identify potential program participants early in the criminal justice process";
- and, "treatment plans and disposition decision that are both tailored and flexible."

Holbrook & Anderson, *supra* note 9, at 41.

III. Precedents from Military Discharge Remission Programs

A. The Value of a Historical Perspective on Military Clemency and Offenders with Combat Trauma

The following sections of Part III trace military discharge remission programs from their genesis with special attention to clemency accorded on the basis of combat-generated mental health conditions. Although combat trauma has been a staple of military service since the earliest battles,[130] and its link to crime has been known throughout the military and society since at least the Civil War,[131] military law practitioners and the courts have missed many crucial lessons from earlier periods.[132] Instead, like many students of history in general, they are captives of a "history effect," which sometimes causes them to adopt narrow and faulty interpretations of historical facts and causal relationships.[133] This effect permeates studies of battles and the evolution of theories and represents the failure to consider alternative explanations for outcomes.[134] Andrew S. Effron, the former Chief Judge of the military's highest court, has described the dangers of the history effect in legal interpretation:

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[130] *See, e.g.*, WILLIAM SCHRODER & RONALD DAWE, SOLDIER'S HEART: CLOSE-UP TODAY WITH PTSD IN VIETNAM VETERANS 175 (2007) ("As early as 1900 B.C., Egyptian physicians depicted hysterical psychological reactions in soldiers exposed to traumatic events in battle.").

[131] Holbrook, *supra* note 60, at 259, 268. Arguably, much earlier, Homer explored this link in *The Odyssey*. JONATHAN SHAY, ODYSSEUS IN AMERICA: COMBAT TRAUMA AND THE TRIALS OF HOMECOMING 26 (2002) ("A career that war exactly prepares veterans for upon return to civilian life is a *criminal career*, symbolized . . . by Odysseus' pirate raid on Ismarus."). If not the Civil War, Vietnam certainly resurrected earlier concerns. *See, e.g.*, BEN SHEPHARD, A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY 365 (2000) ("Ever since the early 1970s there had been press stories about the problems of Vietnam veterans—their drug addiction, high crime rate, homelessness, propensity to violence and suicide.").

[132] *Infra* Part III.B.

[133] ROBERT F. BERKHOFFER JR., FASHIONING HISTORY: CURRENT PRACTICES AND PRINCIPLES 215 (2008) (defining the "history effect" as "rhetoric [that] asserts definite, preferably definitive, statements about the past whether simple fact or speculative generalization"). *See also* JOHN TOSH & SEÁN LANG, THE PURSUIT OF HISTORY: AIMS, METHODS AND NEW DIRECTIONS IN THE STUDY OF MODERN HISTORY 180 (4th ed. 2006) ("Most of what pass for the 'facts' of history actually depend on inference.").

[134] *See, e.g.*, JEREMY BLACK, RETHINKING MILITARY HISTORY 30 (2004) (discussing how "[e]ven frequently recounted battles benefit from re-examination . . . ."); Phillip S. Meilinger, *The Historiography of Airpower: Theory and Doctrine*, 64 J. MIL. HIST. 467, 467 (2000) ("Theory and doctrine deal with the realm of ideas, not operations . . . . [T]racing the history of ideas has proven to be a fairly barren field.").

> The most important cases require a deep appreciation of military justice in its larger context—the conduct of military policy, the war powers, the separation of powers, and the role of military justice in projecting military power. When such matters are addressed through buzz words, rather than critical scholarship, the courts are deprived of an important source of analysis.[135]

Further, "when military justice issues are debated by policy makers in the executive or legislative branches without the benefit of historical perspective and past example, these deficiencies cannot be overcome by a thousand buzz words."[136]

Mindful of the history effect, in approaching offenders with mental illness, the military justice practitioner should have an open mind and be ready to eschew core historical narratives and oversimplifications of what commanders have or have not done in the past.[137] Despite writers'

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[135] Hon. Andrew S. Effron, *Military Justice: The Continuing Importance of Historical Perspective*, ARMY LAW., June 2000, at 1, 7.

[136] *Id.*

[137] *See, e.g.*, Jon Tetsuro Sumida & David Alan Rosenburg, *Machines, Men, Manufacturing, Management, and Money: The Study of Navies as Complex Organizations and the Transformation of Twentieth Century Naval History*, *in* DOING NAVAL HISTORY: ESSAYS TOWARD IMPROVEMENT 25, 26, 29 (John B. Hattendorf ed., 1995) (describing how core historical narratives, as repeated, are normally incomplete and reflect unsophisticated analysis "so vast as to preclude careful measurement by a single scholar").

The history of military clemency is even harder to interpret because the field of military corrections is value-laden and can change based on the background of the researcher. Richard L. Henshel, *Military Correctional Objectives: Social Theory, Official Policy, and Practice*, *in* THE MILITARY PRISON: THEORY, RESEARCH, AND PRACTICE 28, 28–32 (Stanley L. Brodsky & Norman E. Eggleston eds., 1970) (describing how military correctional programs have "often produced a 'hodge-podge' of policy . . . created largely by *compromises between conflicting external pressures*," in which representatives from different branches, including judge advocates and military police, "see the problem in a somewhat different light" and, therefore, generate poor decisions based on unexplored clashing objectives and the pressure to achieve some sort of compromise) (emphasis added). In 1952, following major clemency lessons of the Second World War, an official publication by the Adjutant General sought to prevent such distortion by capturing several recent lessons. U.S. DEP'T OF ARMY, THE ARMY CORRECTIONAL SYSTEM, at i (2 Jan. 1952) [hereinafter U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM] (forecasting how the publication's "general statement of the history, development, progress, practices, and beliefs which comprise the Army Correctional System, will be of valuable assistance to those whose duties are connected in any way with custodial problems"). *See also* COLONEL JAMES J. SMITH, MILITARY CLEMENCY AND PAROLE: DOES IT WORK? 3 (1993),

lack of attention to historical precedents, the civilian criminal and military justice systems both adopted problem-solving approaches to address the unique situations facing combat-traumatized veterans in generations prior to operations Enduring and Iraqi Freedom.[138] For example, in the civilian realm, since the late nineteenth century, the Veterans Homes established in the wake of the Civil War developed their own disciplinary system and structure as an alternative to conviction through the civilian courts in efforts to rehabilitate veterans.[139] Likewise, in the aftermath of WWII, much like contemporary VTCs, the state of Indiana developed a "special" sentencing program that provided intensive rehabilitation and mentorship in lieu of lengthy incarceration for convicted veterans.[140] Yet, the current discourse on contemporary problem-solving courts entirely omits such examples.[141]

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available at WWW.DTIC.MIL, http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc =GetTRDoc. pdf&AD =ADA276635:

> We learn lessons from the past. The more things change, the more they remain the same. Because [military] clemency and parole is a human topic, rather than a scientific study, history is even more likely to lead us in the right direction. We look at how our predecessors used clemency and parole, so we can learn from their experiences and avoid mistakes.

[138] For in-depth explorations of military programs, see *infra* Part III.B.

[139] *See, e.g.*, Judith Gladys Cetina, A History of Veterans' Homes in the United States 1811–1930, at 166, 411–14 (1977) (unpublished Ph.D. dissertation on file at Case Western Reserve University) (describing disciplinary approaches at Veterans Homes).

[140] Albert Evigil & Harry L. Hawkins, *The Short-Term Institution and the Delinquent Veteran*, PRISON WORLD, May–June 1946, at 16, 28 (recognizing how the veteran offender "seems to be a 'special' person who requires a 'special' type of treatment and appeal" and describing a specialized program built on individualized treatment plans, involvement of VA representatives, the use of veterans mentors, and community partnerships with methods for monitoring the participant's adjustment).

[141] Although aspects of the Veterans Homes and Indiana's program largely resemble contemporary VTCs, commentators normally link the VTC movement to the programs at Anchorage, Alaska, in 2004, Buffalo, N.Y., in 2008, or Rochester, N.Y., in 2006. *See, e.g.*, Hawkins, *supra* note 2, at 565–66 (describing origins in Anchorage or Buffalo); Timothy S. Eckley, *Veterans Court Session in Buffalo*, 92 JUDICATURE 43, 43 (2008) ("The concept of the Veterans Court grew from proceedings in the Rochester, New York City Court of Judge John Schwartz, who began [in 2006] to involve Veterans Affairs staff in his drug court."). *Cf.* Telephone Interview with Darlene Richardson, Historian, U.S. Dep't of Veterans Affairs (Jan. 5, 2011) (observing how the lessons from the Veterans Homes, while relevant to modern practice, remain largely undiscovered and unexplored).

Contemporary views of military discharge remission are similarly infected by a virus of oversimplification. They are reminiscent of the entirely fictional account of WWII clemency in E.M. Nathanson's critically-acclaimed book and film adaptations of *The Dirty Dozen*,[142] in which the Army selects twelve dishonorably discharged prisoners convicted at a general court-martial, trains them, and unleashes them behind enemy lines to conduct clandestine "suicide missions."[143] In every rendition of the storyline, a general officer exercises his broad clemency power by suspending prisoners' court-martial sentences and affording them a chance to be considered for restoration to active duty upon mission success; if the prisoners fail, they will face summary execution of their sentences.[144] In their adoption of this fable, some scholars reason that clemency has always been a rarity, that discharges were suspended only in limited situations involving special skills, and that such suspensions are obsolete artifacts of past wars.[145]

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[142] E.M. NATHANSON, THE DIRTY DOZEN (Random House Book Club ed. 1965); THE DIRTY DOZEN (MGM 1967). Unabashedly, Nathanson explained that the whole story was an entirely fictional account. NATHANSON, *supra*, at 1 ("This story is fiction. I have heard a legend that there might have been men like them, but nowhere in the archives of the United States Government, or in its military history did I find it recorded.") (appearing on an unmarked page after the author's dedication).

[143] The theatrical trailer for the original film dramatically summarizes, "Train them. Excite them. Arm them. And, turn them loose on the Nazi high command." THEATRICAL TRAILER FOR THE DIRTY DOZEN (MGM 1967).

[144] As the precursor to a 2012 re-make, made-for-television movies, and a 1988 television series, the recurring plot grows entirely from the concept of a suspended probationary sentence and continues to introduce court-martial clemency to audiences in mainstream America and the world. *See* Joseph Adalain & Michael Fleming, *WB Gets Down and "Dirty,"* VARIETY.COM, http://www.variety.com/article/VR1117939603.html?Categoryid=13&cs=1 (Mar. 12, 2006 9:00 PM PT); THE DIRTY DOZEN: NEXT MISSION (1985); THE DIRTY DOZEN: THE DEADLY MISSION (1987); THE DIRTY DOZEN: THE FATAL MISSION (1988); DIRTY DOZEN: THE SERIES (1988). A representative example of the television series is the ninth episode of the season, titled *Don Danko*, in which, the Dozen, while stationed in Lisbon, Portugal in 1943, "must pose as mafia mobsters and use their inside knowledge of forgery, in order to stop a counterfeit money operation which is funding the Nazis." *Dirty Dozen: The Series*, IMDB.COM, http://www.imdb.com/title/tt0094451/episodes #year-1988.

[145] One commentator distinguishes how modern warfare is different from WWII, "where perhaps one man . . . could make [an individual] difference in the outcome of the war" because of special training. Hamner, *supra* note 35, at 1, 18 (citing an individual "integrally involved in the creation of the atomic bomb" as an example of one who might have been restored to duty from a dishonorable discharge in the past and speculating that, today, no soldier "is so crucial that it demands the commander to exercise his prerogative to keep that [s]oldier for the war effort").

Military courts have not only adopted this clemency fiction, but attributed it to eminent figures like General Dwight Eisenhower.[146] The line of cases cites Mr. Felix Larkin's summary of General Eisenhower's testimony:

> The classic case that I think General Eisenhower stated in his testimony before your subcommittee last year was that even though you might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such a unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say "Well he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission."[147]

The account reflects a simplified history of military justice during the Second World War with sentences so oppressive that they necessitated the establishment of a Uniform Code to prevent widespread abuses by commanders.[148] Closer examination, however, reveals an entirely different philosophy toward clemency.

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[146] *See* United States v. Cansdale, 7 M.J. 143, 146–47 (C.M.A. 1979); United States v. Morrison, 3 M.J. 408, 412 n.13 (C.M.A. 1977); United States v. Prince, 36 C.M.R. 470, 472 (C.M.A. 1966); United States v. Kirsch, 35 C.M.R. 56, 64 (C.M.A. 1958); United States v. Fields, 25 C.M.R. 332, 337 (C.M.A. 1958); United States v. Nassey, 18 C.M.R. 138, 144 (C.M.A. 1955); United States v. Schmidt, 13 M.J. 934, 938–39 (A.F.C.M.R. 1982).

[147] *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1184 (1949) [hereinafter House Hearing on H.R. 2498] (comments of Felix E. Larkin, a member of the drafting committee for the *Uniform Code of Military Justice* during floor congressional debates).

[148] The contemporary historical account of military justice in WWII perpetuates a limited core narrative that neglects the use of rehabilitation, probationary sentences, and related lessons. It paints a picture of 2,000,000 courts-martial—sometimes related in daily rates for effect—which ultimately resulted in over 80,000 punitive discharges. *See e.g.*, WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 14 (1973) ("There were about eighty thousand general court-martial convictions during the war, an average of nearly sixty convictions by the highest form of military court, somewhere every day of the war."); Hon. Walter Cox III, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 11 (1987) (noting "more than sixty convictions by general courts-martial for every day the war was fought"). Problematically, the narrative omits the prominent fact that the Army remitted more than half of these discharges and honorably restored the same offenders to military service. *See infra* Part III.B.3.

In 1947, General Eisenhower was then Army Chief of Staff. He testified during a full session of the House Committee on Armed Services regarding a proposal to empower the Judge Advocate General to mitigate a court-martial sentence independent of the convening authority and the Secretary of War. General Eisenhower related his own experience as Commander of U.S. Forces in the German front to underscore the importance of line commanders' involvement in the clemency process. The actual account clearly distinguishes between clemency fact and clemency fiction by highlighting, in Eisenhower's own words, a far more "delicate" calculus, completely omitted by Mr. Larkin and modern commentators.

As General Eisenhower visited troops, the tentacles of a complex black market syndicate had reached from France to Germany, targeting U.S. equipment. Soldiers often made inquiries: "Every time I visited the front and walked along the front, all I heard was, 'General, what are you doing about that business? These people are stealing our gasoline so we can get no place, and stealing our cigarettes.'"[149] Eventually, the American soldiers involved in these activities were court-martialed, receiving severe sentences, including terms of seventy-five years. General Eisenhower purposely "kept out of the thing because it was not my primary responsibility to try these men."[150] Thus, he waited until the sentences were fixed and word of their severity spread throughout the German front.[151] All the while, General Eisenhower had been poised along with his Deputy Commander to address the group of convicts:

> As quickly as those sentences were given, after the files were concluded . . . I offered every one of them this: Complete opportunity to exonerate himself if he would volunteer for the front line. I made that offer to every single one of them, including men who had been given 75 years on this thing.[152]

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[149] *Full Committee Hearings on H.R. 2964, 3417, 3735, 1544, 2993, 2575, Before the H. Comm. on Armed Services*, 80th Cong. 4413 (1947) [hereinafter Full Committee Hearings].
[150] *Id*.
[151] *Id.* ("We took great care to punish those so that the boys in the front line knew about it.").
[152] *Id*.

His offer was based on the notion that discipline has more than one dimension: "I am trying to show you that there is a very delicate thing, but a very, very powerful thing always involved in this business and that is the morale of the whole fighting force," he remarked to the committee.[153]

Notably, there was no mention of a "suicide mission" to complete. These convicts would be called to perform the same duties as peers who had committed no crimes. Nor was there any mention that the members of this criminal syndicate had any unique skills. Rather, they were soldiers, plain and simple. The system functioned and resulted in a sentence that provided other soldiers with a sense of satisfaction and legitimacy of the military justice system. The additional component that made it a "very delicate" situation was a common factor in clemency recognized by Brigadier General John S. Cooke in his observation that "discipline" does not mean "fear of punishment for doing something wrong," but rather "faith in the value of doing something right."[154] Rejecting an end state in which servicemembers are constantly "cringing in fear of the lash," valuable discipline is an orientation that "flows from within," and which is fundamentally rooted in the perception of fair treatment.[155] Seizing on the observations of General George Marshall, General Cooke highlights the danger that the ideal war-fighting perspective in combat operations "will quickly die if soldiers come to believe themselves the victims of indifference or injustice."[156] Not

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[153] *Id*. Fourteen of the men "who had fifteen years or less refused to volunteer for the front line," to his amazement. *Id*.

[154] Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 6 (1998).

[155] *Id*.

[156] *Id.* (citing General Marshall in BARTLETT'S FAMILIAR QUOTATIONS 771 (1980)). Echoing the observations of Generals Cooke and Marshall, Professor Linda Ross Meyer, who has studied different forms of military clemency, characterizes one distinct form as "allegiance" between superior and subordinate. Linda Ross Meyer, *The Merciful State*, *in* FORGIVENESS, MERCY, AND CLEMENCY 64, 69–71 (Austin Sarat & Nasser Hussain eds., 2007) [hereinafter Meyer, *Merciful State*]. This variation of military mercy "stems from an authority . . . who can forgive and resettle a preexisting relationship for the future" and is uniquely relevant in the military setting because it serves the mutual trust between a commander and a subordinate that is necessary to accomplish disciplined military missions. *Id.* at 70. She describes one vivid example involving a soldier deployed to Forward Operating Base (FOB) Cropper, Iraq, in 2004. This soldier apparently "had had his fill of death" and, toward the end of his tour, repeatedly refused to chamber rounds when leaving the FOB on military missions. Linda Ross Meyer, *Military Mercy* 54 (Quinnipiac Law Sch. Working Paper Grp., Paper No. 955207) [hereinafter Meyer, *Military Mercy*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=

surprisingly, this same balance of interests has endured in more recent clemency decisions involving offenders with mental conditions.[157] To Eisenhower, this symbiosis of interests in a second chance was a way in which the "court-martial system affects the Army as a whole."[158]

955207. Although the commander could have pursued court-martial, he, instead, assigned the soldier to "duties within the perimeter for the short remainder of his tour." Meyer, *Merciful State*, *supra*, at 64, 69.

The clemency came in recognition of the soldier's several months of steadfast duty before experiencing this aversion to combat. Had the misconduct occurred in the beginning of the deployment, the commander estimates he would have had little choice but to resort to court-martial. *Id.* (noting that, during the beginning of the tour, "other members of the company would have taken it as favoritism, weakness, and it would have destroyed discipline"). What transformed the situation, observes Meyer, is the fact that members of the company had observed the soldier's prior faithful service to the commander and his peers. *Id.* (observing the sentiments of many members in the company who "understood that the soldier had been responsible to the commander, and now the commander was being responsible for the soldier"). Transcending buzz words like "deterrence" or "discipline," there existed between the commander and the subordinate a relationship in which one's success would depended on the other in either the granting or withholding of clemency. Ultimately, the commander's clemency decision was "essential to maintaining the interdependence and trust within the command structure that is essential to teamwork." Meyer, *Military Mercy*, *supra*, at 43.

[157] *See infra* Part IV.B (citing more recent examples involving the recommendations of panels and military judges and the adoption of those recommendations by convening authorities in cases involving combat trauma).

[158] Full Committee Hearings, *supra* note 149, at 4423. The notion that commanders were uniformly inflexible regarding clemency might better characterize their judge advocates. During the course of his testimony, General Eisenhower explained that "my judge advocate all during the war was always against me when I wanted to reduce and mitigate sentences." *Id.* at 4426. In his opinion, the involvement of the legal advisors contributed to the "tremendously stiff sentences" that had been criticized in the legislature, while line commanders were much more inclined toward mercy. *Id.* For an example of another commander's equally lenient clemency philosophy, see House Hearing on H.R. 2498, *supra* note 147, at 1185:

> I well remember General Collins' testimony . . . when he talked about his authority, as of that time, to empty the whole guardhouse if he wanted to. He had a bunch of people out there who had been convicted. They were getting ready to go to combat and he wanted to give them a chance to work themselves out from under a serious conviction. He suspended their sentences and let them all go back to combat. If they made good he remitted the entire sentence. Now this permits the convening authority to do the very same thing. That is the intent.

(citing Robert Smart, Counsel for the Comm. on Armed Servs.).

Because many have settled for caricatures of historical events rather than the genuine articles, military justice practitioners must resist the temptation to duplicate the same misleading core history in approaching contemporary problems. Otherwise, we may mistakenly believe that there is no basis for re-appraisal of existing clemency policies. To correct for the distortion of the history effect, historians have employed an approach that is cognizant of broader lessons, which they have collectively labeled the "new military history."[159] This view encompasses additional perspectives, such as ones from international relations and economics.[160] The enlightened view equally demands a conscious effort to consider the historical experience of servicemembers in dealing with the "psychological experiences in battle" and their "postwar effects."[161] Lawyers and courts must similarly look to historical accounts from military corrections specialists and mental health professionals as they relate to offenders with mental conditions.[162]

The sections below explore these obscured lessons, confirming that, many decades ago, the military justice system enjoyed a problem-solving approach that resembled contemporary treatment courts. The disciplinary companies at the U.S. Disciplinary Barracks of WWI, Service Command Rehabilitation Centers during WWII, and discharge remission programs

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[159] *See, e.g.*, Peter Paret, *The New Military History*, PARAMETERS, Autumn 1991, at 10, 11–14 (describing how this approach "represent[s] a . . . change in emphasis in research and writing" that counters the traditional "narrowness" of historical analyses by "increas[ing] interdisciplinary approaches and topics").

[160] *See, e.g.*, John B. Hattendorf, *Introduction to* DOING NAVAL HISTORY: ESSAYS TOWARD IMPROVEMENT 1, 5 (John B. Hattendorf ed., 1995) (describing a range of disciplines that increase accurate interpretation of historical events, including science, industry, politics, and even migration of persons across the globe).

[161] Don Higginbotham, *The New Military History: Its Practitioners and Their Practices*, *in* MILITARY HISTORY AND THE MILITARY PROFESSION 131, 136, 139 (David A. Charters et al. eds., 1992). Ben Shephard's book *A War of Nerves*, has been cited as an example of the new military history applied to psychology. *Id*. at 139; *see generally* SHEPHARD, *supra* note 131.

[162] Aside from official regulations, specialized texts that address the evolution of programs for military offenders include articles in the *American Journal of Sociology*, *Diseases of the Nervous System*, *Psychological Bulletin*, *American Journal of Psychiatry*, *Federal Probation*, *Prison World*, *U.S. Armed Forces Medical Journal*, *Military Medicine*, *Journal of Criminal Law and Criminology*, and the Medical Department's multi-volume set *Neuropsychiatry in World War II*. *See infra* Part III.B (referring to various publications—many from bygone eras). Even philosophy is valuable to consider, as it helps to place types of clemency in a proper context. *See generally* FORGIVENESS, MERCY, AND CLEMENCY (Austin Sarat & Nasser Hussain eds., 2007); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST (1989); Meyer, *Military Mercy*, *supra* note 156.

in the Army and Air Force during Vietnam equally reveal how a robust clemency machinery functioned, apart from the inflexible and oftentimes harsh sentencing regimes that dominate the stock military justice histories.[163] The military, in fact, fostered restorative justice by suspending discharges with the dual purpose of treating combat-traumatized offenders while protecting society in the long-term.[164] When properly considered, the recognition that these concepts are not foreign to the profession of arms should encourage a revival of innovation within the court-martial system and collaboration with civilian agencies currently operating at the tip of the spear in treatment court programs.

B. Historical Discharge Remission Programs

Military diversionary programs that have suspended and remitted punitive discharges shed necessary light on the suitability of problem-solving programs for military members with service-connected mental illness. Although active duty programs have never overtly targeted offenses committed by mentally ill servicemembers, they all have inescapably been forced to contend with these offenders. While the power to suspend a punitive discharge has been a staple of command authority over courts-martial from the inception of the Articles of War in 1775,[165] the first national-level discharge remission programs emerged in

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[163] *See infra* part III.B.

[164] *See* MICHAEL BRASWELL ET AL., CORRECTIONS, PEACEMAKING, AND RESTORATIVE JUSTICE: TRANSFORMING INDIVIDUALS AND INSTITUTIONS 141 (2001) (describing how the concept of restorative justice "has a broader mandate than the traditional criminal justice system" in the way it prioritizes "maintaining order and social and moral balance in the community," far beyond "the limited institutional goals of clearing a court docket or ensuring that the offender is punished").

[165] American Articles of War Art. LXVII (June 30, 1775), *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953, 959 (2d. ed. 1920) (1896):

> That the general, or commander in chief for the time being, shall have full power of pardoning, or mitigating any of the punishments ordered to be inflicted for any of the offenses mentioned in the foregoing articles; and every offender convicted as aforesaid by regimental court-martial, may be pardoned, or have his punishment mitigated by the colonel or officer commanding the regiment.

According to Winthrop, commanders routinely imposed "conditional remissions" of discharges based on the satisfaction of various types of events, either prior to or after the sentence went into effect. WINTHROP, *supra*, at 469 (noting especially that, "[d]uring the period especially of the late war, pardons on express conditions, granted in Orders, both by the President and by army commanders, were not unfrequenty in military cases").

relation to desertion offenses, in the form of executive orders. Building on President Thomas Jefferson's initial pardon of deserters in 1807,[166] President Andrew Jackson developed a program to return incarcerated convicts to duty in General Orders 29 of June 12, 1830.[167] In 1864, President Abraham Lincoln instituted a similar program, allowing commanding generals to "restore to duty deserters under sentence, when in their judgment the service will be thereby benefitted."[168] Lincoln's order was the last attempt to restore military offenders convicted by courts-martial prior to 1873 when the Congress permitted the Secretary of War to "remit, in part, the sentences of . . . convicts [at the Military Prison at Fort Leavenworth] and to give them an honorable restoration to duty in case the same is merited."[169] However, by 1893, another congressional act effectively muted all restoration provisions by preventing the re-enlistment of any servicemember whose prior period of enlistment had not been "honest and faithful."[170]

1. Major General Enoch Crowder's Guiding Vision

When MG Enoch H. Crowder assumed duties on February 11, 1911, as the Army's Thirteenth Judge Advocate General, he brought a fresh perspective on military justice and penology. After transferring from the cavalry to the Judge Advocate General's Corps, Crowder spent time

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These conditions ranged from "reenlist[ment]" following return to duty to payment of fines, "the company fund in his hands," "the expenses incurred in his apprehension . . . ," or further service equivalent to "the time lost by his absence." *Id.*

[166] U.S. PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT 357 (1975) (observing that "Thomas Jefferson was the first American President to grant a pardon to military deserters").

[167] While the order directed, "[a]ll who are under arrest for this offense at the different posts and garrisons will be forthwith liberated, and return to their duty," it simultaneously precluded restoration for other classes of offenders; "Such as are roaming at large and those who are under sentence of death are discharged, and are not again to be permitted to enter the Army, nor at any time hereafter to be enlisted in the service of this country." Headquarters, War Dep't, Gen. Orders 29 (12 June 1830), *available at* THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/ajack02.asp.

[168] Headquarters, War Dep't, Gen. Orders 76 (26 Feb. 1864), *available at* THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=70008.

[169] An Act to Provide for the Establishment of a Military Prison, and for its Government, 17 Stat. 582, 583 (1873).

[170] An Act to Regulate Enlistments in the Army of the United States, 28 Stat. 215, 216 (1893).

inspecting military confinement facilities throughout the United States.[171] In Cuba, he addressed policy issues regarding "crime and punishment" while serving as chairman of the Advisory Law Commission and Supervisor of the Department of State and Justice.[172] Not only had he studied the difficulties of military justice and penology in the aftermath of the Civil War,[173] just prior to his appointment in 1910, General Crowder conducted "firsthand study of the military penal systems of England and France" and the theories of international penologists.[174] This combination of experience and interest revived in General Crowder the desire to reform the *Articles of War*, as he had attempted to do since he was a line officer.[175]

General Crowder's insights came at a crucial time. In 1909, at the behest of Adjutant General F. C. Ainsworth, the Army began a nationwide effort to reverse a trend in which, "for many years[,] the War Department and the Army made no systematic or energetic efforts to apprehend deserters."[176] The new measures represented "a policy of pursuing all deserters vigorously and bringing them to punishment if possible."[177] As part of the effort, executive orders removed court-martial provisions on leniency for youthful offenders,[178] resulting in so many

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[171] DAVID A. LOCKMILLER, ENOCH H. CROWDER, SOLDIER, LAWYER AND STATESMAN 135 (1955).

[172] *Id.*

[173] *See, e.g.*, David R. Henderson, *From "Porous" to "Ruthless" Conscription, 1776–1917*, 14 INDEP. REV. 587 (2010) (discussing General Crowder's study of an 1866 report regarding the Civil War draft in 1899 when Crowder was "a young cavalry officer").

[174] LOCKMILLER, *supra* note 171, at 135 (recognizing the influence of theorists, including F.H. Wines, E.S. Whitlin, C.R. Henderson, and the reports of the International Prison Congress).

[175] General Crowder detailed his attempts to urge General Lieber and the Secretary of War to reform the *Articles* in a personal campaign that began "[i]n 1888, while still a lieutenant in the Cavalry." Letter from Major General Enoch H. Crowder to Secretary of War Newton D. Baker (Mar. 10, 1919), *in* WAR DEP'T, MILITARY JUSTICE DURING THE WAR: A LETTER FROM THE JUDGE ADVOCATE GENERAL OF THE ARMY TO THE SECRETARY OF WAR IN REPLY TO A REQUEST FOR INFORMATION 5–6 (1919) [hereinafter 1919 Crowder Letter].

[176] Annual Report of the Adjutant General, 1910, *in* 1 WAR DEPARTMENT ANNUAL REPORTS, 1910, at 176 (1910) [hereinafter 1910 Adjutant General's Report].

[177] *Id.*

[178] Annual Report of the Judge Advocate General, 1910, *in* 1 WAR DEPARTMENT ANNUAL REPORTS, 1910, at 237–38 (1910) [hereinafter 1910 Judge Advocate General's Report]:

> Formerly the executive orders prescribing the maximum limits of punishment provided for a much lighter sentence in the case of an inexperienced soldier, particularly if surrendering himself promptly

discharges that it appeared most courts-martial awarded dishonorable discharges automatically, even though they had the option of retention.[179] Despite a significant decrease in the number of desertions, tension between the Adjutant General and the Judge Advocate General was apparent in their 1910 reports to the Secretary of War, just prior to General Crowder's assumption of duties.[180]

> he showed a disposition to atone for the offense. It was expected that in deserving cases courts would not award dishonorable discharge, but would impose a term of confinement with forfeiture as a corrective punishment, giving the soldier an opportunity to return to duty with the colors and redeem himself, to the end that the Government should not be deprived of the services of one who, as a result of such corrective punishment, would probably become a good soldier. Recently, the executive order has been amended so as to prescribe one limit of three years with dishonorable discharge and forfeiture of pay and allowances for all cases of desertion . . . .

[179] *Id*. at 168 ("It has been found . . . that there has been a tendency to impose dishonorable discharge in nearly all cases of desertion, regardless of any mitigating circumstances.").

[180] On the one hand, Adjutant General Ainsworth attributed the thirty percent decrease in desertion to the effectiveness of the program, urging the Secretary of War to preclude any convicts from return to the ranks.

> It is not contended here that clemency should never be extended to a deserter, but it is contended that it should not be extended to him at the expense of keeping him in or restoring him to a status of honor in the Army, and thereby giving widespread encouragement to other men to yield to the temptation to desert. The Army is not a reformatory for its own criminals or for criminals from civil life, and it cannot be made one without doing great damage to the service.

1910 Adjutant General's Report, *supra* note 176, at 177. On the other hand, Judge Advocate General George B. Davis urged the Secretary of War to consider the danger of overly harsh discipline:

> This tendency to mete out the extreme and degrading punishment of dishonorable discharge, even to young and inexperienced soldiers who, it is quite certain, have failed to grasp the enormity of their offense in deserting, will, if unchecked, draw the discipline of the army further and further away from the trend, not only of modern criminology, but also, it is believed, of the modern trend of military discipline toward correction, rather than merely punitive measures.

1910 Judge Advocate General's Report, *supra* note 178, at 238. The Judge Advocate General, therefore, recommended the adoption of some method to alert department commanders to the "view of corrective punishments without dishonorable discharge." *Id*.

Shortly after his appointment, General Crowder toured the confinement facilities as he had in years past, but now with an eye toward using his new influence to promote reform.[181] He, like others, saw that most dishonorably discharged inmates were approximately twenty-three years-old and was concerned that these men were wasting away in cells with eroded skills and little to offer.[182] General Crowder took a far more active role in penology than prior judge advocates general, justifying his expanded involvement on the fact that confinement conditions were an outgrowth of military justice programs.[183] From his examinations, General Crowder concluded that "discipline must be maintained, but . . . the military system of justice could be utilized as a reforming agency and that many men, heretofore lost through dishonorable discharge, could be saved for the service."[184]

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[181] James Barclay Smith, *What of the Court-Martial System?: A Comparison with Civil Criminal Procedure*, 30 MINN. L. REV. 78, 100, 102 n.25 (1946) (describing General Crowder's personal inspection of "the main branch of . . . military prisons" in October 1911 and later in 1913).

[182] *Id*. at 100 n.25 ("General Crowder expressed surprise at the youth of the prisoners in the military prison, their average age being twenty-three years."). *See also* Annual Report of the Secretary of War, 1911, *in* 1 WAR DEPARTMENT ANNUAL REPORTS, 1911, at 26 (1912) ("Over three-fourths of [inmates] are men who have been convicted of a military offense only, by far the largest proportion of which is desertion. Seven-eighths of these are men under 24 years of age.") [hereinafter 1911 War Secretary Report]. Chief of Staff, Major General Leonard Wood, raised similar concerns as General Crowder. Annual Report of the Chief of Staff, 1911, *in* 1 WAR DEPARTMENT ANNUAL REPORTS, 1911, at 161 (1912):

> Under present conditions, a man found guilty of desertion has no chance to make good and to earn by conduct, a chance to serve honorably as a soldier. All hope of doing so by excellent and long-continued good conduct is removed. No matter how much he may desire to clear his name he cannot do so. Most of the offenders are mere boys. The practical effect of our present military prison system and the legislation governing it is to crush out of these young men all hope of atoning for an offense, the gravity of which most of them failed to appreciate, to brand them as convicts, and to deprive them of . . . hope for the future.

[183] Smith, *supra* note 181, at 100 n.25 (observing the basis of General Crowder's increased involvement in confinement and restoration regimes as their "*relation . . . to the administration of military justice*") (italics in original).

[184] LOCKMILLER, *supra* note 171, at 135.

General Crowder consulted with President Taft and others to share ideas for a new military corrections framework.[185] He also observed as the U.S. Navy established its first disciplinary barracks at Port Royal, South Carolina, on September 1, 1911.[186] From these collaborations grew the revolutionary concept of "honorable restoration to duty"—a "reform school" approach[187]—that entered the national agenda after Crowder presented it to the Military Affairs Committee of the House of Representatives in 1912.[188] Modeled on the British system, which had provided the very impetus to create a Military Prison in the late 1800s,[189]

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[185] Some of these great minds included George Ives, author of *History of Modern Penal Methods*, and his friend Northwestern University Law Professor John H. Wigmore. *Id*. at 136.

[186] Annual Report of the Judge Advocate General, 1912, *in Annual Reports of the Navy Department for the Fiscal Year 1912*, H.R. Doc. No. 62-932, at 98–99 (1913) (describing the impetus for the inaugural disciplinary barracks as a method to distinguish between naval offenders who committed purely military offenses and "the criminal in civil life convicted of offenses which brand him as a menace to organized society," which clearly he was not) [hereinafter 1912 Navy Judge Advocate General's Report]. As time passed, the Secretary of War not only cited, but included, the very same studies of naval board members regarding their inspection of British prisons as the impetus for Army modifications. *See* 1911 War Secretary Report, *supra* note 182, app. B, at 70–71.

[187] General Crowder, himself, expressed so much in a letter to the Secretary of War. 1919 Crowder Letter, *supra* note 175, at 19 ("Our disciplinary barracks should indeed be thought of as a reform school, rather than as a prison; it corresponds to the term 'industrial school' as used in some states."). *See also* Annual Report of the Secretary of the Navy, 1912, *in Annual Reports of the Navy Department for the Fiscal Year 1912*, H.R. Doc. No. 62-932, at 61 (1913) (calling the Navy's disciplinary barracks system a "correctional school").

[188] *See Revision of the Articles of War: Hearings on H.R. 23628 Before the H. Comm. on Military Affairs*, 62d Cong. 15, 51 (1912) (statement of Major General Enoch H. Crowder):

> Subdivision *b* is new and grants the reviewing authority the power to change the sequence in which a sentence as adjudged by the court may require the execution of the punishment of dishonorable discharge and confinement. Under the present practice a soldier sentenced to be dishonorably discharged and to confinement is sentenced to be dishonorably discharged first and serves his confinement in the status of a civilian. It is sometimes the case that the reviewing authority is convinced that the prisoner might mend his conduct under discipline. By giving him the power to defer dishonorable discharge he could in a meritorious case remit the discharge and restore the man to duty with the colors.

See also Smith, *supra* note 181, at 102 n.25 (describing other aspects of General Crowder's presentation before the House's military committee).

[189] *See, e.g.*, SMITH, *supra* note 137, at 5 (observing how "[t]he goal of the British military prison was to restore a soldier to duty," primarily to "return[ ] them to society as

the plan featured six components, all tailored toward the inmate's eventual restoration to duty.[190] Cementing a patchwork of executive orders with legislation, Congress gradually implemented Crowder's Army restoration scheme, allowing reenlistment of peacetime deserters in 1912,[191] permitting suspended sentences for dishonorable discharges in 1914,[192] and, on March 4, 1915, christening a U.S. "Disciplinary

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productive citizens"); Captain Diane E. Sapp, "Our Mission, Your Future": The United States Disciplinary Barracks, Fort Leavenworth, Kansas: An Overview 1-14 (Aug. 1981) (unpublished M.A. thesis, University of Minnesota) (on file with The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.) (describing how, after observing harsh conditions in civilian prisons that housed military inmates, "the Secretary of War ordered . . . a board of officers to visit the British military prisons in Canada to obtain ideas for improvement of our own disciplinary system," which culminated in the creation of the U.S. Military Prison).

[190] General Crowder's six objectives were

> (1) Conversion of the United States Military Prison into the United States Military Disciplinary Barracks, (2) use of indeterminate sentences, and suspended sentences of dishonorable discharge, (3) military and industrial training in disciplinary companies to stimulate soldiers' self-respect, (4) the use of parole to test a man's fitness for restoration to duty, (5) removal of loss of citizenship previously attached to peace time deserters and authority in the Secretary of War to permit discharged offenders to reenlist, and (6) honorable restoration to duty with the colors.

LOCKMILLER, *supra* note 171, at 136. The Navy's new system operated with nearly identical objectives, using a probationary system that made "it possible for any detentioner at the disciplinary barracks whose sentence includes a dishonorable discharge to save himself from such a discharge." 1912 Navy Judge Advocate General's Report, *supra* note 186, at 99. In all of the services, the concept was so completely revolutionary that Navy Secretary Josephus Daniels remarked in 1914 how the disciplinary system represented "a view to abandoning the methods which all navies had deemed essential in maintaining a full enlistment and enforcing discipline." Annual Report of the Secretary of the Navy, 1914, *in Annual Reports of the Navy Department for the Fiscal Year 1914*, H.R. Doc. No. 63-1484, at 40 (1915) [hereinafter 1914 Navy Secretary Report].

[191] Act of Aug. 22, 1912, 37 Stat. 356 (1912) (limiting prior legislation and permitting "the reenlistment or muster into the Army of any person who has deserted, or may hereafter desert, from the military service of the United States in time of peace, or of any soldier whose service during his last preceding term of enlistment has not been honest and faithful . . . "). Such provisions allowed the Navy to place deserters in its disciplinary barracks on the same date. 1912 Navy Judge Advocate General's Report, *supra* note 186, at 101.

[192] Act of Apr. 27, 1914, 38 Stat. 354 (1914):

> The reviewing authority may suspend the execution of a sentence of dishonorable discharge until the soldier's release from confinement; but the order of suspension may be vacated at any time and the

Barracks" (USDB or DB) with "legislative authority for employment and training of offenders with a view to their honorable restoration to duty or reenlistment."[193] The War Department provided guidance to court-martial reviewing authorities not more than two months after Congress's endorsement of the suspended dishonorable discharge, directing suspension "whenever there was a probability of saving a soldier for honorable service."[194]

Significantly, what began as a proposal to address the crime of desertion in no time grew to encompass all military-related offenses,[195] with immediate transfer of murderers and career criminals into different facilities than those designated for restoration.[196] The new restoration program functioned chiefly through the "indeterminate (or probationary)" court-martial sentence, in which, "having no minimum,

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> execution of the dishonorable discharge directed by the officer having general court-martial jurisdiction over the command in which the soldier is held, or by the Secretary of War.

Later, in 1918, Congress gave convening authorities themselves the right to suspend sentences, apart from reviewing authorities. Act of July 9, 1918, 40 Stat. 882 (1918) ("The authority competent to order the execution of a sentence of a court-martial, may, at the time of approval of such sentence, suspend the execution in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension.").

[193] LOCKMILLER, *supra* note 171, at 137. *See also* An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June Thirteenth, Nineteen Hundred and Sixteen, 38 Stat. 1085–86 (1913) (directing the Secretary of War to place offenders deemed worthy of restoration to duty in "a course of military training" carried out by "disciplinary companies" and authorizing "the Secretary of War [to] remit the unexecuted portions of the sentences of offenders . . . [to] grant those who have not been discharged from the Army an honorable restoration to duty, [and to] authorize the reenlistment of those who have been discharged"). This enactment was recognized as "the final execution of Crowder's plan." LOCKMILLER, *supra* note 171, at 137.

[194] LOCKMILLER, *supra* note 171, at 137.

[195] Legislative authorization to reenlist prisoners whose prior service had not been honorable and faithful reached far beyond desertion to the majority of youthful offenders who had been incarcerated for purely military offenses. The "nine principal military offenses" also included "absence without leave, sleeping on post, assaulting an officer or noncommissioned officer, disobeying an officer or noncommissioned officer, mutiny, and disobeying general order or regulation," all of which received special recognition as offenses for which leniency could be accorded following behavioral modification. 1919 Crowder Letter, *supra* note 175, at 35.

[196] Alcatraz Island, recognized as the Pacific Branch of the United States Disciplinary Barracks (USDB), became a home for offenders not considered for restoration to duty, as did segregated portions of the facility at Fort Leavenworth over time. Smith, *supra* note 181, at 102 n.25.

only a maximum, the confinement may be terminated at any time, and the offender . . . may be restored to duty" upon the satisfaction of program criteria.[197]

In October of 1913, under the authority of General Orders 56, the Military Prison at Fort Leavenworth established the first restoration program in the form of a disciplinary battalion, consisting of four disciplinary companies.[198] In these units, participants were treated differently from prisoners:

> [M]embers of the disciplinary organizations were to be taken out of prison garb, and put into uniform. They were to be known by name and not by number separated from other prisoners, permitted to render and receive the military salute, and to be armed, equipped, and trained as infantry—all for the purpose of developing their self-respect, and fitting them for restoration to duty.[199]

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[197] 1919 Crowder Letter, *supra* note 175, at 18. In a 1914 report, the Commandant of the Disciplinary Barracks described the objective: "A soldier dishonorably discharged from the service can be honorably restored to the service only by putting him back honorably in the enlistment period which he cut short by his dishonor." *Reports of Military Prisons, Fort Leavenworth, Kans., and Alcatraz Island, Cal.*, H.R. Doc. No. 63-1418, at 31 (1914) [hereinafter 1914 Military Prison Report]. He further explained, "[t]he reinstatement or restoration of the soldier works a revivication of the enlistment period." *Id*. In this way, he "picks up the 'broken thread,' continues in the military services, and completes his enlistment." *Id*. at 26.

[198] Headquarters, War Dep't, Gen. Orders 56 (17 Sept. 1913). *See generally* 1914 Military Prison Report, *supra* note 197, at 26 (noting that the order "directed the organization of a disciplinary battalion—four companies—at the military prison [with e]ach company, at its maximum strength, . . . to consist of 86 prisoners, with a proper complement of officers and noncommissioned officers of the line of the Army acting as instructors"). The order also established one disciplinary company along similar lines at Castle Williams Prison at Governor's Island, N.Y.

[199] Smith, *supra* note 181, at 103 n.25. The Navy treated its inmates similarly: "Detentioners wear the regular naval uniform and instead of being required to perform hard labor are given a thorough course of drills and instruction with a view to better fitting them for the duties of their ratings should they earn their restoration to duty." Annual Report of the Judge Advocate General, 1914, *in Annual Reports of the Navy Department for the Fiscal Year 1914*, H.R. Doc. No. 63-1484, at 114 (1915).

These Army inmates, known as "disciplinarians," further had free movement throughout their company areas, and operated on an "honor system," in which peers were expected to enforce rules of discipline.[200]

Importantly, as this Army program developed from its seedlings of innovation planted by General Crowder, mental evaluation played a significant role as early as 1914, with the establishment of the DB's Department of Psychiatry.[201] Under a "confidential" review, medical examiners conducted a comprehensive evaluation of each prisoner's family and social background by corresponding with police departments, family members, and others, and evaluating these facts along with the circumstances surrounding the offense for which he was convicted.[202] After evaluation, it was ultimately the medical examiner that assessed future capacity for restoration:

> If the medical examiner considers the man a good risk for restoration to the colors, he recommends suspension of dishonorable discharge in case one be adjudged, or in certain cases, if the man be unsuited for further service, and if discipline will not suffer thereby, he may recommend that any confinement awarded be remitted, this latter action being frequently taken in the case of married national guardsmen whose records indicated that they had properly supported their families before being called into federal service.[203]

Offenders who committed purely military offenses, it was thought, had entered the military without efficient systems to deal with its exacting requirements. Unless inmates suffered from calamities that made them nonresponsive to further direction, they remained good candidates for

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[200] 1914 Military Prison Report, *supra* note 197, at 27. The honor system was modeled off of existing civilian penal institutions under the recommendations of their wardens. As a form of "self-government" committees of elected representatives "handle[d] the discipline of the battalion while in quarters, looks after minor infractions of the rules, etc., and . . . caused each man in the battalion to feel his responsibility not only to the battalion but to himself." *Id*. at 35. In one representative example, twenty-one unsupervised members of the disciplinary battalion participated in the apprehension of escaped inmates after obtaining authorization from the Commandant. *Id*.

[201] Major George V. Strong, *The Administration of Military Justice at the United States Disciplinary Barracks, Fort Leavenworth, Kansas*, 8 J. AM. INST. CRIM. L. & CRIMINOLOGY 420, 421 (1917).

[202] *Id*. at 421–22.

[203] *Id*. at 424.

restoration-to-duty. The two key criteria for participation in the restoration program were an "average mentality" and "no serious blots in his past" prior to military service.[204]

Within only a short time after its inception, by August of 1914, 51 Army inmates had been restored to duty.[205] In the same year, the Navy had restored 396 sailors and 95 Marines at Port Royal and 135 sailors and 22 Marines at Puget Sound.[206] Later, in the Army, "[o]ne hundred and seven out of 128 men restored up to March 4, 1915, were serving satisfactorily on that date."[207] By 1917, for the purpose of uniformity and monetary savings, the USDB became a separate general court-martial jurisdiction for all Army desertion cases involving servicemembers projected to receive dishonorable discharges if convicted.[208] Of 349 cases tried at Fort Leavenworth, the DB's SJA observed that "the reviewing authority suspended the execution of dishonorable discharge until the soldier's release from confinement in 134 cases," the purpose of such suspension to "give the man a certain period of time in which by positive action he can evidence his reformation and be restored to the service without the stigma of a dishonorable discharge appearing upon his record."[209] Like the Navy, in the great majority of these cases—"over 80%"—the Army program worked, with many restores "later being discharged as non-commissioned officers with a character 'Excellent.'"[210]

2. WWI Restoration

As American participation in WWI was about to commence, Professor John Wigmore, serving on active duty as a lieutenant colonel, outlined plans for the implementation of a widespread Army restoration-

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[204] *Id*. at 426.
[205] Annual Report of the Judge Advocate General, 1914, *in* 1 WAR DEPARTMENT ANNUAL REPORTS, 1914, at 213 (1914) [hereinafter 1914 Judge Advocate General Report].
[206] Annual Report of the Judge Advocate General, 1914, *in Annual Reports of the Navy Department for the Fiscal Year 1914*, H.R. Doc. No. 63-1484, at 113 (1915). More importantly, the Navy had, until that date, cumulatively restored 696 naval personnel at Port Royal and 157 more at Puget Sound with over eighty percent success rates among both groups. 1914 Navy Secretary Report, *supra* note 190, at 40.
[207] Annual Report of the Judge Advocate General, 1915, *in* 1 WAR DEPARTMENT ANNUAL REPORTS, 1915, at 240 (1916).
[208] Strong, *supra* note 201, at 420.
[209] *Id*. at 424.
[210] *Id*.

to-duty program to address an anticipated explosion in wartime courts-martial.[211] Building on General Crowder's initial concept, which reflected "a modernized penal system to the extent of placing reformation on a plane of equality with punishment," Wigmore proposed the following systems outline:

The path of the offender will be:

> 1. Commits offense.
> 2. Confined for trial.
> 3. Examined mentally and physically.
> 4. Reported mentally and physically fit, or unfit.
> 5. If unfit, action according to circumstances, but separated from service in any case.
> 6. If fit, tried, and sentenced, if found guilty.
> 7. After sentence, placed in disciplinary battalion (unless guilty of major crime).
> 8. After three months' training, restoration, either to regular organization or one of the special units.[212]

Colonel Wigmore recommended that inmates should be placed in disciplinary companies within two weeks after commencing the service of their sentences and restored to duty within three months' time.[213] Under the plan, "[b]y not executing the dishonorable discharges imposed by courts, it will be a simple matter to [restore participants to] duty at the proper time."[214]

As times changed, the restoration programs that grew entirely from peacetime considerations persisted during times of war, when purely military offenses had far greater impacts. Significantly, during WWI, an estimated twenty percent of all dishonorably discharged prisoners were restored to active service under terms similar to those outlined by Wigmore.[215] Although the Navy sent fewer offenders to disciplinary

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[211] *See generally* Lieutenant Colonel John H. Wigmore, *Modern Penal Methods in Our Army*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 163 (1918).
[212] *Id*. at 165.
[213] *Id*.
[214] *Id*. at 168–69.
[215] SMITH, *supra* note 137, at 6 (relating restoration statistics from Fort Leavenworth).

programs, its Judge Advocate General also still recognized the enduring value of the restoration program in time of war.[216]

Following WWI, restoration-to-duty remained the objective of the military justice system, and programs continued at the USDB and other military confinement facilities. Ultimately, the Army's and Navy's experience with restoration to duty in the inaugural period of 1911–1917 teaches two significant lessons. First, these programs began during a time of peace, not war. Although re-filling the depleted ranks with restored soldiers, sailors, and Marines was, no doubt, a valuable goal during the War, the programs were hardly established with this single goal in mind. The "principal object" of the restoration programs, as observed by the Judge Advocate General of the Navy who established the first programs, was to avoid "turning [a military offender] adrift without the credentials generally necessary to secure honest employment in civil life."[217] The second, equally important, point exists in the fact that the entire impetus for restoration grew when the military operated on an all-volunteer status. Both of these lessons weigh against the notion that the military's restoration theories are not applicable to contemporary times because circumstances have drastically changed. Evident immediately below, this message echoes most clearly in the following World War.

3. WWII Rehabilitation Centers

Before the mobilization for WWII, responsibility for restoration-to-duty of military offenders was split between local stockades and the USDB,[218] whose restoration programs grew more stringent and selective over the years. The major difference between the post-WWI program and General Crowder's brainchild was transformed expectations about the number of inmates that the DB should return to duty. Since the original

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[216] Annual Report of the Judge Advocate General, 1917, *in Annual Reports of the Navy Department for the Fiscal Year 1917*, H.R. Doc. No. 65-618, at 125 (1918) [hereinafter 1917 Navy Judge Advocate General's Report] ("It is held to be proper and right that some prisoners should have another chance to gain and maintain honorable status in the naval service, thus wiping out the effect of early misconduct for which a substantial punishment has been suffered. . . ."). However, new provisions eliminated automatic participation based on the age of the offender and encouraged commanders of naval prisons to be judicious in recommending program participants. *Id*.

[217] 1912 Navy Judge Advocate General's Report, *supra* note 186, at 99.

[218] Brigadier General Raymond R. Ramsey, *Military Offenders and the Army Correctional Program*, *in* CRIME IN AMERICA: CONTROVERSIAL ISSUES IN TWENTIETH CENTURY CRIMINOLOGY 117, 120 (Herbert A. Bloch ed., 1961).

program had, to some extent, been exported to local installations, corrections specialists expected that soldiers worthy of the opportunity for restoration already had their opportunity prior to arrival at the DB.[219] Consequently, corrections specialists expected that only 10 out of 200 general prisoners at the DB would ultimately be restored:

> 180, being unqualified for service, complete their sentences and receive dishonorable discharges;
> 10, being qualified for service but unwilling to work for restoration and honorable discharge, complete their sentences and receive dishonorable discharges;
> 9 who are restored to duty make good;
> 1 who is restored to duty, deserts or otherwise fails to make good.[220]

Significantly, even though only 9 of 200—4.5%—would maintain their honorable status, the DB program's overseer remarked that those nine, "who have made one big mistake, but who are fighting their way back to honor and self-respect . . . deserve favorable assistance and favorable consideration wherever they go."[221]

The dramatic increase of personnel during the Second World War required new plans for confining and rehabilitating inmates. While it is not the aim of this article to provide the definitive history of restoration programs in the 1940s, it explores the period in some detail, to the extent that identifiable lessons exist regarding combat-connected mental health disorders and rehabilitative programs. Although there are notable differences between the war tactics and machines used in different generations, many of the psychiatric issues from that early era are similar to, if not indistinguishable from, the dilemmas we face today.[222] During

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[219] Robert C. Davis, TAG, Information Paper, *Honorable Restoration to Duty of General Prisoners at the United States Disciplinary Barracks: For Leavenworth, Kansas and its Branches at Fort Jay, New York, and Alcatraz, Calif.* ¶ 1, at 1 (n.d.), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.).
[220] *Id*. ¶ 9, at 1.
[221] *Id*. at ¶ 10, at 2.
[222] While some may describe certain features of Iraq and Afghanistan as unique causes of combat stress, it is vital to recognize the reasons why the trauma of WWII was considered to be even "tougher" than that of the trench warfare of WWI. WILLIAM C. MENNINGER, PSYCHIATRY IN A TROUBLED WORLD: YESTERDAY'S WAR AND TODAY'S CHALLENGE 132 (1948). Doctor Menninger describes how the Second World War

the Second World War, society became acutely aware of the problems related to veteran readjustment.[223] Figure 1, below, drawn from a representative book on readjustment strategies,[224] pictorially depicts the daunting challenges encountered by WWII veterans who had problems acclimating to civilian society after enduring harsh battle conditions.

> was nearly three times as long; it was fought on a rapidly moving and shifting basis instead of on fixed lines; it required many amphibious landings; it was fought in every extreme of climate; the lethal devices were far more devastating and nerve-racking than ever before; and more men were kept away from home for longer periods.

Id. In attempting to deal with the unique problems of these veterans in WWII Mental-Hygiene Units (MHUs) or other rehabilitative settings, mental health professionals had to understand the dynamics of particular types of trauma. *See* Major Harry L. Freedman, *The Mental-Hygiene-Unit Approach to Reconditioning Neuropsychiatric Casualties*, 29 MENTAL HYGIENE 269, 276–77 (1945) (describing the necessity of adopting approaches tailored to specific types of trauma). For example, the Marine who suffered from a condition that became known as "Guadalcanal Nerves," based on a combination of constant combat operations in tropic environs, posed different challenges from a soldier who nearly drowned during the sinking of an amphibious vessel. Albert Deutsch, *Military Psychiatry: World War II 1941–1943*, *in* ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 419, 437, 440–41 (J.K. Hall et al. eds., 1944) (describing, among other things, unique symptoms facing victims of torpedoed ships); *see also* Freedman, *supra*, at 288 (exploring complications of trauma suffered from sea combat, including the problems of a soldier who felt responsible for shipmates who perished because he required assistance during rescue due to his lack of skill in swimming). With the tremendous number of servicemembers who experienced combat trauma, mental health professionals came to learn of delayed onset of symptoms, survivor's guilt, and identical situations that often manifest in criminal conduct. *See, e.g.*, G.M. Gilbert, *A Preview of Adjustment Problems*, 40 J. ABNORMAL & SOCIAL PSYCHOL. 287, 296 (1945) ("We can anticipate that many war neuroses will precipitate into activity many years later in civilian life when the stress of the environment rekindles these old feelings of helplessness.").

[223] As General Omar Bradley remarked during an August 1946 radio address, "The shooting war may be over but the suffering isn't." MENNINGER, *supra* note 222, at 363.

[224] For examples, see, e.g., WILLARD WALLER, VETERAN COMES BACK (1944); MORTON THOMPSON, HOW TO BE A CIVILIAN (1946); HERBERT I. KUPPER, BACK TO LIFE: THE EMOTIONAL READJUSTMENT OF OUR VETERANS (1945); DIXON WECTER, WHEN JOHNNY COMES MARCHING HOME (1944); CHARLES G. BOLTE THE NEW VETERAN: CITIZENS FIRST, VETERANS SECOND (1945). For an overview of these sources and other mainstream media depictions of the '40s reflecting PTSD specifically, see generally Christina Jarvis, *"If He Comes Home Nervous": U.S. World War II Neuropsychiatric Casualties and Postwar Masculinities*, 17 J. MEN'S STUD. 97 (2009).

Fig. 1. Depiction of WWII Veteran Readjustment Problems.[225]

The civilian community's experiences with returning veterans and their problems underscored the necessity of developing innovative programs to address their crimes.[226] As the military was the very origin of many combat neuroses, the Armed Forces had an even more pressing need to become efficient in both the practice of psychiatry and the practice of military justice in relation to psychiatric conditions. The Service Command Rehabilitation Center (SCRC) was the first real bridge between these distinct areas.

In 1940, the Nation began a massive mobilization for WWII. The War Department, concerned for the preservation of manpower and expecting a tremendous increase in the number of courts-martial, contemplated major changes to its correctional system. Aided by several of the leading civilian penologists, the Army soon devised a program for the operation of "rehabilitation centers" within each of its nine service commands.[227]

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[225] THOMPSON, *supra* note 224, at 17 (illustration by Charles Pearson). Although this book was originally published in 1946 by Doubleday & Co., a corporation whose titles are now affiliated with Random House Inc., the copyright in Thompson's work is registered to Mr. Hilliard L. Bernstein, Esq., who is now deceased. According to his survivor, Mrs. Kathleen Bernstein-Lipkins, she is not now enforcing this copyright and she knows of no entity that is enforcing this copyright.

[226] *See supra* notes 61–62 (describing concerns over the post-WWII veteran crime wave); *supra* note 140 (describing Indiana's implementation of a specialized criminal court program for WWII veteran offenders).

[227] The civilian penologists were complemented by distinguished experts who adorned the uniform during the war, including Richard A. Chappell and Victor Evjen, who were formerly employed as the Chief and Assistant Chief of Federal Probation, and who used their skills within the Navy's Correctional Services Division and the Army's Correctional Division of the Office of the Adjutant General, respectively. Miguel Oviedo, *Federal Probation During the Second World War—Part One*, 67 FED. PROBATION 3, 6 (2003).

At a decisive time when the Army had little more than 1551 inmates in custody,[228] it assembled five-person teams, including psychiatrists, from each of the nine service commands at the Command and General Staff College and the USDB to translate penal theory into practice.[229] Although modeled off of the DB's restoration program—with similar inmate classification procedures, gradually increasing privileges, intensive military training, and participation in honor companies as a condition precedent to restoration—rehabilitation centers were designed to restore a far greater number of general prisoners.[230] The October 1942 memorandum establishing the centers, in fact, reminded the service commands that "[c]onsideration and action under existing regulations which permit suspension of sentences, reclassification, and restoration of general prisoners to duty will be liberalized."[231]

The concept of the rehabilitation center was considered to be an "innovation in Army practice." Austin MacCormick & Victor H. Evjen, *The Army's Postwar Program for Military Prisoners*, PRISON WORLD, May–June 1947, at 3, 5. *See also* Major Isodore I. Weiss, *Rehabilitation of Military Offenders at the Ninth Service Command and Rehabilitation Center*, 103 AM. J. PSYCHIATRY 172, 172 (1946) (referring to the rehabilitation center experience as "a brilliant chapter in the history of the war"). In 1943, when the Navy adopted a similar restoration program, it too was considered "a new departure from traditional Navy confinement activity." Colonel Emmett W. Skinner, *The Navy's Correctional Program*, PRISON WORLD, Jan.–Feb. 1945, at 8, 8. While none of these personnel referenced the effort of General Crowder or the service secretaries in instituting the first real restoration programs in the early 1900s, or COL Wigmore for recommending a similar idea during WWI, this may have been due to the monumental scale on which correctional planners conceptualized WWII programs.

[228] Colonel Marion Rushton, *The Army's New Correction Division: Its Purposes, Functions and Organization*, PRISON WORLD, Nov.–Dec. 1944, at 4, 4 (providing statistics from January 1942).

[229] Weiss, *supra* note 227, at 172; Major Perry V. Wagley, *The Army Rehabilitates Military Offenders*, 8 FED. PROBATION 14, 15 (1944).

[230] As the Turlock Rehabilitation Center's first commander, COL Kindervater, explained to his cadre and staff, the program would not be "exactly the same as [the DB because] we were to instill a better sense of responsibility and patriotism among our prisoners with a view towards restoring them to duty instead of merely keeping them in confinement." CARLING I. MALOUF, REHABILITATION AT TURLOCK: LIFE IN AN AMERICAN PRISON CAMP DURING WORLD WAR II, at 6 (n.d) (unpublished manuscript), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (citing the commander).

[231] Carling I. Malouf, *Notes from a War Department Letter Regarding the Establishment of Detention and Rehabilitation Centers* 3 (n.d.), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (citing War Department Letter from S.O.S., Oct. 28, 1942, AG 383.06 (10-17-42) OB-I-SP-M). The memorandum likewise admonished commanders that "[c]ourts-martial will be held at an absolute minimum, using other authorized disciplinary means and measures" and that "[g]eneral courts-martial should be resorted to only in most flagrant cases." *Id*. at 3–4. In developing the concept of rehabilitation centers, the War Department weighed these

By the end of 1942, nine Army rehabilitation centers commenced operation across the United States.[232] Over time, so would eleven overseas counterparts known as "disciplinary training centers" or "detention rehabilitation centers."[233] With differences in population size and operational standards, each center was quite unique.[234] Although the service command commanders had had the final say in determining who would be returned to duty under War Department standards, theater commanders had more discretion to change the format of their training programs[235]—and often did. A primary concern was ensuring that inmates did not view rehabilitation centers as safe "haven[s]" from combat.[236] The *Trainee Handbook* for the inmates at the North African

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considerations in order of precedence: (1) The best interests of the prisoners; (2) those of other soldiers; (3) those of the Army; and (4) those of society. U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 6.

[232] The locations of the nine service command rehabilitation centers (SCRCs) were Fort Devens, Mass. (First Service Command (S.C.)); Camp Upton, N.Y. (Second S.C.); Camp Pickett, Va. (Third S.C.); Fort Jackson, S.C. (Fourth S.C.); Fort Knox, Ky. (Fifth S.C.); Camp Custer, Mich. (Sixth S.C.); Camp Phillips, Kan. (Seventh S.C.); Camp Bowie, Tex. (Eighth S.C.); and Turlock, Cal. (Ninth S.C.). U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 5. By 1944 these commands were consolidated from nine to six, eliminating the First, Third, and Sixth, with the shifting of the Seventh S.C. from Kansas to Jefferson Barracks, Mo. Rushton, *supra* note 228, at 4, 6. The Navy established its retraining commands for each coast, with the east coast's command located at the Naval Base at Norfolk, Va., and the west coast's command located at Mare Island Naval Shipyard in Vallejo, Cal. Captain J. Maginnis, *The Navy's Postwar Correctional Program*, PRISON WORLD, Mar.–Apr. 1947, at 3, 25.

[233] Austin H. MacCormick & Captain Victor H. Evjen, *The Army's Rehabilitation Program for Military Prisoners*, *in* SOCIAL CORRECTIVES FOR DELINQUENCY: 1945 NATIONAL PROBATION ASSOCIATION YEARBOOK 1, 8 (Marjorie Bell ed., 1946) (noting rehabilitation units for dishonorably discharged soldiers in "Pisa, Italy; Paris, Loire, and Seine, France; Casablanca and Oran, North Africa; Shepton Mallet, England; Chungking, China; Saipan; Calcutta and Karechi, India; Round Mountain, Australia; Oro Bay, New Guinea, Oahu, T.H.; and Luzon, P.I.").

[234] MALOUF, *supra* note 230, at 10 ("Not all Rehabilitation[ ] Centers were alike in their policies of operation. Some . . . were just being sent prisoners with less serious cases behind them . . . .").

[235] MacCormick & Evjen, *supra* note 233, at 1, 8.

[236] Sergeant George M. Hakim, *GIs Gone Wrong Get Straightened Out at Progressive Prison in Africa*, YANK: THE ARMY WKLY., Mar. 24, 1944, at 6, 6 (observing that "[g]enerally a prisoner works and trains 12 [to 14] hours a day, seven days a week—and they're probably the toughest days he ever put in," that prisoners eat standing up, miss meals for "gigs" during inspections, repeat infantry training even if they completed basic training prior to their offense, and that "if the training were easy and routine, the center might become a haven for those outside who want to escape work or danger"). Sergeant Norbert Hofman, *GI Reform School: The Toughest Detail in the Army is Dished Out to Court-Martialed GIs at the Disciplinary Training Center Near Pisa*, YANK: THE ARMY WKLY., Nov. 9, 1945, at 16, 16 (observing that the re-training regimen was "planned to

Theater of Operations (NATOUSA) clearly expressed this position upon their admittance:

> *A man confined in the Disciplinary Training Center is a man enlisted in the service of our enemies.* More than that, he represents two men in the Axis army. This is true because of the large numbers of officers and men retained here to operate this institution—to train and care for you—and also because your presence here has deprived the army of a soldier whose services had been counted upon. You have deprived the Army of two men. To even the score you will do the work of *two men* while you are confined.[237]

Although indisputably tough on inmates, many prisoners in the program had opportunities to serve in leadership positions[238] and "alert squads"—armed with Thompson machine guns for special duty.[239] At overseas

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be tougher than combat, and when the Army tries to make things rugged it does a good job"); MALOUF, *supra* note 230, at 23 ("Army regulations . . . specified that [rehabilitation center] programs be more strenuous than those required in the Army itself."). In the words of War Secretary Robert Patterson,

> A military prison is safer than the battlefield, but it should not be made into a soft berth, and certainly no soldier who commits a serious offense should be sent back to civilian life ahead of the steady soldier who does do his duty. We owe it to our fighting men who maintain clear records to deal *effectively* with those few who commit offenses.

Hon. Robert P. Patterson, *Military Justice*, PA. BAR ASS'N Q., Oct. 1945, at 30, 32 (emphasis added).

[237] WAR DEP'T, HQS., NORTH AFR. THEATER OF OPERATIONS, NATOUSA DISCIPLINARY TRAINING CENTER (A.B.S.) TRAINEE HANDBOOK 5–6 (1943) [hereinafter WAR DEP'T, NATOUSA HANDBOOK] (on file at the U.S. Dep't of Army Military Police History Office, Fort Leonard Wood, Mo.) (emphasis in original).

[238] War Dep't, HQs NATOUSA Disciplinary Training Center, *Organizational History from Activation to 19 June, 1944* (Jun. 19, 1944) (on file at the U.S. Dep't of Army Military Police History Office, Fort Leonard Wood, Mo.) (describing how trainees could potentially rise to trainee non-commissioned officer).

[239] WAR DEP'T, NATOUSA HANDBOOK, *supra* note 237, ¶¶ 3–4, at 29 ("The squad is armed with Thompson sub-machine guns, and is specifically trained in the use of that weapon, in guard duty . . . special patrol work . . . . [or] any emergency which might arise . . . such as an air raid, fire, riot or an emergency action"). It was said that some soldiers in otherwise uneventful positions purposely committed offenses with hopes that their assignment to a rehabilitation center would result in quicker assignment to a different unit. *See* MALOUF, *supra* note 230, at 126.

centers, the reality of combat lingered at all times,[240] especially when, in 1944, the NATOUSA program moved its location from Morocco to just twelve miles from the front line, near Pisa, Italy.[241] Not surprisingly, these "rehabilitation" experiences were far different from inmates in domestic centers, many of whom were incarcerated for absenting themselves from duty at induction stations, before they even received their initial issue of gear or attended military training.[242]

a. The Basic Structure of Restoration Programs

All rehabilitation centers and disciplinary training centers had basic programmatic elements. The blueprint contained a multi-phase program, which began with a period of screening and classification. Following assignment to a training unit, staff and cadre intensely observed participants' performance as their responsibilities and concomitant privileges gradually increased.[243] Initial stages of participation employed the philosophy of "re-training," the assumption that the participants'

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[240] *See, e.g.*, WAR DEP'T, NATOUSA HANDBOOK, *supra* note 237, at 9 ("All production is planned to aid those who are at this moment fighting the battles which you and I should be participating in, were it not for *your* failure to understand the meaning of discipline.") (emphasis in original). Some overseas centers used such work with therapeutic, rather than punitive aims, however. *See, e.g.*, Captain Edward N. Usnick, Commander, Round Mountain Detention and Rehabilitation Ctr., Australia Base Section, USAOS, *Foreword* to SUPPLEMENT TO THE HISTORY OF ROUND MOUNTAIN DETENTION AND REHABILITATION CENTER (n.d.) (on file at the U.S. Dep't of Army Military Police History Office, Fort Leonard Wood, Mo.):

> It is believed by those of us who hold the present and immediate future destines of the Trainees in our hands, that in order to start re-training, a man's mind must first be eased as to his burden on the government, this we have accomplished by our employment of the labor in the furtherance of the war effort by our extensive production policy. After showing a Trainee that the time spent here is not completely lost we are able to emphasize the need for retraining both along military and technical lines.

[241] Hofman, *supra* note 236, at 16, 16. The Pisa DTC confined the poet Ezra Pound while he awaited charges for treason. *See, e.g.*, EZRA AND DOROTHY POUND: LETTERS IN CAPTIVITY, 1945–46, at 84 (Omar Pound & Robert Spoo eds., 1999) (citing a letter written by the DTC Commander to his mother reflecting on Ezra Pound's activities translating various writings by a Chinese philosopher while confined at the DTC).

[242] MALOUF, *supra* note 230, at 22.

[243] *See, e.g.*, MacCormick & Evjen, *supra* note 233, at 1, 12 (describing how pre-honor company trainees were under guard, whereas honor company trainees lived in a separate area with freedoms that were very similar to those they would enjoy as normal soldiers).

criminal behavior resulted from unsuccessful adaptation to military ways of life and a failure to apply standards of military discipline.[244] The "correctional treatment" at rehabilitation centers largely operated under the "medical model" of corrections, in which "the prisoner was viewed as 'sick,' the prison became a 'hospital,' and the corrections personnel were the 'medical staff' who would 'cure' the patient of his illness through scientific treatment."[245] Under this approach, endless iterations of drill and ceremonies, physical training, and other common soldier tasks were the antidote for improved performance, and intensive observation during the performance of these tasks would permit cadre to correct contaminated beliefs on-the-spot by modeling acceptable

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[244] *See, e.g.*, Major Herman B. Snow, *Psychiatric Procedure in the Rehabilitation Center, Second Service Command Rehabilitation Center*, 25 MIL. NEUROPSYCHIATRY 258, 258 (1946) (noting that "reorientation in the military service is of primary import" and that "[e]verything that is done at these Centers, whether it be in the form of privileges, instruction, discipline, dress or attitude, all emanate from one consideration, all converge toward one goal—the performance of proper military service upon release from the Center"). Some trainee handbooks reprinted the definition of military discipline in their first pages. *See, e.g.*, WAR DEP'T, NATOUSA HANDBOOK, *supra* note 237, at 3:

> Military Discipline is that mental attitude and state of training which render obedience and proper conduct instinctive under all conditions . . . It is generally indicated in an individual or unit by smartness of appearance and action; by cleanliness and neatness of dress, equipment, or quarters; by respect for seniors and by the prompt and cheerful execution by subordinates of both the letter and the spirit of the legal orders of their lawful superiors.
>
> Army Regulation 600-10.

The NATOUSA *Trainee Handbook* went on to explain,

> It is known that most offenses arise from the soldier's lack of understanding of discipline and inadequate training. The War Department established this Disciplinary Training Center to train and work you in such a way that you will thoroughly appreciate the meaning and vital importance of discipline in the Army, with the entire day from *before dawn until late at night* filled with a schedule to fit you for active service in a combat unit.

Id. at 7–8 (emphasis in original).

[245] ROGER G. MILLER, CRIME, CORRECTIONS, AND QUALITY FORCE: A HISTORY OF THE 3320TH CORRECTION AND REHABILITATION SQUADRON 1951–1985, at 61 (1987). *See also* Lieutenant Colonel Lawrence J. Morris, *Our Mission, No Future: The Case for Closing the United States Army Disciplinary Barracks*, 6 KAN. J. L. & PUB. POL'Y 77, 85 (1997) (noting, from a "review of official reports and other records" at the DB, the "persistent belief" that rehabilitative measures could address "criminal behavior as if it were an illness for which there was a 'cure'").

behavior.[246] Although psychologists, psychiatrists, and other mental health professionals screened participants and composed reports, most of these programs could not facilitate the "treatment" of all participants in any meaningful way.[247] While there was an opportunity for individual "therapy" in exceptional cases, the standard correctional treatment did not contemplate it.[248]

If trainees successfully performed in successive phases, their daily conditions, with a few exceptions, eventually resembled those commonly encountered in normal military service.[249] Servicemembers in their final stages could often could go anywhere on the military post under curfew[250] and draw pay to attend movies and other recreational events.[251] In all cases, graduates were never returned to the units where they had been court-martialed, and only their commanders were supposed to know

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[246] MALOUF, *supra* note 230, at 23 ("A military training was regarded as adequate therapy for most of the prisoners.").

[247] *See, e.g.*, Major Ivan C. Berlien, *Rehabilitation Center: Psychiatry and Group Therapy*, 36 J. CRIM. L. & CRIMINOLOGY 249, 254 (1945). At the Ninth SCRC, the psychiatrist, for example, then-First Lieutenant Isodore Weiss, explained, that "everyone goes through precisely the same procedure no matter what their problems are or how long they will be confined," and, even for the neurotic, "once he is diagnosed . . . I promptly proceed to forget about him because there is nothing I can do—not even see him again. The scope of the work is so great that I see a man only for the purpose of preserving his papers." Letter from First Lieutenant Isodore I. Weiss, Psychiatrist, Headquarters Rehabilitation Ctr., Ninth Serv. Command, Turlock, Cal., to Major Perry V. Wagley, Dep't of Psychiatry & Sociology, Sixth Serv. Rehabilitation Ctr., Fort Custer, Mich. 1 (May 1, 1943), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) [hereinafter Weiss Letter]. Importantly, there was an exception to this general rule. *See infra* Part III.B.3.b.i & ii (describing group therapy and intensive treatment at some SCRCs).

[248] *See, e.g.*, MALOUF, *supra* note 230, at 22 ("There was no effort to provide training or therapy required of individual cases. The psychiatrist had to devote most of his time to evaluating prisoners rather than giving them treatment, although he did try to find some time to try group therapy.").

[249] *See, e.g.*, Major Joseph L. Knapp & Fredrick Weitzen, *A Total Psychotherapeutic Push Method as Practiced in the Fifth Service Command Rehabilitation Center, Fort Knox, Kentucky*, 102 AM. J. PSYCHIATRY 362, 365 (1945) (comparing honor company status to "institutional parole," in which restores could "associate on an equal basis with other soldiers on a duty status").

[250] *See, e.g.*, MacCormick & Evjen, *supra* note 233, at 1, 12.

[251] This was true even at the USDB. Austin MacCormick, *Some Basic Considerations in the Discipline of Military Prisoners*, 9 FED. PROBATION 7, 11 (1945) ("At Fort Leavenworth, members of the disciplinary company after the first four weeks in the company have the freedom of the post at Fort Leavenworth on Saturday and Sunday afternoons, and may draw a limited amount of funds for expenditures.").

they had been assigned from rehabilitation programs.[252] In both the Army and the Navy, however, graduates still remained on a term of probation for several months prior to the remission of their sentence, after returning to active duty.[253] While commanders' attitudes toward restorees ranged from high praise[254] to the belief that they generally constituted "inferior material,"[255] overall assessments in the Army suggest that restorees generally performed well and commanders were generally satisfied with their performance.[256] The ultimate philosophy of all 1940s rehabilitation centers and retraining commands is best summarized in the conclusion of the Ninth Service Command's *Prisoner's Handbook*: "Remember the slogan, 'Put out and you will get out.'"[257]

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[252] *See, e.g.*, Don Wharton, *The Army Saves its Black Sheep*, READER'S DIG., Nov. 1943, at 77, 77 (describing the policy that "[o]nly his company commander knows that he came from a rehabilitation center").

[253] *See, e.g.*, McCormick & Evjen, *supra* note 233, at 1, 12 ("On restoration to duty the unserved portion of his sentence to confinement is suspended. This procedure in a sense is comparable to being placed on probation."); Hakim, *supra* note 236, at 6, 6 (noting how, in the Army, the probationary period following restoration lasted six months); Maginnis, *supra* note 232, at 3, 3 (describing the Navy's institution of a probationary period of six to twelve months). In fact, the War Department stressed this point to all restores as a way to exert legal leverage over their future conduct. U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 18 ("Emphasis was placed upon the fact that in the event of subsequent misconduct the suspension could be vacated and the entire sentence, including dishonorable discharge, total forfeitures, and confinement, ordered executed.").

[254] *See, e.g.*, Rushton, *supra* note 228, at 4, 5 (observing that some "commanders are anxious to find [trainees] and, whenever possible, to restore them to the field").

[255] Editorial, *Rehabilitated Soldiers Can Make Good*, WHAT THE SOLDIER THINKS, May 25, 1944, at 5, 5.

[256] MacCormick & Evjen, *supra* note 233, at 1, 17 (observing reports that, after six months of active duty following restoration, 89% of restores were rated "average or above average in performance of duties" and 87% "average or above average in personal conduct").

[257] WAR DEP'T, HQS. REHABILITATION CENTER, NINTH SERVICE COMMAND, INTERNAL SECURITY ORDERS NO. 2: PRISONER'S HANDBOOK 24 (10 Aug. 1943), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.). The Camp Sociologist described how the same slogan was prominently displayed at the inprocessing section of the center, until a trainee who had not been restored argued that he met his side of the bargain by putting out; following this, cadre modified the banner to read, "Put out and you *may* get out." MALOUF, *supra* note 230, at 13 (emphasis added). At Turlock, which housed approximately 10,000 trainees during its tenure, the motto held true in approximately ninety percent of the cases, with the rejects serving the remainder of their—in some cases twenty-year—sentences at the DB or federal prisons. *Id*. at 24. Not all centers were as generous, however. *See, e.g.*, Snow, *supra* note 244, at 270 (describing nearly half the numbers of restored trainees at his SCRC).

i. The Flexible Concept of Correctional Treatment

Although, initially, the Army mandated that trainees should be restored in the quickest time possible,[258] actual experience led the War Department to make the programs indefinite in length to address each trainee's underlying problems.[259] This policy foreshadowed the future experiences of the Army and Air Force rehabilitation programs in the 1950s and beyond.[260] At the largest Army rehabilitation center, for example, while most participants graduated within nine to ten months, some remained for one year, and others even eighteen months.[261] The elastic nature of program duration also permitted innovation in these earliest centers and, as a necessary component of such innovation, the opportunity to incorporate both civilian correctional theories[262] and psychotherapeutic approaches.[263]

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[258] *See, e.g.*, Weiss Letter, *supra* note 247, at 6:

> [T]his is a place for "mass production" and the guiding theme is to get them back into the service just as soon as possible. I feel that the mission of the station is compromised by the singleness of purpose which blinds everyone to the shortcomings of many of these people who will never be good soldiers.

It is noteworthy that Weiss wrote the above excerpt during the infancy of the center. The author's opinion changed by 1945, when operations permitted more time for psychotherapy. Weiss, *supra* note 227, at 176.

[259] *See, e.g.*, MacCormick & Evjen, *supra* note 233, at 1, 12 ("Proper preparation for restoration rather than speed is emphasized at all times.").

[260] *See infra* Parts III.B.4 & 5.

[261] Weiss, *supra* note 227, at 173. The overall average for all rehabilitation centers was thirty-two weeks. U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 22.

[262] The War Department, on October 11, 1944, assembled a thirteen-person board of civilian penology "consultants" for the purpose of reviewing rehabilitation centers and developing standards and guidelines for their operation, to include matters of restoration. U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 8. *See also* Memorandum from First Lieutenant Robert D. Moran, Office of The Judge Advocate Gen. to the JAGO Files, subject: Background of Present System for the Administration of Clemency 10 (28 May 1954) (JAGA 54/5169) [hereinafter Moran Memo]. More specifically,

> the board was made up of the country's leading prison administrators and penologists, and included among its members the Director of the Federal Bureau of Prisons, the General Secretary of the American Prison Association, a member of the New York State Board of Parole, three State Commissioners of Correction, four Federal and two State Institution Wardens, and a former Commissioner of Correction for New York City.

ii. Philosophies of Rehabilitation at WWII Centers

Built into the concept of the "second chance" was the realization that, in a time of war, there would be little time to accurately determine the potential of an inmate at court-martial.[264] Recognizing the harshness of the punitive discharge, the rehabilitation center began to function as a laboratory in which to evaluate the inmate's potential objectively, after careful observation. Court-martial panels often advised inmates about the expectation that they would in fact prove themselves, and return to honorable duty in six months, while simultaneously adjudging twenty-year sentences to the very same offenders.[265] In all cases, the major

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U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra*, at 8.

This cooperative spirit was not just limited to the Army; noting how the rehabilitative program was necessarily "flexible and experimental," the Psychiatrist for the Naval Retraining Command at Mare Island, Cal., described other collaborative policies: "Close liaison with various other correctional institutions in California is maintained, with field trips and open exchange of information and ideas. Every effort is made to integrate and correlate the work of the several departments toward the ultimate objective of more effective retraining." Commander John M. Murphy, *The Role of Psychiatry in Naval Retraining*, 3 U.S. ARMED FORCES MED. J. 631, 632 (1952). In fact, by July 1945, the classification system for all Army retrainees was adopted from "the Federal Bureau of Prisons and more progressive state prisons, reformatories, and correctional institutions." MacCormick & Evjen, *supra* note 233, at 1, 11.

[263] Berlien, *supra* note 247, at 254–55 (challenging psychiatrists at rehabilitation centers to innovate new therapeutic approaches to address trainees' underlying developmental problems—not simply their responsiveness to disciplinary measures); Knapp & Weitzen, *supra* note 249, at 362 (describing how the Fifth SCRC instituted a program of individual therapy, despite significant challenges); Weiss, *supra* note 227, at 176 (describing how expansion of staff responsibilities permitted the Ninth SCRC's psychiatrist to institute various group therapy initiatives).

[264] *See, e.g.*, *infra* discussion accompanying notes 311 to 319 (suggesting how more specific information about the offender's history and the circumstances surrounding the offense would have likely altered the findings and sentences of many courts).

[265] A 1943 *Saturday Evening Post* article related the court-martial president's additional comments when announcing his sentence of twenty years' confinement to seven soldiers who had been convicted for desertion from a unit in French Morocco:

> I must explain to you that Army justice is tempered with mercy. What happens to you now depends entirely upon yourselves. You will begin serving your sentence in the disciplinary training center near Casablanca. [A]nd your conduct there will determine your future. At the end of six months, like all other offenders, you are entitled to apply for restoration as soldiers in good standing. If your records indicate that you have learned what discipline means, the commanding officer in this area is empowered to approve your application.

vehicle through which to accomplish these tasks was the suspended sentence accompanied by the assignment to a rehabilitation center, rather than the DB.[266] With some important differences, the Navy too established a very similar system when operating its own retraining commands throughout the United States.[267]

iii. One Commander's Perspective on Restoration and Rehabilitation Centers

The historical records for the Ninth SCRC at Turlock, California, provide unique insight into the Commander's philosophy on restoration. Occupying fairgrounds formerly used as a holding area for Japanese-American internees, Turlock was the first and largest rehabilitation center in the United States.[268] In an effort to ensure consistency in court-martial and restoration practice throughout the command, MG Kenyon Joyce met with "officers involved with courts-martial procedures" to highlight his expectations.[269] His illuminating speech, which offers important insight into how the program operated—aside from amounting to what is now unlawful command influence—first established that he largely viewed cases of absence without leave and desertion as a failure

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Demaree Bess, *When Soldiers Go to Jail*, SATURDAY EVENING POST, Dec. 11, 1943, at 20, 20–21. *See also* Knapp & Weitzen, *supra* note 249, at 362 (observing courts-martial in which "[a]t the time the sentence is passed the court makes a recommendation as to whether the soldier has any possibility of being rehabilitated and restored to duty").

[266] *See, e.g.*, Weiss, *supra* note 227, at 173 (describing the necessity of suspended sentences and noting how, even where the center desired to restore a trainee with an unsuspended discharge, the "obstacles to restoration were . . . virtually insurmountable").

[267] With time to observe the Army's experiment, the Navy began to institute its retraining programs in 1943. Commander John M. Murphy, *The Role of Psychiatry in Naval Retraining*, 3 U.S. ARMED FORCES MED. J. 631, 631 (1952). *See generally* Commander Richard A. Chappell & Ensign F. Emerson Logee, *Training Wayward Sailor Men for Return to Duty*, *in* SOCIAL CORRECTIVES FOR DELINQUENCY: 1945 NATIONAL PROBATION ASSOCIATION YEARBOOK 20, 20–27 (Marjorie Bell ed., 1946) (describing how, by 1944, a fixed program had been established in which prisoners were enrolled in retraining commands for an eight- to ten-week training program, but only after they had served a good portion of their adjudged sentence).

[268] MALOUF, *supra* note 230, at i, 4, 5. The center housed inmates from the Pacific Theater, Alaska, and eight western states. *Id*. at 2, 28. At times, the Ninth SCRC had a greater number of participants than inmates at the USDB. *Id*. at 28.

[269] Carling I. Malouf, Command Policies Regarding Court-Martial 1–5 (n.d.), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.).

in leadership on the part of the offender's commanding officer.[270] Consequently, as a matter of course, in all desertion cases, even if soldiers received decades of confinement, General Joyce would reduce confinement to between two and five years, depending on the aggravation present.[271] He pledged further to suspend each of the sentences, thereby offering the possibility of restoration and early release from the already substantially reduced sentence.[272]

General Joyce had a similarly accommodating view of crimes that occurred in the backdrop of alcohol consumption. He explained that the soldier who "commits some act of violence . . . . may get drunk, take a swing at somebody and be all wrong about it as a matter of military procedure but still be all right basically,"[273] thus providing insight into special considerations for what some would term "situational offenders."[274] Contrastingly, for crimes of moral turpitude—especially larceny of other soldiers' property—General Joyce explained his

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[270] According to Major General Joyce, "[t]he inordinate number of men who have gone absent without leave or who have deserted is a direct reflection on the discipline that has been instilled in these men by unit commanders, and in that source lies the greatest possibility for correction of the existing situation." *Id*. at 1. For further exploration of this concept, see generally, Rear Admiral Chester Ward, *Leadership as Related to the Application of Military Law*, JAG. J., Dec. 1957–Jan. 1958, 13, 16 ("The achievement of justice is leadership in action."). In his speech, General Joyce further acknowledged, "[i]n this command every effort has been made to handle cases of the sort with a minimum resort to courts[-]martial." Malouf, *supra*, note 269, at 1.

[271] Malouf, *supra* note 269, at 1–2.

[272] *Id*. ("In all such cases [including "ordinary wartime desertion and aggravated desertion"] the dishonorable discharge has been suspended."). General Joyce's allowance reflected the general policy that "a long sentence to confinement was not taken as an indication that successful preparation of the inmate for restoration to duty could not be accomplished by the rehabilitation center." U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 17. *See also* Hofman, *supra* note 236, at 16 (describing sentence ranges of trainees between "five years to life," all with dishonorable discharges).

[273] Malouf, *supra* note 269, at 2 (noting, additionally, "[i]f they are basically good soldiers, we should save them to the service. In 95 out of a hundred cases they can be safely restored to duty even though the sentence includes a dishonorable discharge").

[274] Berlien, *supra* note 247, at 252 (defining situational or accidental crimes, which "are brought about when the anti-social impulses gain supremacy in the individual under impelling [or unconscious] circumstances" and distinguishing these types of "acute criminal[s]" who commit crimes "under special circumstances," from more chronic offenders). Lieutenant Malouf, who served as the Camp Sociologist for more than a year, explained how "the Army itself stimulated a desire for alcohol within its ranks" at the time and that "a large number of the offenders at Turlock attributed their downfall to intoxication." MALOUF, *supra* note 230, at 155–56.

presumption of nonrestorability.[275] This presumption of restoration for deserters prevailed, despite the fact that, in the words of one audience member, the deserter "deprived or 'robbed' the Army and his fellow soldiers of months of useful service."[276]

General Joyce's philosophies of punishment, to a large extent, mirrored the War Department's prohibitions on the participation of servicemembers convicted for nonmilitary offenses.[277] Although the rehabilitation centers *did* come to restore all types of offenders—including ones convicted of homicide, aggravated violence, narcotics, and sex offenses[278]—the presumption of nonrestorability for nonmilitary

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[275] Malouf, *supra* note 269, at 2 ("[A]ny time that restoration is asked for a man who has been convicted of robbery, larceny or thievery of any kind, the case must be an extraordinary one to warrent [sic] favorable consideration. I don't believe in restoring them and it is not going to be done unless there is rehabilitation beyond a reasonable doubt."); *id.* at 3–4:

> [For] crimes which indicate distinct moral turpitude or depravity or a mental slant which goes to violence . . . rape, sodomy, robbery. All of those offenses, of course, will receive penitentiary confinement as far as our recommendations are concerned. And in those cases, of course, the action here will always be to execute the dishonorable discharge.

[276] MALOUF, *supra* note 230, at 8–9 (noting that "[a] man who stole an inexpensive fountain pen was often regarded to be more evil and disturbing to a unit than a deserter").

[277] Carling I. Malouf, *Extracts from Section VI-W.D. Circular 6, and Section VI-W.D. Circular 63, Which Are Still In Effect—Governing Places of Confinement for General Prisoners* 1 (n.d.), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (generally designating the following types of offenders for confinement in Federal penitentiaries: "All prisoners . . . convicted of treason, murder, rape, kidnapping, arson, sodomy, pandering, any illegal trafficking in narcotics or other habit forming drugs in violation of Federal law . . ."; and the following offenders at the USDB: officers, drug offenders, "sodomists or other sexual perverts," those with unsuspended discharges, and "[e]stablished incorrigibles and soldiers convicted of crimes involving aggravated violence . . ."). For the violent offenders and incorrigibles, these directives further explained that "dishonorable discharge is usually executed and not suspended." *Id.* The directives did, however, permit the commanders of rehabilitation centers to take alternative action when warranted by "special circums[t]ances." *Id.* These were some of the same concerns that General Crowder voiced about young deserters and crimes of a military nature. *See supra* Part III.B.1.

[278] *See, e.g.*, MALOUF, *supra* note 230, at 26–27 (describing how, as a result of the "indiscriminate" selection of inmates transferred to Turlock, the rehabilitation center "absorbed many individuals, by regulation who should have been sent elsewhere for a full term of confinement"); *id.* at 125–26 (noting how twenty-three percent of trainees at the center were confined for criminal offenses punishable for civilians and twenty-one percent more were confined for "a combination of military and civilian type criminal

crimes carried throughout the services, far beyond the territorial limits of the Ninth SCRC. Major General Henry B. Luis, during a speech to corrections professionals in 1948, explained the reason why, despite demonstrated transformations in attitude and discipline, many offenders were not restored at rehabilitation centers:

> It is seldom that the Secretary of the Army will find circumstances in a case are sufficiently unusual to warrant the restoration to duty of a thief, a robber, or a sex offender. While it is granted that the offender might be completely reformed, the youth of so many of our enlisted men provides a compelling reason to avoid requiring any of them to eat and sleep beside men who have been convicted of felonious crimes. I am sure you understand how parents of young soldiers would feel about that. Military service must be maintained on a high plane, and the Army must be very careful to protect the reputation as well as the character of all those in its service.[279]

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offenses, such as where a soldier stole a car, and used it to go into desertion"); Hofman, *supra* note 236, at 16, 16 (noting that seven percent of the retrainees at the Pisa Disciplinary Training Center were convicted of "misbehavior before the enemy, murder, rape, larceny, and other felonies"). In a telling example, a "trainee with a life sentence had shot and killed a fellow soldier while drunk; he proved to be such an efficient trainee that he rose in a few months to [trainee] sergeant major." Bess, *supra* note 265, at 99.

[279] U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, app. II, at 98 (reprinting an address to 78th Annual Congress of Correction, held at Boston, Mass., Sept. 2, 1948). The reasoning for this policy remains in even today's regulations on restoration in the Army. *See* AR 190-47, *supra* note 21, ¶ 8-3*b*, at 19:

> In the absence of exceptional circumstances, conviction of a crime generally recognized as a felony or serious offense in civil law, or a serious crime perpetrated under circumstances showing disregard for the rights or feelings of others that is willfully malicious, brutal, heedless, and lacking in serious provocation will ordinarily disqualify that prisoner for restoration to duty or reenlistment. Desertion or absence without leave with intent to avoid hazardous or important service or, regardless of offense of which convicted, a history of repeated drunkenness, narcotic addiction, or continued difficulty in adjusting to military life may also disqualify a prisoner for restoration to duty or reenlistment.

Such nonmilitary type offenders, of course, still could be restored to duty at the USDB, and even from the Federal prisons, however at a far smaller rate.[280]

On the final analysis, between 1940 and 1946—largely during the lifespan of the rehabilitation centers and retraining units (December of 1942 to May of 1946)—the Army restored to honorable service 42,373 of 84,245 punitively discharged soldiers, in what amounted to the full strength of "three full infantry divisions."[281] Among these restorees, only twelve percent—"the strength of approximately one and two-thirds infantry regiments"—became general prisoners once again.[282] At the same time, the Navy and the Marine Corps restored an additional seventy-five percent of their punitively discharged offenders to honorable service—from among 16,000 total offenders confined at their 1945 operational peak.[283] For all of these men, their discharges had been "wiped clean," and many officials within the military recognized that the net effects of these efforts helped not only the military, but ultimately the families and communities who depended on their future employability and good name.[284] Contrastingly, during the same timeframe that

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[280] Rushton, *supra* note 228, at 4, 6 (noting how "[t]he Disciplinary Barracks also have honor companies and they, too, restore prisoners to duty though by no means in such numbers or proportion as do the Rehabilitation Centers," and that, "[e]ven when Federal institutions receive a military prisoner, the door of hope is not closed against him"). From January 1943 to September 1944, for example, while rehabilitation centers restored 7644 inmates, the DB restored only 1098. *Id*. at 6. In total, as of June 30, 1945, the Army's seven disciplinary barracks had restored 2299 of 18,921 general prisoners (12.15%). MacCormick & Evjen, *supra* note 233, at 1, 7. Between 1944 and 1945, Federal prisons restored an additional 326. *Id.*

[281] MacCormick & Evjen, *supra* note 227, at 3, 5, 6. Reflecting on how the rate of 500 restorations per week during the war amounted to the strength of "two full companies," one reporter explained, "You might call them 'lost battalions' that are being found." Wharton, *supra* note 252, at 77, 77.

[282] *See, e.g.*, Major General Edward F. Witsell, *The Quality of Mercy* (1947), *in* U.S. DEP'T OF ARMY, THE ARMY CORRECTIONAL SYSTEM app. I, at 90 (2 Jan. 1952).

[283] Maginnis, *supra* note 232, at 3, 3 ("[A]pproximately 75 per cent of all general court-martial prisoners confined during and immediately following hostilities were restored to active duty."). At the conclusion of 1945, one Navy penologist estimated that "more than 90 percent of those in confinement will one day be restored to duty, as he addressed the new retraining commands, which had moved to Camp Peary, near Williamsburg, Va., and Farragut, Idaho. Lieutenant Commander Richard A. Chappell, *Naval Offenders and Their Treatment*, 9 FED. PROBATION 3, 5 (1945).

[284] *See, e.g.*, MacCormick & Evjen, *supra* note 227, at 3, 5 ("Throughout the war the major emphasis was on restoring as many men as possible to duty, not only to provide needed manpower *but also give them a second chance to earn an honorable discharge*." (emphasis added)); Skinner, *supra* note 227, at 8, 27 (observing how the Navy's

rehabilitation centers restored roughly half of discharged convicts, the USDB only restored 12.15% of its confines,[285] which—while surely surpassing its own pre-war five percent (10/200) standard—fell dramatically short of the massive gains outside its gray "castle" walls.

b. Treatment of Offenders with Mental Illness and Combat Trauma

The Army's initial appropriation of the name "rehabilitation centers" for its new correctional program ultimately forced the medical service departments to name their own programs "recovery centers."[286] In an ironic way, the medical connotation of the name underscored the reality that these corrections programs would inevitably face many offenders

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restoration program existed "to assure both the naval service and society in general that the released naval prisoner will be an asset rather than a detriment"); Weiss, *supra* note 227, at 178 ("[A] few thousand young men were remolded into better soldiers and citizens [at the Ninth SCRC]; and since their families as well as communities will continue to profit thereby, society at large has also benefitted"); Chappell, *supra* note 283, at 3, 5:

> It is the objective of the naval correction program to treat its offenders in such a manner that they will be restored to duty benefitted, rather than damaged, by the period of confinement. The Navy considers this to be not only in its own best interests but also the interests of society as a whole.

See also Morton M. Goldfine, *Current Penology Methods and the Military Offender*, 14 B. BULL. 207, 209 (1943), describing the benefits of the First SCRC's program at Fort Devens, Mass.:

> Civilian authorities owe the Army a certain debt of gratitude for the rehabilitation work, in the sense that the awakening in many of these men will be reflected in their approach to civic responsibilities and subsequent adjustments to community life, after the War has finally been won. The rehabilitative work is of permanent value to the community at large . . . .

[285] *Compare* MacCormick & Evjen, *supra* note 233, at 1, 7, *with* MacCormick & Evjen, *supra* note 227, at 3, 5.

[286] MALOUF, *supra* note 230, at 21. *See also* Snow, *supra* note 244, at 258 ("Rehabilitation has been applied to physical . . . and mental rehabilitation in . . . hospitals, but, when applied specifically to these Centers, it has a somewhat different connotation. Actually, it is a military rehabilitation, an effort to change the habits and thought processes of the individual by reformation and redirection.").

with mental illness.[287] Although, by regulation, mental illness disqualified inmates from participating in rehabilitation programs,[288] this prohibition was not enforceable from a practical standpoint. Initial detention centers had become so flooded with court-martial convicts that their staff routinely sent all prisoners to rehabilitation centers, hoping for more meaningful psychiatric screening at some later date.[289] For many servicemembers with mental illness, this was not the first time their conditions had been overlooked. Psychiatrists at induction centers often conducted cursory examinations[290] and members of some draft boards, who were opposed to the War, purposely sent the lowest quality draftees for induction.[291]

As a result of the unavoidable participation of mentally ill trainees, the Army's SCRCs and the Navy's retraining commands provide a rare window to enduring lessons about necessary modifications to the standard penal approach. Importantly, this very brief experiment, which lasted only two and one-half years, came at a time when psychiatry was forced by both circumstances[292]—and President Roosevelt[293]—to rapidly

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[287] U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 69 ("It is a recognized fact that a large percentage of prisoners become prisoners because of some mental, or a combination of mental and physical maladjustments.").

[288] *See, e.g.*, Snow, *supra* note 244, at 259–60 (providing a representative list of prohibited psychiatric conditions).

[289] *See, e.g.*, MALOUF, *supra* note 230, at 26–27 (describing how inmates who clearly did not meet eligibility criteria were sent to the Turlock Rehabilitation Center on an "indiscriminate" basis).

[290] *See, e.g.*, Deutsch, *supra* note 222, at 419, 423, 425–26 (explaining that psychiatrists were reduced to "decide-at-a-glance shotgun decisions" based on "the two-minute average psychiatric interview unaided by social histories, [which] proved little more than a farce").

[291] Colonel Franklin G. Ebaugh, *Survey of Neuropsychiatric Casualties at Station Hospitals and Military Camps—1941–1943*, *in* MANUAL OF MILITARY NEUROPSYCHIATRY 106, 107 (Harry C. Solomon & Paul I. Yakovlev eds., 1945) (describing how "[m]any local draft boards, some of which were not too enthusiastic about the military effort, sent to the Army men who were the least needed in the community"). One psychiatrist who worked at the New York induction center during the Second World War recalls how draft boards went against his recommendations in many of the cases he wished to eliminate for psychiatric reasons. Commander (Ret.) James L. McCartney & Sergeant Frederick J. Cusick, *Classification of Prisoners in American Civil and Military Correctional Institutions*, 124 MIL MED. 447, 452 (1959) (estimating that "at least 30 percent of the young draftees would be unable to adjust to the Navy, but the center rejected only 10 percent . . .").

[292] *See, e.g.*, Albert Deutsch, *The History of Mental Hygiene*, *in* ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 325, 365 (J.K. Hall et al. eds., 1944) (observing how "psychiatry and mental hygiene were slow to accept the challenge presented to them by the war emergency" and how "[t]he profound lessons of World War I regarding the significance

"evolve" its treatment capabilities.[294] To this end, the illustration below, supplied from a popular veteran re-adjustment guide from 1946, conveys

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of mental hygiene in wartime were for the most part forgotten"); Deutsch, *supra* note 222, at 419, 425 (discussing the national shortage of psychiatrists to meet wartime demands in both the civilian and military sectors). William Menninger, who served as the Chief Consultant in Neuropsychiatry to the Army Surgeon General from 1943 to 1946, described, "It is an enigma that despite the terrific loss from psychiatric causes which was suffered in World War I, the Army was essentially unaware of psychiatry at the beginning of World War II." MENNINGER, *supra*, note 222, at 535. The resulting lack of insight seriously limited the Army's ability to respond to increasing psychiatric casualties, 380,000 who would eventually be discharged for neuropsychiatric reasons. *Id*. at 152. Not only had the Army failed to create a separate division for psychiatrists until February of 1942, Deutsch, *supra* note 222, at 429, in 1941, it removed psychiatrists from each of the divisions—for the purpose of economic savings. MENNINGER, *supra*, at 11. Menninger also observed how several WWI psychiatric lessons, which would have surely aided the Army in its prewar planning, sat on dusty shelves at the Medical Department. *Id*. at 7, 10 (noting additionally how "[t]he rich knowledge gained from the experience of World War I had either been forgotten or neglected"). That crucial volume was 10 THE MEDICAL DEPARTMENT IN THE WORLD WAR (1929) (covering neuropsychiatry practice in the United States and the American Expeditionary Forces); "paradoxically," while the British used it to aid in their war-planning efforts, the War Department did not. MENNINGER, *supra*, at 10.

[293] On December 4, 1944, President Franklin Delano Roosevelt dispatched a letter to the Secretary of War, which read:

> My dear Mr. Secretary:
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> I am deeply concerned over the physical and emotional condition of disabled men returning from the war. I feel, as I know you do, that the ultimate ought to be done for them to return them as useful citizens—useful not only to themselves but the community.
>
> I wish you would issue instructions to the effect that it should be the responsibility of the military authorities to insure that no overseas casualty is discharged from the armed forces until he has received the maximum benefits of hospitalization and convalescent facilities which must include physical and psychological rehabilitation, vocational guidance, prevocational training, and resocialization.
>
> Very sincerely yours,
> FRANKLIN DELANO ROOSEVELT

MENNINGER, *supra* note 222, at 296 (reprinting the letter).

[294] *Id*. at 293 ("The psychiatric treatment program had to be evolved during the war."). For example, at the Mediterranean Theater of Operations Disciplinary Training Center, "[t]he task of providing comprehensive case reports accurately and quickly for 4,000

both the prevalence of psychiatric analysis in the Army and the stigma that accompanied it:

Fig. 2. Depiction of the Effects of Rapid Psychiatric Growth.[295]

While the general practice of psychiatry in the military was stunted by a number of factors, the greatest gains occurred in corrections settings—rehabilitation centers, specifically—because the task called for *treatment*, not just diagnosis or the standard dose of military discipline administered to all prisoners deemed salvageable.[296] Although psychiatric treatment

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prisoners *forced* the development of new technologies, instruments, and procedures." Captain Morse P. Manson & Captain Harry M. Grayson, *The Psychological Clinic at the MTOUSA Disciplinary Training Center*, 1 AM. PSYCHOLOGIST 91, 91 (1946) (emphasis added).

[295] THOMPSON, *supra* note 224, at 153 (illustration by Charles Pearson). Although this book was originally published in 1946 by Doubleday & Co., a corporation whose titles are now affiliated with Random House Inc., the copyright in Thompson's work is registered to Mr. Hilliard L. Bernstein, Esq., who is now deceased. According to his survivor, Mrs. Kathleen Bernstein-Lipkins, she is not now enforcing this copyright and she knows of no entity that is enforcing this copyright.

[296] Without question, rigorous drill enforced the need for unquestioning obedience to authority. Knapp & Weitzen, *supra* note 249, at 3 ("[T]hese activities are extremely valuable in promoting group action (teamwork) and the automatic, unquestioning acceptance of authority, which is essential in the training of any good soldier."). Above this, however, psychiatrists at rehabilitative centers recognized that therapeutic intervention, in concert with discipline and training, was required to return the emotionally disturbed soldier to duty as a productive military member. *See* Berlien, *supra* note 247, at 254 ("We must not alone train men to drill, wear gas masks, read maps, and fire guns. We must strive to continue or reinstitute normal development where it left off in our offenders.").

was not technically condoned until 1945 in major Army commands,[297] and the general attitude of the military toward psychiatry was "a mixture of fatalism and disinterest,"[298] the military corrections system both solicited and accepted advice from psychiatrists and provided them the room to develop creative approaches to the rehabilitative task.[299] These innovations would forever alter the military's corrections and justice systems.[300]

Importantly, the role of the military psychiatrist and other mental health professionals at the rehabilitation centers was not limited to the determination of competency to stand trial, which was often their exclusive function in the military justice system prior to trial.[301] Here, they had a different, broader function to "infer" an offender's "capacity for responding to rehabilitation," and the concomitant responsibility to tailor individualized plans for this purpose.[302] The rehabilitative task required not only extensive study of the offender's background and personal circumstances,[303] but close and continued observation of the

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[297] MENNINGER, *supra* note 222, at 295 ("Technically, treatment was not officially approved until a directive of March, 1945 . . . .").

[298] *Id*. (observing the prevalence of these sentiments until approximately the spring of 1944).

[299] *See, e.g.*, *id*. at 200 ("The recommendations of psychiatry for rehabilitation efforts were welcomed and seriously accepted."); Lieutenant Commander Robert J. Lewinski & Lieutenant Edward J. Galway, *Psychological Services at a Naval Retraining Command*, 42 PSYCHOLOGICAL BULL. 297, 297 (1945) (addressing how "psychological opinion [was] frequently solicited" in the Naval Retraining Command, making the Neuropsychiatric Clinic an "integral part of the retraining program"); Lloyd J. Thompson, *Other Neuropsychiatric Services*, *in* 2 MEDICAL DEPARTMENT, UNITED STATES ARMY, NEUROPSYCHIATRY IN WORLD WAR II: OVERSEAS THEATERS 399, 411 (Colonel William S. Mullins & Colonel (Ret.) Albert J. Glass eds., 1973) (discussing how psychiatrists assigned to the Disciplinary Training Centers developed specialized expertise and broadened the scope of corrections operations "by using much initiative and imagination").

[300] *See infra* Part III.B.4–5.

[301] *See, e.g.*, Colonel William C. Porter, *Military Forensic Neuropsychiatry*, *in* MANUAL OF MILITARY NEUROPSYCHIATRY 122, 125–26 (Harry C. Solomon & Paul I. Yakovlev eds., 1945) (describing the psychiatrist's limited role in the court-martial competency determination and how the accused was normally found competent to stand trial).

[302] Lewinski & Galway, *supra* note 299, at 299.

[303] For a general description of the contents of a psychiatric history workup, see, e.g., Staff Sergeant Max Deutscher, *The Clinical Psychologist in an AAF Mental Hygiene Unit*, 41 PSYCHOLOGICAL BULL. 543, 544 (1944). Importantly, the clemency board at rehabilitation centers "generally ha[d] before it much more about the offender than was available to the members of the court martial who handed down the original sentence." Benjamin B. Ferencz, *Rehabilitation of Army Offenders*, 34 J. CRIM. L. & CRIMINOLOGY 245, 246 (1943). As one source for important historical background, the personnel at

offender's performance and attitude while in the program.[304] These interactions provided ample opportunity to develop innovative treatment plans and therapeutic interventions.

i. Psychotherapy and Alternative Disposition for Trainees with Mental Illness

Rehabilitation centers had to develop methods to sustain all program participants, even though some inmates would not benefit from disciplinary training and were not supposed to be at SCRCs in the first place. Both the center commanders and the War Department responded in different ways. Initially, the programs experienced failures and growing pains. In most cases, mentally ill offenders who were physically fit, capable of carrying on conversations, and had awareness of their daily activities completed training and returned to duty like offenders without such conditions.[305] This resulted mainly from the intense

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rehabilitation centers relied on home chapters of the American Red Cross. Major Joseph L. Knapp & Frederick Weitzen, *A Total Psychotherapeutic Push Method as Practiced in the Fifth Service Command Rehabilitation Center, Fort Knox, Kentucky*, 102 AM. J. PSYCHIATRY 362, 363 (1945). In at least 17,000 other cases, they went beyond the standard reports and records of trial, working in concert with civilian Federal Probation officers to obtain additional information in the same format as standard presentencing reports used in Federal courts at the time. Oviedo, *supra* note 227, at 3, 6 (addressing the period between 1942 and 1945).

It is axiomatic that these work-ups were precisely the documents that most induction centers lacked in evaluating the suitability of recruits who should have never been inducted. *See, e.g.*, Deutsch, *supra* note 222, at 419, 425, 427–28 (describing how induction boards conducted cursory psychiatric examinations "unaided by social histories," and how, due to the cost of procuring records of convictions and school delinquency, induction boards largely "ignored" directives to investigate such matters). These comprehensive studies also provided the exact type of information that would benefit commanders *prior* to the charging decision. *See infra* discussion accompanying notes 311 to 319 (addressing numerous recommendations to incorporate these reviews *prior* to court-martial and *prior* to sentencing).

[304] *See, e.g.*, Lewinski & Galway, *supra* note 299, at 299 (describing the practice of routinely annotating "progress notes," which included "observations on the man's attitude toward the program and the service in general, his physical well-being, his immediate problems, his adjustment to the routine of the command," and the professional's own recommendations for improvement); Captain Joseph Abrahams & Lieutenant Lloyd W. McCorkle, *Group Psychotherapy at An Army Rehabilitation Center*, 7 DISEASES OF THE NERVOUS SYSTEM 50, 58 (1947) ("At daily staff conferences, group and individual progress is discussed and, if indicated, rehabilitees are shifted from one group to another.").

[305] *See, e.g.*, Weiss Letter, *supra* note 247, at 2:

pressure of rehabilitation center commanders to appear efficient by rehabilitating as many prisoners, as quickly as possible.[306] This emphasis also led to inconsistent standards for psychiatric evaluation, with some psychiatrists foregoing any type of diagnosis unless and until an inmate was visibly and seriously debilitated.[307]

Continued concerns over restorees with mental problems, however, led the War Department to require more comprehensive testing and screening of inmates by psychiatrists.[308] With the additional staff assigned to meet this mandate, psychiatrists who had formerly felt as though their treatment and diagnosis skills were horribly underutilized now perceived an opportunity to make a significant impact.[309] Group therapy became a hallmark of all programs in their later phases.[310] In

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> As for the treatment of the psychopaths in confinement . . . he receives no special consideration of any kind, goes through exactly the same routine as other prisoners, and disposition of his case is made exactly the same as the others. I have found that the psychopath is restored to duty as readily as the so-called average or normal individual . . . .

[306] MALOUF, *supra* note 230, at 8 (describing the Ninth SCRC Commander's direction to the board "to make as many favorable recommendations for restoration to duty as possible"—"The more restorations we have," he explained, "the better we will be judged in our records of rehabilitating prisoners."). *See also* Weiss letter, *supra* note 247, at 2, 6 (noting the "mass production" nature of the Turlock Rehabilitation Center and the "pressure" to move cases).

[307] Weiss Letter, *supra* note 247, at 2 ("In outstanding cases I record the diagnosis, but I am gradually getting away from the practice and merely giving a short summary of the psychiatric evaluation of the prisoner before me. Higher authority merely wants an opinion as to what type of soldier this man can be.").

[308] *See, e.g.*, Memorandum from Major M.F. Mochau, Adjutant Gen., Army Serv. Forces, Ninth Serv. Command, to Commanding Officers, subject: Medical Reports to Accompany Records of Trial by General Court-Martial 1 (9 Dec. 1943), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.).

[309] *Contra* Letter from Isodore Weiss to Carling I. Malouf 1 (Apr. 16, 1945), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (noting a "very wholesome change" in the rehabilitative program at the Ninth SCRC by April 1945, which was "really rehabilitation," as opposed to his prior sentiments in May 1943), *with* Weiss Letter, *supra* note 247.

[310] *See, e.g.*, MENNINGER, *supra* note 222, at 201, 513–14 (observing how group therapy was implemented at some level in all rehabilitation centers and that it "was adjudged by some of the commanding officers, nonmedical individuals, as being one of the most potent factors in the entire rehabilitation process"); MacCormick & Evjen, *supra* note 233, at 1, 11 (explaining attributes of group therapy, in which "[s]ome centers supplement the lecture method by dramatization and other devices," addressing a range of topics from "emotional development" to "social orientation").

conducting psychiatric evaluations for the purpose of transfer to a confined setting, it also became routine practice to consider and report on whether confinement would have a negative effect on the inmate's condition.[311]

As mental distinctions between trainees became clearer, another standard emerged to medically discharge mentally ill inmates so they could obtain civilian treatment, rather than putting them through the new brand of "disciplinary" treatment.[312] For example, shortly after the opening of the Sixth SCRC, the commander, MG Henry S. Aurand, voiced the following concerns:

> Many [soldiers] *while mentally responsible* for their actions, are inapt and do not possess the required degree of adaptability for the military service or give evidence

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[311] *See, e.g.*, Commander John R. Cavanaugh, *The Effect of Confinement on Psychiatric Patients*, 2 U.S. ARMED FORCES MED. J. 1479, 1479 (1951):

> The Manual of the Medical Department of the United States Navy (Paragraph 3326) requires a Board of Medical Survey insert the following sentence in all its reports on patients in whom disciplinary action is pending: "It is the opinion of the Board * * * that disciplinary action is (not) likely to have a deleterious effect on his mental or physical health."

Cf. also MALOUF, *supra* note 230, at 166, 170–72 (describing incidences of "prison psychosis," which would materialize only after the trainee was in a confined setting); Weiss, *supra* note 227, at 175 (noting trainee breakdowns that were "incidental to confinement").

[312] *See, e.g.*, Memorandum from Colonel Chas. C. Quigley, Adjutant Gen., Headquarters Ninth Serv. Command, Office of the Commanding Gen., to Commanding Officer, Ninth Serv. Command Rehabilitation Ctr., subject: Procedure for Discharge of General Prisoners Requiring Intermittent [or] Continuing Medical Treatment and of No Value as Soldier Material ¶ 5, at 2 (18 June 1943), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.) (directing in cases where psychiatric examination reveals a psychoneurotic condition, absent malingering, which renders a trainee unfit for limited duty or further service, "the report should be submitted to this headquarters with the recommendation that the sentence of the prisoner be remitted" with the expectation that the discharge certificate will be "blue" rather than dishonorable); Weiss, *supra* note 227, at 176 (discussing cases in which "sentences were mitigated, and the prisoners restored to duty and medically discharged for care and treatment in a non-military hospital"). This policy held true even in the Mediterranean Theater near the front lines in Italy. Manson & Grayson, *supra* note 294, at 93 (noting cases of "mental deficiency," "constitutional psychopathy," and "chronic alcoholism" in which offenders were either sent for treatment in the Zone of the Interior with a suspended punitive discharge or assigned to limited duty).

> of habits or traits of character which serve to render their retention in the service undesirable. . . . It is obvious that prisoners who are mentally or physically disqualified for service should not be sent to the Rehabilitation Center for the purpose of retraining them for further military service. Many of these prisoners should have been discharged *and not brought to trial*.[313]

With reference to this group of offenders, a consensus emerged among military psychiatrists that medical discharge was optimal over a term of confinement that would only increase the risk to society by aggravating the inmate's symptoms.[314]

In a very real way, the rehabilitation center evolved into the first military organization that was capable of routinely conducting detailed analyses of offenders' mental condition with an eye toward rehabilitative measures, and not only competency evaluations.[315] Although such analyses were conducted here in the reverse—following the sentence—

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[313] Wagley, *supra* note 229, at 18 (citing letter dated Sept. 13, 1943) (emphasis added).

[314] *See* Ivan C. Berlien, *Psychiatry in the Army Correctional System*, *in* 1 MEDICAL DEPARTMENT, UNITED STATES ARMY, NEUROPSYCHIATRY IN WORLD WAR II: ZONE OF THE INTERIOR 491, 512–13 (Colonel William S. Mullins & Colonel (Ret.) Albert J. Glass eds., 1973):

> Prisoners who did not meet eligibility for military service constituted the major difficulty to clemency, for many had mental or physical defects . . . . In such cases, the psychiatrist was often tempted, as were his line officer confreres, to recommend clemency on the grounds that continued confinement would avail nothing of value either to the man or the service and might even aggravate the existing condition and make necessary transfer to a hospital.

By 1944, COL Marion Rushton, a judge advocate, and Major Ivan Berlien, a psychiatrist in the Neuropsychiatry Consultant's Division, jointly developed a discharge policy for offenders with mental illness that had the aim of providing clemency for offenders incapable of being restored to duty so long as they did not "pose a menace to the community to which the men returned." William C. Menninger et al., *The Consultant System*, *in* 1 MEDICAL DEPARTMENT, UNITED STATES ARMY, NEUROPSYCHIATRY IN WORLD WAR II: ZONE OF THE INTERIOR 67, 99 (Colonel William S. Mullins & Colonel (Ret.) Albert J. Glass eds., 1973).

[315] *See supra* note 303 and accompanying discussion (describing extensive background studies and reports obtained by Federal Probation officers in the same format as presentencing investigations).

the net effect was greater concern for the offender's mental stability.[316] Based on the value of these new practices, many psychiatrists recommended implementing identical comprehensive investigations, *prior to the charging decision*, as the most prudent course of action in military justice.[317] Although this never became an official requirement, some officers serving as defense counsel volunteered their clients for psychiatric evaluation at rehabilitation centers *prior to trial* for the benefit of negotiating alternative dispositions for their clients.[318] Moreover, even after the War, some commands continued to use these intensive treatment-based investigations to improve decision-making in all cases that could result in a general court-martial.[319]

ii. Enduring Lessons from the Fifth Service Command Rehabilitation Center and Major Harry Freedman

During its abbreviated lifespan, the rehabilitation center system provided two significant mental health treatment guideposts for future generations of military justice practitioners. The first was the "total therapeutic push" method as practiced at the Fifth SCRC at Fort Knox,

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[316] *See, e.g.*, Wagley, *supra* note 229, at 18. Years later, the logic still holds. *See, e.g.*, Lowery, *supra* note 33, at 200–01 (describing the benefits of an extensive and detailed presentencing investigation prior to court-martial sentencing).

[317] *See, e.g.*, Manson & Grayson, *supra* note 294, at 94 ("It is strongly recommended that psychological neuropsychiatric evaluations precede all general courts-martial trials. Such evaluations should be made routinely and introduced as expert testimony where necessary. Cases of mental deficiency often should be administratively discharged rather than court-martialed and sentenced."); Wagley, *supra* note 229, at 18–19 (proposing use of, and sustained communication with, rehabilitation centers prior to court-martial sentencing and the appointment of a "social investigator" to carry-out such investigations in the Army).

[318] Manson & Grayson, *supra* note 294, at 94:

> One S-3 officer, in his capacity as defense counsel of the DTC Special Court-Martial, adopted the standard operating procedure of having every accused soldier examined by the clinic prior to trial. He used the report, where indicated, either as testimony or as a basis for recommending withdrawal of the charges. In several cases administrative discharge proceedings were initiated as a result of the psychological-psychiatric findings.

[319] MENNINGER, *supra* note 222, at 506 ("In certain of the Service Commands a psychiatric examination was prescribed for each offender to be tried at a general-court-martial. Serious consideration was given to making this procedure a uniform rule throughout the Army.").

Kentucky. It remains the most comprehensive treatment program at any rehabilitation center during the 1940s, and singularly marks the culmination of various techniques, which are advanced—even by today's standards.[320] The second achievement comes from the theory and practice of psychiatrist Major (MAJ) Harry Freedman, who set the groundwork for a court-martial system fully adaptable to the treatment concerns of criminal offenders with combat trauma.

(a) The Fifth Service Command Rehabilitation Center

Rehabilitation centers like Turlock were limited by practical considerations, even when the War Department encouraged further psychiatric treatment. As one psychiatrist, who was himself a proponent of intensive treatment, conceded, "[i]f we are to remain realistic we must acknowledge the fact that psychiatrists in our rehabilitation centers have far too little time to devote to the treatment of trainees."[321] The centers were further hampered by the youth of the programs, which all literally grew from scratch. Yet, while minimal group therapy became a staple in all centers, advances at the Fifth SCRC made it possible to implement a new technique called the "total therapeutic push" as the first incorporation of that mental health concept in the correctional setting.[322] Far exceeding the expectation of minimal group discussions, and while still incorporating intensive military training, the Fifth SCRC maximized the therapeutic value of every interaction and activity occurring during the re-training period: each trainee began his time with a personal orientation from the commandant,[323] cadre and staff used the term "rehabilitee" to remove the stigma of prisoner status,[324] the trainees were managed by a diverse and accessible treatment team,[325] the program

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[320] *See supra* Parts I & II (discussing the objectives of modern problem-solving courts).
[321] Berlien, *supra* note 247, at 254.
[322] Knapp & Weitzen, *supra* note 249, at 364.
[323] *Id*. at 362 (recognizing the "tremendous benefit" of the personalized approach).
[324] *Id*. ("This is of itself of psychological benefit as it lessens a feeling of rejection developed during his court-martial and confinement in the guard house.").
[325] Among the members of the treatment team were (1) a Red Cross Worker "to assist with . . . personal family and financial problems, utilizing Red Cross Home Chapters and their contacts with all the public, private, social and relief agencies," (2) a chaplain, (3) a custodial officer who supervises prisoners, (4) a medical officer "who makes every effort to assume the role of family physician and counselor," and (5) a psychotherapist. *Id*. at 363.

instituted a merit system to award participants additional privileges for improvements,[326] and, upon graduation, the clemency board—and separately the commandant—personally congratulated the trainee, sharing comments of optimism for the future.[327]

Within the structure of the Fifth SCRC, psychiatrists transcended the prevailing classification system in which "the man was diagnosed correctly and put in the appropriate 'pigeon hole' and promptly forgotten."[328] Recognizing the limitations of diagnostic criteria at the time,[329] mental health professionals there focused therapy on the nature of the trainee's underlying problem: "Selection for the groups is made on the basis of reaction to group life rather than on categories such as psychopathic, psychoneurotic, etc."[330] In this way, group therapy became the primary "weapon" in the battle "for retaining and reintegrating the personality of our offenders in a normal pattern of development."[331] The Fifth SCRC's tripartite approach to large group,[332] small group,[333] and individual therapy[334]—combined with a treatment team approach—

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[326] *Id*. at 365.
[327] *Id*.

> The board takes the opportunity of commending the man for his success and expressing their confidence in his ability to become a good soldier; they assure him that he will be recommended for restoration. The effect on his morale is further augmented by a final personal contact with the commandant.

[328] Weiss letter, *supra* note 247, at 2.
[329] *See, e.g.*, MENNINGER, *supra* note 222, at 127, 198–99 (describing the "inaccuracy" of diagnoses of psychoneurosis); MALOUF, *supra* note 230, at 162 (observing "some interesting variations in the differences between psychiatrists" regarding trainees labeled "psychopaths" and that "[s]ince psychiatrists themselves often disagree on the diagnosis of individuals as being psychopathic, most statistical information . . . would be questionable").
[330] Joseph Abrahams & Lloyd W. McCorkle, *Group Psychotherapy of Military Offenders*, 51 AM. J. SOC. 455, 456 (1946) (explaining, for example, that it was possible for "excessive drinking and A.W.O.L. [to be] handled similarly").
[331] Berlien, *supra* note 247, at 255.
[332] Large therapy groups at the Fifth SCRC had 125 to 175 members and occurred in a "converted barn that serve[d] as the center's chapel." Abrahams & McCorkle, *supra* note 330, at 455.
[333] Small groups, which consisted of fifteen to thirty-five members, would meet in "two specially equipped barracks." *Id*. Some such groups were devoted to behavior that revealed "aggress[ion]," while others were geared toward "depress[ion] and withdraw[al]," regardless of the trainee's diagnosis on paper. *Id*.
[334] The Fifth SCRC stood in contrast to the many rehabilitation centers that were unable or unwilling to conduct individual therapy. In every case, trainees had "a minimum of

provided maximum flexibility. It is significant that, within this specialized correctional setting, trainees actually received more therapy time than psychiatric battlefield casualties received during their rehabilitation period in mental hygiene units.[335] Importantly, the process did not sacrifice the core requirement for discipline; as a pragmatic psychiatrist explained, "[w]e cannot hope in a military environment to greet the incoming deserter, thief, or forger with love and kisses."[336]

Some observers noted that the novel methods employed by the Fifth SCRC created an environment in which trainees essentially had the opportunity to work through their problems in a "24-hours-a-day" therapy setting.[337] Among various accounts, the trainee labeled *S* was a soldier whose misconduct culminated in a dishonorable discharge for theft of a jeep.[338] *S* also had a history of mental disturbance that culminated when he "refused an interview with a psychiatrist[,] struck a medical officer, and slashed his wrists."[339] In a detailed examination, Captain Joseph Abrahams and Lieutenant Lloyd W. McCorkle tracked *S*'s participation in the center's group setting, the methods used to address his particular problems, and his experiences upon return to duty.[340] *S*'s case study, in particular, demonstrates the flexibility of the rehabilitation centers to address the unique problems of discharge remission for military offenders with mental illness. The work of the Fifth SCRC, and the combined lessons of other rehabilitation centers,

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three sessions, totaling approximately 4 hours" followed by "a variable amount," based on their needs and whether they engaged in "aggressive" or "marked antisocial behavior." Knapp & Weitzen, *supra* note 249, at 363.

[335] For patients suffering from combat trauma, group therapy lasted approximately four-and-a-half hours per week. Freedman, *supra* note 222, at 281. At the Fifth SCRC, group therapy was one-and-one-half hours longer per week. Knapp & Weitzen, *supra* note 249, at 364. Also, whereas the therapy program at MHUs was only six weeks in duration, Freedman, *supra*, at 275, the Fifth SCRC's therapy program lasted four times as long. Abrahams & McCorkle, *supra* note 330, at 456 (describing the twenty-four week program).

[336] Berlien, *supra* note 247, at 253.

[337] Lloyd W. McCorkle, *Group Therapy in Correctional Institutions*, 13 FED. PROBATION 34, 34–35 (1949) (summarizing the 5th SCRC's operations).

[338] Abrahams & McCorkle, *supra* note 330, at 460–61. Although the initial "S" is not italicized in the text of the publication, this article italicizes the initial to reflect the patient's protected identity and shortened true name.

[339] *Id*. at 461.

[340] *Id*. at 460–63 (providing treatment note excerpts from the months of April to November and reprinting a letter from *S* "two and a half months after restoration"). The various excerpts not only describe the therapist's different treatment strategies, but the way he enlisted other group members to help *S* obtain greater insight.

reveals that the Army contemplated a therapeutic approach to military justice for decades. Moreover, for just as long, the Army employed treatment plans and interdisciplinary teams in contingent sentencing arrangements for general prisoners.

At its base, the total therapeutic push practiced at the Fifth SCRC embodies the modern philosophy of "therapeutic jurisprudence," which seeks to maximize the therapeutic value of all phases of criminal justice for the ultimate betterment of both society and the offender.[341] It is no coincidence that contemporary treatment courts also operate on this very principle.[342] That Army corrections in the 1940s and modern treatment courts arose from a *common nexus* is vitally important—especially considering that the military employed these principles during the exigencies of a nation at war, when discipline was of paramount importance.[343] Because the goals of therapeutic jurisprudence were attained in the demanding environment of the 1940s, they can surely be attained within the present military justice system.

(b) Major Harry Freedman's Contributions

Major Harry L. Freedman practiced psychiatry in the Army at the time when the rise in combat neuroses transformed the Medical

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[341] *See, e.g.*, Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25, 25 (1997) (describing how therapeutic jurisprudence is "sensitive to the therapeutic and antitherapeutic consequences that sometimes flow from legal rules, legal procedures, and the roles of legal actors"); David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.U. L. SCH. J. HUM. RTS. 759, 761–62 (1993) (describing how therapeutic jurisprudence "proposes we explore ways in which, consistent with principles of justice, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law [as applied]").

[342] *See, e.g.*, Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 TOURO L. REV. 479, 481 (2002) (describing how drug treatment courts constitute "a therapeutic jurisprudence approach to the processing of drug cases" and how "[s]pecialized treatment courts—including drug treatment courts—are related to therapeutic jurisprudence"); David Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, NAT'L INST. JUST. J., July 1999, at 13 (evaluating various practical applications of therapeutic jurisprudence).

[343] Witsell, *supra* note 282, at 90 ("[I]n many cases confronted with a different type of offender, the Army was faced with much the same problems as civilian institutions, but with the increased complication of being engaged in *the greatest war in history*, with all its attendant social problems.") (emphasis added).

Department's approach. Operating within a network of professionals at both mental hygiene units (MHUs) and rehabilitation centers, he was instrumental in combining the lessons learned in both settings. His publications reveal that he was involved in the initial development of MHUs throughout the military when they existed largely for the purpose of preventing psychiatric casualties in the pre-deployment phases of training.[344] At this level, he came to address justice-related mental health issues in the context of disobedience and absence without leave.[345] The approaches that evolved from the initial MHUs provided the basic framework for addressing treatment and matters of discharge characterization.

Over time, MHUs—which departed from the Army's exclusively diagnostic posture—adapted to address the symptoms of combat trauma.[346] The MHUs treated both officers and enlisted men who were self-destructive or nonproductive at their units after returning from combat.[347] The MHU's six-week intensive therapy programs determined whether these servicemembers would be returned to duty, reclassified, or discharged.[348] Through this experience, clinicians recognized that SCRCs housed many war-traumatized offenders who were different from other classes of sociopaths or chronic offenders. Major Freedman pointed to the representative case in which, "[b]y reason of his participation in combat and the minute to minute existence which he had been living, [the soldier's] values were distorted and in his illness there can be seen the motivating forces which might easily bring him in conflict with the law."[349]

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[344] *See generally* Major Harry L. Freedman, *Mental-Hygiene First Aid for Precombat Casualties*, 28 MENTAL HYGIENE 24 (1944).

[345] *See, e.g.*, MENNINGER, *supra* note 222, at 195 (observing situations in which absence without leave correlated with offenders' severe personality disorders).

[346] Freedman, *supra* note 222, at 269–70 (describing how MHUs were modified to create a more "therapeutic setting" for war-traumatized soldiers).

[347] *See, e.g.*, *id.* at 286–87 (describing the case of a thirty-one-year-old lieutenant, who, after "having been blown out of a fox hole by dive bombers and also having experienced extreme conditions of strafing under fatiguing conditions" had slipped into "seven and a half months of invalidism and unproductivity"); Major Harry L. Freedman & Staff Sergeant Myron John Rockmore, *Mental Hygiene Frontiers in Probation and Parole Services*, *in* SOCIAL CORRECTIVES FOR DELINQUENCY: 1945 NATIONAL PROBATION ASSOCIATION YEARBOOK 44, 52 (Marjorie Bell ed., 1946) (describing a soldier who committed repeated offenses after combat).

[348] Freedman, *supra* note 222, at 274.

[349] Freedman & Rockmore, *supra* note 347, at 44, 53.

This special brand of combat-traumatized offenders needed "*understanding* more than sympathy," because the war was a "principal causative factor" in their behavior.[350] Accordingly, the military justice system had the responsibility to "differentiate between the cause and effect relationship" and to base treatment on "sound mental hygiene principles" and discharge decisions on more "careful study and analysis of the factors involved."[351] Because such court-martial sentences needed to be especially "constructive,"[352] Major Freedman established a system in which MHCs liaised with SCRCs. He provides examples of combat-traumatized soldiers with serious and repeated misconduct who were ultimately treated as "soldier-patients," rather than general prisoners.[353] Through MAJ Freedman's programs, the MHUs provided an alternative to address the unique challenges facing trainees at rehabilitation centers who were unsuitable for restoration to line units as a result of combat trauma.[354]

Major Freedman's concluding advice to legal and corrections professionals is directly relevant to the instant article and its proposals. In contemplating alterations to military justice practice necessary to meet the unique problems posed by PTSD and other invisible wounds of war, MAJ Freedman highlighted the importance of building individualized mental health treatment into both the court-martial and the correctional

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[350] Gilbert, *supra* note 222, at 296.

[351] Freedman & Rockmore, *supra* note 347, at 44, 51, 56.

[352] Berlien, *supra* note 247, at 249 (explaining that, beyond the use of probation and conditional sentences, the military justice system must also make the sentence itself a "constructive experience" in order to attain treatment objectives).

[353] One soldier suffered shrapnel wounds and lost several of his "closest buddies" in severe combat conditions in the North African Theater. He then lived in a state where, "I didn't give a damn whether I lived or not." Following a series of unauthorized absences, alcohol-induced rampages, and an occasion when he pleaded for the military police to shoot him, the Army adopted a treatment-based approach: "After a course of treatment this soldier was returned to duty of a limited nature within the continental limits of the United States." Accordingly, "[t]he Army recognized [the relationship between his lack of treatment and his criminal behavior] and treated him as a soldier-patient. The reward was that a combat-experienced soldier continued to render effective service where otherwise a stockade prisoner might have been the only result." Freedman & Rockmore, *supra* note 347, at 44, 52–53. *See also* Freedman, *supra* note 222, at 270 ("The status of soldier in this therapeutic company is somewhat of an anomaly. It is that of a soldier-patient.").

[354] While it is unclear how many victims of PTSD, despite their illnesses, were returned to combat units as a result of the pressures to restore as many prisoners as possible, *supra* note 306, Major Freedman's initiatives demonstrate the existence of additional options in military justice, specially tailored to individuals who suffered from PTSD.

apparatus following the sentence: The objective of treatment for the war-traumatized offender, he explained,

> can be done by including a mental hygiene division in the courts and in the departments of correction, parole and probation, with a definitive function which includes administrative responsibility. At that point discussion of treatment with a psychiatric orientation, for the individual who is in difficulty, be he a [combat] veteran or no, becomes more than academic.

Further, "[t]he justification of such a painstaking and costly undertaking is its translation into help for the individual, so that the community gains a better citizen instead of a social liability."[355]

The Army's disciplinary policy soon reflected MAJ Freedman's "soldier-patient" concept in its 1951 publication of Army Regulation 600-332, which addressed the "restoration of military prisoners sentenced to confinement and discharge," and officially recognized "combat exhaustion"[356] as an exception that would permit restoration to duty, despite a conviction for desertion from a combat setting.[357] In

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[355] Freedman & Rockmore, *supra* note 347, at 44, 57.

[356] From the time of WWI, prior to the inception of the PTSD diagnosis in 1980, many clinicians used the terms "combat fatigue," "battle or operational fatigue," or "combat exhaustion" interchangeably with "war neurosis," "shell shock," and later "gross stress reaction," all of which ostensibly included identical symptoms of combat trauma. SCHRODER & DAWE, *supra* note 130, at 177–79. In 1962, the Army's *Social Work Handbook* synopsized "combat exhaustion":

> This category includes those transient personality reactions which are due to stress of combat. When treated promptly and adequately, combat exhaustion may clear rapidly, but it may also progress into one of the neurotic reactions. It is justified as a diagnosis only in situations in which the individual has been exposed to severe physical demands or extreme emotional stress in combat.

RAYMOND MONSOUR SCURFIELD, A VIETNAM TRILOGY: VETERANS AND POST TRAUMATIC STRESS: 1968, 1989, 2000, at 13 n.14 (2004) (reprinting U.S. DEP'T OF ARMY, TECHNICAL MANUAL 8-246, ARMY SOCIAL WORK HANDBOOK ¶ 233, at 146 (Jan. 1962)).

[357] Army Regulation 600-332, like successive policies, provided a list of offenses that would not normally lead to restoration absent "exceptional circumstances." U.S. DEP'T OF ARMY, REG. 600-332, RESTORATION OF MILITARY PRISONERS SENTENCED TO CONFINEMENT AND DISCHARGE ¶ 1.*c*, at 1 (24 May 1951). However, a new provision now existed for an offense normally considered to be an aggravated form of desertion: "Desertion from units engaged in combat," it began, "will ordinarily disqualify for

addition to this provision, the Army's 1952 publication, *The Army Correctional System*, addressed necessary considerations for restoration and discharge of offenders with mental illness:

> General prisoners who are not eligible for restoration to duty because of mental or physical disabilities, and who but for such disabilities probably would have been restored to duty with an opportunity to earn an honorable discharge, may be restored as a matter of clemency, solely for the purpose of being furnished a discharge other than dishonorable.[358]

In no uncertain terms, MAJ Freedman advocated the treatment court approach in the military justice system for offenders with combat trauma, long before the VTCs in Anchorage or Buffalo had even been contemplated. Consequently, the therapeutic approach to military justice, at least for victims of PTSD, is a call that has gone unanswered for 60 years—hidden, in plain sight, in the history of military psychiatry and penology.

c. The Conclusion of the Rehabilitation Center "Experiment"

Just as the War Department appointed a commission of civilian experts to study the most efficient use of rehabilitation centers, and just as these programs began to evolve more meaningful standards based on lessons learned, the War ended. During the final phases of the programs, rather than conducting training in military subjects, the program directors trained participants in vocational tasks with the hope of preparing them for civilian employment in a post-war economy.[359] These final days also marked an intensification of efforts to restore and honorably discharge program participants, rather than transferring them to continued

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restoration to duty." *Id.* But it continued, "unless the offender was a victim of combat exhaustion following substantial combat service." *Id.* Significantly, this marked a first occasion when the Army officially recognized that a military offender, himself, could be considered a "victim" in relation to the perpetration of the charged offense. *Id.*

[358] U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 53.

[359] *Id.* at 21 ("Prior to VJ Day, the stress was upon military training. After that date and until inactivation of the last Center, primary emphasis was placed upon vocational and technical training.").

confinement.[360] Importantly, as perhaps the clearest indication of the military's enduring rehabilitative ethic, the concept of restoration to honorable duty was still retained in the Army's and Navy's corrections programs, even though the manpower needs that justified the programs no longer existed.[361] After illustrating how "consideration of clemency is woven constantly through the procedure for military justice,"[362] War Secretary Robert Patterson further remarked on the Army's correctional concept at the end of the War:

> It is the Army's purpose to restore as soon as possible all those convicted who give indication of their ability to again become soldiers. To accomplish this the Army utilizes the most approved and modern methods . . . . It will continue to do everything within its power to administer a fair and just system of military justice.[363]

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[360] *See, e.g.*, *id*. at 10 ("While there was no general amnesty granted to military prisoners, the progressive penal philosophy had enabled many thousands of prisoners to be restored to honorable duty [immediately following the War]"). MacCormick & Evjen, *supra* note 227, at 3, 5 ("Emphasis on restoration to duty did not stop when hostilities ended. During the first 9 months following V-J Day the War Department was more liberal in its restoration policy than at any time during the war.").

[361] *See, e.g.*, U.S. DEP'T OF ARMY, CORRECTIONAL SYSTEM, *supra* note 137, at 11:

> It was recognized, of course, that there were still general prisoners confined who, after participating in the rehabilitation program for an additional time, would be considered for restoration to duty. Because of the War Department's policy to permit every general prisoner who was physically, mentally, and morally qualified to earn honorable restoration to duty, restoration programs to a more limited extent were carried on at each of the disciplinary barracks.

Maginnis, *supra* note 232, at 3, 28:

> The responsibilities of the Navy Department to men who voluntarily enlist in time of peace, and subsequently get themselves into difficulties, are somewhat different from those attached to men inducted into service. However, the Navy feels a keen and continuing sense of responsibility to the Nation for the young men under its jurisdiction. Accordingly, the rehabilitative and restoration aspects of the Navy's wartime correctional program are being retained and adapted to peacetime needs.

[362] Patterson, *supra* note 236, at 30, 41–42, 45 (describing how a deserter who received a dishonorable discharge and fifteen years' confinement would still be considered for restoration to duty).

[363] *Id*. at 46.

The mention of "modern methods" paid reverence to the priceless input that the Army received from advisory boards that included the "Country's most distinguished penologists."[364]

The two most prominent lessons from the 1940s are (1) the use of therapeutic intervention and conditional sentencing to address offenders' underlying problems; and (2) the need to expand and adapt court-martial procedure when addressing offenders with combat trauma. They both echo today, as all of the services contemplate the challenges of unseen injuries in the medical, correctional, and military justice arenas. Despite the passage of many years and countless social revolutions since the Second World War, these programs are all significant because suspended sentences and rehabilitation centers carried into the 1950s and stayed with the Armed Forces after the codification of the *Uniform Code of Military Justice* (*UCMJ*).[365] As observed by Lieutenant Colonel Thomas Cuthbert, who later served as the Chief of the Army's Trial Judiciary,

> Although a cynic might suggest that the restoration rate was related to the fact that there was a war in progress during this period, the tenor of the reports and a contemporary review of the program reflects a reformist zeal that cannot be explained in terms of military manpower economics. Clearly, restoration to duty was a fundamental precept of military prison philosophy.[366]

The courts' continued reference to the clemency lessons of WWII in contemporary military jurisprudence further underscores the importance of this time period.[367]

4. The Air Force's Approach to Rehabilitation

The Army's rehabilitation center experiment, despite teaching many important lessons during its short tenure, ended abruptly at the close of the War, with all operations ceasing in May of 1946. Although

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[364] *Id*. at 43.
[365] *See infra* Parts III.B.4 & 5.
[366] Lieutenant Colonel Thomas R. Cuthbert, Military Clemency: Extra-Judicial Clemency in the United States Army Prison System 5 (May 20, 1977) (unpublished manuscript) (on file with author).
[367] *See supra* note 146 (describing the courts' reliance on WWII commanders' clemency philosophies, though many of their findings were distorted by the "history effect").

restoration responsibilities returned to the DB and the stockades, the infant Air Force provided a chance to continue the Army's major correctional innovations.[368] In 1951, some Air Force corrections professionals who had exposure to the Army's SCRCs developed the 3320th Corrections and Rehabilitation Squadron (3320th) with the goal of improving on the Army's correctional models.[369] This program emphasized a therapeutic environment over rigorous training,[370] and soon came to implement treatment teams and individualized treatment plans that provided the opportunity to address offenders with a wide variety of mental illness.[371]

By the time of Vietnam, the 3320th played a definitive role in the treatment and disposition of offenders with PTSD. Not only was "combat exhaustion" a condition that weighed favorably in admission to the Air

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[368] The Air Force, in fact, continued the tradition of the most innovative SCRC in Fort Knox, Ky., where group treatment functioned on a continuing basis. *See supra* discussion accompanying notes 322–340.

[369] MILLER, *supra* note 245, at 17 ("Air Force leaders were uninterested in developing systems that mirrored those of the Army; they sought to apply new methods to do the same jobs faster, cheaper, and better.").

[370] *Id.* at 48, 62 (noting how "the new arrival wore a regular Air Force Uniform, and staff members spent time insuring that he knew he was a retrainee, not a prisoner" and how "[e]ducation and training were not the purpose of the 3320th [but, in fact,] only the vehicles for rehabilitation activities of the program"). Far from the "put out and you will get out" disciplinary philosophy that dominated the Army's 1940s rehabilitation centers, the 3320th, instead, focused on bolstering the participant's sense of personal worth. *Id.* at 62 (observing how "[e]ducation and training were not the purpose of the 3320th [but] were in fact only the vehicles for rehabilitation activities of the program").

A noteworthy account of the commander's orientation for newcomers to the 3320th captures its operational philosophy: When the Airman [Amn] first entered the room, he sat before Colonel Tackney, who greeted him in all seriousness. The colonel provided a yellow handbook, titled "Rules and Regulations," and sternly reminded the Amn: "[H]ere is our rule book and this is going to be your Bible while you are here. I expect you to abide by every word of it!" *Id.* at 49. The Amn took the book with quivering hand and began to thumb through its nine pages, only to find that it contained but a single sentence: "Use your common sense; it is usually the only thing needed to solve any problem." *Id.* Observers would watch the "dramatic change" as "surly frowns changed to smiles" and hope returned to follow the Airmen through their rehabilitative experience. The Air Force researcher who studied the 3320th and related this account notes how "with this technique, Colonel Tackney vividly established the practical, informal, nonpunitive nature of the 3320th's program." *Id.*

[371] *Id.* at 22–23, 60 (discussing Maxwell Jones's theory of the "therapeutic community," which envisions the patient as "an active participant in his own treatment," and Captain Lawrence A. Carpenter's translation of that theory to a model in which "[r]ehabilitation is not a treatment which can be administered like a dose of Penicillin").

Force's restoration program,[372] but the 3320th developed special expertise to address it. Mr. John Moye, who worked as a judge advocate for the 3320th between 1968 and 1972, describes how, in the early years, Air Force policy required convening authorities to transfer all courts-martial involving offenders with suspected "combat fatigue" to the 3320th for the purpose of trial.[373] Although the transfer of witnesses and evidence to Colorado—sometimes from Vietnam—required great cost and energy, it was thought that the offender would experience less stress and turmoil in the therapeutic environment of the 3320th with the aid of an interdisciplinary treatment team.[374]

Although Mr. Moye could not recall specific statistics, he reports that there were "definitely" cases where offenders diagnosed with combat fatigue received suspended discharges in order to undergo comprehensive and individualized treatment.[375] Alternatively, many of these offenders would be discharged administratively with a characterization that enabled them to obtain benefits from the VA.[376] At this same juncture in history, the Army too addressed these unique considerations with its own offenders.

5. Vietnam and the Army's Retraining Brigade

Although the Army continued to operate rehabilitation centers during the Korean War at Camp Gordon, Georgia,[377] and in Germany,[378] it

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[372] Captain Jeffrey W. Cook, *Clemency, Transfer, and Parole of Air Force Prisoners at the United States Disciplinary Barracks*, 18 A.F. L. REV. 101, 104 (1976) (citing U.S. DEP'T OF AIR FORCE, REG. 125-18, OPERATION OF AIR FORCE CORRECTION AND DETENTION FACILITIES ¶ 7-2(2) (16 Jan. 1975)).

[373] Telephone Interview with John Moye, Senior Partner, Moye White LLP (Jan. 10, 2011) (notes on file with author).

[374] *Id.*

[375] *Id.* At the same time, however, Mr. Moye noted attempts by accused Airmen to falsely claim that they suffered from combat trauma in order to receive better treatment: "We were overwhelmed by people who said they suffered from acute combat fatigue, even though they had not been in combat. It's hard to argue that Montgomery, Alabama, was a combat zone, though." *Id.*

[376] *Id.*

[377] While it could easily go unnoticed in modern times—with only brief mention in the single reported appellate case of *United States v. Gordon*, 2 C.M.R. 322, 322 (A.B.R. 1952) (noting how, after the accused was convicted of willfully disobeying a superior officer and sentenced to a dishonorable discharge and one year confinement at hard labor, the convening authority suspended the discharge and directed his placement in the Pilot Center program pending appellate review or the accused's release from confinement)—

significantly intensified restoration efforts with the establishment of the U.S. Army Correctional Training Facility at Fort Riley, Kansas (later named the United States Army Retraining Brigade (USARB)). The program, launched in 1968, was expected to restore 7560 convicts in its first year and 9825 each following year.[379] Similar to the 3320th, the program developed treatment teams and evolved to the point where social workers played a direct role in addressing the individual needs of trainees.[380] Unlike the 3320th, however, the USARB mainly relied on the

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the Camp Gordon Pilot Rehabilitation Training Center functioned in a manner that was virtually indistinguishable from a WWII rehabilitation or disciplinary training center. MILLER, *supra* note 245, at 26 ("The Army activated a rehabilitation center at camp Gordon, Georgia, similar to those it had operated during World War II.").

Not only were inmates called "trainees" and sentenced to "terms" for therapeutic purposes, but, as in the case of WWII, a "merit system replace[d] guards, barbed wire and high walls." Sterling Slappey, *Cure Adjusts 'Bad' Soldier Into Good GI: Normal Treatment Proves Success at Vast Military Jail*, SUN TIMES (Cumberland, Md.), Aug. 17, 1952, at 40. Trainees likewise adorned regular duty uniforms, rendered and received the salute despite punitive discharges, and earned the right to leave the post unescorted "simply because they give their word they will return." *Id*. As in the WWII experience, "[t]rainees [we]re eligible for honorable discharge regardless of what their courts[-]martial involved." *Id.* The three differences between the Pilot Center and prior iterations were apparently (1) the institution of a sixteen-week intensive military training program; (2) more liberal standards in admitting all classes of offenders; and (3) a high degree of selectivity among the persons ultimately admitted to the program. *Id*. (revealing how, as opposed to the centers of WWII, trainees "were a hand-picked—sifted to avoid those soldiers considered incorrigible"). While it is unclear whether restorations from the center were captured in the Korean War discharge remission statistics, over 1000 trainees attended the Center by August of 1952. *Id*. The program was apparently so successful that the Army once "hinted similar camps will be set up for possibly each of the five armies in the continental United States." *Id*. The Pilot is most noteworthy because it reaffirms the most salient values of the World War II rehabilitation centers in a time period following the codification of the *Uniform Code of Military Justice* (*UCMJ*).

[378] *See, e.g.*, Memorandum from Lieutenant Colonel W.F. La Farge, to Commanding Officer, The Provost Marshal Gen. Ctr., Camp Gordon, Ga., subject: Operating Procedures of Retraining Center (2 June 1953) (describing operating procedures for the 7727th U.S. Army Europe Retraining Center located in Kaufbeuren, Germany) (on file at the U.S. Dep't of Army Mil. Police History Office, Fort Leonard Wood, Mo.).

[379] Memorandum from General Ralph E. Haines, Jr., Acting Chief of Staff, U.S. Army, for Secretary of the Army, subject: Establishment of the Correctional Training Facility ¶ 2 (3 Jan. 1968), *reprinted in* Lawrence J. Fox, A Chronological History of U.S. Army Correctional Programs at Ft. Riley Kansas: 1968–1992, app. G, at 173 (June 1992) (unpublished manuscript on file at U.S. Army Ctr. of Military History, U.S. Cavalry Museum & 1st Infantry Div. Museum, Fort Riley, Kan.).

[380] *See, e.g.*, Mary C. Femmer, *A Second Chance: The Retraining Brigade*, ARMY MAG., Sept. 1980, at 25, 26 & Call-Out Box ("The Retraining of Sgt. McIntyre") (describing an approach to Army rehabilitation that involved "daily [individualized] counseling sessions that lasted for hours [and] well into the night" and the involvement of social workers in several aspects of the rehabilitative program); Fox, *supra* note 379, at 39–40 (describing

concept of intense military training similar to basic infantry training and the physical fitness programs implemented at the rehabilitation centers in the 1940s.[381] Within the framework established at the USARB, like all restoration programs, staff used alternative methods to address offenders with PTSD, who were often medically discharged based on their mental illness.[382]

The end of the draft in 1973 and the concept of a "quality force" pushed servicewide restoration programs into sharp decline and eventual dormancy by the late '70s.[383] However, the Army's Judge Advocate General and other officials still encouraged local commanders to continue their use of suspended punitive discharges.[384] Despite the fact

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the innovative involvement of social workers in the U.S. Army Retraining Brigade (USARB) retraining operations).

[381] Arranged in battalions and companies, under the supervision of Drill Instructors, program participants completed nine weeks of training, which included classroom instruction and field exercises with a focus on basic infantry soldier skills. Fox, *supra* note 379, at 3, 5 (describing organizational and training structures).

[382] Doctor James Smith, who served as a Social Work Officer in the USARB from 1978 to 1983, explains that the program did, in fact, take on offenders who had suffered from PTSD, and, in many cases, helped them earn a medical discharge rather than an approved punitive discharge. Telephone Interview with James Smith, Assoc. Professor, Washburn Univ. Sch. of Social Work (Oct. 8, 2010). Doctor Smith shared that the PTSD encountered at the USARB was not only related to combat in Vietnam, but also included trauma from sexual assault and other causes. *Id*. In line with Dr. Smith's observation, some of the company commanders within the USARB structure innovated treatment plans that were little different from one that a contemporary treatment court might develop today. For example, the "correctional planning conference" included "the Unit commander, the Unit Social Worker, the Battalion Chaplain, and, in some instances . . . an NCO from the trainee's leadership team." Fox, *supra* note 379, at 26. During these meetings, "[t]he team leader offered his evaluation of the trainee and the participants responded with criticisms and suggestions, perhaps modifying the treatment plan." *Id*. Even after routine meetings, there existed the option to schedule subsequent conferences based on the trainee's progress. *Id.*

[383] *See, e.g.*, Cuthbert, *supra* note 366, at 13 (observing how restoration programs came to "retain only historical significance" by 1977); Fox, *supra* note 379, at 124 (tracing how it came to be that the "retraining mission [has] remained . . . in name only").

[384] In May of 1975, Major General George S. Prugh, the Army Judge Advocate General, dispatched a memorandum to all SJAs, promoting the suspended sentence as a valuable tool available to convening authorities. Captain David A. Shaw, *Clemency: A Useful Rehabilitation Tool*, ARMY LAW., Aug. 1975, at 32, 32 (citing extensively from Memorandum DAJA-CL 1974/12056 (2 Jan. 1975)). Notably,

> all staff judge advocates were urged to look for instances where clemency action would be appropriate in courts-martial cases. It was requested that staff judge advocates stress the value of suspended sentences to commanders at all levels. The memorandum stated the

that the Air Force is the only service with a functioning program,[385] now called the "Return-to-Duty Program"—which has, at times, been populated by only one trainee—all of the restoration programs were extremely successful, with their disuse resulting from policy preferences, rather than legal mandates.[386]

In fact, based on existing statutory mandates to operate military restoration programs,[387] scholars suggest that such programs have been "mothballed," rather than terminated, so that they can be resurrected in times of national emergency when a significant number of sevicemembers is again mobilized to defend the Nation.[388] Without question, however, in addition to the 42,373 soldiers rehabilitated by the SCRCs and Disciplinary Training Centers, the USARB restored an additional 37,801 soldiers by 1992,[389] and the Air Force an additional 8252 Airmen by 1985.[390] The military courts' experiences addressing these programs have clarified a number of enduring legal lessons that will be vital to any program that contemplates discharge remission based on successful treatment of mental illnesses.

> suspension and/or remission of an individual's discharge might provide an incentive for the individual, set an example for others in similar circumstances, encourage good behavior, and improve morale.

Id. The Air Force also stressed the importance of suspensions at the installation level. MILLER, *supra* note 245, at 147 (describing the Air Force's encouragement "for wider application of suspended sentences in lieu of short term confinement" in the same time period).

[385] Telephone Interview with Lieutenant Colonel (Ret.) Peter J. Grande, Chief of Staff, Military Correctional Complex, Fort Leavenworth, Kan. (Dec. 30, 2010) [hereinafter Grande Interview] (notes on file with author).

[386] Morris, *supra* note 245, at 84 ("The regulations governing restoration to duty have become somewhat more restrictive over the years, though statistics will show it is their *interpretation*, as opposed to their *text*, that has tightened most markedly.") (emphasis added).

[387] *See, e.g.*, *id*. (describing the continued validity of statutory requirements); 10 U.S.C. § 953 (2006) (requiring the establishment of restoration programs throughout the services); U.S. GEN. ACCOUNTING OFFICE, COMPTROLLER GEN., REPORT TO THE CONGRESS: UNIFORM TREATMENT OF PRISONERS UNDER THE MILITARY CORRECTIONAL FACILITIES ACT CURRENTLY NOT BEING ACHIEVED 40–41 (May 30, 1975) (strictly interpreting the statutory requirement).

[388] MILLER, *supra* note 245, at 107–08 ("[S]hould the Air Force interest in rehabilitation increase at any time, the nucleus of a strong rehabilitation program still existed."). Cuthbert, *supra* note 366, at 16 (observing that the Army's secretarial restoration program exists on paper "probably as a safety valve . . .").

[389] Fox, *supra* note 379, at 163.

[390] MILLER, *supra* note 245, app. X, at 251.

C. Legal Lessons Learned from Military Restoration Programs

As discharge remission programs evolved over the years, military courts recognized their success[391] and resolved a number of important issues that could one day be important if such programs emerge from the mothballs. The sections below briefly review the most enduring legal precedents.

1. Cases Regarding the Nature and Objectives of Restoration Programs

Since the *Wise* opinion in 1955, military courts have recognized the convening authority's responsibility to review each case, on its individual merits, for the possibility of suspending a punitive discharge:

> A casting aside of the sentence review by a sweeping proclamation that all accused who receive a punitive discharge are to be discharged from the service, regardless of any showing made on their behalf, is not in keeping with [the] rationale [of clemency]. That view smacks too much of the principle that all military offenders must inflexibly and arbitrarily be tarred with the same brush of dishonorable service.[392]

Instead, suspension of a punitive discharge that accords the possibility of remission is the sole vehicle through which to accomplish rehabilitation as conceptualized by the *UCMJ*.[393] Hence, the *opportunity* to participate

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[391] *See, e.g.*, United States v. Andreason, 48 C.M.R. 399, 401 (C.M.A. 1974) (observing that the 3320th's "degree of success is . . . extraordinary in comparison to correctional programs in the civilian community" and relying on this fact in its ruling).
[392] United States v. Wise, 20 C.M.R. 188, 192 (C.M.A. 1955).
[393] *Id.*

> [I]t seems axiomatic to state that if a convening authority can group all cases in one category and by a policy fiat decide in advance not to suspended any punitive discharge, the painstaking efforts of Congress and the framers of the Manual to prescribe an enlightened way of dealing with restoration to duty and rehabilitation of military offenders would go for naught.

in a program that could result in remission of the discharge has a distinct clemency value, separate from one's ultimate graduation from the program or return to duty[394]—even if the individual ultimately fails to complete the program.[395] The Army Court of Military Review recognized this special value in its 1981 *Krenn* decision:

> We assume that the convening authority knew that prisoners assigned to the Retraining Brigade have more of an opportunity to ameliorate the confinement and forfeiture portions of their sentence than prisoners confined in the Disciplinary Barracks and that he took that matter into account when he designated the Retraining Brigade as the place the appellant was to be confined. To that extent the erroneous failure to transfer the appellant to the Retraining Brigade resulted in a more severe sentence than deemed appropriate by the convening authority.[396]

While appellate courts have acknowledged a presumption of regularity in the review of convening authority clemency determinations, they have nevertheless mandated that convening authorities must individually weigh the merits of suspending a punitive discharge in each case.[397]

See also United States v. Schmit, 13 M.J. 934, 939 (A.F.C.M.R. 1982) ("[T]he possibility of . . . rehabilitation is the *sole* justification for suspension of a punitive discharge.") (emphasis added).

[394] *See, e.g.*, *Schmit*, 13 M.J. at 940 (observing that the convening authority's allowance for an accused to participate in a rehabilitation program constitutes an exercise of clemency and "sentence amelioration," even if the convening authority does not do anything beyond permitting the accused to participate in the program); United States v. Thompson, 25 M.J. 662, 665 (A.F.C.M.R. 1987) (recognizing the vital question in cases involving participation in the 3320th as "whether [the accused] would be offered the *opportunity* for rehabilitation," rather than where he would be assigned or whether he would matriculate) (emphasis in original).

[395] *Thompson*, 25 M.J. at 655 ("Being sent to the 3320th CRS does not, of course guarantee a member will successfully complete the retraining program and be retained in the service.").

[396] United States v. Krenn, 12 M.J. 594, 597 (A.C.M.R.), *petition denied*, 12 M.J. 64 (C.M.A. 1981) (addressing a case in which the convening authority suspended the sentence in order to permit the accused's participation in the USARB). *See also* United States v. DeHart, 18 M.J. 693, 694 (A.F.C.M.R. 1984) (finding error in the Government's failure to transfer the accused to the 3320th based on his loss of the second chance to prove his value to the Air Force).

[397] *Wise*, 20 C.M.R. at 193 (finding "the refu[sal] to listen" as grounds to review such cases on appeal, despite the dual presumptions that the convening authority considered favorable matters and "conscientiously reached the conclusion that the particular accused

Convening authorities cannot, therefore, preemptively remove the suspended punitive discharge from their clemency practices or philosophies.[398]

With as much zeal as they have confirmed the necessity for convening authorities to evaluate the suitability of an accused for a suspended discharge, the appellate courts have upheld convening authorities' refusal to grant the opportunity after *meaningful* consideration. Courts have found no freestanding right to participate in a rehabilitative program, even if the accused so requests,[399] even if he otherwise meets the enrollment criteria for a specific program,[400] and even if an experienced military judge "strongly recommend[s]" a suspended discharge to permit participation in a rehabilitative program.[401] However, when the military judge or the panel has, on the record, issued a contemporaneous recommendation for suspension of an adjudged discharge or participation in a restoration program, courts have stringently applied the requirement for SJAs to alert the convening authority.[402]

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was not entitled to that form of relief"); United States v. Johnson, 45 C.M.R. 44, 45 (C.M.A. 1972) (discussing the presumption of regularity).

[398] *See, e.g.*, United States v. Davis, 58 M.J. 100, 104 (C.A.A.F. 2003) (commenting on *Wise*'s vitality and relevance in current times).

[399] In fact, an SJA is not even required to single out the accused's request during the review of clemency matters. *See, e.g.*, United States v. Taylor, 67 M.J. 578, 580 (A.F. Ct. Crim. App. 2008) ("[N]either statutory law nor case law obliged [the SJA] to specifically advise the convening authority of the appellant's RTDP request."); United States v. Black, 16 M.J. 507, 514 (A.F.C.M.R. 1983) (Snyder, J., concurring and dissenting) ("Informing the convening authority that one is a volunteer for the CRS is not on the same level as appraising him of a petition for clemency . . . . [and] realistically, not a threshold action.").

[400] *See, e.g.*, United States v. Turbeville, 32 C.M.R. 745, 749 (C.G.B.R. 1962) (rejecting the claim that the accused "lost the chance to undergo rehabilitation training [and] did not have proper opportunity to demonstrate restorability" as a result of the location where he was ultimately confined).

[401] *Johnson*, 45 C.M.R. at 45; United States v. Gardner, 1991 WL 229961, at *1 (A.F.C.M.R., Oct. 31, 1991) (unpublished); United States v. Hommel, 45 C.M.R. 51, 52 (C.M.A. 1972) (upholding refusal to place the accused in a rehabilitation program even though the military judge and the trial counsel recommended suspension of the punitive discharge based on his "excellent history of conduct, proficiency" and "other traits").

[402] The requirement to inform the convening authority of the recommendation for a suspended sentence under this circumstance derives from RCM 1106(d)(3)(B), which mandates that all announcements of clemency "made in conjunction with the announced sentence" must be summarized in the staff judge advocate's recommendation (SJAR). Courts have stringently applied this rule. For example, in *United States v. Boyken*, 2004 WL 944030 (A.F. Ct. Crim. App., Apr. 2, 2004) (unpublished), *review denied*, 2005 CAAF LEXIS 218 (C.A.A.F., Feb. 23, 2005), the court found error in the SJA's failure to bring matters to the convening authority's attention when,

It is sometimes the case that the aims of courts-martial or convening authorities clash with servicewide restoration program eligibility criteria. On these occasions, the courts weigh in favor of the secretarial standards, invalidating inconsistent provisions. In *United States v. Cadenhead*, the Air Force Board of Review nullified that portion of the convening authority's clemency which curtailed the length of participation in the 3320th prescribed by the Secretary of the Air Force.[403] Recognizing how "[t]he Secretary's view is that suspension of a punitive discharge with provision for automatic remission removes much of the incentive of the prisoners to work toward restoration,"[404] the Board thus eliminated the "self-contradictory" clemency terms (six months' participation time limit) that had originally been recommended in the panel's contingent sentence.[405] Other cases similarly nullified inconsistent provisions of judicial clemency recommendations,[406] with all suggesting that military justice practitioners should independently evaluate the recommended terms of suspended sentences before incorporating them into the convening authority's action. Importantly, a convening authority's comparison of a recommended contingent sentence with servicewide restoration programs is necessary only to the extent that the court-martial invokes a specific preexisting servicewide restoration program; regulations governing programs at the secretarial level do not, and should

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> [a]fter announcing the sentence, the military judge stated that if the appellant elected to volunteer for the Air Force Return to Duty Program, she would "recommend that the convening authority seriously consider that [she] be given that opportunity." She added, however, that if the appellant did not volunteer for the program, her "sentence would not change one bit." She said that, "This recommendation should not be misconstrued as a recommendation for any other type of clemency, and it does not impeach the bad conduct discharge I have adjudged, nor any other element of this sentence."

Id. at *1.

[403] 33 C.M.R. 742 (A.F.B.R.), *aff'd*, 34 C.M.R. 51 (C.M.A. 1963).

[404] *Id*. at 745.

[405] *Id*. ("We think the real concern of the court members in submitting their recommendation was that [the] accused be given an opportunity to earn restoration to duty.").

[406] *See, e.g.*, United States v. Merriweather, 44 C.M.R. 544, 544–46 (A.F.C.M.R. 1971) (finding serious problems with the military judge's clemency recommendation concerning the actions that the commander of the 3320th was expected to take, especially regarding restoration of the accused's reduced rank).

not, control participation in treatment programs that operate locally through civilian or military channels.[407]

Additional court decisions counsel toward use of post-conviction agreements in all cases that involve treatment plans, so as not to create clemency conditions that deny an accused the opportunity to participate in a rehabilitative program for which he would have otherwise been eligible. So suggested *United States v. Rogan* by finding impermissible the convening authority's denial of participation in the 3320th on the basis that he refused to accept responsibility for the charged offenses; at the time, the Air Force did not require acceptance of responsibility for enrollment.[408] However, it would be a far different case if the accused—having knowledge of program requirements—agreed to participate in a treatment program that required acknowledgement of guilt, as most veterans and other treatment court programs require.[409] *Rogan*, as

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[407] The military courts have emphasized the need for creativity and flexibility in developing specialized programs to meet the individual needs of servicemembers and supported such terms. *See, e.g.*, Major Mary M. Foreman, *Let's Make a Deal!: The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53, 116 (2001) (reviewing various cases and concluding that "the CAAF has paved the way for much broader discretion on the part of convening authorities for entering into pretrial agreements with innovative terms"). Individualized treatment plans offer far greater opportunities to meet the accused's particular needs compared with programs operated by the Service secretaries because they eliminate the inevitable clash of competing objectives that occurs by virtue of different interest groups in the corrections field. *See generally* Henshel, *supra* note 137, at 28.

[408] 19 M.J. 646 (A.F.C.M.R. 1984). In *Rogan*, the accused was convicted of rape, sodomy, and other offenses, all contrary to his pleas. Even after his conviction, he did not desire to accept responsibility for his offenses, leading the SJA to recommend against his participation in the 3320th, in part because "[u]ntil he admits his wrongs, there is no possibility of any successful rehabilitation taking place." *Id*. at 650. The court recognized that such a requirement exceeded the eligibility criteria for participation in the 3320th under then-existing Air Force regulations, and ruled that "a servicemember's refusal to admit guilt, before or after trial, should not exclude him from the opportunity for rehabilitation." *Id*. Because the clemency recommendation relates to a restoration program operated by the Service secretary, *Rogan* falls in line with *United States v. Tate*, which more recently held that "[t]he terms and conditions [of a pretrial agreement] that would deprive Appellant of parole and clemency consideration under generally applicable procedures are unenforceable . . . . ," largely because they "usurp" the discretion of a Service secretary and the President in promulgating such rules. 64 M.J. 269, 272 (C.A.A.F. 2007) (citing cases).

[409] Interview with Major (Ret.) Brian Clubb, Veterans Treatment Court Project Dir. for the Nat'l Ass'n of Drug Court Prof'ls, in Santa Clara, Cal. (Aug. 6, 2010) [hereinafter Clubb Interview] (notes on file with author) (describing how the majority of VTCs are post-plea programs that require admission of guilt). *See also* Holbrook & Anderson, *supra* note 9, at 27 (concluding that a majority (57%) of a sample of 14 VTCs "enrolled

informed by rehabilitation programs since the early 1900s, provides additional insight by underscoring the value of clemency terms specially tailored to meet specific, quantifiable goals, rather than ones that depend on merely the passage of time without incident. Suspensions should create a genuine opportunity for participants to benefit from the program by specifying the maximum program length (usually up to 24 months) or the attainment of specific goals within estimated timeframes.[410]

Voluntary participation in all aspects of the rehabilitative program is another factor raised by the cases. In *Black*, the Air Force court explained that the convening authority was not permitted to compel the accused's participation in a rehabilitative program: "[I]f a prisoner is not a volunteer, the convening authority is precluded from entering him into the program."[411] Judge Snyder's concurrence emphasized how this limitation acted as a "restraint on convening authorities," "specifically, to deter [them] from wasting limited space by attempting to rehabilitate those who have no desire to be rehabilitated."[412] Related cases have highlighted the special problems that arise when an accused does not desire to participate in a restoration program—even when recommended by a military judge,[413] when the accused changes his mind regarding intentions to participate prior to the convening authority's action,[414] or

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veterans solely at the post-plea stage of criminal proceedings"). Military treatment programs often require more than mere acknowledgement of culpability. *See, e.g.*, United States v. Cockrell, 60 M.J. 501, 505 (C.G. Ct. Crim. App. 2004) (discussing the terms of a sex offender treatment program requiring submission to polygraph examinations and discussions of one's sexual history).

[410] *See infra* Part VI & app. G (discussing pretrial agreement terms for program duration based on existing requirements).

[411] United States v. Black, 16 M.J. 507, 510 n.1 (A.F.C.M.R. 1983).

[412] *Id*. at 514 (Snyder, J., concurring).

[413] In *United States v. Clear*, the judge remarked, on the record,

> in view of the previous superb record, Sergeant Clear, the recommendations of supervisors and other NCOs, it's the recommendation of this court that the 3320th Corrections and Rehabilitation Squadron at Lowry Air Force Base, Colorado, be designated as the place of confinement and that Sergeant Clear be afforded an opportunity to earn conditional suspension of the discharge.

34 M.J. 129, 130 (C.M.A. 1992). Despite this, the accused expressed that he did not desire the clemency recommended by the judge and would rather be punitively discharged with a shorter term of confinement so that he could meet financial needs of his family more quickly. *Id.* at 131.

[414] *Black*, 16 M.J. at 511.

when an accused desires to un-volunteer himself from a restoration program after enrollment (based on its demanding requirements).[415] Together, such cases reveal how a comprehensive post-conviction agreement would cure many of these potential problems.[416]

2. The Accused's Right to Request Restoration Program Participation and to Present Evidence Concerning Rehabilitative Program Attributes

The suspended sentence is cognized only in the form of clemency, which a court may recommend, but may not itself adjudge. Military courts have, therefore, recognized the inherent value of both the opportunity to participate in discharge remission programs[417] and a court-martial's recommendation of a suspended sentence to effectuate them.[418]

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[415] *See* United States v. Smith, 1995 WL 229143, at *3 (A.F. Ct. Crim. App., Apr. 5, 1995) (unpublished), *review denied*, 43 M.J. 474 (C.A.A.F. 1996) (addressing a situation in which, despite a pretrial agreement "requirement for designation of the 3320th Correctional and Rehabilitation Squadron as the place at which any confinement will be served," the accused changed his mind while in the program and sought to modify the terms to allow him to leave).

[416] For a recommended format, see *infra* app. G.

[417] *See, e.g.*, United States v. Roberts, 46 C.M.R. 953, 955 (A.F.C.M.R. 1972) (internal citations omitted):

> Assignment to the retraining group "offers Air Force prisoners the opportunity to receive specialized treatment and training to return them to duty improved in attitude, conduct and efficiency and with the ability to perform productively in the Air Force." To deny such assignment deprives the accused of the opportunity "to obtain an additional chance to prove his worth to his service and his country."

[418] *United States v. Weatherspoon*, 44 M.J. 211, 213 (C.A.A.F. 1996), recognized that a clemency recommendation for suspension of a sentence "is a practice which must be encouraged in light of the court-martial's legal inability itself, to suspend any or all of a sentence." The *Weatherspoon* court further explained, "for over 4 decades, the President has provided for, and this Court has recognized the power of a court-martial to recommend clemency to the convening authority *contemporaneously with announcement of the sentence*." *Id*. (italics added). Refusing to limit "*when* and *where*" clemency recommendations are made, the Army Court of Criminal Appeals later found plain error in the judge's prohibition on announcing clemency at sentencing, further identifying "various reasons" for contemporaneous announcement of the recommendation with the sentence. United States v. Hurtado, 2008 WL 8086426, at *2 (A. Ct. Crim. App., June 30, 2008) (unpublished). *Hurtado* highlighted the fact that "[t]he accused's best hope for sentencing relief is most likely to result from recommendations made by the panel

Even if the convening authority is not inclined to grant the request for participation in a restoration program, knowledge of the court-martial's clemency request can lead the convening authority to mitigate the sentence in some other way besides the one requested.[419] Civilian jurisdictions that permit juries to recommend sentences of probation like the military does have recognized this same "gravitational influence"[420] principle: "The right to be considered for probation is valuable, *even if probation is not given*," remarked the Texas Court of Criminal Appeals, "because the jury instruction concerning probation forcefully directs the jury's attention to the lowest punishment allowed by law."[421] This very phenomenon occurred in the case of *United States v. Parsons*, where the convening authority confined the accused at a facility where the accused could potentially participate in the 3320th, even without a suspended sentence, "in partial recognition of the military judge's recommendation."[422] Because of the undeniable value of clemency recommendations in court-martial practice, the accused can use the presentencing stages of court-martial proceedings to request a suspended punitive discharge that would enable participation in a rehabilitation program.

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members determined by the convening authority, himself as 'best qualified' to sit on this court martial and decide the appropriate sentence." *Id.* at *3.

[419] *See, e.g.*, United States v. Clear, 34 M.J. 129, 132 (C.M.A. 1992) (evaluating a recommendation for enrollment into the 3320th: "The decision of an 'experienced' military judge to recommend clemency of one kind is a circumstance that may also predispose a convening authority towards granting clemency of some other type."); United States v. Olson, 41 C.M.R. 652, 653 (A.C.M.R. 1969) (recognizing that, with knowledge of a judicial clemency recommendation to reconsider the sentence if the accused demonstrates rehabilitative potential by the time of appellate review, the convening authority "might . . . have approved a lesser period of confinement or, alternatively, expressly provided in his action for the remission of the unexecuted sentence of confinement for upon the completion of appellate review").

[420] *Ex parte* Cash, 178 S.W.2d 816, 822 (Tex. Crim. App. 2005) (Holcomb, J., dissenting) (characterizing the phenomenon).

[421] Snow v. State, 697 S.W.2d 633, 665 (Tex. Crim. App. 1985) (emphasis added).

[422] 1990 WL 8404, at *1 (A.F.C.M.R., Jan. 13, 1990) (unpublished) (further explaining his decision to pencil-in Lowry Air Force Base over Fort Lewis for confinement because "he understood that various authorities could then direct rehabilitation at a further time, should they believe it appropriate").

In the backdrop of an Air Force program that was still producing annual restoration rates in the triple digits,[423] *United States v. McBride*[424] articulated a rule for the propriety of a contingent sentence based on treatment, rather than fines or more familiar conditions. Airman (Amn) McBride asked his panel not to adjudge a BCD but "instead to confine [him] for 'two or three months or so and let him go to the rehabilitation center at Lowry . . . where experts and people who are familiar with [the accused's kind of problems] know what the situation is, have been through it, and who would work with him.'"[425] The panel, after considering the unique factors in the case, attempted to adopt the suggestion by adjudging a BCD, but simultaneously providing for remission of the discharge contingent upon his future improvement in the program. On the Sentence Worksheet, the panel president wrote:

> To be discharged from the service with a bad conduct discharge; to be confined at hard labor for 6 months; to be reduced to the grade of airman basic. The court recommends that confinement be at the 3320th and that the B.C.D. be reduced to an administrative discharge dependent upon performance in the 3320 R.G.[426]

The military judge, noticing the apparent "inconsisten[cy]" between a BCD and an administrative discharge, which the panel could not lawfully adjudge,[427] did not permit the sentence to be announced as written.[428] The president thus attempted to explain the panel's rationale:

> We felt that the situation as it exists now warrants the sentence as we wrote it, however we do feel that there is some incentive provided in our recommendation for improved performance on the individual's behalf, and

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[423] MILLER, *supra* note 245, app. II.
[424] 50 C.M.R. 126 (A.F.C.M.R. 1975).
[425] *Id*. at 130–31.
[426] *Id*. at 131.
[427] For example, in the case of *United States v. Sears*, 2004 WL 637951 (A.F. Ct. Crim. App., Mar. 24, 2004) (unpublished), the court remarked on the concerns raised when a panel attempts to adjudge an administrative separation and a punitive discharge, without conditioning the recommendation on a specific future event: "[T]he case raises the real possibility that the members adjudged a sentence that they believed excessive based upon the hope that the convening authority would substitute an administrative discharge for the bad-conduct discharge." *Id*. at *3. This approach to hedge one's bets can easily backfire if the accused's goal is "to avoid the bad-conduct discharge." *Id*.
[428] *McBride*, 50 C.M.R. at 126.

> that our recommendation for a lighter discharge follows his performance. In other words, if his performance does not warrant a less severe discharge, then that should be the case; however, if his performance at Lowry does show that he intends to improve and he does in fact improve, in their judgment, then he is not worthy of that degree of discharge.[429]

The Air Force Court of Military Review held that, under these facts, the judge erred in disallowing the sentence and recommendation as it had been written. The defense's request for a clemency recommendation was permissible—as was the panel's adoption of it.[430]

To the appellate court, it was vital that the panel understood the limitations of its powers. To this end, the members clearly evidenced their knowledge that they *did not* have the power to adjudge a suspended sentence or its intended result—an administrative discharge. The recommendation was therefore consistent with the panel's power and did not impeach their sentence.[431] *McBride*'s enduring relevance today is its general rule permitting contemporaneous clemency recommendations for participation in specific rehabilitative programs so long as (1) the panel "underst[ands] the relationship of the recommendation to the sentence adjudged . . . ,"[432] and (2) the recommendation is in some way based on observation and "evaluation" of the "accused's conduct between trial and discharge."[433] *McBride*'s continued validity is evident in cases upholding various types of "contingent sentences" on the grounds that remission is

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[429] *Id*. at 131.

[430] *Id*. at 132–33. *See also* United States v. McLaurin, 9 M.J. 855, 859 (A.F.C.M.R.), *petition denied*, 10 M.J. 113 (C.M.A. 1980) ("When a contemporaneous recommendation is for a form of clemency not within the power of the sentencing authority to implement . . . the recommendation will not impeach the adjudged sentence.").

[431] *See, e.g*., United States v. Grumbley, 1985 CMR LEXIS 3257, at *3–4 (A.F.C.M.R., Sept. 13, 1985) (unpublished):

> A Court, after having imposed a sentence it believes to be appropriate, may seek to temper justice with mercy, by recommending a form of clemency it has no authority to grant itself. In the context of our military justice system, it appears clear that we should not, in any way, discourage such clemency considerations.

[432] *Id*. at 143 (internal citation omitted).

[433] *Id*. at 132–33. *See also* United States v. McLaurin, 9 M.J. 855, 858 n.5 (A.F.C.M.R. 1980) ("[A] contemporaneous recommendation [for clemency] would be permissible if contingent upon evaluation of the accused's post-trial conduct.").

conditioned on a future event.[434]

That an accused may request a clemency recommendation does not automatically render admissible all evidence regarding such programs. However, since the inception of the service rehabilitation programs, the military courts' evaluation of evidence pertaining to these programs has reflected a tension between two opposing theories of admissibility. At one pole are concerns of speculation: All secretarial restoration programs have, by their nature, required an accused to participate in a course of training that subjects him to constant observation and rating; the failure to demonstrate sufficient proficiency in military tasks and personal attitude is a basis for dismissal from all programs. These prominent features would ordinarily place an accused's ultimate restoration in the area of conjecture because it is contingent on many unknown factors. Courts have accordingly found certain information about restoration programs to be collateral to the court-martial's decision-making task. Adopting key language from *United States v. Quesinberry*, the cases usually exclude evidence on the basis that "an unending catalogue of administrative information" would only "mudd[y]" the "waters of the military sentencing process."[435]

At the other pole, because rehabilitation is undoubtedly one of five permissible rationales for punishment in the military,[436] military judges

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[434] *McLaurin*, 9 M.J. at 859 nn.6–7 (identifying permissible contingencies of "good post-trial conduct," "cooperation with law enforcement," and "restitution"). *See also* Captain Daniel R. Remily, *Instructions: Failure to Disclose to the Court Members Their Right to Recommend Clemency*, 27 JAG. J. 523, 530–31 (1973) (noting additional historical examples from the *Military Judge's Guide*, including "health," and "attitude of or by an accused after trial").

[435] 31 C.M.R. 195, 198 (C.M.A. 1962). *Quesinberry* did, in fact, deal with an endless chain of information. The panel in that case repeatedly asked for information regarding the effects of a BCD. Even after the trial counsel provided a copy of a chart documenting eligibility for various benefits, the president requested a more recent one since his version was three years-old. The court's instruction to the members on the general consequences of a punitive discharge were upheld on the foregoing grounds.

[436] DA PAM. 27-9, *supra* note 43, instr. 2-6-9, at 92; MCM, *supra* note 34, R.C.M. 1001(b)(5) (defining evidence on rehabilitative potential as "the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society"); *see also id.* R.C.M. 1001(c) (concerning rehabilitative evidence in mitigation, specifically). *See generally* Major Charles E. Wiedie, Jr., *Rehab Potential 101: A Primer on the Use of Rehabilitative Potential Evidence in Sentencing*, 62 A.F. L. REV. 43 (2008) (discussing general evidentiary requirements); Major Jan Aldykiewicz, *Recent Developments in Sentencing: A Sentencing Potpourri from Pretrial Agreement Terms Affecting Sentencing to Sentence Rehearings*, ARMY LAW., July 2004, at 110, 112–113 (describing different views

cannot exclude *all* evidence concerning restoration programs. In the 1991 case of *United States v. Rosato*, the military's highest court admonished others that there was no "per se rule of inadmissibil[ity]" regarding sentencing "evidence of service-rehabilitation programs"; such evidence, instead, required consideration on a case-by-case basis.[437] An increasing number of opinions regarding rehabilitative potential evidence has since removed many issues from *Quesinberry*'s exclusionary domain.[438] Although Rule 1001(b)(5) does not limit the defense the way it limits the Government,[439] it is a good point of reference for the defense because military law accords the defense even greater latitude to introduce mitigation evidence related to rehabilitative potential.[440] Rule 1001(b)(5) now provides a wide berth for experts to offer opinion evidence on future dangerousness, which contemplates many of the same evidentiary issues as treatment programs, including features that would make the accused more amendable to reformed behavior.[441] Because defense evidence on rehabilitation is even broader, *Quesinberry*'s prohibition now mainly applies to the narrow issue of optimal program completion times,

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regarding the extent to which Rule 1001(b)(5)—known by some to be a "Government" Rule only—still relates to the presentation of defense evidence on rehabilitative potential).

[437] United States v. Rosato, 32 M.J. 93, 95 (C.M.A. 1991).

[438] *See generally* United States v. Ellis, 68 M.J. 341, 345 (C.A.A.F. 2010) (tracing the development of cases regarding admissibility of expert testimony on rehabilitative potential). *See also* United States v. George, 52 M.J. 259, 263 (C.A.A.F. 2000) (Crawford, C.J., concurring in the result) (describing how the 1994 amendments to RCM 1001(b)(5) "greatly modified" its provisions on rehabilitative potential opinions).

[439] United States v. Griggs, 61 M.J. 402, 410 (C.A.A.F. 2005) ("R.C.M. 1001(b)(5)(D) does not apply to defense evidence offered in mitigation under R.C.M. 1001(c).").

[440] United States v. Hill, 62 M.J. 271, 272 (C.A.A.F. 2006) (observing the defense's "broad latitude" to present its own evidence on rehabilitative potential under Rule 1001(c), which pertains to mitigation). *See also* O'Brien, *supra* note 47, at 5, 5 & n.1 (explaining how, for these reasons, "[t]he sentencing rules in courts-martial dramatically favor the defense" and contrasting the "restrictive nature" of the prosecution rule with the "broad nature" of the defense rule).

[441] *Ellis*, 68 M.J. at 345 (explaining that "there can be no hard and fast rules as to what constitutes 'sufficient information and knowledge about the accused' necessary for an expert's opinion as to the accused's rehabilitation" and, ultimately, permitting testimony from an expert who did not interview the accused, did not read his medical files or mental health reports, and essentially based his opinion on the nature and number of charges). Since other cases have also permitted testimony regarding estimates of likelihood for success in drug treatment programs based on a review of the accused's "efforts at rehabilitation," "determination to be rehabilitated," and "other information relevant to becoming drug-free," the defense's more liberal standards would surely permit evidence regarding the nature of service restoration programs or VTCs without violating the dated rationales that once precluded such evidence under *Quesinberry*. United States v. Gunter, 29 M.J. 140, 142–43 (C.M.A. 1989).

rendering some of this evidence irrelevant on the basis that it is collateral.[442]

Although an accused has no right to participate in a specific discharge remission program independent of a grant of clemency, military appellate opinions clarify that an accused has the right to present certain evidence about rehabilitation programs including matters of eligibility, his desire to participate, and his understanding of the program's requirements. The legal opinions touching on these issues are vital because they distinguish between relevant and collateral aspects of any program that contemplates discharge remission contingent on program participation or successful completion of treatment. To this end, *Rosato* is ideal.

In 1991, a year when participation in the Air Force Return-to-Duty program had plummeted, a drug offender desired to use his unsworn statement as a means to inform the panel of his desire to participate in the 3320th.[443] Under *Quesinberry*, the trial judge excluded a letter by the Air Force Judge Advocate General which promoted the program, as well as a newspaper article describing it, as collateral to the sentencing considerations.[444] After hearing the accused's proposed unsworn statement, the judge, on the same theory, excluded "whatever he has to say about what other people told him about the 3320th" and any information beyond the accused's "desire to go into the 3320th."[445] In pertinent part, the accused would have stated,

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[442] *See, e.g.*, United States v. Murphy, 26 M.J. 454, 457 (C.M.A. 1988) (upholding the exclusion of an "extract" explaining eligibility requirements for the 3320th when offered for the purpose of showing the accused's ineligibility to participate if he was sentenced to a certain confinement time range); United States v. McNutt, 62 M.J. 16, 20 (C.A.A.F. 2005) (finding error in the trial judge's consideration of "good-time" credit during sentencing).

[443] *Rosato*, 32 M.J. 93. An unsworn statement is a method by which the accused may address members of the panel at sentencing without being subject to cross-examination by the Government. *See generally* MCM, *supra* note 34, R.C.M. 1001(c)(2)(C). The Government is, however, permitted to rebut statements of fact following the accused's statement. *Id*. Because defense counsel have long recognized the unsworn statement as a method to generate a sort of living presentencing report, ideally suited for clemency requests, it is reasonable to expect most of this evidence to be presented in the form of the unsworn statement. Captain Charles R. Marvin, Jr. & Captain Russel S. Jokinen, *The Pre-Sentence Report: Preparing for the Second Half of the Case*, ARMY LAW., Feb. 1989, at 53, 54.

[444] To the court, this "evidence of the details of a particular service program was an irrelevant collateral consequence of a prison sentence." *Rosato*, 32 M.J. at 94.

[445] *Id*. at 95.

> I have been seeing a counselor at the rehabilitative squadron of the 3320th for once a week for about two months. . . . I have come to realize that drugs are 95 percent of my problem. He mentioned the rehabilitative program to me. . . . I would like to do this program. I have talked with prisoners who came from the rehabilitative program and were unable to complete it. Only about two or three people out of 12 people who were in the program last year completed it. The prisoners I talked to who have been in the program said it was very difficult and a good program. The prisoners who have not been in the program constantly say it is a waste of time and a waste of eight months of your life and then you'll just get discharged. I do not agree with them. I think the program will be tough, but I know I can do it and I will be better off for it. I ask you to consider my attitude about rehabilitation training in determining my rehabilitative potential as a factor in your sentencing me.[446]

The appellate court in *Rosato* found that the proposed statement was not so extensive or convoluted as to "muddy[ ] the sentencing waters,"[447] and that any potential confusion could have easily been remedied with a standard instruction on the limited nature of an unsworn statement.[448] Invoking the enduring concept of "soldier[ing] . . . back" from a conviction, the appellate court further recognized that the excluded portions of the accused's unsworn statement were necessary to show the "depth of his commitment to a rehabilitative program" and his understanding of its exacting requirements.[449] *Rosato*'s holding also reflects the longstanding rule that an accused has a "broad right during allocution" to "attempt to demonstrate . . . readiness for rehabilitation."[450]

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[446] *Id*. at 94–95 (emphasis omitted).
[447] *Id*. at 96.
[448] *Id*.
[449] *Id*.
[450] United States v. Green, 64 M.J. 289, 293 (C.A.A.F. 2007) (relying on the same principle to conclude that an accused can offer evidence of his "religious practices and beliefs" as proof of readiness for rehabilitation).

3. The Convening Authority's Requirement to Ignore Secretarial Norms

A final line of cases places *Rosato* and *McBride* in their proper context, cementing the legal requirement for convening authorities to adopt precisely the *opposite* positions as the clemency policies that permeate the Service secretaries' restoration programs. Expanding on *Wise*'s requirement for the convening authority to approach suspensions with an open mind, *United States v. Plummer* addressed the "appal[ling]" situation where a convening authority denied an accused consideration for a suspended dishonorable discharge simply because he was a convicted "barracks thief."[451] There, the SJA recommended denial of clemency based on the military's need for "trust" and loyalty to peers, while acknowledging that civilian courts "would probably suspend the entire sentence" for the same offense.[452] By adopting a policy little different from the Service secretaries' presumption against discharge remission for crimes of moral turpitude,[453] the convening authority's lack of "conscious discretion" on review amounted to prejudicial error.[454]

United States v. Prince directly emphasized the difference between the Army's regulatory policies and the convening authority's responsibility during clemency review. While the court certainly acknowledged "the services' traditional policy against retention of those convicted of thievery and similar crimes," the court also distinguished it:

> Undoubtedly, such personnel may frequently prove untrustworthy or, indeed, in most cases, be eminently suitable candidates for separation. At the same time, there is nothing so inherently wrong with these offenders that justifies branding them as unsuitable for restoration to duty as a matter of law. It was to a convicted thief that Jesus remarked, "Truly, I say unto you, today you will be with me in Paradise." . . . . Surely, others may grant a lesser degree of mercy without justifying their clement attitude. In any event, as Congress has provided, it is the convening authority who must make the determination, unbound by any strictures as to his

[451] 23 C.M.R. 94, 95 (C.M.A. 1957).
[452] *Id*. at 95–96.
[453] *Id*. at 96.
[454] *Id*. at 97.

> reaching the conclusion a particular offender is worthy of another opportunity to serve.[455]

United States v. Johnson[456] revived the *Wise* rule in a case involving a military judge's "very strong[ ]" clemency recommendation for a suspended BCD and "with provision for automatic remission."[457] In reviewing the convening authority's denial, *Johnson* emphasized how, despite the convening authority's unfettered discretion, any "firm policy against suspension" means that he "ha[s] not consciously reflected on all the evidence affecting the sentence and ha[s] thereby denied the accused his right to an individualized sentence."[458]

Through the years, courts have applied the same rationales as *Plummer*, *Prince*, and *Johnson* to clemency recommendations involving participation restoration programs. The decisions have invalidated denials of clemency when the evidence suggested that the court denied clemency solely based on the award of a short term of confinement.[459] The cases have likewise targeted decisions in which the convening authority appeared unaware of the power to commute a punitive discharge to a longer term of confinement which, if granted, would make the accused eligible for participation in a restoration program.[460]

Ultimately, while the trial counsel may incite passion when he argues that the military "is not a rehabilitation center,"[461] convening authorities cannot adopt this position in their determinations regarding the opportunity to obtain mental health treatment under a conditional sentence. It is illegal in the military justice system to foreclose this form of clemency *at the convening authority level*, simply because the USDB has not done it in a decade's time or because military regulations

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[455] 36 C.M.R. 470, 473–74 (C.M.A. 1966) (biblical citation omitted).
[456] 45 C.M.R. 44 (C.M.A. 1972).
[457] *Id*. at 45.
[458] *Id*. at 46.
[459] *See, e.g.*, United States v. Lynch, 1990 WL 79318 (A.F.C.M.R., May 29, 1990) (unpublished), *review denied*, 33 M.J. 160 (C.M.A. 1991).
[460] *See, e.g.*, United States v. Bennett, 39 C.M.R. 96, 99 (C.M.A. 1969) (finding prejudicial error in the SJA's failure to "call attention to [the] alternative" of a commuted punitive discharge that would enable the accused to participate in the 3320th); United States v. Roberts, 46 C.M.R. 953, 955, 956 (C.M.A. 1972) (finding error in the SJA's "failure to advise the supervisory authority of the only method by which the [accused's] transfer to the retraining group . . . could have been effected"—"by commutation").
[461] United States v. Metz, 36 C.M.R. 296, 297 n.1 (C.M.A. 1966) (relating the trial counsel's representative argument).

involving secretarial programs cite a presumption against restoration of certain types of offenders. In no uncertain terms, the military courts' jurisprudence prohibits general policies against punitive discharge remission by convening authorities.

IV. Court-Martial Practices as Windows to the Rehabilitative Ethic

A. Panel Member Sentencing Practices Reveal the Viability of the Contingent Sentence

Aside from the Service secretaries' discharge remission programs, the actual practices of military judges and panel members in contingent sentencing are more reliable indicators of the rehabilitative ethic in military justice. Although considered as a special or "unusual" occasion,[462] military judges have crafted detailed clemency recommendations in an effort to surpass the default limitations of court-martial sentencing. Judges not only suggest clemency alternatives involving restoration programs,[463] but they also create their own restoration-to-duty programs with clemency recommendations that the accused's punitive discharge be suspended until after he has deployed to a combat zone with his unit.[464] Panels also attempt to construct

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[462] United States v. Brown, 1993 WL 180100, at *1 (A.F.C.M.R., May 7, 1993) (unpublished) (addressing judicial clemency recommendation for participation in the 3320th).

[463] *See, e.g.*, United States v. Schrock, 11 M.J. 797, 799–800 (A.F.C.M.R. 1980) (Miller, J., dissenting):

> I therefore recommend to the convening authority to designate the 3320th Corrections and Rehabilitation Squadron at Lowry as the place of confinement in order to allow you the opportunity to rehabilitate yourself. In the event that the convening authority should not see to do that, or by some reason be prevented from doing so, I would further recommend that he give serious consideration to a conditional suspension of the imposition of the bad conduct discharge which I have adjudged as a portion of this sentence.

[464] In United States v. Guernsey, 2008 WL 8087974, at *1 (A. Ct. Crim. App., Jan. 22, 2008) (unpublished), the military judge made the following recommendation after announcing the sentence: "The court recommends that the bad-conduct discharge be suspended for a period of one year so the accused can deploy to Iraq." *Gurnsey* teaches an important lesson about judicial surrogates for restoration-to-duty programs. Even without an operational Army restoration program in place, military judges (and panels) still have the ability to create a similar system through a deployment contingency. Implicit in *Guernsey*, if the command withholds discharge and the accused performs well

contingent sentences, often without the benefit of instructions from the court or even knowledge of their right to recommend clemency.[465] The rehabilitative ethic has, in essence, enabled them to rise above the artificial limitations imposed by the Sentence Worksheet and to construct more meaningful sentencing alternatives.[466]

United States v. King is a simple case that represents both the limitations of conventional sentencing practice and the promise of the rehabilitative ethic. There, the panel members announced the following sentence after consulting "a chart for reduced VA benefits associated with a bad conduct discharge":

> Your honor, it's the feeling of this court in sentencing Airman King that we have two duties to perform; first to see that Airman King is punished for the offenses of which the court has found him guilty; secondly, but to see that this 22-year old does not carry the brand of his misconduct in the past for the rest of his life—for this reason the court would recommend that upon the

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in combat, his service generates new data upon which to determine whether discharge is appropriate; in the literal sense, the servicemember receives a chance to "soldier-back," in an environment where battlefield gains are real, rather than hypothetical.

[465] *See, e.g.*, United States v. Samuels, 27 C.M.R. 280, 285 (C.M.A. 1959) (sentencing the accused, among other things, "to be discharged from the naval service with a bad conduct discharge to be suspended for a period of three (3) years during good behavior. At that time, unless the sentence is vacated, the suspended portion should be remitted without further action."). In *United States v. Wanhainen*, a Navy case in which the panel sentenced the accused to "a Bad Conduct [d]ischarge, suspended for six months," the court contemplated their reasoning: "[T]he court-martial was faced with the task of sentencing an eighteen-year-old first offender with only nine months' service and no prior record of misconduct. Undoubtedly, it may have thought, as did the convening authority, that 'by suspending the Bad Conduct discharge, the Navy might restore a potentially good naval seaman.'" 36 C.M.R. 299, 300 (C.M.A. 1966).

[466] *See, e.g.*, United States v. Thompson, 2010 WL 2265444, at *6 (A.F. Ct. Crim. App., May 6, 2010) (unpublished) (revealing a situation in which "the members asked if a general discharge was allowed"); United States v. Perkinson, 16 M.J. 400, 401 (C.M.A. 1983) ("The president has handed me Appellate Exhibit V, the sentence worksheet, and next to number eight, which is to be discharged from the naval service with a bad conduct discharge, the words 'bad conduct discharge' have been struck out and the words 'general discharge as unsuitable for military service' have been inserted."); United States v. Briggs, 69 M.J. 648, 649 (A.F. Ct. Crim. App.), *review denied*, 69 M.J. 117 (C.A.A.F. 2010) ("[T]he members asked the military judge if there was an option for recommending a discharge other than a bad-conduct discharge."); United States v. Keith, 46 C.M.R. 59, 60 (C.M.A. 1972) ("The question that has been asked is: Is there any other type of discharge available in this case?").

> completion of his confinement sentence the bad conduct discharge be reduced to an administrative discharge in the hopes that when Airman King is released from the Navy he can start a second life.[467]

The court reluctantly affirmed this sentence because the members were aware of the limits of their recommendation, but cautioned that "military judges would do well to steer clear of th[e] judicial shoalwater" that results from discussions of administrative options.[468] *King* thus signals a reason why judges have often been reluctant instruct on clemency.[469] Beyond this limitation, however, the panel's underlying rationale in *King* suggests that, when provided with useful evidence about sentencing alternatives and a proper framework for contingent sentencing, courts-martial are ideally positioned to incorporate a therapeutic perspective in military justice.

The next section will explore judges' and panels' rationales for these persistent and recurring contingent sentences for three primary reasons. First, the continuing trend emphasizes that members of the military who are discharging their duties in the criminal justice system have long supported the same diversionary principles underlying civilian treatment courts' approach to veterans. In so doing, panels and military judges have even embraced MAJ Freedman's concept of the "soldier-patient"; they too recognize a moral obligation to make the sentence constructive—even where return to duty is not contemplated due to mental and medical conditions.[470] Second, and closely related, the

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[467] 1 M.J. 657, 660 (N.M.C.C.M.R. 1975).
[468] *Id.* at 661.
[469] Many opinions reveal an apparent threshold in which judges must first be convinced that a panel intends to recommend clemency before instructing members on their right to do so or the proper considerations. In *United States v. Perkinson*, for example, even though the members lined through the punitive discharge option and replaced it with an administrative one, this did not warrant a clemency instruction as "[t]he mere attempt to award a general discharge, standing alone, was insufficient to signal an intention on the part of the members to recommend clemency." 16 M.J. 400. 401 (C.M.A. 1983). *See also Thompson*, 2010 WL 2265444, at *6 ("During sentencing deliberations, the members asked if a general discharge was allowed. The military judge responded, 'The short answer to that question is no. Again in adjudging a sentence you are restricted to the kinds of punishment which I listed during my original instructions or you may adjudge no punishment.'"); United States v. Keith, 46 C.M.R. 59, 60 (C.M.A. 1972) ("You may adjudge only a bad conduct discharge. You may not adjudge any administrative discharge under general, unfitness, or unsuitability. You may not adjudge any discharge other than a bad conduct discharge in this case, if you elect to adjudge a discharge at all.").
[470] *See supra* Part III.B.3.b.*ii* (describing Major Freedman's theories).

persistent endorsement of the same "constructive" sentencing philosophy—especially despite the lack of judicial instructions spelling out its dimensions—demonstrates an underlying rehabilitative ethic at work within the military. Echoing Justice Owen Roberts's observations in the 1940s, these cases show us that clemency is, in fact, engrained in the DNA of the Armed Forces.[471] Third, and perhaps most concerning, panel members' continuing attempts to adjudge contingent sentences suggest that there are, lurking below the surface of many adjudged punitive discharges, hidden contingent sentencing recommendations—suppressed by the judges' omission of instructions, or suffocated by the forced choices appearing on the Sentence Worksheet.

B. The Soldier-Patient in Court-Martial Clemency Recommendations

Within the appellate cases addressing these recommendations, panels and judges have invoked their own concept of the soldier-patient, not so different from MAJ Freedman's. Under this view, when the accused is attempting to obtain treatment for a condition over which he has little control, these facts introduce a new perceptual frame. Considerations here far exceed the standard sentencing analysis, as court-martial members have often voiced additional concerns for the accused.[472]

In *McBride*, the panel members explained the unique calculus that resulted in their recommendation for the convening authority to allow the accused to participate in the 3320th so he could ultimately obtain an administrative discharge, instead of the punitive discharge they had adjudged. The panel president described how the accused had been stable and productive prior to his experiences in Southeast Asia.[473] Lacking any

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[471] When Supreme Court Justice Owen J. Roberts was chair of the Advisory Board on Clemency in 1945, he underscored the fact that "clemency is and has always been the capstone of the whole system of military justice." Moran Memo, *supra* note 262, at 10 (citing 1945 interim report).

[472] For a basic example, see, e.g., United States v. Sears, 2004 WL 637951, at *1–2 (A.F. Ct. Crim. App., Mar. 24, 2004) (unpublished) (attempting to sentence the accused to "[a] bad conduct discharge, with recommendation for clemency for a general discharge under honorable conditions," owing to the fact that the offense, which involved "suddenly" striking a crying infant on the head, was "an isolated incident" and the accused had a "recent diagnosis of bipolar disorder," which was likely aggravated by the "tragic death" of his father).

[473] United States v. McBride, 50 C.M.R. 126, app. A, at 134 (A.F.C.M.R. 1975) (reprinting the 26 July 1974 clemency petition of Major Lawrence A. Day) ("Throughout the deliberations of the court, I questioned the factors that brought about in [Amn]

criminal past, it was clear to the president and other members of the panel that the military environment had contributed in a significant way to his present mental condition, and his offenses. Because the military contributed to the accused's need for "immediate and intensive psychological treatment,"[474] the military incurred a special obligation to treat it, even though Amn McBride engaged in criminal behavior: "I felt strongly, and still do, that the military environment in South East Asia brought about [Amn] McBride's change of attitude, and that the Air Force was therefore at least partially obligated to provide him medical or psychiatric treatment."[475] On these facts, the court's recognition of the panel's right to recommend a reduced sentence contingent upon future progress in treatment highlights the unique sentencing considerations in cases that involve mental health issues.[476] The court evidently agreed that the standard Sentence Worksheet and instructions were not adaptable to the panel's demanding obligations and decision-making process in their application of the law.[477]

The 2010 *Knight* opinion is also valuable for the purposes of this article. There, even though the accused had not been diagnosed with a

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McBride an apparent psychological reversal in his attitudes. Prior to his tour of duty in Thailand, this young man had an outstanding school record and performed highly satisfactory as an aircraft crew chief.").

[474] *Id*.

[475] *Id*.

[476] *Id*. at 132–33.

[477] *Id*. app. A, at 134:

> From the choice of sentences available, which I felt were insufficient, I envisioned the capability for [Amn] McBride to reduce the type of discharge by demonstrating a willingness to attend and be rehabilitated by the Lowry Rehabilitation Center. I do not feel that a bad conduct discharge is appropriate in this case; the court awarded a [BCD] as the lowest available discharge.

See also id. app. B, at 134 (reprinting the 26 November 1974 clemency petition of Second Lieutenant Richard W. Joyce):

> As I am sure can be seen from the record of trial, the court was not satisfied with the options we had and I thought that an administrative discharge was appropriate; or, at least, [Amn] McBride should be given a chance. I think that the judge should have recognized our initial recommendation . . . . [T]he way the judge's recommendations were phrased left us really no choice. I adjudged a BCD because it was the only option I thought we had.

psychiatric disorder, the military judge—much like federal judge John Kane had in the Colorado *Brownfield* case[478]—suspected that the accused suffered from PTSD based on his combat experiences in Iraq.[479] In *Knight*, the accused had wrongfully taken various pieces of military equipment, which were later recovered when he was apprehended by local authorities for impersonating a law enforcement officer in Texas.[480] Upon sentencing the accused to a BCD and ten months confinement, the judge recommended:

> If [the appellant] has been diagnosed with Post Traumatic Stress Disorder resulting from his combat service in Iraq, then I recommend that the Convening Authority, at the time he takes action on the record of trial, approve only so much of the adjudged confinement as will have been served by that date.[481]

Adoption of the clemency recommendation would have reduced the accused's confinement by several months.[482] In the SJA's post-trial recommendation, he argued against the clemency on a number of grounds. Even if the accused did suffer from PTSD, the SJA explained, there was no proof that the condition had been "caused" by the combat deployment. The SJA also pointed out that the accused's pretrial agreement governed the terms of the deal and that the accused already benefitted greatly from that deal. The convening authority thus rejected the clemency recommendation.[483]

Knight is an important opinion because it demonstrates that some military judges—not only panels—believe that psychiatric conditions, including those connected to combat, are valid reasons to suspend significant portions of adjudged sentences.[484] The case also suggests that

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[478] *See* Memorandum Opinion and Order on Sentencing at 15–23 United States v. Brownfield, No. 08-cr-00452-JLK (D. Colo. Dec. 18, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/us/20100303brownfield-opinion-order.pdf (describing the court's approach to medical diagnosis and treatment for suspected PTSD).
[479] United States v. Knight, 2010 WL 4068918, at *1 (A.F. Ct. Crim. App., June 28, 2010) (unpublished).
[480] *Id*. at *3–4.
[481] *Id*. at *4.
[482] The current standard for processing a court-martial is 120 days. United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).
[483] *Knight*, 2010 WL 4068918, at *1.
[484] In *United States v. Mack*, 56 M.J. 786 (A. Ct. Crim. App. 2002), for example, the accused was a COL in the Chaplain's Corps, who perpetrated an elaborate fraud scheme

suspended sentences hold less weight with convening authorities if they are based on nothing more than a diagnosis of PTSD. Without establishing benchmarks for demonstrated rehabilitation, diagnosis-dependent conditions are susceptible to the same brand of skepticism that leads military members to believe that PTSD is a trial tactic and nothing more. Had the defense counsel obtained the PTSD diagnosis first or proposed treatment standards in *Knight*, there may have been an entirely different outcome. Consequently, *Knight* signals that it is easier to reject the proposal for a suspended discharge in the absence of a clear results-oriented framework.

C. Convening Authorities *Do* Grant Treatment-Based Clemency

It is particularly difficult to obtain statistics on cases in which punitive discharges were remitted based on successful completion of treatment.[485] However, contrary to the impression left by reported appellate cases concerning clemency denials, unreported cases reveal the vitality of the practice today, and decades ago. In years past, upon granting a suspended punitive discharge, it was not uncommon for the convening authority to appoint a probation officer from a line unit to routinely monitor the progress of the offender and report back to the command on violations of

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to support a pathological gambling addiction, going so far as enlisting his sister to play the role of a religious book saleswoman to field official inquiries into the fictional "Covenant House" business he created. *Id.* at 788. Based on evidence that he had "been diagnosed as suffering from PTSD due to his combat experiences and his sexual abuse as a child [and that] his gambling addition [was] connected to his [PTSD]," the convening authority initially "deferred confinement for forty days to enable the appellant to obtain medical treatment." *Id*. at 787. The military judge, after hearing the case, sentenced the accused to various punishments, including dismissal from the service, but then added, "[b]ased upon the entire record I recommend that the sentence be suspended." *Id*. at 787 n.2. *See also* United States v. Clear, 34 M.J. 129, 130 (C.M.A. 1992) (recommending enrollment in the 3320th to provide the accused with "an opportunity to earn conditional suspension of the discharge," in part, because "the accused had been exposed to direct sniper fire; that he was working long stressful hours; and that he was going through a bad divorce"). *Cf.* United States v. Ledbetter, 2008 WL 2698677, at *3 (N-M. Ct. Crim. App., July 10, 2008) (unpublished), *review denied*, 2009 CAAF LEXIS 307 (C.A.A.F., Mar. 31, 2009) (recommending a suspended punitive discharge based, in part, on "some evidence indicating that he had an alcohol problem, and that his command would not refer him for treatment due to manpower concerns . . .").

[485] Telephone Interview with Colonel (Ret.) Malcolm Squires, Jr., Clerk of Court, U.S. Army Court of Criminal Appeals (Jan. 3, 2011) (explaining how there is no method to track how many cases had discharges remitted after a period of suspension based on the Army's record-keeping system, but confirming, anecdotally, that the practice *does* occur).

probationary terms.[486] Seeing that most of these line officers did not have specialized mental health training, some commanders tailored conditions in which a psychiatrist served as a probation officer for an offender with significant emotional difficulties to ensure that the offender would benefit from a course of mental health treatment.

In a 1960 *U.S. Armed Forces Medical Journal* article, a Navy psychiatrist recounted the case of a nineteen-year-old sailor who stole items from another sailor's barracks locker in order to fund the costs of his mother's urgent operation. The sailor was raised by his mother, who suffered from repeated heart problems after his father died when he was six. He joined the Navy primarily to support his mother and often experienced "hallucinatory episodes" in which he believed his father was telling him to support his mother.[487] After a sanity board found the sailor competent to stand trial, the court-martial accepted his plea and sentenced him to thirty days confinement at hard labor and a BCD.[488] The convening authority in the case suspended the sentence for six months because the sailor suffered from "acute situational turmoil" and because "the offender's difficulties were largely neurotic."[489]

The convening authority then appointed a psychiatrist as the military probation officer "on the theory that assisting persons in regaining confidence and self-respect, evaluating tensions and attitudes, and suggesting constructive courses of action are functions of a psychiatrist."[490] The convening authority also reasoned that,

> particularly during the probationary period, the parolee would need help, because the threat of a [BCD] might

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[486] Lieutenant John C. Kramer & Lieutenant Commander John L. Young, *The Psychiatrist as Probation Officer*, 11 U.S. ARMED FORCES MED. J. 454, 455 (1960) (noting how, in the normal course of events, "[t]he position of probation officer, as with other similar special functions ordinarily performed in civilian life by experienced professional personnel, must be occupied in the armed services by officers with little or no preparation"). Later, the *Figueroa* court addressed, upheld, and applauded the assignment of a Marine Corps officer to monitor the accused's probation compliance during meetings "at least once per week" for a ten-month term, though recognizing that there was no obligation for the convening authority to do so. United States v. Figueroa, 47 C.M.R. 212, 213–14 (N.M.C.M.R. 1973). *See also* Lowery, *supra* note 33, at 200–01 (discussing the modern-day application of *Figueroa*).
[487] Kramer & Young, *supra* note 486, at 455.
[488] *Id*. at 455–56.
[489] *Id*. at 455–57.
[490] *Id*. at 456.

> not be enough to overcome the bitterness and antagonism toward authority engendered by the probable scorn and rejection, real or imagined, of his associates and superiors. It was felt that he might develop a "What's-the-use" attitude leading to compensatory misconduct if thoughtless and uncomprehending persons caused him to feel unwanted.[491]

The terms of mental health probation included "regular weekly interviews" involving "a pattern of supportive psychotherapy," in which the sailor therapeutically addressed issues ranging from "guilt over his mother's surgery," conflicts with his father, and unresolved issues regarding "his relationship with a 17-year-old woman."[492]

The practice, while raising the potential for ethical conflicts in light of the psychiatrist's requirement to report the client's probation violations under the dual role,[493] appears to be an early variant of the contemporary mental health probation officer now assigned to various MHCs.[494] Embodying the notion of interdisciplinary treatment teams, the military psychiatrists concluded that such a program of probation "has a definite place within the military forces," if it can be instituted "by the commanding officer with the assistance of social workers, psychiatrists, chaplain, and legal officer," and if the psychologist can maintain loyalties by serving on the team, *in addition to* a regularly appointed probation officer from the line.[495] Although it would be extremely difficult to determine how many probationary terms like this have been implemented throughout the services, it is crucial that the military precedent has existed for over forty years, at a time after the implementation of the *UCMJ*, and within its statutory limitations. Also important is the fact that the local commander instituted a mental health treatment program using installation resources rather than requiring entry

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[491] *Id*.
[492] *Id*.
[493] *Id*. at 457.
[494] For a discussion of the recent trend of assigning specially-trained probation officers to cases involving offenders with mental illness, see, e.g., Nancy Wolff et al., *Mental Health Probation Officers: Stopping Justice-Involvement Before Incarceration*, CTR. FOR BEHAV. HEALTH SERVS. & CRIM. JUST. RES., Oct. 2010, at 1, 2, http://www.cbhs-cjr.rutgers.edu/pdfs/Policy_Brief_Oct_2010.pdf (describing "[s]pecialized [t]raining of Mental Health Probation Officers" in "psychopathology" and "co-occurring disorders," interviewing and stress-reduction techniques, coupled with a smaller case load to allow for more sustained and individualized attention).
[495] Kramer & Young, *supra* note 486, at 454, 457.

into a formalized restoration program; standard restoration-to-duty statistics hardly reflect these innovative clemency practices.

In contrast with *Knight*, the 2010 case of *United States v. Miller* reflects a more comprehensive treatment-based approach to clemency for a servicemember with PTSD. The case is not reported because the convening authority remitted the accused's punitive discharge after he successfully completed treatment for PTSD under the terms of a suspended sentence.[496] According to the trial transcript, Staff Sergeant Ryan Miller first deployed to Afghanistan in 2003–2004 as a cavalry scout. During that deployment, he was confronted with a divorce, the death of his father, and his mother's cancer diagnosis. His second deployment to Iraq, from 2005–2006, brought greater turmoil; aside from the re-emergence of his mother's cancer and a break-up with his girlfriend, Sergeant Miller suffered the loss of his best friend as a result of an improvised explosive device. The impact of the death was so great that he was immobilized, "just laying in bed crying and thinking about the very last moment[s]."[497] When he received word that the unit had detained the insurgent suspected of the killing, Sergeant Miller immediately traveled to the holding facility, "and stood there watching, waiting, hoping he would do anything that would allow me to kill him."[498]

Sergeant Miller experienced increasing symptoms of PTSD through the rest of the deployment, and thereafter.[499] He was near the expiration of his term of service (ETS), and set the goal of surviving until the day in 2007 when he would be able to return to civilian life. Recognizing the impact of his PTSD symptoms, Sergeant Miller purposely avoided treatment, "in fear that I would be labeled a 'nut' and no longer be respected by my peers or subordinates."[500] One-and-a-half months before his ETS date, Sergeant Miller received news that the Army had "Stop-Loss'd" him, essentially requiring him to stay at his unit and participate in a third deployment—this time to Iraq.[501] Sergeant Miller experienced

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[496] Interview with Major Jeremy Larchick, Chief of Military Justice, Fort Drum & 10th Mountain Div., at Charlottesville, Va. (Nov. 3, 2010).
[497] Trial Transcript, *supra* note 19, at 68.
[498] *Id*.
[499] *Id*. at 69 ("I have anger issues and did not sleep most nights.").
[500] *Id*.
[501] "Stop-Loss" describes the procedure by which the military requires service beyond a servicemember's original contractual term. *See generally* Evan M. Wooten, Note, *Banging on the Backdoor Draft: The Constitutional Validity of Stop-Loss in the Military*,

the feeling that he had done his "time" and "combat deployments" and simply "couldn't take it anymore."[502] Sergeant Miller absented himself without leave for a period of just over two months, until one of his friends talked him into returning. Upon his return, perceiving that he could no longer bear "reliving the past and reopening old wounds,"[503] Sergeant Miller left a second time, for seventeen months, until he was detained by police on a seat belt violation.

Unlike the accused in *Knight*, Sergeant Miller was diagnosed with PTSD prior to trial, with a mental health prognosis that his condition was "treatable" by "medication and therapy."[504] During sentencing, the prosecution, in recognition of Sergeant Miller's "previous deployments and service," asked the court for a sentence of seven months confinement and a BCD, in pertinent part, arguing that "Staff Sergeant Miller was the anchor for the team . . . he let them down when he went AWOL and his unit deployed to Iraq without him," and further that the "difficult events in his life . . . [were] no excuse to let your squad[,] command and the Army down."[505] Recognizing that "extremely unfortunate events [often happen] in a war, on multiple fronts," the trial counsel explained,

> Staff Sergeant Miller is not the only one who has gone through events like this. There are thousands of [s]oldiers who have died in Iraq and countless more who have witnessed it, all of whom dealt with similar tragedies. Staff Sergeant Miller was the only one from his unit to go AWOL. The other [s]oldiers, the same [s]oldiers who lost friends, did what a [s]oldier in the U.S. Army does, they [s]oldiered on. . . .
>
> If we allow Staff Sergeant Miller to get off easy, what kind of message will that send? We cannot do that. It

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47 WM. & MARY L. REV. 1061 (2005) (discussing various policies that emerged from the President's declaration of a state of emergency following the attacks of September 11, 2001, all of which suspended the laws pertaining to the separation of servicemembers from the Armed Forces). Some researchers have observed that the distress associated with the Stop-Loss process contributes to or aggravates PTSD. *See* William B. Brown, *Another Emerging "Storm": Iraq and Afghanistan Veterans with PTSD in the Criminal Justice System*, 5 JUST. POL'Y J. 1, 11 (2008).

[502] Trial Transcript, *supra* note 19, at 20.

[503] *Id*. at 70.

[504] *Id*. at 75.

[505] *Id*. at 70, 72.

> would tell all those [s]oldiers, lower [s]oldiers it is okay to go AWOL, which it is not.[506]

Sergeant Miller's defense counsel asked for no confinement. He first explained,

> [t]his is not a [s]oldier who failed to perform his duty; this is a [s]oldier who did do his duty, in fact, to his own detriment. He deployed twice, once to Iraq and once to Afghanistan. He lost a best friend on that last deployment just 3 months short of coming home. The impact of that loss is with him, and he experiences it every day.[507]

Addressing the report by Sergeant Miller's therapist—indicating that the condition was treatable—defense counsel argued that "medication and therapy" were preferable to confinement.[508] He then cited a major lesson learned during Operation Iraqi Freedom:

> He is a senior NCO. But not too long ago, Your Honor, Defense Secretary Rumsfeld, returning to Iraq, said, "We broke it, we bought it," meaning it's our obligation to fix it. Now, he's talking about the enemy, but if we have an obligation to fix the enemy, do we have no less of an obligation to our own?[509]

Before announcing his sentence, the military judge recognized the link between the accused's untreated symptoms and his charged offenses:

> The accused said in his unsworn statement that he did not seek assistance with dealing with his situation because he did not want to be seen as weak. It is a far too common but outmoded belief that seeking help for a mental health issue is a sign of weakness. The proper view is that seeking such assistance should be seen as a sign of strength. This case is a painful example of the

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[506] *Id*. at 73, 74.
[507] *Id*. at 74.
[508] *Id*. at 75.
[509] *Id*. at 77.

> negative effects that flow from the adherence to this common but outmoded belief.
>
> Accused and Counsel, please rise.[510]

After sentencing the accused to seven months confinement, reduction to the lowest enlisted grade, and to be discharged from the service with a BCD, the judge recommended clemency: "I recommend that the entire sentence, with the exception of reduction to the grade of E4, be suspended upon conditions including successful participation in and completion of treatment and counseling, as recommended by military mental health professionals."[511] Unlike *Knight*, the convening authority, MG James Terry, adopted the judge's recommendation; Miller successfully completed his treatment without incident.

Together, *McBride*, *Knight*, *Miller*, and the 1960 Navy case reflect more than a generation of attempts—albeit with varying degrees of success—to incorporate mental health treatment in the form of contingent sentences. Within the parameters of these opinions, it is evident that such efforts require greater tools than those provided by the standard court-martial sentencing framework. Collectively, these cases speak to the need for a more flexible sentencing process. Rather than changing the Rules for Courts-Martial or instigating other congressional action, one need only consider the comments of panel members who have wrestled with these issues. Because *McBride* and other cases demonstrate problems with the force-choice format of the Sentence Worksheet and the lack of clarity in panel instructions, the following Part proposes simple, nonlegislative alterations that will assist panel members in properly devising contingent sentences and recommendations for treatment.

V. Comprehensive Tools for Treatment-Based Contingent Court-Martial Sentences

Although a court-martial panel is entitled to hear evidence regarding the nature of rehabilitation programs and can use this information to make a clemency recommendation, panel members are not trained in penology and have little understanding of how probationary terms

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[510] *Id*. at 78.
[511] *Id*. at 79.

operate.[512] The task of determining whether to recommend clemency for mental health treatment necessarily requires consideration of both the accused's mental condition and the capabilities of a given program to respond to it.[513] In addressing these two considerations, sentencing tools should allow the panel to estimate the accused's potential for successful completion of a program. This naturally includes inquiries about modes of treatment—medication, phases, and the nature of counseling.[514] But, it also includes the capacity of the treatment program to monitor the accused's progress and adapt to his needs. To determine the feasibility of a "second chance" for treatment, panels also need assurances that the accused will be accountable during his treatment and that the program will prevent abuses.[515]

Providing a useful sentencing framework to address the possibility of treatment is a complex undertaking; it is simply unrealistic to ask panel members to stand in the place of an interdisciplinary team of professionals and to dictate specific treatment terms, given their limited expertise in penology and mental health. If a panel is expected to recommend a series of treatment conditions, the task would consume substantial time; it could, ironically, persuade the convening authority to deny the recommendation, simply based on its complexity. However, it is just as prudent to educate the panel about aspects of treatment programs and suspended sentences that would not otherwise be obvious to them and which would enhance the quality of their deliberations. In

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[512] *See, e.g.*, Colonel Herbert Green, *Trial Judiciary Note: Annual Review of Developments in Instructions*, ARMY LAW., Apr. 1990, at 47, 56 (observing that "[c]ourt members ordinarily are not privy" to the same information about offender treatment programs as are military judges); Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39, 44 (2009) (criticizing panel members' "lack of sufficient experience with the criminal justice system" to determine appropriate sentences); Robbins & Carmichael, *supra* note 84, at 26 (criticizing panel members' lack of training and experience on sentencing considerations and explaining how "court members normally will have less information about the accused than the judge, and be completely unaware of the available alternatives for his treatment").

[513] Civilian courts speak of information necessary for a jury to "tailor" its recommendation for probation to the individual needs of the defendant. *See, e.g.*, Najar v. State, 74 S.W.3d 82, 88 (Tex. Crim. App. 2002).

[514] *See, e.g.*, United States v. Gunter, 29 M.J. 140, 142–43 (C.M.A. 1989) (permitting the panel to hear estimations of the accused's likelihood of succeeding in drug treatment at sentencing); Green, *supra* note 512, at 47, 56 (describing how instructions that "place the treatment programs and their availability to the accused in proper focus" can "lead to more intelligent sentencing").

[515] *See supra* Parts I & II (describing how judges developed problem-solving treatment courts to assure such accountability because it was lacking in traditional programs).

striking the appropriate balance, the following subsections consider existing panel instructions on mental health evidence and recommend improvements that will avoid inundating panel members with needless and distracting information.

A. Existing Sentencing Instructions on Mental Health

Students of panel sentencing in the military justice system have criticized standard instructions for failing to define important concepts.[516] This concern is manifest in the area of mental health, where instructions in the *Military Judges' Benchbook* describe unclear, and often inconsistent, mental health concepts. Depending upon the nature of a case and the instructions raised by the facts, panels could potentially hear about "mental inability," "mental capacity," "mental development," "mental infirmity," "mental disease or defect," "mental handicap," "mental alertness," "mental impairment," "mental faculty," "mental maturity," "mental conditions," "mental coercion," "mental distress," "mental deficiency," "unconsciousness," and "character or behavior disorders," during the course of a trial without any standards to distinguish between different gradations of impairment or cognitive interference.[517] The range of terms raises a litany of concerning questions: For example, can a panel evaluate the impact of an accused's mental condition on his functioning by applying the standard used to evaluate the substantial incapacitation of a sexual assault victim? Should the panel accord different weight at sentencing to the accused's mental status if the members believe it is a "condition," as opposed to a "deficiency," a "defect," or an "impairment?" There are nearly infinite possibilities for such cross-over.[518]

At sentencing, panel members are charged to consider "rehabilitation of the wrongdoer" as one of the "five principal reasons for the sentence of those who violate the law."[519] They are normally instructed to consider

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[516] *See, e.g.*, Colonel R. Peter Masterton, *Trial Judiciary Note, Instructions: A Primer for Counsel*, ARMY LAW., Oct. 2007, at 85, 85 (describing various occasions when inadequate *Benchbook* instructions require counsel to tailor their own panel instructions on topics, including definitions).

[517] *See generally* DA PAM. 27-9, *supra* note 43 (addressing mental health concepts in various sections on sexual assault, alcohol offenses, and defenses).

[518] *Id. passim.*

[519] *Id.* instr. 2-6-9, at 92. The other four rationales are "punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the

various additional matters for the purpose of "extenuation and mitigation" of the sentence, such as "lack of previous convictions or Article 15 punishment," "financial" or "domestic" difficulties, and the accused's desire to remain in the Service or not to be punitively discharged from it.[520] Presumably, instructions that touch upon service-related mental conditions might include mandates to consider "[t]he combat record of the accused," "[t]he accused's (mental condition) (mental impairment) (behavior disorder) (personality disorder)," and any "(physical disorder) (physical impairment) (addiction)."[521] In weighing all of these matters, including the concept of rehabilitation, the panel is ultimately directed to "select a sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society."[522]

While government evidence of future dangerousness is routinely admitted under a principle of rehabilitation,[523] only two of the *Benchbook*'s instructions are remotely useful for addressing treatment considerations. The instruction titled "Presentencing Factors," which is designed to put evidence of mental conditions in a proper context for sentencing purposes, provides a very basic foundation for considering mental illness in relation to clemency:

> Although you have found the accused guilty of the offense(s) charged, and, therefore, mentally responsible (you should consider as a mitigating circumstance evidence tending to show that the accused was suffering from a mental condition) (you should consider a condition classified as a (personality) (character or behavior) disorder as a (mitigating) factor tending to explain the accused's conduct.) (I refer specifically to matters including, but not limited to (here the military judge may specify significant evidentiary factors bearing

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military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses." *Id*.

[520] *Id*. instr. 2-5-23, at 71–72 (items 6, 7, 16, 20 & 21).

[521] *Id*. instr. 2-5-23, at 72 (items 8 & 9). In a capital case, the panel must consider evidence of a "nervous disorder," in addition to the listed types of impairments, with the addition of a blank space, suggesting that any possible condition should be listed even if not enumerated in the instruction. *See id*. instr. 8-13-40, at 1076 (item 8).

[522] *Id*. instr. 2-5-24, at 76.

[523] *See generally* United States v. Ellis, 68 M.J. 341, 345 (C.A.A.F. 2010).

> on the issue and indicate the respective contentions of counsel for both sides).)[524]

Instruction 6-6 provides additional cues to assist in the evaluation of treatment programs for mental conditions, including treatment courts. Though intended to accompany evidence on the lack of mental responsibility or partial mental responsibility defenses, Instruction 6-6 offers these applicable considerations:[525]

> (1) Panels may consider evidence regarding a mental condition "before and after the alleged offense(s)," as well as on the date of the offense(s);
>
> (2) panel members are not "bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect";
>
> (3) simply based on the purpose of an expert's inquiry—whether the analysis is done to consider treatment or criminal responsibility—psychologists' and psychiatrists' opinions on the nature and severity of a mental condition may change;
>
> (4) panel members are free to consider lay testimony regarding "observations of the accused's appearance, behavior, speech, and actions" to evaluate his mental condition;
>
> (5) they should likewise consider testimony regarding presence or lack of "extraordinary or bizarre acts performed by the accused";
>
> (6) they should not "arbitrarily or capriciously reject the testimony of a lay or expert witness" regarding mental health;
>
> (7) and, finally, they "should bear in mind that an untrained person may not be readily able to detect a mental [issue] 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."

Aside from signaling the difference between mental health evaluations for the purpose of "treatment" and those used to determine "criminal

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[524] DA PAM. 27-9, *supra* note 43, instr. 6-9, at 952.
[525] *Id*. instr. 6-6, at 942–43.

responsibility," all *Benchbook* instructions are otherwise silent on considerations of treatment. These are seemingly the only guidelines that have been available to the members in the many cases where military courts have allowed sentencing evidence regarding the accused's likelihood of success in drug treatment, the nature of programs available in different confinement facilities, and indicators of future dangerousness—most of which has been offered by the Government in aggravation under Rule for Court-Martial (RCM) 1001(b)(5).

B. Existing Instructions on Clemency

Like instructions on expert testimony and sentence mitigation, the clemency instructions are merely additional floorboards in the sentencing framework for treatment programs—hardly a wall, and certainly no ceiling. Here, Instructions 8-3-34 (addressing the recommendation for a suspended sentence) and 2-7-17 (addressing "additional" clemency instructions), merely trace the contours of the contingent sentence. The first instruction states:

> Although you have no authority to suspend either a portion of or the entire sentence that you impose, you may recommend such suspension. However, you must keep in mind during deliberation that such a recommendation is not binding on the Convening or higher Authority. Therefore, in arriving at a sentence, you must be satisfied that it is appropriate for the offense(s) of which the accused has been convicted, even if the convening or higher authority refuses to adopt your recommendation for suspension.[526]

After directing that selected members' names be listed on the Sentence Worksheet if less than all of them support a suspended sentence, the instruction permits the president to read the recommendation contemporaneously with the sentence, and explains that the decision of "[w]hether to make any recommendation for suspension of a portion of or the sentence in its entirely is solely a matter within the discretion of the court."[527]

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[526] *Id*. instr. 8-3-34, at 1071.
[527] *Id*.

Instruction 2-7-17 provides additional guidance on the operation of the suspended sentence. After reiterating the limitations of the court-martial's recommendation, this instruction briefly explains the mechanics of a permissible contingent sentence:

> A recommendation by the court for an administrative discharge or disapproval of a punitive discharge, if based upon the same matters as the sentence, is inconsistent with a sentence to a punitive discharge as a matter of law. You may make the court's recommendation expressly dependent upon such mitigating factors as (the (attitude) (conduct) of) (or) (the restitution by) the accused after the trial and before the convening authority's action.[528]

Although unlike earlier versions of the *Military Judge's Guide*, which explicitly provided for improvement in "health" as a contingency for remission,[529] the current language is still broad enough to include improvement in mental health conditions, as evident in *Miller*, *Knight*, and *McBride*. However, the foregoing instructions—even if pieced-together by counsel from their disparate locations in the *Benchbook*—offer little guidance for panels considering treatment-based contingent sentences. The following section therefore considers how civilian courts have approached such instructions in the two states that allow juries to recommend probation during criminal sentencing.

C. Precedents from Arkansas and Texas

Among six states that authorize juries to sentence defendants in criminal cases,[530] both Arkansas[531] and Texas[532] further permit juries to

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[528] *Id*. instr. 2-7-17, at 134.

[529] Remily, *supra* note 434, at 530–31.

[530] Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004) (noting that, "in [the following] six states, felons convicted by juries are routinely sentenced by juries": Virginia, Kentucky, Montana, Arkansas, Texas, and Oklahoma). Seeing how "[r]oughly 4000 juries deliver felony sentences every year" in these states, appellate opinions on these cases provide valuable insights on the nature of jury sentencing instructions. *Id*. at 887.

[531] *See* ARK. CODE ANN. § 16-97-101(4) (2011) (permitting the jury to consider a defense request for an alternative probationary sentence); *id.* § 16-93-201 (describing various types of community punishment that can be requested by the jury as part of its recommendation for an alternative sentence).

recommend probationary terms to enable participation in rehabilitative programs.[533] In Texas, while a jury has the discretion to reject the defendant's request, the *Code of Criminal Procedure* requires a judge to order probation when recommended if the defendant otherwise lacks a prior felony conviction.[534] Arkansas is most similar to the military in the way its code vests the presiding judge with the discretion to accept or reject the jury's recommendation for probation.[535] The legal opinions and, more importantly, jury instructions from both jurisdictions provide additional guidance.

Arkansas courts have implemented a system in which the jury, "[c]ompletes two forms, one imposing an alternative sentence and the other imposing imprisonment, a fine, or both. If the court declines to follow the alternative sentence recommendation of the jury, there will be a basis, *viz*., the other completed verdict form for a sentence."[536] The model instruction for alternative sentencing provides: "_____ (*Defendant)* may also contend that he should receive [an alternative sentence] [the alternative sentence of _____]. You may recommend that he receive [an] [this] alternative sentence, but you are advised that your recommendation will not be binding on the court."[537] Defense attorneys, in practice, may fashion additional verdict and instruction forms based on any of the alternative sentences provided for in Arkansas's Community Punishment Act,[538] some of which include

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[532] TEX CODE CRIM. PROC. §§ 37.07(f), 42.12(4) (2011) ("In cases in which the matter of punishment is referred to a jury, either party may offer into evidence the availability of community corrections facilities serving the jurisdiction in which the offense was committed.").

[533] This is not true of all states. In Missouri, for example, an appellate court did not allow a jury to recommend probation because, under the state's law, "[i]t was not the task of the jury to determine whether appellant should receive leniency or probation." State v. Dungan, 772 S.W.2d 844, 861 (Mo. Ct. App. 1989). Because the military already permits such recommendations, cases from Missouri and other jurisdictions that do not allow such recommendations offer little useful guidance.

[534] TEX. CODE CRIM. PROC. art. 42.12 § 4(d).

[535] ARK. CODE ANN. § 16-97-101(4) (stating that the jury's recommendation for an alternative sentence "shall not be binding on the court").

[536] ARK. MODEL JURY INSTRUCTIONS-CRIMINAL ¶ 2-91 (2d ed. 2010).

[537] *Id*. at AMCI 2d 9111 (closing instruction).

[538] *See, e.g.*, State v. Hill, 887 S.W.2d 275, 279–80 (Ark. 1994) (upholding use of the form instruction, which included options of probation or a suspended sentence, and noting the defense counsel's corresponding "discuss[ion] of alternative sentencing and the restrictions which would accompany probation or a suspended sentence").

straight probation,[539] more complex conditions,[540] or involvement in community corrections facilities where a defendant can obtain mental health treatment.[541] The "mental health treatment services" involve "both inpatient and outpatient mental health, family, and psychological counseling and treatment provided by qualified community correction service provider programs for correctional clients."[542] Accordingly, Arkansas juries may recommend an individually tailored sentencing alternative based on general knowledge of how probationary programs function.

The Texas courts, which have upheld testimony regarding various features of treatment programs under the state's jury sentencing provisions,[543] have likewise provided an instructional framework contemplating probation. For example, in the instruction used by Judge Carol Davies in a 2003 jury sentencing trial, she described the nature of community supervision and a list of fifteen possible community supervision conditions including "counseling sessions," "electronic monitoring," and "a period of confinement in a county jail for no more than 180 days," and then further described how revocation proceedings would occur.[544]

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[539] ARK CODE ANN § 16-93-1202(2)(A) (2011) (defining the term as a "criminal sanction permitting varying levels of supervision of eligible offenders in the community").

[540] These other conditions include economic sanctions programs (defined as "an active organized collection of fees, fines, restitution, day fines, day reporting centers, and penalties attached for nonpayment of fines"); home detention programs ("curfew programs [or] house arrest with and without electronic monitoring"); community service programs ("both supervised and unsupervised work assignments and projects such that offenders provide substantial labor benefit to the community"); work-release programs ("residential and nonresidential forms of labor, with salary, in the community"); and restitution programs ("an organized collection and dissemination of restitution by a designated entity within the community punishment range of services, including, when necessary, the use of restorations centers such that the offender is held accountable to the victim and the victim receives restitution ordered by the court in a timely fashion"). *Id*. at § 16-93-1202(2)(A)–(F).

[541] Community corrections facilities are "multipurpose facilities encompassing security, punishment, and services such that offenders can be housed therein when necessary but can also be assigned to or access correction programs which are housed there." *Id.* § 16-93-1202(2)(A). They can include "boot camps," drug treatment programs, and educational programs. *Id*.

[542] *Id*. at § 16-93-1202(2)(M).

[543] *See, e.g.*, Najar v. State, 74 S.W.3d 82, 87–88 (Tex. Crim. App. 2002).

[544] HON. ELIZABETH BERRY & HON. GEORGE GALLAGHER, TEXAS CRIMINAL JURY CHARGES § 4:420 (2009).

Although Texas does not allow jurors to recommend specific conditions of probation, the above instruction highlights the value of making jurors aware of the nature and mechanics of a suspended sentence. Quintessentially, where probation exists as a means to attain mental health treatment, not as an end in itself, the need for more detail about programs is most evident. Texas courts have consequently reasoned that jurors can be overcome by emotional "impulse[s]" without proper information on which to base their probation recommendations.[545]

D. Proposed Modified Sentence Worksheet

The proposed model instructions and Modified Sentence Worksheet draw three important points from the Texas and Arkansas instructions. First, panel members should know the limits of their role in recommending clemency, which includes, foremost, the fact that they cannot participate in future vacation proceedings if probation is granted. Second, the panel should have a general understanding of how a contingent sentence operates. The military clemency instruction's current references to contingencies of "conduct" or "attitude" provide so little guidance that panel members might perceive these terms as nothing more than absence of misconduct—the very notion of automatic remission that the *Cadenhead* court used to invalidate the convening authority's grant of clemency; there, the Air Force Return-to-Duty program required the servicemember to *transform* according to varied and measurable program

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[545] *See Najar*, 74 S.W.3d at 88 (noting that "community supervision, which by its nature offers a defendant a 'second chance' and an opportunity for rehabilitation without having to serve time in prison" can easily trigger "impulse[s]" that make jurors feel "compel[led]" to simplify their evaluation of evidence unless they have access to details on nature and mechanics of the rehabilitation program). Other Texas instructions provide additional guidance to aid deliberations, such as:

> If you recommend that the Defendant be placed upon community supervision, the Court shall determine the conditions of community supervision and may, at any time, during the period of community supervision alter or modify the conditions. The Court may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate or reform the Defendant. You may NOT recommend that part of the period of confinement be served by incarceration and part by community supervision.

BERRY & GALLAGHER, *supra* note 544, § 4:260.

objectives, not just to sustain.[546] Third, panel members should have an idea of the types of additional conditions that the convening authority could impose upon adoption of the panel's recommendation. Knowledge, for example, that their accepted recommendation would lead to a more detailed agreement with the convening authority—possibly including "therapeutic incarceration" as a sanction during the course of the accused's treatment—might provide the members with a better understanding of the ways that clemency could meet the accused's individual treatment needs.

The Modified Sentence Worksheet therefore adopts a hybrid of Texas's and Arkansas's frameworks, permitting panel members to suggest ideal program attributes, but limited to a menu of brief descriptions. The pertinent part of the Modified Sentence Worksheet appears below in Figure 3, while the whole document is located at Appendix D.

PUNITIVE DISCHARGE

10. To be discharged from the service with a bad-conduct discharge.
11. To be dishonorably discharged from the service.
12. To be dismissed from the service.

NON-BINDING CLEMENCY RECOMMENDATION

13. To suspend and then [remit the [entire adjudged sentence] [the adjudged punitive discharge] [the adjudged confinement]] [commute the adjudged punitive discharge to an administrative discharge] upon the occurrence of the following future event(s):

Restitution in the amount of _____ paid to _____ no later than _____.

Crime-free conduct for a period of _____.

Successful completion of a treatment program requiring [demonstration of measurable progress according to [psychiatric] [medical] [_____] professionals]] [an <u>intensive</u> treatment program with regularly scheduled appearances and other measures to monitor and encourage compliance].

Other:_____ _____.

Fig. 3. Excerpt from Modified Sentence Worksheet, App. D.

[546] United States v. Cadenhead, 33 C.M.R. 742, 745 (A.F.B.R.), *aff'd*, 34 C.M.R. 51 (C.M.A. 1963).

The Modified Sentence Worksheet adds just one heading and a few lines to a single page that has changed little from its predecessors dating back to the 1940s.[547] However, these provisions have the power to make the sentencing process far more constructive, providing convening authorities with vital insights on the panel's estimations of future improvement.

By unmasking the hidden vehicle for considering and indicating clemency recommendations, the new section on the Worksheet prevents a decisional impairment known by psychologists as "acting from a single perspective."[548] A simple experiment highlights the problem with the standard force-choice form. There, an actor played the part of an injured person poised feet away from a drugstore. After the actor told passers-by that she had sprained her knee and needed help, she explained that she needed an Ace Bandage™ to treat the injury. The coached clerk at the drugstore informed all bystanders that he had sold the last of the Ace Bandages. With a limited concept of only one fix for the problem, all twenty-five subjects in the study accepted failure, even though they had at their disposal several other means of assistance for addressing the sprain.[549] The situation is practically no different from cases where panel members would have recommended contingent sentences, but refrained owing to force-choice sentence worksheets and judicial silence.

As important as the form on which to recommend clemency is a lawful and meaningful instruction to guide the members in their deliberations. The instruction accompanying the Modified Sentence Worksheet appears at Appendix E and draws upon existing legal principles to ensure that deliberations on treatment neither interfere with the task of determining an appropriate *sentence* nor devolve into debates over tangential matters. Beyond the mechanics of contingent sentences, the following section considers more complicated methods to analyze mental health conditions for the purpose of recommending treatment.

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[547] *Compare* COLONEL F. GRANVILLE MUNSON & MAJOR WALTER H.E. JAEGER, MILITARY LAW AND COURT-MARTIAL PROCEDURE: "ARMY OFFICER'S BLUE BOOK" app., at 113 (1941) (providing similarly limited binary choices), *with* DA PAM. 27-9, *supra* note 43, app. C3, at 1099–1100 (providing the current Sentence Worksheet for a noncapital court-martial empowered to adjudge up to a Dishonorable Discharge).
[548] ELLEN J. LANGER, MINDFULNESS 16 (1989).
[549] *Id*. at 16–17 (explaining how "[p]eople left the drugstore empty-handed to the 'victim' and told her the news" due to the recurring cognitive phenomenon).

E. Instructions Regarding Treatment for Mental Health Conditions

Because the current instructions are largely silent on treatment considerations, the proposed instruction offers new provisions to guide the members in their evaluation of testimony on individualized treatment plans, untreated mental health conditions, and connections between symptoms and military service. While the panel members retain the right to determine the existence, impact, and mitigation value of any alleged mental condition, as emphasized by Instruction 6-6, this additional guidance is still necessary to prevent confusion and interference with the deliberative process. Despite patent differences between civilian and military systems, the civilian frameworks explored below are useful to the extent that they provide tools to consider the impact of PTSD and other mental conditions on an offender.

1. Service-Connected Mental Health Disorders

The first valuable principle from civilian sentencing practice concerns the "service connection" issue, which, depending on the case, could either involve the connection between the accused's military service and the mental condition, or, additionally, the further link between the mental condition and the charged offense. The SJA's concern in *Knight*, which prompted him to deny clemency on the basis that the accused's "combat service 'has not been identified as the cause of the PTSD,'"[550] may be shared by panel members during their sentencing deliberations. Civilian cases rectify these matters by revealing the importance of context. Often, such standards of proof are necessarily heightened to urge the adoption of a "narrow" categorical exclusion.[551] Likewise, the circuit-splits among federal courts regarding how they will interpret the rules on downward

[550] United States v. Knight, 2010 WL 4068918, at *1 (A.F. Ct. Crim. App., June 28, 2010) (unpublished).

[551] Marine Major Anthony Giardino, for example, provides criteria for exempting all PTSD-afflicted combat veterans from the death penalty. He argues, in part, first, that "one meets the criteria for being a combat veteran only if he or she has taken fire from or fired at an enemy force while serving in the armed forces"; second, that "a combat veteran be suffering from a diagnosis of PTSD or Traumatic Brain Injury (TBI) at the time of his or her offense;" and third, that, "for a diagnosis of PTSD or TBI to be considered service-related, some aspect of military service must be the primary cause of the injury in the opinion of a medical expert." Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2988–89 (2009) (suggesting use of the VA's criteria for service-related injuries).

departures for diminished capacity are similarly limited by the strict requirements of Federal Sentencing Guideline 5K2.13, which does not apply to the military.[552]

Contrastingly, in *Johnson v. Singletary*, a concurring justice of Florida's Supreme Court described how TBI sustained during a training accident could easily constitute a service-related mental condition for sentence mitigation purposes. The soldier there "descended into madness" after incurring "a freak head injury on military maneuvers" when he "was struck directly in the head by a [four or five pound] smoke grenade canister hurled in his direction."[553] Justice Kogan found that the injury "contributed to [an] inability to cope," which existed at the time of the offense, despite the absence of a combat-connection.[554] The logic would be little different in evaluating the mental condition of a female offender suffering from PTSD as the result of a sexual assault occurring during her military service.[555] In both instances, "[a] peacetime veteran could incur PTSD or TBI through any variety of noncombat, service-related causes ranging from training exercise accidents to incidents occurring while performing day-to-day military duties."[556]

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[552] *See, e.g.*, Robert R. Miller, Comment, *Diminished Capacity—Expanded Discretion: Section 5K2.13 of the Federal Sentencing Guidelines and the Demise of the 'Non-Violent Offense,'* 46 VILL. L. REV. 679 (2001) (discussing aspects of U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (1997)).

[553] Johnson v. Singletary, 612 So. 2d 575, 578, 578 n.4 (Fla. 1993) (Kogan, J., concurring specially).

[554] *Id.* at 580.

[555] To this end, Representative Jane Harman shared statistics indicating that "[w]omen in the U.S. military are more likely to be raped by a fellow soldier than killed by enemy fire . . . ." Hon. Jane Harman, *Rapists in the Ranks: Sexual Assaults are Frequent, and Frequently Ignored, in the Armed Services*, L.A. TIMES, Mar. 31, 2008, at 15. For a general discussion of military sexual trauma, see, e.g., Jennifer C. Schingle, *A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs Regulations Governing the Burdens of Proof for Post-Traumatic Stress Disorder Due to Combat and Military Sexual Trauma*, 16 WM. & MARY J. WOMEN & L. 155 (2009). *Cf. also* Chris R. Brewin et al., *Meta-Analysis of Risk Factors for Posttraumatic Stress Disorder in Trauma-Exposed Adults*, 68 J. CONSULTING & CLINICAL PSYCHOL. 748, 752–53 (2000) (discussing gender as a risk factor in the development of PTSD, and situations in which traumatized women would be more likely to develop the condition, including combat, and even mixed traumas). In VTCs, some women offenders have suffered such trauma, requiring a different approach to their treatment and rehabilitation. *See* Clubb Interview, *supra* note 409.

[556] Giardino, *supra* note 551, at 2965 n.61.

The proposed model instruction helps to ensure that panel members do not deny clemency consideration based on an unnecessary, self-imposed requirement for a direct combat connection:

> As long as the accused was performing duties faithfully and honorably at the time trauma was sustained, you may consider this as a positive factor in recommending treatment. There is no requirement for trauma to have been inflicted by an enemy during combat operations for the accused to receive the benefit of your clemency consideration. You may consider trauma to be service-connected if it was sustained during a training exercise, as the result of a sexual assault, or any other execution of faithful service to the Government.[557]

This instruction, which follows Justice Kogan's distinction, is also consistent with the *Benchbook*'s current guidance on the consideration of symptoms suffered at times other than the date of the charged offense, which could reasonably include behavior in response to a full range of trauma.[558] The proposed instruction highlights honorable service to avoid the situation where offenders might benefit from clemency premised upon adverse reactions resulting from their own criminal conduct, such as PTSD resulting from observing the aftermath of a detainee they had assaulted, tortured, or killed.[559]

2. Co-occurring Substance Abuse

The issue of service connection may arise in regard to "self-medication"—the accused's use of narcotics or other controlled substances to minimize the symptoms of PTSD. The term, which has been overused in different contexts, often obscures the significance of one's resort to controlled substances rather than conventional methods of treatment. Here, one uses a controlled substance, not to get "high," but

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[557] *Infra* app. F.
[558] DA PAM. 27-9, *supra* note 43, instr. 6-6, at 942.
[559] *Cf.* Bell v. Cone, 535 U.S. 685, 712 (2002) (Stevens, J., dissenting) (describing how honorable military service should reasonably result in mitigation value). The perpetrator of a heinous crime often suffers traumatic stress as the result of his participation. *See, e.g.*, J. Vincent Aprille II, *PTSD: When the Crime Punishes the Perpetrator*, 23 CRIM. JUST. 39 (2009) (exploring the reality of this common phenomenon).

rather to get "normal."[560] There is mitigation value when an accused resorts to controlled substances in an effort to "slow down, calm down and experience the world as most everyone else does."[561] Self-medication may reveal how PTSD contributed to offenses involving distribution or use of controlled substances, as described in *Perry*:

> There is certainly a clear and interdependent "causal" relationship between (a) the disorder which caused the nightmares and associated symptoms of the disease; (b) Perry's efforts to avoid sleep in order to avoid the nightmares; (c) Perry's impaired judgment as a result of his efforts to avoid sleep and the nightmares which followed; (d) Perry's use of over-the-counter medication followed by cocaine to cause exhaustion so as to prevent sleep which permitted avoidance of the nightmares; and (e) distribution of cocaine to fund the purchase of cocaine so as to be able to continue to self-medicate.[562]

Along the same lines, the purposeful failure to obtain treatment, as underscored by the military judge in *United States v. Miller*,[563] has mitigation value because it also signals abnormality. As noted by *Perry*, not only was self-medication consistent with the *Diagnostic and Statistical Manual*'s criterion discussing "avoidance" behavior, but the "refusal to seek help likewise tends to confirm that Perry's judgment was impaired, as he was willing to suffer through a life haunted by uncontrollable compulsion to vividly relive truly horrific experiences."[564] The proposed model instruction, therefore, addresses self-medication by permitting members to consider the "[u]se of controlled substances to limit unwanted effects of the mental condition." It goes on,

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[560] Elliot L. Atkins, *Preparing for Sentencing in the Federal Courts: Use of Mental Health Consultation in the Development of Departure Strategies*, THE CHAMPION, Mar. 1995, at 38, 40.

[561] *Id*. In a Supreme Court case involving counsel's failure to present evidence of PTSD during the sentencing phase, Justice Stevens recognized "the possible mitigating effect of drug addiction incurred as a result of honorable service in the military." *Bell*, 535 U.S. at 712–13 (Stevens, J., dissenting).

[562] United States v. Perry, 1995 WL 137294, at *8 (D. Neb., Mar. 27, 1995) (unpublished).

[563] Trial Transcript, *supra* note 19, at 78 (noting a "common but outmoded belief" to abstain from assistance to avert perceived weakness).

[564] *Perry*, 1995 WL 137294 at *10.

> [i]f an accused has used controlled substances not to get "high" but, instead, in an attempt to be "normal," such as in an attempt to eliminate problems falling asleep because of recurring nightmares or intrusive thoughts, this may present evidence of the nature of an accused's mental condition and the value of treatment.[565]

The proposed instruction also addresses the failure to seek treatment in a number of ways, including guidance on factors that may have prevented rehabilitative efforts, such as superiors who would not permit the accused to obtain treatment or otherwise interfered with the ability to be treated.[566]

3. The Physical and Behavioral Manifestation of Unseen Injuries

A final contribution from the civilian cases concerns the analytical framework for evaluating symptoms. While Instruction 6-6 emphasizes the fact that labels alone should not dictate whether a panel accords weight to evidence of a mental condition, little is said regarding a more useful alternative.[567] Its admonishments to consider "appearance, behavior, speech, and actions" still fall short of meaningful guidance based on the near-endless reach of these terms.[568] Federal cases like *United States v. Cantu* assist to this end by identifying "distort[ion] of reasoning" and "interference with [the] ability to make considered decisions" as the influences of concern, regardless of the condition's label.[569] In this respect, "nightmares," "flashbacks to scenes of combat," "intrusive thoughts [and images]," "rage," "paranoi[a]," and

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[565] *Infra* app. F.

[566] *Id*. In *Johnson*, for example, it was significant to the court that the defendant's condition worsened because he was "abandoned without the medical intervention he obviously needed after being injured while on his nation's business." Johnson v. Singletary, 612 So. 2d 575, 580 (Fla. 1993) (Kogan, J., specially concurring). For a recent study of other common obstacles to successful treatment of PTSD, see generally Paul Y. Kim et al., *Stigma, Barriers to Care, and Use of Mental Health Services Among Active Duty and National Guard Soldiers After Combat*, 61 PSYCHIATRIC SERVS. 582, 585 tbl.3 (2010).

[567] *See* DA PAM. 27-9, *supra* note 43, instr. 6-6, at 942.

[568] *Id*.

[569] 12 F.3d 1506, 1513 (9th Cir. 1993). *See also id.* at 1512 (also identifying "a failure to be able to quickly or fully to grasp ordinary concepts" as a functional description that cuts across definitions or labels).

"explosive[ness]," all have value when considered for their "effect on [one's] mental process."[570]

Clinical studies have categorized the nature of mental impairments like PTSD in a helpful way. Mitigation expert Deana Dorman Logan divides behaviors under the main headings of "reality confusion"; "speech and language"; "memory and attention"; "medical complaints"; "emotional tone"; "personal insight and problem solving"; "physical activity"; and "interactions with others."[571] Others have identified specific executive functions that are commonly linked to criminal offenders with mental illnesses.[572] The proposed model instruction applies these concepts first by defining a "mental condition" in terms of its effects: "As referenced here, the term 'mental condition' means impairment to the accused's ability to reason and make considered decisions."[573] It then provides specific categories in the notes to help the members consider specific behaviors that are evidence of a mental condition as defined.[574]

While evaluation of PTSD and other service-connected disorders will grow increasingly complex with the advancement of psychotropic medications and the promulgation of new diagnostic criteria, the proposed instructions are purposefully adaptable to accommodate such developments. Although expert testimony and advocacy may often provide the panel with enough information to evaluate evidence for the purpose of clemency, the complex, individualized nature of unseen injuries requires additional precautions to ensure that uneducated assumptions do not deprive an accused of the benefit of fair consideration or activate impulses that cause the panel to abandon a reasoned approach.[575]

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[570] *Id*.

[571] Deana Dorman Logan, *Learning to Observe Signs of Mental Impairment*, *in* KY. DEP'T OF PUB. ADVOCACY, MENTAL HEALTH AND EXPERTS MANUAL figs.1–8 (6th ed. 2002), http://www.dpa.state.ky.us/library/manuals/mental/Ch17.html.

[572] *See infra* app. F (citing Russell Stetler, *Mental Disabilities and Mitigation*, THE CHAMPION, Apr. 1999, at 49, 51).

[573] *Id*. (providing additional commentary).

[574] *Id*. at n.

[575] *See, e.g.*, Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, FED. LAW., Sept. 2010, at 42, 49 (observing the operation of a "certain stigma" jurors commonly attach to PTSD as a result of their lack of knowledge about the disorder or what they have learned in the media).

F. Succinct Descriptions of Individualized Treatment Programs, Including Treatment Courts

The proposed instructions provide a concise description of the general attributes of an "intensified" treatment program, as opposed to the standard probationary term accorded by a suspended sentence with no treatment requirement or provisions that merely require treatment without the possibility of sanctions. In pertinent part, the proposed instruction advises,

> [Y]ou may recommend a more intensive form of probation that uses sanctions to encourage compliance with treatment plans. Examples of possible sanctions include: being subject to unannounced searches of person and property, random drug testing, imposition of curfews, electronic monitoring, and intermittent confinement. You should not speculate on the specific terms that would be imposed during the suspension, but should recommend a basic form of clemency best suited to the accused's individual needs or circumstances.[576]

Despite the brief description, the Modified Sentence Worksheet and corresponding instructions provide tremendous incentive for defense counsel to recommend programs that are well suited to meet the accused's particular needs.[577]

Should the defense offer evidence concerning a specific treatment program, the instructions provide additional guidance, advising the members that they may consider the accused's "desire and willingness to participate," his "personal understanding of the program's requirements," "plans the accused may have developed" to maximize the benefits of treatment, "[t]he availability of a specific type of treatment to address the accused's present symptoms," effects of confinement on the accused's mental condition, and the impact of treatment on the accused's family.[578] In addressing preadmission to a specific program, the instruction also explains that, while the panel is free to consider such evidence, it "should

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[576] *Infra* app. F.
[577] The election of a less stringent program may provide the convening authority with insight necessary to fully evaluate a clemency request because it signals greater trust in the accused's ability to rebound from mental illness.
[578] *Infra* app. F.

not assume that the absence of evidence about a specific program would disqualify the accused from participating in one."[579]

Although the instructions on intensive treatment are minimal for the purpose of considering clemency recommendations, provisions concerning the same program attributes are necessarily detailed in the context of plea agreements. Despite this incongruity, the standards governing pretrial plea agreements are still valuable in all contested panel cases that result in clemency recommendations; due to the requirements for voluntary participation in a treatment program, convening authorities can use the same standards applicable to pretrial agreements to achieve meaningful post-trial agreements.[580] The next Part, therefore, explores multiple aspects of treatment-based pretrial provisions.

VI. Pretrial and Post-Trial Agreements Contemplating Suspension of Sentences for Treatment of Mental Conditions

Rather than judge-alone and panel courts-martial involving *sua sponte* recommendations for the suspension of punitive discharges, the best source of guidance on the establishment of effective treatment options appears in the decades of precedents addressing such terms in pretrial agreements (PTAs). In their promotion of discharge remission at the installation level, the military courts have highlighted special considerations pertaining to treatment. As military law has evolved, the courts have become increasingly willing to enforce PTAs with innovative provisions for soldiering-back from punitive discharges.[581] In fact, by 1999, some commentators recognized that the Court of Appeals for the Armed Forces (CAAF) had reached the most liberal period in its

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[579] *Id.*

[580] *Cf.* Foreman, *supra* note 407, at 106 (citing various cases for the proposition that the courts "allow a great deal of flexibility in [post-trial] negotiations between the accused and the convening authority").

[581] *Id.* at 116 ("[T]he CAAF has paved the way for much broader discretion on the part of convening authorities for entering into pretrial agreements with innovative terms."). *See also id.* at 115 (recognizing a "trend" of an "increasingly hands-off approach when reviewing pretrial agreements").

history in construing such terms.[582] The position apparently remained unchanged in 2010.[583]

This trend is mirrored in PTAs that include terms permitting offenders to benefit from state and local treatment programs unavailable in the military.[584] Like many medical rehabilitation programs for wounded warriors, they recognize that some civilian programs are highly coordinated and are often better suited to facilitate civilian employment and life routines following military service.[585] Military law upholding such PTA terms permits military offenders to benefit from all existing problem-solving courts, including VTCs. This section describes the rulings of military courts on some of the most important provisions.

A. Particular Lessons for Treatment Programs

Within the significant corpus of law on pretrial agreements related to treatment programs there are many lessons. The first set deals with the reality that the convening authority must necessarily rely on the expertise of mental health personnel to carry out a rehabilitation program in accordance with professional standards that are likely unfamiliar to the command. Despite this reliance on others, the convening authority may not delegate clemency discretion to these professionals to determine the

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[582] *Id*. at 116 ("The playing field has never before been so broad, affording both the accused and the convening authority unlimited opportunities to bargain with each other within the confines of fair play.").

[583] Major Stefan R. Wolfe, *Pretrial Agreements: Going Beyond the Guilty Plea*, ARMY LAW., Oct. 2010, at 27, 29 ("The appellate courts have . . . abandoned their past paternalism and now have an expansive and permissible attitude towards pretrial agreements.").

[584] *See, e.g.*, Spriggs v. United States, 40 M.J. 158, 163 (C.M.A. 1994) (recognizing that the parties' objective to involve a state agency in providing treatment was commendable, especially because they attempted to "creatively and effectively address the best interests of the individual accused and of society in a meaningful way . . .").

[585] *Compare* U.S. Naval Inst. & Military Officers Ass'n of Am. War Veterans Reintegration Panel (CSPAN television broadcast Sept. 10, 2010) [hereinafter Watkins Presentation], *available at* http://www.c-spanvideo.org/oakleywatkins (comments of Captain Oakley Key Watkins, Commander, U.S. Navy Safe Harbor Program) (explaining how the Navy's rehabilitative program largely depends on civilian community agencies for programs such as job placement and residential treatment that the Navy is unable to provide), *with* Marvin & Jokinen, *supra* note 443, at 53, 57 (observing that "[t]he sentence recommendation of counsel need not be limited to the options contained in the Rules for Court-Martial" and that, "[i]n appropriate cases, a sentence recommendation can blend normal sentence components with participation in community or military rehabilitative programs").

attainment or violation of material terms in the PTA. Thus, a military court disapproved of a PTA term in which the commander of a medical treatment facility was empowered to determine whether the accused "successfully" completed treatment by that commander's own subjective standards prior to remission of the conditional court-martial sentence.[586] As applied to VTCs or MHCs, this same rule would prohibit the convening authority from conditioning punitive discharge remission merely on the treatment court judge's subjective determination that the accused "successfully" completed the program.[587]

Importantly, while the convening authority cannot delegate the individual discretion accorded to her by Article 71(d) of the *UCMJ* and RCM 1108(b),[588] she also cannot delimit this discretion to the point where remission is conditioned on whatever subjective, unarticulated factors she might deem sufficient at a future date. To the contrary, military appellate courts have interpreted the plea provisions of RCM 910(f) to require the accused to manifest understanding of not simply all material PTA terms, but also the corresponding consequences of violating them.[589] The section below explores these two complementary requirements in turn.

1. Successful Explanation of Treatment Plan Requirements

Over the years, military courts have struggled to define the threshold

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[586] United States v. Wendlandt, 39 M.J. 810, 812–13 (A.C.M.R. 1994).

[587] Alone, the word "'successful' implies a subjective determination. A person can complete a job (e.g., building a bookcase), but the user may not deem the work successful (e.g., if the shelves are crooked, or not spaced to accommodate large books)." *Id.* at 813.

[588] UCMJ art. 71(d) (2008) ("The convening authority . . . may suspend the execution of any sentence or part thereof, except a death sentence."); MCM, *supra* note 34, R.C.M. 1108(b) ("The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a court-martial, except for a sentence of death.").

[589] Rule 910(f) governs the plea agreement inquiry. MCM, *supra* note 34, R.C.M. 910(f). This Rule also incorporates by reference the additional requirements of RCM 705, which covers, among other things, both prohibited and permissible plea terms. Notably, RCM 705(c)(2)(D) authorizes the accused's "promise to conform [his or her] conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence . . . ." Subsection (3) requires "disclosure of the entire agreement before the plea is accepted," and subsection (4) requires inquiry into the agreement to ensure the accused's understanding. *Id.* R.C.M. 910(f)(3) & (4). Additionally, the requirement of RCM 1108(c)(1) mandates that all conditions of suspended sentences must be further specified in writing.

for sufficient explanation of treatment program participation requirements. While a literal interpretation of Rule 910 would require the PTA to repeat verbatim every component—to include terms in all waivers and forms that the accused would have to sign as part of the program, or an accounting of the content, frequency, or duration of every required therapy session[590]—these minute details far exceed the convening authority's legal requirements.[591] Although courts have pointed to the validity of a standard condition that the accused refrain from violating any provisions of the *UCMJ* for the duration of the suspension—despite its lack of explanation for each of the *UCMJ*'s punitive articles[592]—PTAs concerning treatment programs require a bit more illumination.[593]

Convening authorities are best served by designating an existing program that has all of its major requirements expressed in a prospectus, like most treatment courts already provide by virtue of their rigorous program evaluation requirements.[594] Moreover, due to the legal context surrounding programs administered by treatment *courts*, many of these programs use *legally vetted*, written participation agreements.[595] During a

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[590] For a case in which the appellant raised these issues, see *United States v. Coker*, 67 M.J. 571, 576, 576 n.8 (C.G. Ct. Crim. App. 2008), addressing the claim that he lacked knowledge of "what rights he is required to waive, in order to participate in the sex offender program" and the absence of information on the number of sessions in "three treatment series that are prerequisite to [additional required] sex offender treatment [meetings]."

[591] *Id*. at 576.

[592] *See, e.g.*, United States v. Myrick, 24 M.J. 792, 796 (A.C.M.R. 1987) ("In our opinion, to require appellant to participate in and successfully continue a prescribed counseling program is a condition of suspension that is as specific as the well-recognized one that the probationer not violate any punitive article of the code."). Note, however, that this contemplates pre-existing treatment conditions, hence prior knowledge of its terms.

[593] This is likely because military members are routinely trained in the requirements of the *UCMJ* and have attained some familiarity with them during prior military service, whereas treatment requirements are likely unfamiliar to the accused.

[594] For example, in accordance with the eighth Key Component of Drug Courts, which applies to all VTCs, the Santa Clara County VTC has pledged to "draw upon our experience in evaluating and monitoring our other treatment court collaborative efforts to replicate our prior efforts in this new program because we recognize that if we do not have specific goals and measures of success or lack of success, the program will fail." SANTA CLARA CNTY. VETERAN'S TREATMENT COURT: POLICY AND PROCEDURE MANUAL 4 (Apr. 2010) (on file with the Nat'l Ass'n of Drug Court Prof'ls, Justice for Vets, Alexandria, Va.).

[595] *See, e.g.*, Oklahoma County Mental Health Court Participant Performance Contract, *reprinted in* COUNCIL OF STATE GOV'TS, BUREAU OF JUSTICE ASSISTANCE, A GUIDE TO

providence inquiry, it is insufficient merely for the accused to silently read the treatment program description and associated requirements and then to acknowledge his understanding of the terms he read.[596] Although each of the program's requirements need not be reproduced verbatim, and can be summarized in writing,[597] the military judge is required to discuss each of the accused's material obligations under the treatment plan on the record. In the Coast Guard appellate case of *United States v. Coker*, for example, the court found error in the trial judge's failure to verbally explore the program's particular requirements to "admit some responsibility and be willing to discuss his behavior in detail" and "agree to follow program guidelines specified in a Program Agreement," even though the accused acknowledged reading about them in a general sense.[598]

Because relapse and dishonesty are not only possible but *expected* as part of the recovery process in any treatment program,[599] an accused must understand the consequences of noncompliance and the interrelationship of nonmaterial and material PTA terms. In *United States v. Cockrell*, the PTA required the accused to pay for the costs of his participation in a sex offender program that mandated voluntary submission to polygraph examinations and the discussion of his past sexual behaviors.[600] The court addressed significant "gaps" between PTA's terms and consequences for noncompliance that rendered those terms unenforceable; specifically, "[w]ithout amplification in the pretrial agreement or mutual understanding on the record, noncompliance could mean anything from the Appellant's voluntary disenrollment from the program to the Convening Authority's subjective evaluation that Appellant was not making progress."[601] The court explained that the

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MENTAL HEALTH COURT DESIGN AND IMPLEMENTATION 91–92 (2005) (providing a detailed representative example).

[596] United States v. Coker, 67 M.J. 571, 576 (C.G. Ct. Crim. App. 2008) ("The military judge ascertained that Appellant had read [the program description] but did not discuss with Appellant the obligations it sets forth for an individual seeking to enroll in the sex offender treatment program.").

[597] *Id.*

[598] *Id.*

[599] *See, e.g.*, Heather E. Williams, *Social Justice and Comprehensive Law Practices: Three Washington State Examples*, 5 SEATTLE J. SOC. JUST. 411, 433 (2006) (describing how, in the King County Family Drug Court, which represents other problem-solving courts in Washington, "[b]ecause of the nature of addiction and recovery, the court expects that relapses will happen").

[600] 60 M.J. 501, 505 (C.G. Ct. Crim. App. 2004).

[601] *Id.*

unarticulated bases for vacating the suspension might include "Appellant having insufficient funds for continued treatment, a refusal by him to submit to a specific polygraph examination, or having submitted to a polygraph examination, an assessment by the polygraph examiner of deception by Appellant."[602] In *Cockrell*, because the accused was provided with no idea of the standards that would ultimately be applied to potential infractions, the PTA's requirement for treatment program "compliance" was unenforceable.[603]

Fortunately, other cases provide necessary illumination of how these fatal "gaps" can be bridged in the PTA. In the subsequent opinion of *United States v. Coker*, the same appellate court found terms sufficient which identified basic program requirements and then "provide[d] that failure of compliance by Appellant allows the Convening Authority to vacate the suspension after following the hearing procedures set forth in R.C.M. 1109."[604] The connection between specific terms and "specific consequences" eliminated the problem of "unlimited and undefined discretion on the part of the Convening Authority."[605]

2. Completion Times

Like the early military rehabilitative programs, treatment courts have learned through experience that individualized treatment plans may exceed ideal timeframes for program completion. Many VTC programs last longer than the twelve-month period recommended for drug courts, with most VTCs approaching twenty-four months due to mental health

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[602] *Id*.

[603] *Id*. at 506–07 (finding "insufficient information to meet the terms of Article 72, UCMJ, and RCM 1109 . . . ," both of which govern proceedings to vacate suspended sentences).

[604] 67 M.J. 571, 576–77 (C.G. Ct. Crim. App. 2008). For a practical explanation of the Rule's multiple requirements, see generally DAVID A. SCHLUETER ET AL., MILITARY CRIMINAL PROCEDURE FORMS §11-11(a)–(d) (3d ed. 2009) (providing a discussion of key principles and scripts for vacation proceedings). At the most basic level, the procedures of RCM 1109 are intended to meet the due process requirements articulated by the Supreme Court in its *Gagnon*, *Morrisey*, and *Black* decisions. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrisey v. Brewer, 408 U.S. 471 (1972); Black v. Romano, 471 U.S. 606 (1985).

[605] *Coker*, 67 M.J. at 577. *Coker*, however, was still not a perfect case because the military judge failed to explore the essential terms on the record. *Id*. at 576.

treatment requirements.[606] In recommending an ideal duration of a suspended court-martial sentence, Army Regulation 27-10 specifies the period of one year for a BCD adjudged by a Special Court-Martial,[607] or two years for any punitive discharge (BCD or DD) adjudged at a General Court-Martial.[608] However, these periods are conservative compared with RCM 1108(d)'s requirement that the timeframe for a suspension not be "unreasonably long," in all instances.[609]

In the case of *Spriggs v. United States*, the Court of Military Appeals concluded that five years' completion time approached the "outer limits" of suspension of a punitive discharge for sex offender treatment permitted by Rule 1108.[610] Accordingly, a program's terms were indefinite and impermissible when they required treatment for up to five years, followed by up to ten years of supervision.[611] Despite the insufficiency of the treatment terms in *Spriggs*, the court otherwise encouraged and "commend[ed]" treatment plans with civilian agencies.[612] Because automatic remission of a probationary sentence not tied to treatment progress or the participant's performance provides disincentives to attain program objectives,[613] the proposed pretrial agreement conditions remission on the maximal time contemplated for graduation from the program.[614] In any event, the PTA must specify a date certain for remission of the suspended portions of the sentence.

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[606] Clubb Interview, *supra* note 409 (observing a range for VTCs between nine and twenty-four months). *See also* Holbrook & Anderson, *supra* note 9, at 29 (observing program lengths ranging from "an initial 12 month probation with three phases followed by a six month post-graduation phase" to two years among 14 surveyed VTCs). At least one VTC requires a commitment of more than thirty months. *See* SUPERIOR COURT OF CAL., CNTY. OF ORANGE, VETERANS COURT PARTICIPANT'S HANDBOOK 3 (rev. ed. Oct. 2009) (on file at Nat'l Ass'n of Drug Court Prof'ls, Justice for Vets, Alexandria, Va.) (describing how participation in the VTC is accomplished in conjunction with a "formal [term of] probation for a period of three years").

[607] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ¶ 5-35*a*(2), at 40 (3 Oct. 2011).

[608] More specifically, "[t]wo years or the period of any unexecuted portion of confinement (that portion of approved confinement unserved as of the date of action), whichever is longer for a GCM." *Id.* ¶ 5-35*a*(3), at 40.

[609] MCM, *supra* note 34, R.C.M. 1108(d) ("Suspension shall be for a stated period or until the occurrence of an anticipated future event. The period shall not be unreasonably long.").

[610] 40 M.J. 158, 163 (C.M.A. 1994).

[611] *Id.* at 160, 162.

[612] *Id.* at 163.

[613] United States v. Cadenhead, 33 C.M.R. 742, 745 (A.F.B.R.), *aff'd*, 34 C.M.R. 51 (C.M.A. 1963).

[614] *See infra* app. G (providing a model pretrial agreement for modification).

3. Pay Status

The *Spriggs* opinion separately addressed issues related to the pay status of a military member while completing a probationary sentence that foreseeably removes him from the productive service of the Armed Forces. Under the terms of Senior Amn Spriggs's PTA and a subsequent agreement, the convening authority required him to begin unpaid appellate leave pursuant to Article 76a, *UCMJ*; to pay victim restitution on a schedule; to engage in an alcohol rehabilitation program if suggested after consultation; and to complete a designated civilian sex offender treatment program, or suitable alternative, provided that the funding was "without use of Air Force Funds."[615] The practical effect of these requirements left Amn Spriggs with serious hardships that affected his family. They constituted impermissible terms because Article 76 only permits appellate leave for discharged servicemembers with *un*suspended punitive discharges.[616]

That probationary servicemembers cannot be placed on unpaid appellate leave while pursuing treatment is but one lesson from *Spriggs*. Another is that the conditions of probation for treatment should not be so onerous that a servicemember still on active duty is forced by those conditions between a "proverbial rock and a hard place" to hunt for civilian jobs without having a discharge that would enable meaningful employment.[617] While *Spriggs* does not foreclose alternative arrangements that might take funds out of an accused servicemember's control,[618] the opinion suggests that it becomes the Government's obligation to assist the accused in meeting pretrial terms on which he expends a good faith effort if financial hardship is the only factor lending

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[615] *Spriggs*, 40 M.J. at 159.

[616] UCMJ art. 76a (2008) (observing that "an accused who has been sentenced by a court-martial may be required to take leave pending completion of the action . . . if the sentence, as approved . . . includes an unsuspended dishonorable or bad conduct discharge").

[617] *Spriggs*, 40 M.J. at 160: "The rock: The action obligated him to pay from his own pocket for the cost of his rehabilitation program . . . . The hard place: For the duration of that suspension . . . Spriggs would not receive any active duty pay . . . and would be handicapped in his effort to seek civilian employment by the fact that he had no discharge at all from his military service." In this instance, despite searching for a civilian job for five months, and eventually accepting a $4.00-per-hour pizza delivery job, Spriggs and his family lost their home, were evicted from their apartment, and suffered "continuingly deteriorating financial and related living conditions" that culminated in their stay at a church which provided them with donated food. *Id*. at 161.

[618] *Id*. at 163.

to noncompliance, despite those efforts.[619] So as not to provide the accused with a financial windfall during the course of treatment, the PTA could require the accused to make automatic allotments to fund administrative costs of a treatment program for amounts in excess of living requirements.[620]

4. Therapeutic Incarceration

While incarceration represents the ultimate deprivation of personal liberty, aside from death, brief periods of incarceration remain a hallmark of treatment court programs as the ultimate sanction for program noncompliance on a graduated scale.[621] The difference between therapeutic incarceration and outright incarceration, however, is the relationship of the brief custodial period to an unwanted behavior occurring in the context of individualized therapy. The possibility of therapeutic incarceration looming as a potential consequence of treatment noncompliance can, in itself, provide necessary legal leverage to encourage treatment progress. However, the mere fact of therapeutic incarceration during the course of program participation should not automatically trigger vacation proceedings as breach of a material term in the PTA or count as vacation of a deferred or suspended term of confinement in the original sentence. Although the distinction is a fine one, the proposed model PTA contains a provision to enable the effective use of therapeutic incarceration.

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[619] Judge Cox, in addressing the requirements for vacating a suspended sentence under RCM 1113(d)(3), considered the good faith efforts of the accused and thought that the financial circumstances "require[d] some effort by both the appellant and *the Government* to resolve the problem." *Id.* at 164 (Cox, J., concurring) (emphasis in original).

[620] Military courts have upheld provisions of restitution that are functionally little different, and the standard practice of requiring proof of financial allotments from pay is routinely required prior to granting requests for deferments to provide money for dependents. *See, e.g.*, United States v. Mitchell, 51 M.J. 490 (C.A.A.F. 1999) (discussing the validity of restitution conditions in pretrial agreements); Lieutenant Colonel Timothy C. MacDonnell, *Tending the Garden: A Post-Trial Primer for Chiefs of Criminal Law*, ARMY LAW., Oct. 2007, at 1, 13 (specifying terms of deferred forfeitures themselves "contingent on the accused's establishing and maintaining an allotment for the benefit of [his] dependents").

[621] *See supra* Parts I & II (discussing the concept of legal leverage and its value in treatment court settings).

In pertinent part, the model provision resembles the Texas legislature's approach to the issue in its community supervision statute. Article 42.12 of Texas's *Code of Criminal Procedure* provides that a court may require, as a condition of community supervision, the probationer to serve up to 30 days confinement for a misdemeanor or up to 180 days confinement for a felony "at any time during the supervision period," and "in increments smaller than" those maximum terms.[622] Adopting similar terms in the PTA permits an interdisciplinary team to effectuate its treatment objectives without unnecessarily consuming the convening authority's time when activating intermittent incarceration. If, in advance, an accused understands and agrees to a minimal number of days of incarceration that may be distributed intermittently during the period of the suspension as a part of his treatment, this would not amount to improper delegation of the convening authority's discretionary function.[623] It also represents a PTA term far more favorable to the accused than standard terms requiring several months of incarceration prior to the implementation of a suspended sentence for the purpose of treatment.[624] Furthermore, the accused's knowledge of the relationship and interplay between therapeutic incarceration and material terms that *do* require vacation proceedings would eliminate potential ambiguity in his understanding.[625]

5. Deferral of Confinement to Effectuate Treatment Objectives

A major limitation of the court-martial process is the immediate imposition of confinement following a sentence including confinement, even despite the possibility that a convening authority may suspend or remit that very confinement during a later review of the case. Under current practice, the first time a convening authority is able to modify the confinement provisions occurs weeks or months after the verdict when the trial transcript has been authenticated and the case is ready for

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[622] TEX. CODE CRIM. PROC. art. 42.12, § 12(a) & (c) (2011).

[623] *See supra* discussion accompanying notes 586–87 (discussing *Wendlant*'s prohibitions on delegation of the convening authority's functions).

[624] *See, e.g.*, United States v. Cockrell, 60 M.J. 501, 502, 503 (C.G. Ct. Crim. App. 2004) (suspending the accused's sentence in order to participate in sex offender treatment outside a confined setting, however, only after his release from confinement for ten months).

[625] *See, e.g.*, United States v. Martin, 2006 CCA LEXIS 330, at * 4 (C.G. Ct. Crim. App., Dec. 6, 2006) (unpublished) (voiding two pretrial agreement provisions which could possibly have led to a conflicting or ambiguous interpretation without discussion of the "interaction of the[ ] provisions" during the providence inquiry).

action.[626] In some cases, where the accused suffers from an untreated condition like PTSD, time in confinement can aggravate his symptoms and make him less likely to benefit from treatment at a later period following release.[627] This phenomenon was witnessed in the Air Force after prisoners were transferred from the USDB to the 3320th's rehabilitation program. According to Air Force clinicians and facilitators, these prisoners were less amenable to rehabilitative treatment because they had already been conditioned: "They learned to play their confinement center's game, and this increased their difficulty with rehabilitation."[628]

The courts have been clear that automatic confinement is only a default standard, which is not mandatory.[629] Convening authorities are therefore free to begin a period of suspension prior to their "action," if this is specified in writing prior to the adjudged sentence. Like the convening authority in *Mack*, convening authorities in cases involving untreated mental conditions like PTSD can defer confinement for a period that would permit immediate entry into a treatment program.[630] Although the military courts have identified situations where certain post-trial arrangements would violate public policy, the treatment-based suspended sentence resembles a longstanding and permissible clemency tradition.[631] Even where the case is fully contested, a preliminary

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[626] *See, e.g.*, United States v. Koppen, 39 M.J. 897, 900 n.7 (A.C.M.R. 1994) ("The suspension will begin on the date when the convening authority takes action, which in our view is the best time for a suspension to begin.").

[627] *Supra* Part I.

[628] MILLER, *supra* note 245, at 179.

[629] *Koppen*, 39 M.J. at 900 n.7 ("[T]he agreement may state the date or event when any period of suspension or confinement will begin.").

[630] United States v. Mack, 56 M.J. 786, 787 (A. Ct. Crim. App. 2002) (deferring confinement for over a month to enable treatment of a medical condition).

[631] First, *United States v. Lundy* reveals that convening authorities may not suspend rank reduction if an unsuspended punitive discharge would statutorily require automatic rank reduction to the lowest enlisted grade. 60 M.J. 52, 55 (C.A.A.F. 2004) (invalidating the pretrial agreement on the basis that the convening authority promised more than the law would permit). Second, it would violate public policy for a convening authority to develop a sliding scale in which the accused would benefit from a suspended punitive discharge only if the accused first received a fixed amount of confinement from the court-martial. United States v. Cassity, 36 M.J. 759, 765 (N.M.C.M.R. 1992) (rejecting the arrangement because it essentially "distort[ed] the sentencing process" by undermining sentencing rationales). Third, the convening authority cannot create a plea provision that would limit the accused from exercising the right to apply for post-trial clemency and parole from a service secretary. United States v. Tate, 64 M.J. 269, 272 (C.A.A.F. 2007).

Under the instant proposal, the convening authority would suspend the entire sentence to permit the accused to enjoy the benefits of treatment prior to incarceration. Unlike

agreement for deferral of confinement to permit mental health treatment until action, *if a suspended sentence is recommended by the panel*, would be particularly useful in promoting a successful result.

B. Model Pretrial Agreement Contemplating Veterans Treatment Court Participation

The proposed pretrial agreement, included in Appendix G, contains a number of provisions modeled on common features of existing VTC programs. It provides detailed descriptions of program obligations and rules and distinguishes the relationship between material terms of the agreement with the convening authority and requirements of civilian programs that could lead to termination or expulsion from the program. Ideally, the convening authority's obligations will be limited, permitting maximum participation in the civilian program, with ample room for program administrators to impose rewards and sanctions that are responsive to individual performance and treatment needs. For this reason, therapeutic incarceration, alone, will not be the basis for vacating suspension of the sentence. Instead, the deal-breakers include violations of the *UCMJ* and civilian criminal laws, failure to pay for administrative costs of the civilian program (consistent with the accused's ability to pay), and termination from the treatment court program. On this last point, it is assumed that termination from a program reflects the interdisciplinary treatment team's position that the accused is no longer able to benefit from the program and not suited for its rehabilitative goals.

Although some civilian cases have addressed a defendant's due process rights under state and federal law before his original sentence can be reinstituted following termination from a treatment court program,[632] such law would not apply to a military accused. As long as it

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Lundy, the provisions for a suspended discharge would not require reduction to the lowest enlisted pay grade. Dissimilar to *Cassity*, the treatment-based suspended sentence would not require any period of confinement prior to enrollment. Finally, the arrangement would not offend the rights discussed in *Tate*. Here, the convening authority would maintain continuing jurisdiction over the accused through the duration of the suspension. The accused would remain free to apply for secretarial clemency upon vacation of the suspension.

[632] *See, e.g.*, Torres v. Berbary, 340 F.3d 63, 72 (2d. Cir. 2003) (vacating a sentence imposed under a conditional release to a drug treatment facility based on the defendant's lack of a revocation hearing when the judge reinstituted a felony sentence after taking the

is clear that participation in a state treatment program is merely a condition of an agreement with the convening authority, the proper forum for exercise of the accused's due process rights is within the limits of the *UCMJ* (Articles 71 and 72) and Rules for Courts-Martial (1108 and 1109), which are consistent with the Supreme Court's requirements for revocation of probation. The Department of Justice, through its U.S. Attorney's Office in the Western District of New York, has adopted a similar approach to deferred adjudication of purely federal offenders, in which it has permitted participation in the Buffalo VTC as a condition of the pretrial agreement.[633] Even without a willing or able VTC, the provisions of Appendix G's model pretrial agreement can be adapted to a treatment program administered through a board of interdisciplinary officers, rather than a treatment court.[634]

VII. Functional Considerations Across the Military Justice Spectrum

On paper, the Modified Sentence Worksheet, panel instructions, and model pretrial agreement all provide instant methods to incorporate the proposal for enlightened sentencing within the limits of existing law and regulation. However, military justice depends as much on the commitment of its stakeholders as it does on the law. As an example, although clemency interviews with the accused were widely practiced throughout all of the services until 1977, the *Hill* case's requirement for representation during such interviews marked the functional "demise" of the practice.[635] Because complexities of time, money, discipline, and the military mission all impact matters of military justice, this Part provides insight on the way these tools can be used most effectively. The sections below address functional considerations at each level of military justice practice from the defense counsel to the convening authority.

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word of the program administrators that there was a valid basis for terminating his participation).

[633] *See infra* Part VIII.B (describing the Department of Justice's cross-jurisdictional arrangement).

[634] *See infra* Part VII.D (describing alternatives to VTCs).

[635] Vowell, *supra* note 45, at 149 (citing United States v. Hill, 4 M.J. 33, 34 (C.M.A. 1977)).

A. Defense Counsel

Because all treatment courts operate on the basis of the offender's voluntary decision to participate,[636] the accused should be the one to propose a treatment-based sentencing alternative to the convening authority or present such evidence at a court-martial.[637] Even though the nature of mental illness creates additional challenges for defense counsel in contested cases,[638] the court-martial sentencing format is of great benefit. Despite longstanding recommendations to eliminate panel sentencing,[639] or, at least substitute a traditional presentence report for the adversarial penalty phase,[640] the existing sentencing format withstands these challenges for a simple reason: The opportunity to observe the demeanor of the accused and probe further into competing positions will always be superior to a paper presentation, which can neither be questioned nor interpreted independently from the shaded perceptual lenses of its author.[641] In a necessarily limited environment where SJAs can satisfy their statutory responsibility with mere formulaic statements indicating disagreements with summarized positions,[642] and

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[636] Cartwright, *supra* note 9, at 306 ("In accordance with due process, all courts require that the defendant voluntarily agree to participate in the treatment court program.").

[637] Military courts require voluntary participation in rehabilitative programs. *See supra* discussion accompanying notes 411–15. Further, there may be strategic reasons to withhold this option from a decision-maker, such as the concern that panels or military judges would be more likely to adjudge punitive discharges in order to create greater incentives for successful treatment program completion.

[638] *See, e.g.*, Seamone, *supra* note 65, at 161 (describing how the nature of mental illness largely requires defense attorneys to know more about its symptoms and treatment to be effective advocates).

[639] *See, e.g.*, Major James Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1, 4 (1994) (noting consistent criticisms of panel sentencing dating back to the period just after WWI).

[640] *See, e.g.*, Major General George S. Prugh, *Evolving Military Law: Sentences and Sentencing*, ARMY LAW., Dec. 1974, at 1, 5 (discussing the value of a formalized presentence report); Lowery, *supra* note 33, at 201 ("The factfinder should have a presentence report to aid in deciding what punishment to impose.").

[641] *See, e.g.*, Michael I. Spack & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 SW. U. L. REV. 481, 536 (1999) (observing how "a presentencing report [is not] a significant improvement over the current sentencing procedure that allows the accused to introduce matters in extenuation and mitigation with relaxed rules of evidence").

[642] *See, e.g.*, Major Andrew D. Flor, *"I've Got to Admit It's Getting Better": New Developments in Post-Trial*, ARMY LAW., Feb. 2010, at 10, 21 (describing recommendations for SJAs to respond to allegations of legal error with minimal statements, such as, "I have considered the defense allegation of legal error regarding _____. I disagree that this was legal error. In my opinion, no corrective action is necessary.") (citing United States v. McKinley, 48 M.J, 280, 281 (C.A.A.F. 1998)).

where a busy commander might have five or ten minutes, at best, to review binders of material, the commander is better served relying on the evaluations of those panel members who have, by virtue of their service, come to know the accused, the crime, and the victim on a far more intimate level.[643]

Within the sentencing forum, a unique series of rules related to rehabilitative evidence permits an approach unavailable to prosecutors who are more limited in the presentation of evidence in aggravation. Initiative, time, and creativity invested by the defense counsel determine whether these possibilities are ever realized, however.[644] While it is beyond the scope of this study to outline the approach in detail, defense counsel have the benefit of a detailed scholarly article, which recommends a live presentencing report for the panel conveyed in the form of an unsworn statement by the accused and built around a request for a clemency recommendation from the panel regarding a suitable rehabilitation program.[645] If defense counsel recognize their potential during the sentencing proceedings, not only will SJAs be required to brief clemency recommendations to the convening authority in addition to the standard boilerplate,[646] but the evidentiary basis will exist to support clemency recommendations, limiting the chance that the military judge would construe the clemency recommendation as impeachment of the adjudged lawful sentence.

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[643] *See*, *e.g.*, United States v. Hurtado, 2008 WL 8086426, at * 2 (A. Ct. Crim. App., June 30, 2008) (unpublished) (describing the value of clemency recommendations by panel members based on their criteria for selection); Major Robert D. Byers, *The Court-Martial as a Sentencing Agency: Milestone or Millstone?*, 41 MIL. L. REV. 81, 100 (1968):

> Logically, the most intelligent decision concerning the feasibility of suspending all or a portion of a sentence can be made by the agency who, through the advantages of trial presence and an exhaustive inquiry into the background of the accused, is responsible for tailoring a sentence to meet the needs of the accused and society.

[644] While "most defense counsel still rely on the same [limited sentencing] methodology as the prosecution," they are still "in the best position to present the information that the court needs to tailor the sentence" when they exceed such limits. Marvin & Jokinen, *supra* note 443, at 53, 53.

[645] *See id.* at 53, 54 (recommending a "defense presentence report format").

[646] MCM, *supra* note 34, R.C.M. 1106(d)(3)(B) (requiring "concise information" on such recommendations in the SJAR).

B. Staff Judge Advocates

The SJA holds a special place in the clemency process by virtue of his or her military justice role in the organizational structure of most Offices of the Staff Judge Advocate.[647] Effective clemency policy depends as much on leadership and setting the right example for subordinate prosecutors as it depends on getting the legal decisions right. Without considering matters of fairness and the best interests of the accused and society—in addition to the military—SJAs have every incentive to recommend against discharge remission; not only did their offices invest the time and money to secure a conviction that would withstand appellate review, but the SJA logically would not have recommended referral of the case to a court-martial in which a punitive discharge could be adjudged without providing advice that a punitive discharge was deserved and obtainable in that very case.[648] However, the SJA's role is far more comprehensive.

The existence of plea agreements containing suspended discharges and alternative dispositions based on the nature of a sentence—sometimes with provisions commuting punitive discharges to a term of additional months or years if adjudged—tells a far different story. Rather than acting only as a frugal manager with the predominant objective of deterrence, these practices align with the concept of the SJA as a problem-solver—a community prosecutor—with responsibilities to the commander, the military community, society, and the accused.[649] In

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[647] *See, e.g.*, United States v. Hill, 4 M.J. 33, 39 n.26 (C.M.A. 1977) (observing "that the staff judge advocate is the 'chief counsel for the given command among whose various functions include the responsibilities of being the chief prosecutor'") (internal citation omitted).

[648] Byers, *supra* note 643, at 100 (discussing the SJA's incentive not to recommend suspension of the adjudged sentence).

[649] The concept of the community prosecutor evolved in the 1990s, embodying the ideal that "prosecutors [should] respond to community concerns with procedures that depart from the traditional focus on prosecuting criminal cases." Kelley Bowden Gray, Comment, *Community Prosecution: After Two Decades*, 32 J. LEGAL PROF. 199, 200 (2008). Under the theory, also hailed as the "new prosecution," "policymakers and district attorneys seek to encourage local prosecutors to expand their professional outcomes beyond conviction and sentencing of defendants to prioritize the reduction of crime as a principal goal." Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1128–29 (2005). Notably, this includes participation in problem-solving courts. *Id.* at 1128. By 2004, more than half of 879 local prosecutors' offices employed the community prosecution model. ANTHONY C. THOMPSON & ROBERT V. WOLF, TEACHERS GUIDE, THE PROSECUTOR AS PROBLEM-SOLVER: AN OVERVIEW OF COMMUNITY PROSECUTION 5 (2004).

keeping with this ideal and obligation, the panel's ability to provide the convening authority with the highest quality of information should be viewed as an opportunity rather than as a threat.[650]

C. Military Judges

The proposed alterations to court-martial sentencing practice require two judicial initiatives. The first is the willingness to inform panel members of their rights to recommend clemency and to provide guidance on evaluating treatment options for mental health conditions. To this end, while cases over time have revealed reluctance on the part of some judges to instruct members about their right to recommend clemency in any form, appellate courts, including the CAAF, have more recently encouraged clemency instructions.[651] Although some panels have clearly misunderstood their purpose in considering clemency, the proposed instructions provide suggestions on how to avoid these distractions. If judges do not prefer those recommendations, they might draw from the existing *Benchbook* instructions, or other specially tailored examples. Because of the unique issues raised by cases involving untreated mental conditions, these are the instances where the panel's special consideration of treatment options will have the most value to the convening authority during post-trial review.

The second initiative is further involvement in the management of cases. While unlikely in every case involving the prospect of mental health treatment, some cases could require further testing, evaluation, or preliminary participation in a treatment program to permit the court-martial to evaluate rehabilitative potential or the suitability of a suspended sentence. Although, traditionally, judicial oversight has been limited in the court-martial system, military judges retain authority to dictate conditions during the course of delays in the proceedings.[652]

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[650] *See, e.g.*, United States v. Finster, 51 M.J. 185, 187 (C.A.A.F. 1999) (noting the responsibilities that SJAs have as commissioned officers, not only lawyers, and observing that their advice on clemency "is much more than a ministerial action or mechanical recitation of facts concerning the trial") (internal citation omitted).

[651] United States v. Weatherspoon, 44 M.J. 211, 213 (C.A.A.F. 1996) (observing that the practice "must be encouraged") (internal citation omitted).

[652] Zimmerman, *supra* note 39, at xi n.77 ("It is not unreasonable to assume that the military judge's powers . . . to grant continuances could be used as the method of granting [a] probationary period."). *See also* UCMJ art. 40 (2008) (discussing the court's power to grant a continuance "for reasonable cause"); MCM, *supra* note 34, R.C.M.

Despite the fact that military judges often prefer quick cases that move directly to sentencing after the findings,[653] more complicated cases can require delays for a period of weeks.[654] In recognition of this inherent flexibility, especially where the defense favors a delay, military judges can facilitate more "intelligent sentencing" in the complex area of mental health.[655]

On a final note, the military judge has the ability to replicate the most crucial aspect of problem-solving courts at the installation level where participation in a civilian treatment court—with a civilian judge—is not possible. While, in pretrial diversion programs, there are viable concerns

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906(b)(1) (discussion) (describing the discretionary nature of determinations to grant continuances).

[653] *See, e.g.*, Lieutenant Colonel David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Court-Martial 1003(b)*, 52 NAVAL L. REV. 1, 40 n.185 (2005) (describing how the interval between court-martial conviction and sentencing is "almost immediate" or "usually no more than a few days"); United States v. Stafford, 15 M.J. 866, 869 (A.C.M.R. 1983) ("[T]here is usually no temporal break between findings and sentence in courts-martial . . . .").

[654] Grove, *supra* note 44, at 26, 33 ("[C]ontested cases with high maximum permissible punishments are often recessed for a week or more after guilty findings to allow counsel to prepare the presentence case.").

[655] In *United States v. Flowers*, Senior District Judge Jack B. Weinstein described the genesis of federal and state court delays "intended to allow the defendant further time to demonstrate rehabilitation prior to imposition of sentence." 983 F. Supp. 159, 160, 161–67 (E.D.N.Y. 1997). Recognizing the societal interests served by such presentencing adjournments, the court held,

> Under appropriate circumstances, adequate steps should be taken to allow a defendant facing sentencing an opportunity to rehabilitate herself and change her circumstances. Such steps may include, in appropriate circumstances and with adequate controls, granting a request for deferred sentencing, similar to the sort of adjournment granted under structured diversion programs, so that a defendant may restore herself, on her own, to her greatest potential.

Id. at 167. Federal appellate courts have commented on the types of factors to consider in evaluating such periods of deferment. *See, e.g.*, United States v. Maier, 975 F.2d 944, 948–49 (2d. Cir. 1992) (noting "the nature of the defendant's addiction, the characteristics of the program she has entered, the progress she is making, the objective indications of her determination to rehabilitate herself, and her therapist's assessment of her progress toward rehabilitation and the interrupting of that progress"). *See generally* Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HEALING PROFESSION 245, 267–71 (Dennis P. Stolle et al. eds., 2000) (exploring the value of presentence deferments).

over participation of military judges who risk later disqualification from cases involving an accused who violates the terms of such agreements,[656] this article promotes a post-trial, post-plea diversion program in recognition of the unparalleled value of legal leverage in promoting compliance with individualized treatment plans. Under the proposed system, the military judge retains the ability to play a role unmatched by any other member of an interdisciplinary treatment team. Concerns of recusal would arise only in cases where subsequent misconduct is so egregious as to warrant another court-martial. In all other cases, it would be the Special Court-Martial Convening Authority conducting the revocation proceedings—and not the military judge—who ultimately makes the recommendation on whether to vacate the suspension. In this expanded role, military judges can easily attend training provided for civilian problem-solving court judges and build on their existing expertise to produce similar results in a military setting.

D. Convening Authorities

It is suggested that "[c]onfinement is the single element of the 'Military Justice System' which commanders see least and know less."[657] Although true in some—or, even, most—cases, convening authorities' continuing development of innovative alternatives to incarceration, such as MG James Terry's suspension of Staff Sergeant Ryan Miller's sentence at Fort Drum, suggests that far more is underway. While, to some critics, it might seem inefficient and counterproductive to convene a court-martial and then abandon its adjudged punitive discharge after the investment of significant time and resources, this simplistic position ignores several benefits of contingent sentences based on treatment.

First, courts-martial involving guilty pleas require far less time to prosecute than contested cases and far fewer resources.[658] Second, the

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[656] *See* Zimmerman, *supra* note 39, at 33 (discussing the prospect of recusal arising from judges' knowledge of, and response to, misconduct unrelated to the initial charges).

[657] COLONEL PATRICK R. LOWREY, MILITARY CONFINEMENT: NEEDLESS LUXURY OR VIABLE NECESSITY?: AN INDIVIDUAL RESEARCH REPORT 1–2 (1974).

[658] As the *Benchbook* currently instructs, "[t]ime, effort, and expense to the government (have been) (usually are) saved by a plea of guilty." DA PAM. 27-9, *supra* note 43, instr. 2-6-11, at 103. *See also* Major Michael E. Klein, United States v. Weasler *and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?*, ARMY LAW., Feb. 1998, at 3, 7 ("[S]ince the military first started using pretrial agreements, savings in the time it takes to try an accused have been a significant benefit to the government.").

legal leverage provided by the conditional suspended sentence is often the determinative factor that enables meaningful treatment and lasting rehabilitation, which remains a sentencing rationale in all courts-martial. Third, the ability to vacate a suspension for failure to meet the terms of a suspended sentence preserves the option of executing the adjudged punishment.

Even in contested cases where a treatment-based contingent sentence arises from a military judge's or panel's clemency recommendation, expended time and other resources are not necessarily lost if the convening authority adopts the recommendation. In addition to the ease of remission, addressed above, military justice values optimal information and careful analysis in the convening authority's exercise of disciplinary authority. Foremost is the Article 32 pretrial investigation, which often involves production of experts and other witnesses.[659] Commanders regularly direct pretrial investigations that *never* result in the convening of courts-martial, despite the investment of substantial resources.[660] When this occurs, SJAs and commanders do not normally conclude that such efforts were *wasted* if they led to the production of helpful information.[661] While treatment-based contingent sentences will surely have similar value, they offer more in the sense that they can empower the accused to deal with potentially lifelong consequences of mental illness, thereby promoting the safety of society.

Importantly, in the absence of civilian treatment court programs, convening authorities can establish standing boards of interdisciplinary professionals to implement the same types of treatment team interventions that have allowed VTCs and MHCs to flourish. Not only are traditional courts—like courts-martial—capable of incorporating successful attributes of treatment courts, even when full transformation is not possible,[662] but Judge Robert Russell, Jr., the innovator of the Buffalo

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[659] *See generally* MCM, *supra* note 34, R.C.M. 405 (describing various attributes). For other nuances of pretrial investigations, see also DAVID A. SCHLUETER, MILITARY JUSTICE PRACTICE AND PROCEDURE § 702 (7th ed. 2008); Major Larry A. Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 MIL. L. REV. 49 (1986).

[660] *See, e.g.*, Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15, 18 (suggesting that commanders should "reassess the case after the Article 32 investigation is complete [and military justice c]hiefs should be liberal in recommending that charges be dropped after the Article 32 before referral").

[661] *Id.*

[662] *See, e.g.*, JOANN MILLER & DONALD C. JOHNSON, PROBLEM-SOLVING COURTS: NEW APPROACHES TO CRIMINAL JUSTICE 197 (2009) (explaining that "the practices of the

VTC, also believes that a standing military board can attain similar goals as VTCs like his own.[663]

To this end, many boards that have either been planned or established in the military setting are well suited for this problem-solving purpose. The post-appellate review clemency board established at the 101st Airborne Division in the late '70s signals the types of members who could be included and their distinct functions,[664] as does Captain Charles Zimmerman's further suggestions for an organization to set the conditions of pretrial diversion.[665] Other useful lessons exist in the

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[problem-solving court] should be transferred to the conventional courtroom to settle . . . everyday disputes," such as "mandate[d] drug-abuse treatment within the sentencing order").

[663] Interview with Hon. Robert T. Russell, Jr., Presiding Judge, Buffalo Veterans Treatment Court, in S.F., Cal. (Aug. 6, 2010). As support, Judge Russell observes that the military structure of communication, supervision, and accountability provides many more opportunities for oversight of the participant's behaviors and progress in settings outside of the courtroom. *Id.*

[664] The informal clemency board developed at Fort Campbell by Major General John A. Wickham included "the Deputy SJA (to provide legal expertise in reviewing records and recommending specific clemency actions), the Post/Division Command Sergeant Major (to provide expertise in assessing character)," and a member of the Provost Marshal's Office (to assess rehabilitative and "correctional" options). Major Jack F. Lane, Jr., *Discharge Clemency After Appellate Review*, ARMY LAW., Dec. 1978, at 5, 5. In the activities of the board, where "[t]he provisions of AR 15-6 will not apply," General Wickham directed the board to

> review the soldier's performance . . . through interviews with his supervisors and commanders, review of records and interviews with the individual concerned. . . . [T]heir function is advisory and . . . they are to perform this function informally, and . . . the individual concerned will be allowed to know and rebut any adverse comments by his supervisors and commanders.

Id. at 6. By 1978, nine of fourteen soldiers, whose crimes included assault, larceny, and drug sales, were restored to duty by the board following an adjudged punitive discharge. *Id*. at 7.

[665] Captain Charles Zimmerman, in his 1975 thesis, proposed an installation-level "diversion committee" to oversee a pretrial program in which court-martial charges would be held in abeyance pending the soldier's successful participation in and completion of a structured course of rehabilitation:

> The diversion committee shall be composed of the trial counsel, the defense counsel, the unit commander of the offender, and any other persons the diversion authority requests to participate. It shall be the function of the committee to advise the diversion authority

Family Advocacy Program's Case Review Committees, which already operate on all major Army installations to develop plans for dealing with domestic violence allegations.[666]

To attain oversight of military probationers in the civilian community, options range from the assignment of military probation officers to the innovative use of drilling or volunteer reservists, which has largely proven successful for current medical rehabilitation programs in the Navy.[667] The Mandatory Supervised Release Program, which has

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> concerning the propriety of diversion and the type of individual diversion program to be utilized.

Zimmerman, *supra* note 39, at 42. Modeled off of civilian treatment teams, the committee could foreseeably include various experts, depending on the nature of the accused's problems: "[I]f the offender has a drug problem . . . the head of the local drug abuse program would be an ideal addition to the committee. If a contributing factor to the offense is the soldier's language difficulty, the director of the local education center would be . . . appropriate . . . ." *Id.* at 43. Surely, a mental health professional and chaplain would add necessary perspectives to a pre- or post-conviction diversionary team. In the military landscape, Unit Ministry Teams and their chaplain leaders have been specially equipped to work alongside medical professionals in addressing a condition like PTSD. *See* Chaplain (Major) Stephen M. Tolander, *The Relationship of PTSD Issues to the Pastoral Care of Soldiers with Battle Fatigue*, MIL. CHAPLAINS' REV., Fall 1990, at 47, 52–56 (describing how military chaplains can combine tenets of healing with their ministry activities to aid PTSD-afflicted military members).

[666] The Case Review Committee is established to "determine the type and extent of treatment and prevention training that will be required" in substantiated cases of domestic violence. Major Toby N. Curto, *The Case Review Committee: Purpose, Players, and Pitfalls*, ARMY LAW., Sept. 2010, at 45, 52. By definition, it is a "multidisciplinary team appointed on orders by the installation commander." U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM ¶ 2-3*a*(1), at 11 (30 Oct. 2007). Its diverse membership includes a doctor, lawyer, military police officer, social worker, and a physician. *Id.* ¶ 2-3*a*(3). Juvenile Review Boards also use diverse teams to address offenses committed by juveniles on the installation. *See, e.g.*, U.S. DEP'T OF ARMY, INTELLIGENCE CTR. & FT. HUACHUCA, REG. 27-3, YOUTH COUNCIL ¶ 5a(1)–(13), at 3–4 (25 Oct. 2006) (specifying members from various organizations on the Youth Council, including county government entities as well as military ones).

[667] Navy Captain Oakley Key Watkins, who recently commanded the Navy's Safe Harbor Program, explained the components of the "Near Pier Anchor Program," in which sailors undergoing rehabilitation for PTSD and other medical conditions are paired with reservists who volunteer to mentor the active duty sailor-patients. Watkins Interview, *supra* note 72. While there is a handbook and orientation for the Anchor Program, there are no formal courses; "What we ask is not more than good old fashioned leadership," remarked Captain Watkins. *Id.* After considering the prospect of using reservists to monitor the progress of military members with suspended punitive discharges, Captain Watkins believed that the same sort of approach could work with modifications, such as drawing reservists from military police or medical branches and pairing offenders with mentors of a much higher rank, such as an E7 or E8. *Id.* Although this use of reservists

recently been implemented to maintain accountability over military offenders released from confinement early, also provides a useful framework to maintain oversight over military members receiving PTSD treatment in the community.[668] The salient point from the combined examples is that existing frameworks can easily be modified without the burden of initially establishing a system. Similar to the lessons learned by treatment court judges and medical rehabilitation programs, the key issue involves "coordination" of functioning programs and existing resources, rather than the creation of any programs from scratch.[669]

VIII. Intergovernmental and Cross-Jurisdictional Cooperation

In considering the relationship between state courts and military offenders, courts and commentators have largely interpreted exclusive federal jurisdiction over the offender as a prohibition on the exercise of state authority.[670] While active duty servicemembers currently participate

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would be akin to "an AA [Alcoholics Anonymous] sponsor to verify that the participant would not fall off the wagon," Captain Watkins estimated that the Anchor Program would be a useful model to develop a probationary system for servicemembers with suspended discharges. *Id*.

[668] In 2001, the Mandatory Supervised Release Program was established by the Department of Defense as an alternative to parole, in which offenders could be released into the community with several requirements to conform their conduct to the law. *See generally* United States v. Pena, 64 M.J. 259, 262, 263 (C.A.A.F. 2007) (describing the genesis of the program and reviewing sixteen representative conditions placed on a sex offender who was enrolled in the program). During the course of participation in this program, released offenders are still accountable to the military and tracked for administrative purposes as if they were still participating in units. The methods used to account for these participants could lend important examples in the development of programs for offenders participating in treatment under suspended punitive discharges. *See* Grande Interview, *supra* note 385 (describing attributes of administrative processing for members under Mandatory Supervised Release).

[669] *See, e.g.*, Watkins Presentation, *supra* note 585 (describing how the Safe Harbor Program operates on the basis of coordination, and how the program achieves its objectives by linking existing resources, including those in the community, rather than using any of its own); Hon. Steven V. Manley, Presiding Judge, Veterans and Mental Health Treatment Court, Santa Clara Superior Court, Presentation at the 2010 ABA Annual Meeting (Aug. 6, 2010) (describing how, without coordinating existing resources within the community, it would not be possible for his Veterans Treatment Court to function); Steinberg, *supra* note 6, at 20 (relating the comments of Illinois VTC Judge Kirby that his primary function is to coordinate existing programs).

[670] *See generally* John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 283–84 (2000) (describing why this rule concretized by the 1990s). The view is largely supported by the Supreme Court's 1987 *Solorio* opinion, which recognized that commanders had jurisdiction to try active duty

in state treatment court programs as a consequence of state law violations,[671] the same cannot be said regarding purely military offenses or offenses committed within federal lands.[672] Contrary to this position, the following vital considerations reveal a far more permissive posture for cooperation between the military justice system and civilian treatment courts.

A. *Howard*'s Concept of Noninterference

While the military retains criminal jurisdiction over offenders and offenses committed within federal enclaves and the state retains exclusive criminal jurisdiction over offenses committed within state property,[673] these rules do not apply so broadly to administrative matters involving protection of the public or an individual at risk.[674] A number of state cases involving child protection and domestic issues has paved the way for a permissive rule that has been characterized as the "presumption of noninterference."[675] Under this rule, which trended in the 1990s,[676] the courts essentially find that "all state laws are valid within federal enclaves unless they interfere with the jurisdiction asserted by the federal government."[677] Their major anchor has been the 1953 Supreme Court opinion of *Howard v. Commissioners of the Sinking*

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offenders based on their military status, rather than the nature of the offense. *See supra* note 12 (discussing the impact of *Solorio v. United States*, 483 U.S. 435 (1997)).

[671] *See, e.g.*, Lindley, *supra* note 31 (describing how two active duty members were participating in her Combat Veterans Treatment Court program as a result of state offenses); Telephone Interview with Hon. Brent Carr, Presiding Judge, Tarrant Cnty., Tex., Veterans Treatment and Mental Health Court (Oct. 15, 2010) (confirming that active duty Army soldiers have participated in his MHC for state offenses).

[672] Clubb Interview, *supra* note 409 (confirming no known cases of active duty offenders charged with purely military offenses).

[673] Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 126 (1997) ("[T]he federal government obtains sole criminal jurisdiction over areas where it has *exclusive* legislative jurisdiction . . . . [and] a state's jurisdiction extends only over state property.") (emphasis in original).

[674] *Id*. at 130.

[675] Michael J. Malinowski, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Legislative Jurisdiction*, 100 YALE L.J. 189, 203 (1991).

[676] *See, e.g.*, Castlen & Block, *supra* note 673, at 116 n.10 (observing how, in 1997, "recent developments are changing th[e courts'] traditional view"); Malinowski, *supra* note 675, at 203 (explaining how "[c]ourts have begun to nudge the law . . . by adopting the doctrine of noninterference's presumption in favor of applying state law").

[677] Malinowski, *supra* note 675, at 203.

Fund of the City of Louisville,[678] which explained occasions when the state can enforce a local law on residents of military enclaves. The Court first debunked the prevailing idea that military bases were "states within states."[679] Rather than adopting this "fiction," the Court identified "friction" as the basis for its intervention to exclude state interests.[680] Hence, it would not violate the Constitution for the state to assert its interest where the military commander approved of the state's involvement and where there was no apparent conflict between the state's enabling legislation and federal legislation. In such cases, "[t]he sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim."[681] Importantly, *Howard* has been used to justify a variety of state involvements including the provision of welfare benefits,[682] the revocation of drivers' licenses,[683] the removal of children from abusive military homes,[684] and the institutionalization of the mentally ill.[685]

B. State Treatment Court Participation as a Plea Condition, Rather Than Transfer of Jurisdiction

Even though the *Howard* noninterference exception permits participation of active duty servicemembers in state VTCs, such participation would never amount to a transfer of jurisdiction by the military, especially when implemented in accordance with a convening authority's suspended sentence; a view of transferred jurisdiction unnecessarily complicates matters. It must always be remembered that VTCs exist to *prevent* the exercise of—rather than to exercise—the state's criminal jurisdiction and power to punish offenders.[686] For this

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[678] 344 U.S. 624 (1953).
[679] *Id*. at 627.
[680] *Id*. ("It is friction, not fiction to which we must heed.").
[681] *Id*.
[682] Castlen & Block, *supra* note 673, at 123.
[683] Williams v. Dep't of Licensing, 932 P.2d 665 (Wash. Ct. App. 1997).
[684] *In re* Terry Y., 101 Cal. App. 3d 178 (Cal. Ct. App. 1980).
[685] Bd. of Chosen Freeholders of Burlington Co. v. McCorkle, 237 A.2d 640, 645 (N.J. Super. Ct. 1968) (finding propriety in the application of civil commitment laws and no interference with "the function of the Federal Government" on the basis that "state laws passed for the public welfare should be applied to federal enclaves within the state, for the state is best fitted to know the requirements of its particular locality and to deal with them").
[686] As reflected in the discussion of VTCs, *supra* Parts I & II, these programs are diversions from traditional sentencing and alternatives to confinement. If termination

reason, active duty participation in state VTCs is a matter of contract and cooperation with civilian entities to treat a mental health disorder in an innovative and effective way—hardly a transfer in jurisdiction. This is precisely the approach adopted by the U.S. Attorney's Office in the Western District of New York, which has instituted an agreement with the Buffalo VTC to enroll federal offenders (charged with exclusively federal crimes) in that state program *as a condition of pretrial diversion*.

The New York agreement was initiated with the case of *United States v. Walker*, in which Britten M. Walker, a combat veteran with multiple deployments as a sniper in Iraq and Afghanistan, had been charged with purely federal offenses for assaulting and threatening to kill employees of the VA while on federal property.[687] Although some have referred to Walker's case as "the first federal criminal case in the nation ever to be transferred to a [state] veterans court,"[688] the government prosecutor, Assistant U.S. Attorney Edward H. White, clarified the nature of the agreement during an interview. While the Buffalo Court has a presiding judge and functions within a state courtroom, it operates as a treatment program; far from a "transfer of federal jurisdiction," explains White, "the Veterans Treatment Court is one of many conditions included as a term of the agreement for deferred prosecution."[689] White's office permitted participation in Buffalo's program because it offered more effective and comprehensive services than confinement and recognized the relationship between Walker's combat-related mental condition and his offense.[690] Under the agreement, Walker will remain subject to

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from the program results in assignment back to a normal court docket, it cannot be said that a VTC holds the same status as a state criminal court.

[687] Dan Herbeck, *Veteran Gets 2nd Chance From a Court with a Heart*, BUFFALONEWS.COM, Sept. 14, 2010, http://www.buffalonews.com/city/communities/buffalonews.com/city/communities/buffalo/article189920.ece.

[688] *Id*. (citing comments of Walker's Federal Public Defender Tracy Hayes).

[689] Telephone Interview with Assistant U.S. Attorney Edward H. White, U.S. Dep't of Justice, W. Dist. of N.Y. (Oct. 15, 2010) [hereinafter White Interview].

[690] *Id*. *See also* Letter from Hon. Kathleen M. Mehltretter, U.S. Attorney, W. Dist. of N.Y., to Hon. William M. Skretny, Chief Judge, U.S. Dist. Court 1 (Feb. 8, 2010) (on file with author):

> [T]he federal criminal justice system, with seeming increasing regularity, finds itself coming into contact with individuals who are military veterans . . . . [and] some cases involve . . . situations in which veterans find themselves in contact with the federal criminal justice system largely as the result of mental health and/or drug and alcohol dependency issues related to their military service . . . . [T]he Magistrate Judges often, together with prosecutors and defense

federal prosecution and continued federal supervision until he has successfully completed treatment.[691]

Viewed along the same lines as the U.S. Department of Justice, the participation of active servicemembers in VTCs hardly raises concerns of Federal Supremacy or related constitutional conundrums. Instead, the participation contemplated by this article takes on qualities of cooperation that have long characterized the military's use of state resources. While current innovations in cooperative medical rehabilitation of active duty members are the most vivid example of this tradition, others can be found in the area of military corrections. Most notably, the Army uses county jails for confinement of active military members awaiting court-martial and for offenders sentenced to minimal terms of confinement.[692] These arrangements are hardly seen as violations of the Constitution.

Just as the active duty military now relies on civilian entities to meet its corrections objectives, this has also been the case historically. Although largely forgotten, for over thirty years, following 1915, the War Department depended on civilian volunteers from the community to serve as probation officers for military offenders released from confinement early on parole.[693] It was not until an agreement between the Department of the Army and the Administrative Office of the United

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> counsel alike, find themselves struggling with how to deal with these offenders. Frankly, experience has shown, that often our criminal justice system is ill-equipped to deal with these individuals. In response, this Office has, working with the United States Probation Office, sought to develop a plan that allows certain veterans, who are qualified, lower-level offenders, another option.

The arrangement also represented community prosecution in the way the U.S. Attorney's Office preferred pretrial diversion over a post-plea arrangement to facilitate Walker's continued progress in treatment. White Interview, *supra* note 689.

[691] White Interview, *supra* note 689.

[692] *See* COLONEL THOMAS P. EVANS, SHOULD THE DEPARTMENT OF DEFENSE ESTABLISH A JOINT CORRECTIONS COMMAND 3–4 (2008) ("The U.S. Army does not operate a level one facility but uses other service facilities or contracts with local jails for confinement of pretrial inmates and post-trial sentences of less than 30 days."). This policy is most evident in reports of pretrial confinement for major cases. *See, e.g.*, Jeremy Schwartz, *Hasan Hearing to Stay Open*, AUSTIN AM.-STATESMAN (Tex.), Sept. 17, 2010, at B1 (reporting how Fort Hood shooter Major Nidal Hasan "has been held at the Bell County Jail since April . . . .").

[693] Colonel Lloyd R. Garrison, *The Military Parolee and the Federal Probation Officer*, 14 FED. PROBATION 65, 65–68 (1950).

States Courts in 1946[694] that Federal Probation replaced these thousands of "first friends"[695]—with some still retaining their roles in cases where parolees lived in remote areas.[696] Considering President Obama's recent endorsement of VTCs as a means to "make court systems more responsive to the unique needs of veterans and their families," these programs are ripe for cooperative arrangements enabling participation by active duty servicemembers with identical "unique needs."[697]

C. The Benefits of Federal Veterans Affairs Participation in State Veterans Treatment Courts

Another important consideration is the dependence of state VTCs on the VA—a federal agency—to achieve their treatment objectives. Veterans Treatment Courts largely require participants to be eligible for VA benefits in order to use their programs because federal benefits reduce the state's financial burdens while ensuring the highest quality of care.[698] Active duty offenders with suspended discharges are ideally suited to use these existing VA resources because their discharges have been held in abeyance. Because the VA is capable of rendering services to active duty personnel, and has recently pledged to increase these efforts in the VHA's 28 November 2010 Directive 2010-051,[699] these

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[694] *Id*. at 66.

[695] These volunteers were defined as "reputable individuals in the prisoner's community who accepted the responsibility to aid the parolee in making satisfactory adjustment in the community." *Id*. at 65.

[696] Herman L. Goldberg & Frederick A.C. Hoefer, *The Army Parole System*, 40 J. CRIM. L. & CRIMINOLOGY 158, 167 (1950):

> In some instances, especially where a parolee lives a great distance from the nearest U.S. Probation Office, the probation officer appoints a volunteer to assist him with the supervision of the parolee. Such a volunteer is called "first friend" or "counselor" of the parolee and is directly responsible to the probation officer.

[697] OBAMA, *supra* note 25, ¶ 1.6.1, at 12 (further recognizing such needs as ones related to "PTSD, TBI, and substance abuse programs").

[698] *Supra* Part I.

[699] U.S. DEP'T VETERANS AFFAIRS, VHA DIR. 2010-051, TREATMENT OF ACTIVE DUTY AND RESERVE COMPONENT SERVICEMEMBERS IN VA HEALTHCARE FACILITIES ¶¶ 2b, 3, at 2, 3 (28 Nov. 2010) (observing that "[i]t is VHA policy to provide health care services to eligible active duty and [reserve component] Servicemembers presenting for care at a VA health care facility," largely based on the fact that "DOD may not have adequate healthcare resources to care for military personnel wounded in combat and other active duty personnel").

factors remove many obstacles in active duty offenders' successful participation in state VTCs. Past VA programs have also recognized the same sorts of capabilities.[700]

D. Funding Considerations

This proposal for treatment-based suspended sentences requires recurring evaluation of a participant's progress over the term of suspension. Because military courts do not currently have a mechanism to provide such intensive post-trial oversight, the ideal arrangement relies on the existing administrative machinery within functioning problem-solving courts. These services surely have associated fees to provide for all aspects of court administration, from placing a participant on the docket to assigning a case manager to review his progress.[701] However, such costs are independent from, and amount to far less than, the value of therapeutic and medicinal services provided by treatment entities.

While money will, no doubt, change hands under any view of the instant proposal, the military's reliance on treatment courts as an alternative to incarceration is particularly appealing at a time when funding is scarce and considerations of cost largely dictate the survival of military corrections programs.[702] Undeniably, the Department of Defense must now pay the daily costs of confining a servicemember, even after a discharge. This fact alone, when coupled with the possibility of effectively treating an aggravated mental condition, supports the suspended sentence. Though monetary figures for the USDB are not

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[700] MILLER, *supra* note 245, at 142, 194 (discussing Air Force proposals "that serious drug abusers should be handled by the Veterans Administration"). On a reimbursable basis, the VA still coordinates for residential drug treatment of active duty offenders, who are usually pending administrative administration. E-mail from John C. Froppenbacher, LCSW, Veterans Justice Outreach Coordinator, Hawaii Department of Veterans Affairs (Sept. 22, 2010 13:11 PST) (describing an agreement in Hawaii whereby the DoD would reimburse the VA for residential treatment of active duty servicemembers).

[701] *See supra* Parts I & II (discussing the coordination performed by treatment court judges and support teams). Within VTCs, different agencies have overcome funding obstacles though "in-kind contributions," including "ancillary services," where budgetary limitations would otherwise prevent the operation of such programs. Holbrook & Anderson, *supra* note 9, at 36.

[702] *See, e.g.*, EVANS, *supra* note 692, at 14, 17–18 (describing how the military is necessarily "looking for ways to cut . . . cost" in its confinement operations and has increasingly turned to consolidation and realignment of its services as a method to survive economic turmoil).

readily available, the daily cost of federal incarceration within a Federal Bureau of Prisons facility is likely comparable at $77.49,[703] which also falls within the same general range as the average daily cost of housing inmates in state facilities.[704] While the instant proposal for a suspended sentence would permit the accused to receive a salary[705]—assuming minor deviations from federal and state incarceration fees—it would still cost the military approximately the base pay for an E-5 (Sergeant) with over three years' service—simply to cover the annual cost of confinement.[706] In fact, total costs may be greater if the servicemember receives deferments or waivers of forfeitures or is sentenced by a Special Court-Martial authorized to adjudge a maximum forfeiture of only two-thirds of the accused's pay.

All forms of community supervision cost significantly less than confinement in any scenario.[707] Among these, VTCs notably generate significant monetary benefits, with programs like Buffalo's program costing only $2,700 per participant annually.[708] Although costs will vary based on the attributes of a specific program, the military would recognize significant savings in at least three different scenarios, each of which may now be implemented:

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[703] Press Release, U.S. Courts, Newly Available: Costs of Incarceration and Supervision in FY 2010 (June 23, 2010), *available at* http://www.uscourts.gov (noting an annual cost of $28,284.16).

[704] The rates vary based on a number of factors. *See, e.g.*, HOWARD ABADINSKY, PROBATION AND PAROLE: THEORY AND PRACTICE 18 (3d ed. 2009) ("[T]he annual operating cost of housing a state prison inmate is $25,000–$30,000, although in some states, such as Massachusetts, Minnesota, New York, and Oregon, the cost is closer to $40,000.").

[705] *Supra* Part VI.A.3.

[706] *See* 2012 BASIC ENLISTED PAY CHART (2012), *available at* http://www.navycs.com/2012-military-pay-chart.html (revealing a monthly pay rate ($2,375) that translates to an annual salary of $28,500).

[707] *See, e.g.*, ABADINSKY, *supra* note 704, at 18 (observing that "[i]ncarceration costs 10 to 20 times as much as probation and parole supervision"). JOHN SCHMITT ET AL., THE HIGH BUDGETARY COSTS OF INCARCERATION 11 (June 2010) ("[F]or each . . . offender shifted from prison or jail . . . to probation or parole . . . , government corrections systems would save $23,000 to $25,000 per inmate per year.").

[708] Cavanaugh, *supra* note 9, at 478 n.108. "While it may seem more costly for veterans to go through treatment programs under the direction of the Buffalo Court, it actually costs less than ten percent of the total amount spent on incarcerating an individual." *Id*. at 478.

• The command bears the cost of court administration fees while requiring the accused to use military, instead of civilian, treatment services;

• the accused bears the cost of civilian treatment services or court administration fees as part of a pre- or post-trial agreement;[709] or

• either the accused (through agreement) or the command bears the cost of the court's administration fees, but the VA covers the costs of its treatment services pursuant to existing arrangements for active duty personnel.[710]

Defense counsel and convening authorities should consider each of these possibilities in a flexible manner since program availability may change based upon the location of any given military installation.

IX. Conclusion: Reclaiming the Rehabilitative Ethic in Military Justice

Medical professionals who work in the field of veteran rehabilitation describe the daunting challenges of unseen injuries.[711] For the criminal justice system, the air of skepticism surrounding unseen conditions has led to dismissive sentiments and labels like "designer disorder," "diagnosis of choice," and "post-*dramatic* stress."[712] Yet, for every forensic psychiatrist who touts the subjective nature of diagnosis, the ease of exaggeration or malingering, or likely financial motives for obtaining a disability rating, clinical psychologists who treat PTSD and TBI victims can describe the tremendous needs of legitimate patients,

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[709] *See supra* Part VI.A.3 (discussing the validity of plea provisions that enable the accused to fund his own treatment during a term of suspension).
[710] *See supra* Part VII.C (discussing recent provisions within the VA).
[711] *See, e.g.*, U.S. Naval Inst. & Mil. Officers Ass'n of Am., War Veterans Reintegration Panel (CSPAN Broadcast, Sept. 10, 2010), *available at* http://www.c-spanvideo.org/michaeldabbs (Comments of Dr. Mike Dabbs, President, Brain Injury Ass'n of Am.) (describing how mental health professionals are largely still learning about the challenges of unseen injuries); Ira R. Katz & Bradley Karlin, *A Veterans' Guide to Mental Health Services in the VA*, *in* HIDDEN BATTLES ON UNSEEN FRONTS: STORIES OF AMERICAN SOLDIERS WITH TRAUMATIC BRAIN INJURY AND PTSD 119, 122 (Patricia P. Driscoll & Celia Straus eds., 2009) (describing how, even with types of treatments, "it can frequently require first one treatment, and then another, and maybe even another before patients are doing as well as they can").
[712] Ralph Slovenko, *The Watering Down of PTSD in Criminal Law*, 32 J. PSYCHIATRY & L. 411, 420, 432 & 423 n.8 (2004).

who might require trials of medications with devastating side effects before a treatment works.[713] This article has attempted to strike a balance between these polar extremes and to adopt a reasoned approach.

Today, at a time when soldiers and officers have been challenged to "own" the Army's professional ethic,[714] there is a growing recognition that effective leaders are obligated to know about the effects of combat trauma on their subordinates, to take active steps in obtaining treatment for them, and to avoid—at all costs—situations that aggravate their symptoms in the long-term.[715] While it is easy to address PTSD symptoms as purely disciplinary problems, the historical lessons of the Second World War[716] and Vietnam[717] on this issue are now repeating at

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[713] *See generally* HOGE, *supra* note 13 (discussing the realities of potentially lifelong treatment requirements). For further discussion of the inevitable tension between "the role of the therapeutic clinician as a care provider and the role of the forensic evaluator as expert to the court," see generally Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 PROF'L PSYCHOL: RES. & PRAC. 50, 50 (1997).

[714] Case et al., *supra* note 36, at 3, 3.

[715] *See* Lieutenant Colonel Mary E. Card-Mina, *Leadership and Post Traumatic Stress Symptoms*, MIL. REV., Jan.–Feb. 2011, at 47, 48 ("By understanding and recognizing PTSD and its symptoms, leaders in every military branch can help those suffering from Post Traumatic Stress by motivating and guiding those persons to seek resources and treatment"); *id.* at 50 ("A true leader has the ability to give meaning to a crisis event and turn it into an opportunity for growth."); *id*. at 51 ("Symptoms that are ignored, left unchecked, or minimized only lead to greater difficulties in the long term."). Inescapably, this mandate for empathetic leaders includes intervention to prevent the permanent solution. *See, e.g.*, Robert M. Hill, *Complexity Leadership: New Conceptions for Dealing with Soldier Suicides*, MIL. REV., Jan.–Feb. 2011, at 36, 36 ("While the Army cannot prevent every suicide, the aim must be to reduce the number dramatically, and new visions of leadership are essential to the task.").

[716] Despite popular accounts of WWII veterans who proudly returned to their families from combat concealing their emotional scars, the soldier-patient philosophy grew largely in an effort to prevent the reintegration problems of many veterans who did not fare as well as their mythical counterparts. *See supra* text accompanying notes 61–62, 140, and 224–25.

[717] Notwithstanding the success of the Retraining Brigade and other restoration programs in treating PTSD, many thousands of other servicemembers with combat trauma were denied the opportunity to participate in these programs. In the more common set of circumstances, commanders treated "almost all soldiers with emotional and psychiatric symptoms to be behavioral problems." SCURFIELD, *supra* note 356, at 34. The situation seems to be little different today. *See* Card-Mina, *supra* note 715, at 47, 48 ("Across the military, service members returning from deployments may be branded malcontents or malingerers when, in fact, they are afflicted with [Post Traumatic Stress Symptoms] or PTSD."). The major result of reliance on the disciplinary process over the medical one was a group of veterans whose PTSD symptoms made them more likely to engage in criminal behavior. *See, e.g.*, Tolander, *supra* note 665, at 47, 52 (discussing the results of

courts-martial and separation boards of the modern era[718] and highlighting significant societal costs.

In these tried and tested situations, the professional ethic, indeed, translates to military justice, where its practitioners must re-orient themselves to dormant statutory provisions which survive on the books for a reason. As revealed in the foregoing historical study, the military justice rehabilitative ethic embraces an interdisciplinary approach to rehabilitation, adoption of the newest theories and methodologies, and a spirit of cooperation that contemplates indivisible interests between society and the military—especially when an offender is not designated for return to the ranks. The military justice system needs only to promote innovation and creativity to reclaim its past glory in addressing the crippling effects of unseen injury.

Rather than dismissing attempts to achieve meaningful results on the blind assumption that rehabilitation *cannot* be done by the military, *has not* been attempted, or, worse yet, that the military is not a "rehabilitation

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studies in which 73% of veteran patients with PTSD had "been arrested for criminal behavior); SHAY, *supra* note 131, at 26–27 (expanding on such studies and his own clinical experience treating criminally-involved veterans). As persuasively argued by Sociologist William Brown:

> [Exacerbating] the problems confronting young veterans today is the absence of a comprehensive understanding of the impact of war on those who have served in war zones. This lack of understanding seems to exist throughout much of America—even though we have volumes of research and personal accountings in the aftermath of the Vietnam War. This is particularly true in the case of the American criminal justice system. American history seems to be positioning itself for a replication of the imprudent responses to veterans' experiences and needs practiced for at least the past several decades.

Brown, *supra* note 501, at 11.

[718] Aside from the many veterans with PTSD who are ineligible for participation in VTCs due to the earlier award of less than honorable discharges, discussed *supra* note 92, this phenomenon also includes soldiers who now progress through increasingly severe forums—such as the graduation from non-judicial punishment to summary court-martial, to involuntary administrative separation or court-martial—who are prevented all-the-while from obtaining quality mental health treatment by virtue of their misconduct-related status. *See, e.g.*, Cartwright, *supra* note 9, at 309–10 (describing situations in which early treatment and intervention on active duty would have prevented a chain of continuing drug, alcohol, and "minor violent offenses" from culminating in more serious violent offenses like murder).

center,"[719] as commissioned officers, and officers of the court, we should instead acknowledge that many of these innovative problem-solving methods were *originated* in the military long before the civilian world embraced them.[720] Ultimately, it is in the very DNA of the military justice system to innovate solutions to the most complex correctional problems based on the special nature of military service. Through their collective efforts, military commanders, SJAs, defense counsel, military judges, corrections specialists, and civilian agencies, such as the VA and treatment courts, can revive the rehabilitative ideal to the mutual benefit of all.

The ability to remit both a conviction and a discharge are unique to the military, making it a place where a conviction can be "wiped clean" and where there is truly an indeterminate sentence. The special clemency powers of convening authorities allow them—today—to help needy offenders who suffer from contemporary mental illnesses perhaps more than many VTCs and other problem-solving courts can. Many civilian courts lack the ability to remove a conviction and its consequences; further, the ability to expunge records may fall short of full restoration of rights.[721] These limits on the clemency power of civilian courts can make the convening authority's powers of remission even more powerful a tool when a military offender successfully completes the program of treatment. Because these powers have been preserved through the centuries, the active component is well suited to use existing problem-solving courts or to replicate their components in the military environment.[722] Revitalized standards for treatment-based suspended sentences can, over time, contribute to the effective and widespread use of analogous provisions in service regulations that allow for the remission of administrative discharges under less than honorable conditions.[723]

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[719] United States v. Metz, 36 C.M.R. 296, 297 n.1 (C.M.A. 1966).

[720] See, particularly, *supra* Part III.B.3.b.*ii* (discussing Major Freedman's conception of the soldier-patient and the precursor to the veterans treatment court in the1940s).

[721] Clark et al., *supra* note 41, at 195 n.3.

[722] MacCormick & Evjen, *supra* note 227, at 3, 6 (noting the uniqueness of the military justice system in that "civil prisoners sentenced to penal and correctional institutions can never completely clear themselves of the stigma of conviction and imprisonment, even in those comparatively few cases where a full pardon is later granted").

[723] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 1-18*a*(1), at 7 (6 June 2005) (with 27 Apr. 2010 Rapid Action Review) (discussing the allowance for a one-year suspended separation in most instances).

"Success"—if it can be defined in a correctional setting where every offender's experience is necessarily unique—must be linked to realistic expectations. To this end, MAJ Ivan C. Berlien's 1945 proposal for psychologists to employ group psychotherapy at rehabilitation centers—against the prevailing wisdom, which would limit such techniques only to medical settings—is equally as valuable today regarding the treatment court approach: "We must disregard the prejudice and proceed on the basis that 'nothing ventured nothing gained' and with vigor and determination bring this weapon into play in our battle of rehabilitation, especially with the acute and neurotic criminal."[724] He continued, "[o]ur purpose is to determine a method of attack in the struggle for regaining and reintegrating the personality of our offenders in a normal pattern of development." Above all, however,

> We must, as all good soldiers do, cultivate the virtue of patience. The method must not be damned if it does not in the space of a few weeks undo and correct the results of years of maldevelopment. Neither must we expect 100 per cent results. . . . If we successfully treat a good percentage, it will have been successful and worth our efforts.[725]

Rather than group therapy, which contributed to the restoration of tens of thousands to honorable service, the military now has the problem-solving court as its prime weapon in the battle against PTSD and TBI. In this regard, it is helpful to consider the reminiscences of Thomas J. Lunney, a World War I veteran, who served as a Veterans Counselor in Rikers Island Prison following WWII:

> We who work close to the veteran in the environment of prison may be less forgetful that he is essentially the same fellow who, but a few years ago, was applauded and heralded in our grandest manner. He was the grandest star in the most savage drama of all history. But the play has been recast. We find our star playing a walk-on-part in a villainous role to be hissed at. His lead has been taken over by the audience. Let them not forget this bit player because of his new costume. Material to rebuild his citizenship is ever too little to ask for in

[724] Berlien, *supra* note 247, at 255.
[725] *Id*.

> remembrance that without him the new show would be a command performance of storm troupers.[726]

Treatment-based suspended sentences are the means to provide the vital "material" of which Mr. Lunney eloquently speaks.

In the final analysis, the military justice system, like the civilian justice system referenced by Mr. Lunney, must accept its own casting function and the societal consequences of observing PTSD and TBI-afflicted offenders solely through a "just deserts" lens. Through the intelligent exercise of clemency and use of the same types of VTC programs now available to veterans like Sergeant Bradley Davis, active duty soldiers like Staff Sergeant Brent Keedens can take the lead in their own recovery with the ability to obtain future care.[727] Otherwise, they can continue playing the role of the villains—civilian offenders in a caste system that reduces them to little more than societal parasites.[728]

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[726] Thomas J. Lunney, *A Veterans' Counselor Goes to Prison*, PRISON WORLD, Mar.–Apr., 1949, at 14, 28.

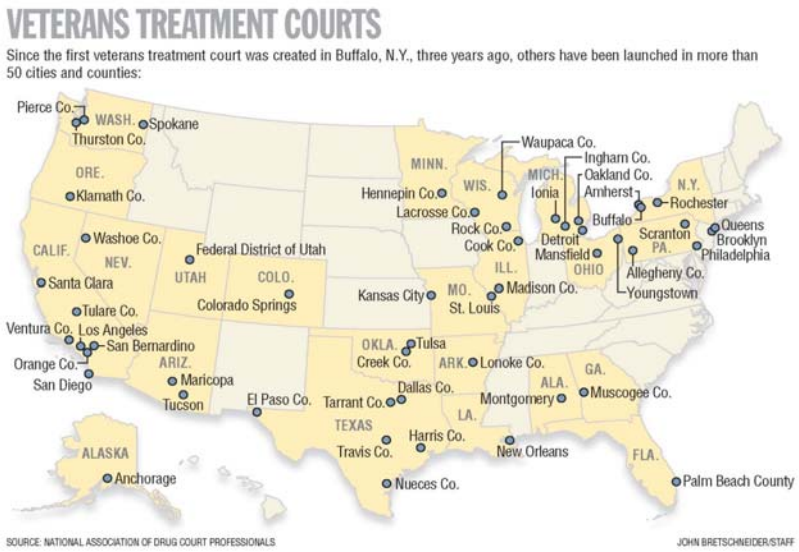
[727] *See supra* Part I (introducing the similarly situated but differently treated offenders, Sergeants Keedens and Davis, at the outset of this article).

[728] *See supra* Part I.C (describing the public safety threats of indifference in the military justice system).

Appendix A

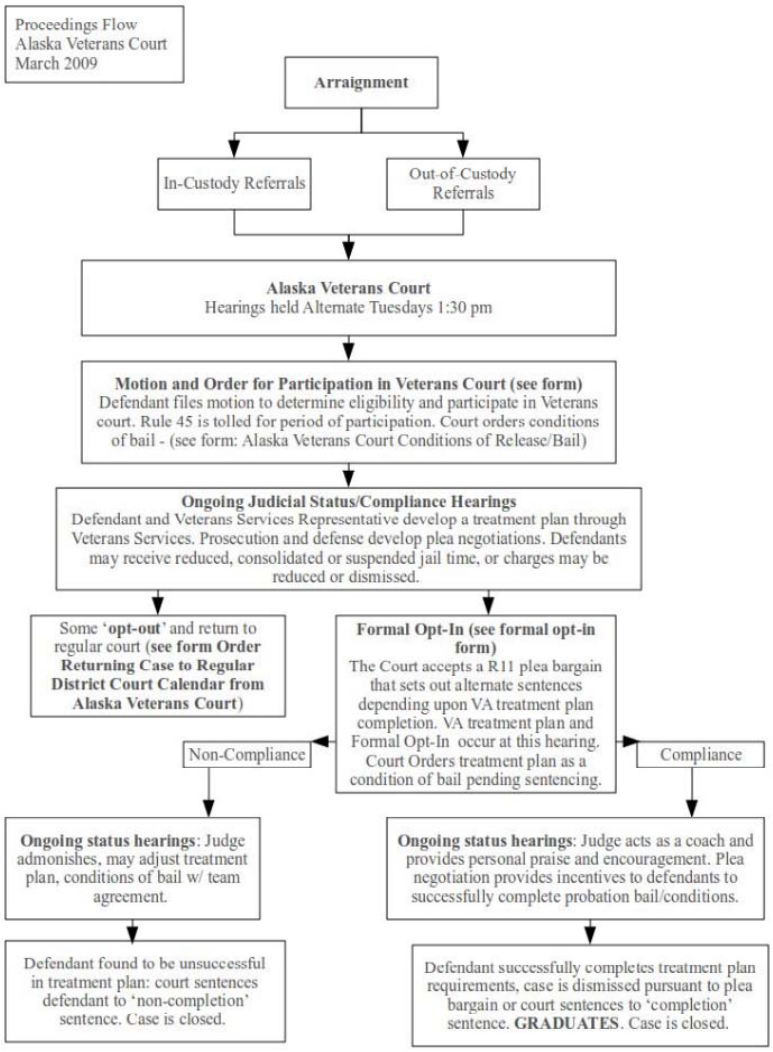
Graphic Dispersion of Veterans Treatment Courts

Note: The graphic immediately below appeared in the February 21, 2011 edition of the *Army Times* and is reproduced with the permission of Gannett Government Media.



Appendix B

Example of Alaska's Veteran's Treatment Court Structure



Reprinted with permission. Hon. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 573 (2010).

Appendix C

Ten Key Components of Veterans Treatment Courts[729]

1. Veterans Treatment Court integrates alcohol, drug treatment, and mental health services with justice system case processing.

2. Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

3. Eligible participants are identified early and promptly placed in the Veterans Treatment Court program.

4. The Veterans Treatment Court provides access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services.

5. Abstinence is monitored by frequent alcohol and other drug testing.

6. A coordinated strategy governs Veterans Treatment Court responses to participants' compliance.

7. Ongoing judicial interaction with each veteran is essential.

8. Monitoring and evaluation measures the achievement of program goals and gauges effectiveness.

9. Continuing interdisciplinary education promotes effective Veterans Treatment Court planning, implementation, and operation.

10. Forging partnerships among the Veterans Treatment Court, the VA, public agencies, and community-based organizations generates local support and enhances Veterans Treatment Courts' effectiveness.

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[729] Russell, *supra* note 118, at 365–67 (also cited in Holbrook, *supra* note 60, at 259. 278–79).

Appendix D

Proposed Modified Sentence Worksheet

United States	)	
	)	
v.	)	
	)	
SPC James D. Jones	)	SENTENCE WORKSHEET
123-45-6789	)	
A Co 1/504 PIR	)	
82d Airborne Division	)	

[NOTE: After the court members have reached their sentence, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The president will not read the language in bold print.]

Specialist James D. Jones, this court-martial sentences you:

NO PUNISHMENT

1. To no punishment.

REPRIMAND

2. To be reprimanded.

REDUCTION

3. To be reduced to the grade of _____.

FINE AND FOREFITURES

4. To pay the United States a fine of $ _____ (and to serve (additional) confinement of ____ [day(s)] [month(s)] [year(s)] if the fine is not paid).

5. To forfeit $ _____ pay per month for ____ month(s).

6. To forfeit all pay and allowances.

RESTRAINT AND HARD LABOR

7. To be restricted for ____ day(s) to the limits of: _____.

8. To perform hard labor with confinement for _____ day(s).

9. To be confined for _____ [day(s)] [month(s)] [year(s)] [life with [without] eligibility for parole].

PUNITIVE DISCHARGE

10. To be discharged from the service with a bad-conduct discharge.

11. To be dishonorably discharged from the service.

12. To be dismissed from the service.

NON-BINDING CLEMENCY RECOMMENDATION

13. To suspend and then [remit the [entire adjudged sentence] [the adjudged punitive discharge] [the adjudged confinement]] [commute the adjudged punitive discharge to an administrative discharge] upon the occurrence of the following future event(s):

Restitution in the amount of _____ paid to _____ no later than _____.

Crime-free conduct for a period of _____.

Successful completion of a treatment program requiring [demonstration of measurable progress according to [psychiatric] [medical] [_____] professionals]] [an intensive treatment program with regularly scheduled appearances and other measures to monitor and encourage compliance]]

[Other: _____.].

Signature of President _____

Appendix E

Model Instruction for Sentence Worksheet

2–7–17A CLEMENCY (INSTRUCTIONS FOR MODEL SENTENCE WORKSHEET CONTEMPLATING TREATMENT)

> *NOTE: Where not indicated in the accompanying notes, the below instructions were merged from* Benchbook *Instructions 2–7–17 and 8–3–34.*

MJ: I now direct your attention to number 13, which addresses the clemency recommendation. It is your independent responsibility to adjudge an appropriate sentence for the offense(s) of which the accused has been convicted. As evident in the Sentence Worksheet, you are limited in the type of punishment you may adjudge. The Convening Authority has separate powers of clemency. The term "clemency" means bestowing mercy or treating an accused with less rigor than (her) (his) crime(s) or conviction deserves.[730] It can include reduction, suspension, or remission of all or part of the legal punishment.[731] You are not authorized to grant clemency to the accused and you are not required to recommend clemency for the accused. However, if any or all of you wish to recommend clemency, it is within your authority to do so after the sentence is announced. You must keep in mind during deliberation that such a recommendation is not binding on the Convening or higher Authority.

Your responsibility is to adjudge a sentence that you believe is fair and just at the time it is imposed and not a sentence that will become fair and just only if the mitigating action recommended in your clemency recommendation is adopted by the convening or higher authority who is in no way obligated to accept your recommendation. The Sentence Worksheet provides you with a format for recommending clemency to the Convening Authority, but you are not limited to it; you can make your own separate recommendation following this court-martial in another form, such as a letter. A recommendation by the court for an administrative discharge or disapproval of a punitive discharge, if based upon the same matters as the sentence, is inconsistent with the sentence to a punitive discharge as a matter of law.

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[730] United States v. Healey, 26 M.J. 394, 395 (C.M.A. 1988); United States v. Lansford, 20 C.M.R. 87, 94 (C.M.A. 1955).
[731] Commander Raymond W. Glasgow, *Clemency*, JAG. J., June 1952, at 7, 7.

The types of clemency listed on the Sentence Worksheet are general suggestions to the Convening Authority. You can expect that, if the Convening Authority adopts your recommendation, (she) (he) may add special conditions beyond the basic ones covered here. You may make the court's recommendation expressly dependent upon different mitigating factors after the trial and before the Convening Authority's action. For example, one type of clemency is a suspended sentence requiring the accused to pay restitution or to remain crime-free and perform military duties for a specific period of time. This can be a term of months, or years, or until the accused has returned from a combat deployment.[732] A suspended sentence furthers the goal of rehabilitation by providing a "second chance" for the accused to "soldier-back" from the offenses with knowledge of the possibility that your adjudged sentence can be reinstituted if (she) (he) does not meet the condition(s).[733]

Aside from the condition of good conduct, restitution, or a change in attitude, you can recommend a suspended sentence with more specific conditions, such as successful participation in and completion of treatment and counseling, as recommended by mental health or medical professionals.[734]

Alternatively, you may recommend a more intensive form of probation that uses sanctions to encourage compliance with treatment plans. Examples of possible sanctions include: being subject to unannounced searches of person and property, random drug testing, imposition of curfews, electronic monitoring, and intermittent confinement. You should not speculate on the specific terms that would be imposed during the suspension, but should recommend a basic form of clemency best suited to the accused's individual needs or circumstances.

The Sentence Worksheet provides you with the option of suggesting how much of the adjudged sentence to suspend, such as the discharge, rank reduction, and confinement, and the duration of the suspension. If you

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[732] United States v. Guernsey, 2008 WL 8087974 (A. Ct. Crim. App., Jan. 22, 2008) (unpublished).

[733] For the notion that "the possibility of . . . rehabilitation is the sole justification for suspension of a punitive discharge," see United States v. Schmit, 13 M.J. 934, 939 (A.F.C.M.R. 1982).

[734] The above wording appeared in the *Miller* Trial Transcript, *supra* note 19, at 79, in which the military judge recommended a suspended punitive discharge for treatment of diagnosed PTSD.

adjudge confinement, a term of suspension can last as long as the confinement period, but should not exceed five years.[735] You should only consider eligibility requirements for specific rehabilitative programs or ideal times to participate in such programs if this information has been presented in court. Otherwise, you should assume that these matters will be determined independent of your recommendation.

If the accused violates a term of the suspension after it is granted, (she) (he) is subject to imposition of your entire adjudged sentence. The Uniform Code of Military Justice provides for a revocation hearing in which an investigating officer will consider the allegation that the accused violated a term of the suspension and the accused will have the opportunity to respond to the allegation with the assistance of a defense attorney. Your services will not be required for any future revocation proceedings, and, aside from knowing that the procedure exists, you should not consider the likelihood of revocation proceedings or other matters related to revocation of a suspended sentence.

If fewer than all members of the court wish to recommend suspension of a portion of or the entire sentence, then the names of those making such a recommendation should be listed at the bottom of the Sentence Worksheet.

Where such a recommendation is made, then the President, after announcing the sentence, may announce the recommendation and the number of members joining in that recommendation. Whether to make any recommendation for suspension of a portion of the sentence, or suspension of the sentence in its entirety, is solely a matter within the discretion of the Court.

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[735] For mental health treatment, the "outermost period of suspension" of a DD is five years. Spriggs v. United States, 40 M.J. 158, 163 (C.M.A. 1994).

Appendix F

Model Instruction for Mental Health Treatment Considerations

2–7–17B CLEMENCY (EVIDENCE REGARDING MENTAL HEALTH TREATMENT)

> *NOTE: Where not indicated in the accompanying notes, the below instructions were merged from* Benchbook *Instruction 6-6.*

You have heard evidence regarding the possibility of future mental health treatment. Only the Court can decide whether the accused has a mental condition or would benefit from mental health treatment. As referenced here, the term "mental condition" means impairment to the accused's ability to reason and make considered decisions;[736] which can include regulating emotions, maintaining self- or social awareness, organizing and remembering information and events, or distinguishing between past and present.[737]

> ***NOTE: Nature of Mental Condition.*** *In an effort to better explain the nature of a mental condition, rather than using labels and concepts lacking definition, Military Judges may highlight behavioral factors that have been linked to "criminality and violence," which include: "Sustaining attention and concentration"; "[u]nderstanding, processing, and communicating information"; "[p]lanning, organizing, and initiating thoughts and behavior"; "[u]nderstanding others' reactions"; "[a]bstracting and reasoning"; "[c]ontrolling impulses/stopping behavior/emotional regulation"; "[i]nhibiting, unsuccessfully, inappropriate or impulsive behaviors"; "[u]sing knowledge to regulate behavior"; "[b]ehavioral flexibility to changing contingencies"; "[m]odulating behavior in light of expected consequences"; "[d]istraction from . . . appropriate behavior"; "[l]acking appreciation of impact of behavior onto others"; and "[m]anipulation*

[736] United States v. Cantu, 12 F.3d 1506, 1513 (9th Cir. 1993).
[737] Atkins, *supra* note 560, at 38.

> *of learned and stored information when making decisions*."[738]
>
> *It can also be helpful to express mental conditions in terms of four areas of functioning: "cognition (how we understand ideas, intellectual capacity); social functioning (how we understand and respond appropriately to our environment, quality of thought and judgment); emotional functioning (mood control: depression, mania, anger); and behavior (impulsivity, substance abuse, etc.).*"[739]

Although witnesses may have used terms such as [Posttraumatic Stress Disorder] [Depression] [Addiction] [Schizophrenia] [Adjustment Disorder] [_____], you are not bound by labels, definitions, diagnostic criteria, or any other conclusions as to what is or is not a mental condition, or whether the accused suffers from one. You are also not bound to any witness's prognosis for the type or extent of treatment necessary to address the accused's mental condition. A mental condition as defined by a mental health professional for clinical purposes, where their concern is treatment, may or may not be the same as the definition of a mental condition for the purpose of determining criminal responsibility.

As reflected in the Sentence Worksheet, you are permitted to recommend successful completion of a treatment program as a future condition upon which to remit the sentence you have adjudged. But, even if such evidence is presented, and even if you believe that the accused suffers from a mental condition, you are not required to make a recommendation concerning treatment. In determining whether to recommend mental health treatment, you may consider the same evidence of a mental condition that you are required to consider for purposes of mitigation in adjudging the accused's sentence.

You may consider the following information about the nature of the accused's mental condition:

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[738] John Matthew Fabian, *Forensic and Neuropsychological Assessment and Death Penalty Litigation*, THE CHAMPION, Apr. 2009, at 24, 27–28.

[739] Stetler, *supra* note 572, at 49, 51. Logan, *supra* note 571 (providing additional guidance for describing behaviors that indicate mental conditions).

1. The accused's mental condition before and after the alleged offense(s), as well as on the date(s) of the offense(s). For example, if the accused experienced a traumatic event and (her) (his) behavior changed after the event, this may help reveal the severity of the condition and the value of treatment.

2. The absence of treatment, or the absence of effective treatment, prior to the offense(s) of which the accused was convicted. If, for example, the accused was not diagnosed with a condition until after the commission of the charged offense(s), this could indicate the decreased likelihood of similar offenses in the future with appropriate treatment. It may also be valuable to consider whether the accused was on medication, the effects of the medication, and whether the accused was compliant with prescriptions.[740]

3. The accused's attempts to rehabilitate (herself) (himself). Here, if the accused attempted to obtain treatment but was stopped in some way, such as by orders of superiors, this may suggest that the accused is motivated to conform (her) (his) conduct to the requirements of the law.

4. The manner in which the accused's mental condition affected (her) (his) subjective "beliefs and state of mind."[741] This can occur in a number of ways, such as where an accused becomes highly paranoid and believes that "everyone is out to get" (her) (him).[742] While this symptom may not have *caused* the offense, it may have been a "contributing factor"[743] in the sense that it explains "how the [offender's] conduct would have been less harmful under the circumstances that the [accused] believed them to be" or how the accused "was more susceptible to being influenced and motivated to undertake the charged activity."[744]

5. Abnormal behavior, including extraordinary or bizarre acts. Such acts might include "self-destructive" acts, such as "fighting, single-car accidents," and other "life-threatening situations"; "sporadic and unpredictable explosions of aggressive behavior"; or "dissociative states

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[740] Richard G. Dudley Jr. & Pamela Blume Leonard, *Getting It Right: Life History Investigations as the Foundation for Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 984, 985 (2008).
[741] Atkins, *supra* note 560, at 38, 40.
[742] LEVIN & FERRIER, *supra* note 63, at 83.
[743] United States v. Perry, 1995 WL 137294, at *8 (D. Neb., Mar. 27, 1995) (unpublished).
[744] Atkins, *supra* note 560, at 38, 40.

. . . during which components of [a past] event are relived and the individual behaves as though experiencing the event at the moment."[745] This behavior may signal the nature of an accused's mental condition and the value of treatment.

6. Use of controlled substances to limit unwanted effects of the mental condition. If an accused has used controlled substances not to "get high" but, instead, in an attempt to be "normal,"[746] such as in an attempt to eliminate problems falling asleep because of recurring nightmares or intrusive thoughts, this may present evidence of the nature of an accused's mental condition and value of treatment.

7. The absence of malingering.

(For suspected Posttraumatic Stress Disorder:

8. The nature, magnitude, and frequency of traumatic event(s) to which the accused was exposed. For example, if the accused suffered from symptoms related to trauma during one deployment, and then experienced additional trauma during a later deployment that aggravated existing symptoms, this may signal the nature of the mental condition and the value of treatment. It may, therefore, be important to consider differences in personality and behavior—who the accused is now—versus who (she) (he) was prior to the trauma; how the accused responded to the trauma when it occurred, and any "family history of psychiatric vulnerability."[747]

> ***NOTE: Identifying the Effect of Trauma.*** *One attempt for determining the event of a mental condition over time includes comparisons between: "(a) the time period preceding the traumatic event; (b) the traumatic event itself; and (c) the time period following the traumatic event in which behavioral changes can be observed."*[748]

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[745] LEVIN & FERRIER, *supra* note 63, at 77, 83.
[746] Atkins, *supra* note 560, at 38, 39–40.
[747] Kathleen Wayland, *The Importance of Recognizing Trauma Through Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 936 (2008).
[748] C. Peter Erlinder, *Vietnam on Trial: Developing a Conceptual Framework and Explaining PTSD in a Forensic Setting*, 42 GUILD PRAC. 65, 73 (1985).

9. "The nature and extent of support [the accused] received following the traumatic experience(s)."[749]

10. As long as the accused was performing duties faithfully and honorably at the time trauma was sustained, you may consider this as a positive factor in recommending treatment.[750] There is no requirement for trauma to have been inflicted by an enemy or during combat operations for the accused to receive the benefit of your clemency consideration. You may consider trauma to be service-connected if it was sustained during a training exercise, as the result of a sexual assault, or any other execution of faithful service to the Government.[751]).

(Additional Information: Within reason, you are free to ask the court for additional information that will help you in your evaluation of mental health treatment programs. For example, you may wish to request a neutral expert witness to pose questions regarding treatment options if you believe that further inquiry is necessary beyond the testimony of a witness for either party to this case.[752] You may further request that the Military Judge defer sentencing for a provisionary period that would allow the accused to demonstrate willingness to participate in and complete treatment prior to sentencing.)

Aside from evidence of any mental condition, you are also free to consider information concerning the nature of a treatment program. This includes:

> 1. The accused's desire and willingness to participate in a treatment program;[753]
>
> 2. The accused's personal understanding of the program's requirements;[754]
>
> 3. Any plans the accused may have developed in order to avail (herself) (himself) of the benefits of treatment;

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[749] *Id.*
[750] Bell v. Cone, 535 U.S. 685, 712 (2002) (Stevens, J., dissenting).
[751] Johnson v. Singletary, 612 So. 2d 575, 578 n.4 (Fla. 1993).
[752] MCM, *supra* note 34, MIL. R. EVID. 614.
[753] United States v. McBride, 50 C.M.R. 126, 132–33 (A.F.C.M.R. 1975).
[754] United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991).

> 4. The ability of a specific type of treatment to address the accused's present symptoms;
>
> 5. Any evidence revealing that the accused has been provisionally accepted to a specific type of program. However, you should not assume that the absence of evidence about a specific program would disqualify the accused from participating in one. You may recommend a treatment program type even if you do not have evidence regarding its eligibility standards or whether the accused currently meets them.
>
> 6. The manner in which confinement would influence the accused's mental condition, to include the nature of treatment available in confinement versus elsewhere.[755]
>
> 7. The potential impact of treatment on the accused's family or significant other(s).

You are not bound by the opinions of either expert or lay witnesses. 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.

You may also consider the testimony of witnesses who observed 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 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 (her) (his) observations and knowledge, the basis for the witnesses' opinions and conclusions, and the time of their observations in relation to the time of the offense 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 nature and

[755] United States v. Flynn, 28 M.J. 218 (C.M.A. 1989).

length of time of the witness's 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.

Appendix G

Model Pretrial Agreement for Mental Health Treatment Programs[756]

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	)))))))))	**OFFER TO PLEAD GUILTY**

I, Specialist James D. Jones, U.S. Army, the accused in the General Court-Martial now pending, having had an opportunity to examine the charges preferred against me and all statements and documents attached thereto, and in exchange for good consideration, and after consulting with my defense counsel, [_____], offer to plead as follows.

To Specification 1 of the Charge: Guilty.

To Specification 2 of the Charge: Guilty.

To The Charge: Guilty.

2. I offer to plead as indicated above, provided that the Convening Authority agrees to the following:

a. To take the action specified in the Quantum; and

[756] This template may omit certain standard pretrial agreement provisions. It can be modified to accommodate post-conviction agreements and should be used only as a starting point.

b. There are no other promises, conditions, or understandings regarding my proposed pleas of guilty that are not contained in this offer and the Quantum portion.

3. I further offer to do the following:

a. I understand that I have a right to be tried by a court consisting of at least five officer members, or by a court consisting of at least one-third enlisted members. None of the members would come from my company. I further understand that I have a right to request trial by military judge alone, and, if approved, there would be no court members and the judge alone would decide whether I am guilty or not guilty. If found guilty, the judge alone would determine my sentence. Knowing all of the above, I agree to be tried by judge alone.

b. Enter into a written stipulation with the trial counsel of the facts and circumstances directly relating to or resulting from the offense and further agree that this stipulation may be used to inform the members of the court or the military judge, if tried by (her) (him) alone, of matters pertinent to an appropriate finding and sentence.

c. I fully understand that if I engage in misconduct after signing this pretrial agreement, I may forfeit the benefits of this agreement. Misconduct means any act or failure to act that violates a punitive article of the Uniform Code of Military Justice (UCMJ) or federal or state criminal law that applies to me at the time and place of the violation. If I engage in misconduct at any time, between when I sign this pretrial agreement and the time that I complete the sentence approved by the Convening Authority, including any period of probation or period in which a sentence component is suspended, the Convening Authority will be able to act on this agreement based on that misconduct. The action the Convening Authority may take on this agreement depends on when the Convening Authority acts, if (she) (he) chooses to act, not on when the misconduct occurs, so long as the misconduct occurs within the timeframe governed by this provision. There are three periods of time during which the Convening Authority may act on this agreement based on my misconduct: (1) from the time the Convening Authority and I sign this pretrial agreement until the time the military judge accepts my plea(s); (2) from the time the military judge accepts my plea(s) until the Convening Authority takes (her) (his) R.C.M. 1107 action; and (3) from the time the Convening Authority takes (her) (his) R.C.M. 1107 action until I have completed serving my entire sentence (including any period

of suspension or probation, if applicable) as finally approved and executed;

d. I understand that if, based on my misconduct, the Convening Authority acts on this agreement after (she) (he) and I sign this pretrial agreement but before the military judge accepts my plea(s), the Convening Authority may use such misconduct as grounds to unilaterally withdraw from this plea agreement. Should the Convening Authority do so, I understand that the pretrial agreement would thereby become null and void, and both I and the Convening Authority would be relieved of all obligations and responsibilities that either of us would have been required to meet by the terms of this pretrial agreement;

e. I further understand that, if based on my misconduct, the Convening Authority acts on this agreement after the time the military judge accepts my plea(s) but before the Convening Authority takes (her) (his) R.C.M. 1107 action, such misconduct may be the basis for setting aside the sentencing provisions of the pretrial agreement. Before setting aside the sentencing provisions of this agreement, however, the Convening Authority shall afford me a hearing, substantially similar to the hearing required by Article 72, UCMJ, and the procedures based on the level of adjudged punishment set forth in R.C.M. 1109(d), (e), (f), or (g), to determine whether misconduct occurred and whether I committed the misconduct; and

f. I further understand that if, based on my misconduct, the Convening Authority acts on this agreement after the time the Convening Authority takes (her) (his) R.C.M. 1107 action, but before I have completed serving the entire sentence (including any period of suspension or probation, if applicable) as finally approved and executed, the Convening Authority may, after compliance with the hearing procedures set forth in R.C.M. 1109, vacate any periods of suspension agreed upon in this pretrial agreement or as otherwise approved by the Convening Authority.[757]

[757] *See* United States v. Coker, 67 M.J. 571, 576–77 (C.G. Ct. Crim. App. 2008) (requiring a description of the process under which vacation proceedings will occur).

Treatment Court Participation and Completion

g. As further consideration of this agreement, I agree to voluntarily enroll into the [_____] County Veterans Treatment Court (VTC), located at [_____]. I agree to undergo all testing and evaluation required for my initial entry into and continued participation in the VTC program. If it is determined that I meet criteria established by the court to pay for treatment, which may include participation in a residential facility, I shall bear the cost for payment of this evaluation and treatment through a monetary allotment administered by the Defense Finance and Accounting Office, and present proof of that allotment to the Convening Authority's Staff Judge Advocate. I will participate in the program until I have obtained a certificate of graduation, or until I have been terminated, whichever comes sooner, understanding that the program will not exceed twenty-four (24) months.[758] Graduation must be certified by the VTC Judge and I will provide a duly certified report of completion to the Convening Authority's Staff Judge Advocate.

Program Description for Veterans Treatment Court

h. I understand that the VTC is a special intensive treatment program for criminal offenders who have served in the military. It is a voluntary program that requires all participants to have regular court appearances, scheduled and random drug tests, individual and group counseling sessions, active participation in residential, transitional, sober-living environments, or an outpatient program, and regular attendance at meetings.

[758] *See* Spriggs v. United States, 40 M.J. 158, 163 (C.M.A. 1994) (requiring a clear understanding of treatment program duration).

Rules and Obligations[759]

i. I further understand that, as a participant in the VTC, I will be subject to the following rules:[760] refrain from violating state and local laws, in addition to the UCMJ, which include traffic offenses and driving without a valid license; attend all VTC-required court appearances and other appointments, such as intake, office visits, home visits, and phone calls; be on time for scheduled appointments; reschedule any missed appointments; refrain from violence or threats toward other participants, staff, or court personnel; refrain from possessing drugs, alcohol, or weapons or bringing these items to court or other treatment facilities; refrain from tampering with my own or anyone else's urine or drug-testing devices; do not argue with the Judge or other team members; dress appropriately for scheduled appointments and do not wear clothing bearing drug or alcohol-related themes or advertising alcohol or drug use; be respectful by following directions of team members, court personnel, and deputies regarding behavior, cell phones, and talking while in court. I agree to abide by these rules.

j. I understand that I will also be subject to the following obligations:[761] making weekly or bi-weekly "court" appearances as determined by the VTC Judge; unannounced searches of my property or person; being present for home visits and phone calls; at least one group therapy session per week; drug testing at least three times per week (drug test patch and immediate-result drug tests may be used at the treatment team's discretion, if appropriate); taking medications as directed by medical and/or mental health professionals; attending at least five self-help meetings per week (if applicable); reporting to a social worker and probation officer at least once per week; completing additional case management services as determined by the treatment team (detoxification, employment search, psychiatric and/or psychological evaluation); making consistent financial payments to probation, and other agencies as determined by the treatment team; curfew as indicated by the treatment team or facility; searching for and obtaining

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[759] These basic rules and obligations, which are applicable in almost all VTCs are provided as an adaptable template to meet the requirements articulated in *Coker*, 67 M.J. at 576.

[760] These rules are modeled off of THE TULSA CNTY. DIST. COURT VETERANS TREATMENT COURT PROGRAM PARTICIPANT HANDBOOK (Dec. 10, 2009) (on file with the Nat'l Ass'n of Drug Court Prof'ls, Justice for Vets, Alexandria, Va.).

[761] These obligations are modeled off of the *Orange County Veterans Court Participant's Handbook*. SUPERIOR COURT OF CAL., *supra* note 606.

employment, developing a treatment plan, participating in educational programs, which includes parenting classes; undergoing detoxification; and, participating in residential programs. Aside from reporting to a probation officer associated with the VTC, I may also be required to meet with a military probation officer. I agree to comply with these obligations.

k. I understand that I may not advance in the program, or I may be terminated from it, if I have positive drug tests (including missed or tampered tests); unexcused absences from scheduled services; if I miss taking medications or fail to take medications as directed; if I fail to acknowledge the extent of any substance abuse problem and fail to commit to living an alcohol- and drug-free lifestyle; if I fail to submit required reports or plans; if I fail to participate in community service; if I fail to become a mentor to a new VTC participant as approved by my treatment team; or if I fail to maintain full-time employment or make progress toward it or an educational goal.

Sanctions

l. I understand that the treatment team may impose any of the following sanctions on me: Admonishment from the court; increased drug testing; writing an essay, which must be read aloud, as instructed; increased participation in self-help meetings; increased participation in individual and/or group counseling sessions; increased frequency of VTC appearances; community service hours in addition to those required by the program; demotion to an earlier program phase; commitment to community residential treatment; incarceration; finding of a formal probation violation; termination from the program.[762]

[762] Even though a VTC treatment team might change the requirements for effective treatment over time, this would not invalidate the plea agreement. For example, a military appellate court upheld pretrial agreement terms that required the accused to pay child support, even if the state court modified the terms of that obligation. 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 12-25.19(b), at 12–18 (3d ed. 2006) (discussing United States v. Smith, No. 83 4182 (N.M.C.M.R., Feb. 16, 1984)).

Intermittent Confinement

m. I fully understand that, if permitted to participate in a VTC, I agree to serve a term of up to sixty (60) days intermittent confinement in a confinement facility chosen by the VTC Judge. This intermittent confinement may be imposed on me as a sanction related to my treatment plan based on the determination of my treatment team. It may be imposed on me in increments of up to ten (10) days. Intermittent confinement does not constitute pretrial confinement under R.C.M. 305. While a violation of the UCMJ or other misconduct, as defined in this agreement, may be a basis for vacating suspension of a suspended sentence, intermittent confinement, alone, is not a basis for vacating any suspension. In the event that my adjudged confinement is reinstated, I will be credited with any intermitted confinement served during VTC participation.

Relationship Between Veterans Treatment Court Rules and Conditions of Suspension[763]

n. I understand that violation of the VTC rules and obligations will normally be addressed by the treatment team assigned to my case, and could lead to termination from the VTC program. If violations of the VTC rules and obligations constitute misconduct, as defined in this agreement, or if I am terminated from the VTC for any reason, this conduct may serve as the basis for the convening authority to withdraw from this agreement, rendering it null and void, or may serve as the basis for the Convening Authority to vacate any or all previously suspended portions of my sentence, causing me to have to serve the previously suspended sentence.

Requirement to Extend Enlistment Beyond ETS to Permit Treatment Court Participation

o. I understand that I am expected to participate in the VTC program, continuously, for a period of [_____] months. The current Expiration of

[763] This provision exists to address concerns related in *United States v. Cockrell*, 60 M.J. 501, 506 (C.G. Ct. Crim. App. 2004) (requiring an understanding of what constitutes a material term in the plea agreement when various other conditions may represent violations of treatment program rules); United States v. Martin, 2006 CCA LEXIS 330, at *4 (C.G. Ct. Crim. App., Dec. 6, 2006) (unpublished) (requiring an understanding of the interaction between provisions).

my Term of Service (ETS) occurs on [_____], which is a date that will not currently afford me the full benefit of treatment. Under the terms of this agreement, I am aware that I am required to extend my enlistment so that I can benefit from the VTC program and the Convening Authority can determine the disposition of my sentence. I also understand that by extending my enlistment, I will be subject to the sentence adjudged by the Court-Martial if I have been found in violation of the terms of this agreement, even though my current ETS will be expired and I will have a new ETS date.

p. I am initially required to request an extension of my enlistment [_____] months prior to my ETS. I will submit my request no later than [_____], which is one month prior to the suspense date. If I fail to meet this suspense, I may be found in violation of a material term of this agreement. Furthermore, after an initial extension, I am required to request further extensions of my enlistment every [____] days. To ensure that I am compliant with these rules, I will submit each of my periodic requests [__] days before the deadline. If I fail to timely submit any of these required requests, this is also grounds for vacation of any suspension.[764]

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[764] This paragraph should be drafted in accordance with Service regulations that govern extensions of enlistment. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM ¶ 4-8.*a*, at 20 (31 Jan. 2006) (providing for extensions of ETS dates not longer than 23 months); *id*. ¶ 4-8.*i* & *l*(6) (permitting extensions for soldiers in substance abuse programs as well as those who are "pending [military] legal action . . . until final outcome of action"). Noting how, "[e]ven though a Marine does not have sufficient time remaining on an enlistment to serve [a] period of suspension," the Marine Corps permits extensions of expiration of terms of service for the purpose of restoration to duty, "provided the Marine consents in writing to an extension of enlistment for the required suspension period" in the following manner:

> With full knowledge that the unexecuted portion of my sentence may be suspended for the purpose of allowing me to serve on active duty during the period of suspension, I hereby agree to be retained on active duty for the period of suspension, such period not to exceed 1 year. I further understand that the suspension may be vacated in accordance with R.C.M. 1109 . . . in which event the unexecuted portion of my sentence shall be executed.

U.S. MARINE CORPS, ORDER P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (LEGADMINMAN) ¶ 1008(1)–(2) (31 Aug. 1999) (citing from the paragraph titled "Agreement to Extend Enlistment for the Purpose of Serving a Period of Suspension").

q. I understand that my conviction may be disapproved at the Convening Authority's discretion.[765] The Convening Authority will have the option of separating me with an administrative discharge upon disapproval of the findings or remission of my sentence, or (she) (he) may offer me the opportunity to continue active service if I am deemed of further benefit to the military. However, I will not be required to serve the remainder of any remaining time on an existing ETS date, including an ETS extenstion that was provided to enable my completion of a VTC program, unless the Convening Authority offers me this opportunity and I affirmatively elect to continue service. I further understand that successful completion of the terms of this agreement does not guarantee me the opportunity to continue my military service.

r. To the extent, if any, the Secretary of the Army has, through the provisions of AR 635-200, provided me a right to a hearing before an administrative discharge board, I agree to waive my right to a hearing before an administrative discharge board, doing so with full understanding of the consequences of waiving such a board, as explained by defense counsel. I understand that any administrative discharge will be characterized in accordance with Service regulations, and may be general under honorable or under other than honorable conditions. I will submit a written waiver to the Convening Authority, upon request.[766]

s. I agree to make restitution in the amount of $ [_____], to the economic victim of my misconduct, [Name of Victim], on the date of trial and the remaining balance $ [_____] by [date]. I expressly represent that I will have the economic means to make full restitution by [date]. Through my defense counsel, I will provide the trial counsel with a cashier's check or money order made payable to [Name of Victim]. I fully understand that failure on my part to meet this obligation may serve as the basis for the Convening Authority to withdraw from this

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[765] If it is contemplated that the convening authority would disapprove the findings of the court-martial following proof of the accused's successful rehabilitation in a treatment court, counsel should explore an agreement term which permits the convening authority to hold the action in abeyance to enable such evaluation since the convening authority only has one opportunity to disapprove the findings.

[766] For guidance concerning this provision, see, e.g., United States v. Tate, 64 M.J. 269, 271 (C.A.A.F. 2007) ("[A]s part of a pretrial agreement an accused may agree to waive an administrative discharge board hearing, as provided in applicable administrative regulations."); United States v. Gansemer, 38 M.J. 340, 340 (C.M.A. 1993) (upholding a pretrial agreement that contemplated processing for administrative discharge and waiver of a board "even if part or all of the sentence, including a punitive discharge, is suspended or disapproved pursuant to the agreement").

agreement, rendering it null and void, or may serve as the basis for the Convening Authority to vacate any or all previously suspended portions of my sentence, causing me to have to serve the previously suspended sentence.[767] I further understand that the duty to pay restitution, as outlined in this agreement, exists independently of, and regardless of, the Convening Authority's approval or disapproval of any deferments or waivers of forfeitures, and independently of, and regardless of, the Convening Authority's approval or disapproval of any fines.

4. In offering the above agreement, I state that:

a. I am satisfied with the defense counsel who has been detailed to defend me, and I believe that (her) (his) advice is in my best interest.

b. This offer to plead guilty originated with me and no persons have made any attempt to force or coerce me into making this offer to plead guilty.

c. My defense counsel has advised me of the meaning and effect of my guilty plea and I understand the meaning and effect thereof. I understand that by pleading guilty I am giving up three important rights: the right against self incrimination (the right to say nothing at all); the right to a trial of the facts by the court (the right to have the court decide whether or not I am guilty based upon evidence the prosecution would present and any evidence I may present); and the right to be confronted by and to cross-examine any witness called against me.

d. I understand that I may request withdrawal of this plea at any time before sentence is announced and that the military judge may, as a matter of discretion, permit me to do so.

e. I request that the Convening Authority defer all adjudged confinement prior to action.

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[767] *See* United States v. Olson, 25 M.J. 293, 297 n.5 (C.M.A. 1987) ("If the pretrial agreement calls for restitution, the judge should determine what is the amount which the accused must pay or how that amount is to be ascertained.").

5. I further understand that this agreement may be cancelled upon the happening of any of the following events.

a. Failure to agree with the trial counsel on the contents of the stipulation of fact;

b. The withdrawal by either party from the agreement prior to trial;

c. The changing of my plea by anyone during the trial from guilty to not guilty; or,

d. The refusal of the military judge to accept my plea of guilty.

_____	_____
Defense Counsel	JAMES D. JONES SPC, USA Accused

The foregoing Offer to Plead Guilty is (accepted) (not accepted).

_____	_____
(Date)	Major General Commanding

United States **v.** SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	)))))))))	**QUANTUM**

In consideration for the promises made by the accused, Specialist James D. Jones, in his Offer to Plead Guilty, the Convening Authority agrees to do the following:

a. The request for deferment of all confinement is granted. The period of deferment will run from the date the confinement is adjudged until the date the Convening Authority acts on the sentence.

b. The execution of all confinement and punitive discharge will be suspended. The period of suspension will end in twenty-four (24) months from the date of the sentence, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

c. Forfeitures or fines may be approved as adjudged. Automatic forfeitures may be implemented in accordance with applicable law.

d. Any other lawful punishments may be approved as adjudged.

_____ _____

Defense Counsel JAMES D. JONES
SPC, USA
Accused

The foregoing is (accepted) (not accepted).

_____ _____

(Date) Major General
Commanding

IN PURSUIT OF JUSTICE, A LIFE OF LAW AND PUBLIC SERVICE: UNITED STATES DISTRICT COURT JUDGE AND BRIGADIER GENERAL (RETIRED) WAYNE E. ALLEY (U.S. ARMY, 1952–1954, 1959–1981)

COLONEL GEORGE R. SMAWLEY[1]

The Judges are probably the best known of all our public men. . . He is constantly brought into direct personal relations, not only with members of a large and active profession, but with men in all ranks of life, and on every sort of subject . . . The strongest impression that they leave in one's mind is the simplicity and unaffectedness of the Judge who, while displaying sometimes a keen sense of humour far reaching in its effects, have not allowed it to interfere in the least with the dignified and most powerful expression they have so often given to the public mind.[2]

—J. W. Norton-Kyshe

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[1] Judge Advocate, U.S. Army. Presently assigned as the Staff Judge Advocate, 25th Infantry Division & U.S. Division–Center (USD–C), Camp Liberty, Iraq. The U.S. Army Command & General Staff College, Fort Leavenworth, Kansas, 2004; LL.M., 2001, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; J.D., 1991, The Beasley School of Law, Temple University; B.A., 1988, Dickinson College. Previous assignments include: Staff Judge Advocate, Multi-National Division–North (MND–N) and Task Force Lightning, Iraq, 2009; Assistant Executive Officer, Office of The Judge Advocate General (OTJAG), Pentagon, 2007–2009; Deputy Staff Judge Advocate, 10th Mountain Division (Light Infantry) & Fort Drum, Fort Drum, New York, 2004–2007; Deputy Staff Judge Advocate, Combined Joint Task Force–76, Afghanistan, 2006; Plans Officer, Personnel, Plans & Training Office, OTJAG, Washington, D.C., 2001–2003; Legal Advisor, Chief, Administrative & Civil Law, Chief, International Law, U.S. Army Special Operations Command, Fort Bragg, North Carolina, 1998–2000; Senior Trial Counsel, Special Assistant U.S. Attorney (Felony Prosecutor), Chief, Claims Division, Fort Benning, Georgia, 1995–1998; Trial Counsel, Special Assistant U.S. Attorney (Magistrate Court Prosecutor), Operational Law Attorney, Chief, Claims Branch, 6th Infantry Division (Light), Fort Wainwright, Alaska, 1992–1995. Member of the bars of Pennsylvania, the U.S. District Court–Northern District of New York, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court.

[2] JAMES WILLIAM NORTON-KYSHE, ED., THE DICTIONARY OF LEGAL QUOTATIONS OR SELECTED DICTA OF ENGLISH CHANCELLORS AND CHIEF JUSTICES FROM THE EARLIEST PERIODS TO THE PRESENT TIME intro. (Lincolns Inn-London, 1904?), *available at* http://books.google.com/books?id=ILJJg6z3H-IC&pg=PR5&lpg=PR5dq=J.W+Norton-Kyshe+dictionary+of+legal&source=bl&ots=IbrH8TNexx&sig=0-4flupwFDnqSSdlnf_DTkpJKjQ&hl=en&sa=X&oi=book_result&resnum=9&ct=result#PPR3,M1 (last visited Dec. 8, 2011).

A Daniel come to judgment! yea, a Daniel!
O wise young judge, how I do honour thee![3]

—William Shakespeare, *The Merchant of Venice*

I. Introduction

Military judges, like all judges who serve as key arbiters of fact and law, are a central and often under-reported component in the administration of justice for the U.S. Armed Forces.[4] From the inception of the Republic, these men and women have played a crucial role across the spectrum of military criminal courts, including the notable trials of Major John Andre for spying during the American Revolution (1780), Confederate Captain Henry Wirz for the Andersonville War Crimes (1865), the insubordination case against General William "Billy" Mitchell (1925), and the My Lai massacre case against Lieutenant William Calley (1969). The role of military judges in more recent conflicts and combat zones in Iraq and Afghanistan continues this distinctive service.

Particularly notable in the *Calley*[5] case is the author of the opinion by the U.S. Army Court of Criminal Appeals (ACCA)[6]—Brigadier General (BG) (Retired) Wayne E. Alley, one of the Army's most distinguished jurists. What makes BG Alley more than a mere footnote in a case from one of the darker chapters in recent American military history is his truly remarkable life and career commitment to the legal profession—as an Army judge advocate, the Dean of the Oklahoma University College of Law, and as a federal judge in the U.S. District Court for the Western

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[3] WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 4, sc. 1, ll. 223–24. This is a likely allusion to the biblical character Daniel who was attributed with fine powers of judgment. In *Daniel* 5:14 (New International Version), we find: "I have heard that the spirit of the gods is in you and that you have insight, intelligence and outstanding wisdom."

[4] *See generally* Uniform Code of Military Justice (UCMJ) Article 26, detailing the qualifications and requirements for service as a military judge. UCMJ art. 26 (2008).

[5] United States v. William F. Calley, 46 C.M.R. 1131 (1973) *affirmed*, 48 C.M.R. 19 (1973).

[6] In 1968 the U.S. Army criminal appellate court was renamed the U.S. Army Court of Military Review (ACMR). *See* Military Justice Act of 1968, Pub. L. No. 90-632, § 2(27), 82 Stat. 1335. The name of the court was changed again in 1994 to the Army Court of Criminal Appeals (ACCA), pursuant to the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-342, § 924, 110 Stat. 2663, 2871 (1994). This article refers to the respective court's current nomenclature.

District of Oklahoma. BG Alley is one of only two career Army judge advocate officers to later serve as a federal judge.[7]

Brigadier General Alley's profound engagement and personal commitment to the exercise of military justice and the Army judiciary throughout a highly successful twenty-four year military career is particularly notable for the fact that he abjured the conventional wisdom of what a judge advocate career should look like. As a trial judge in Vietnam, appellate judge on the Army Court of Military Review, Chief of the Criminal Law Division - Office of the Army Judge Advocate General, and Chief Trial Judge for the U.S. Army, BG Alley maintained a rare and steadfast commitment to military justice and the Army judiciary.

This is a distinctive departure from the common bias toward career enhancing leadership positions such as legal counsel to high-profile organizations, the staff judge advocate (senior legal counsel) for combat divisions and corps, large installations or task forces, or serving as counsel to the Army or Defense Department staff. Since BG Alley's retirement in 1981, there has been no Army judge advocate general officer with as substantive a career history of service on the trial and appellate courts.[8]

In peace and in war, as a soldier and a civilian, as a legal academic and practitioner, Wayne Alley dedicated his marked professional energies to the honest and fair application of law and the tireless pursuit of justice.

By any measure, BG Alley is among the best of his generation for the example he set as a military officer and lawyer who continuously sought excellence in the application of the law within the Army, and the extraordinary standard he established for others to follow. This article is a summary and analysis of key oral histories and interviews, and

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[7] *See* FED. JUDICIAL CTR., THE BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, *available at* http:www.fjc.gov (last visited Dec. 19, 2011). Brigadier General (BG) Emory M. Sneeden, U.S. Army (1927–1987), served as the Army's Chief Appellate Judge before his retirement from active duty in 1975, and was later appointed by President Reagan to serve on the U.S. Court of Appeals for the Fourth Circuit from 1984–1986.

[8] E-mail from Colonel Frederic Borch (Retired), Regimental Historian & Archivist for the U.S. Army Judge Advocate Gen.'s Corps, The Judge Advocate Gen.'s Legal Ctr. & Sch., to Lieutenant Colonel George R. Smawley (2 Dec. 2009) (on file with author); U.S. Army General Officer Management Office (GOMO), *available at* https://www.gomo.army.mil/ext/portal/MainHome.aspx (last visited 3 January 2012).

endeavors to give voice to the narrative of BG Alley's life and career, detailing one man's remarkable life in the context of mid-twentieth century developments in military law and history.

II. Early Background and Education—Prologue for a Life of Learning[9]

A contented mind is a continual feast.[10]

—Thomas Hardy, *Jude the Obscure*

In his 2001 book, *Leadership: The Warrior's Art*, Colonel Christopher Kolenda observed that:

> The education of a leader must move beyond personal experience and draw on the boundless experience and insights of others. These opportunities for education lie in the pages of history, philosophy, theory, and the reflections of past and contemporary leaders. Personal experience, therefore, must be augmented by the records of others and synthesized by the insights of history. . . Such an approach broadens one's mind and richness of one's perspective, and leads ultimately to a much greater understanding of leadership.[11]

Kolenda's high regard for history and the "reflections of past and contemporary leaders" echoes the military's legendary emphasis on the

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[9] Captain John M. Fitzpatrick & Captain Robert Butler, An Oral History of Brigadier General Wayne E. Alley, U.S. Army (Ret.) 1 (Feb. 1986) [hereinafter Oral History 1st & 2d Session] (based on the two sets of independently enumerated interviews taken at Cambridge, Massachusetts, and Oklahoma City, Oklahoma, respectively] (unpublished manuscript, on file with The Judge Advocate Gen.'s Legal Ctr. & Sch. (TJAGLCS) Library, U.S. Army, Charlottesville, Va.). The manuscript was prepared as part of the Oral History Program of the Legal Research and Communications Department at TJAGLCS. The oral history of BG Alley is one of nearly four dozen personal histories on file with the TJAGLCS Library. They are available for viewing through coordination with the School Librarian, Mr. Daniel Lavering. *See also* Karen Kalnins, Oklahoma City University Law Library's Oral History Project, Interview Transcript for Judge Wayne Alley, in Norman, Okla. (Nov. 18, 2008) [hereinafter OCU Interview] (unpublished manuscript, on file with author).

[10] HARDY, THOMAS, JUDE THE OBSCURE 388 (Penguin Books Ltd., 1981).

[11] CHRISTOPHER D. KOLENDA, CHRISTOPHER D., LEADERSHIP: THE WARRIOR'S ART, at xvi (Army War College Foundation Press, 2001).

study of the past as prelude for the future. In the biographical study of individual leaders, those initial reflections rightfully start at the beginning and provide context for the personal motivations and seminal events that move people in one direction or another. In the case of BG Alley, that beginning starts in Portland, Oregon, amidst the depression of the 1930s. As Alley himself later remarked, "everything that happened then shaped my life."[12]

His father, Leonard D. Alley, was a school teacher who attended law school at night, and later opened a solo practice during a period of tremendous economic insecurity. Alley remembers "very, very straitened times" in which he "never experienced any real deprivation as a kid, but [recognized] pretty thin times all through the depression years."[13] The affluence he recalls from radio and advertisements were in direct contravention to the conditions of people he knew, and he credits the limitations of his family's situation as the genesis for a life-long desire to move beyond, to explore, and to travel:[14]

> I think that the limitations that I had as a kid affected my interests and career in later life. That is one reason I wanted to do something that would permit travel and kind of engage in some of the fantasies that I had as a kid fantasies I probably would not have had held if my family had been able to do some things, even on a limited scale.[15]

Among his earliest memories was the emphasis his parents placed on the value and virtue of reading, and of learning about the world at large, particularly the events surrounding World War II. He recalls, "[W]e had a world map in our house and followed the campaigns with pins, and looking back it was really an extraordinary geography lesson."[16] His love of learning led to many academic achievements, including the opportunity to skip 8th grade and advance directly to high school in recognition of demonstrated potential for higher learning, which he

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[12] Oral History (1st Session), *supra* note 9, at 1.
[13] *Id*. at 2.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 4; Interview with the Hon. Wayne E. Alley (BG, U.S. Army (Ret.)), in Norman, Okla. (6 May 2009) [hereinafter Alley Interview] (notes on file with author).

"thought was wonderful because at that time elementary school was a real bore."[17]

So he entered high school at age twelve, and graduated before he was eligible for a driver's license. Along the way he served as the student body president of Washington High School, ran track, pursued music as the drum major of the band and played in the all-city orchestra as a timpanist.[18] Even at such an early age, it was clear that Alley had a unique intensity that set him apart from his peers. His father facilitated this through a passive but persistent emphasis on accomplishment, and for the young Alley to "do your best in everything: succeed–push–advance."[19] His mother, Hilda, an "intense and introspective" woman, sensed the stress:

> [She] detected, I think, that I was living with a great deal of strain—and I was. I couldn't tell at the time, but it didn't take too many years after high school to say—Christ, what should have been such a carefree and pleasant life was one of as hard work as any I've done since. So her . . . general approach to me was—slow down, de-intensify, smell the roses, don't push yourself and so forth. . . .[S]he was not down-playing good results and achievements. . . [only] that you probably would have the same results and the same achievements with less emotional investment if you just cooled it.[20]

The seriousness with which Alley applied himself found respite in his relationship with family, particularly his paternal grandmother. His grandparents owned and operated several small cottages along the Oregon coast where Alley and his brother spent many summers working to maintain the properties and otherwise assist. He recalls that his grandfather was "a scholar . . . who could read Latin and Greek" but retired at age 40, and "rose lounging around to an absolute art form."[21]

Accordingly, the family was supported by his grandmother who was the principal manager of the cottages in addition to her work as a

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[17] *Id*. at 6.
[18] *Id*. at 12–13.
[19] *Id*. at 13.
[20] *Id*. at 13–14.
[21] *Id*. at 16.

practical nurse and charwoman. Alley was exceptionally close to his grandmother: "She was as indulgent as my parents were strict . . . it was just a vacation from reality to go down there every summer."[22] They had a relationship that was in some ways was closer than the one he had with his parents, because of the indulgences she afforded him and the rare balance she brought to his life.[23]

In between the summers on the Oregon coast, Alley's sustained commitment and excellence in academics was readily acknowledged by all. During his junior year in high school, he was actively recruited by the distinguished Phillips Academy boarding school in Andover, Massachusetts.[24] The school offered him a full scholarship, including transportation from Oregon, educational expenses, and room and board.[25] Alley was excited for the opportunity; his parents, however, were not. He recalls:

> I was thrilled to death and ready to go and hot to trot and so forth, and [then] my parents intervened and after bitter, bitter quarrels and disputes [they] just vetoed it on the grounds that I was 14 . . . and that I was too young to go away and if I went to Andover I'd probably go to Harvard and I would be in the East and they'd never see me again.[26]

A. Stanford University

By the time he was considering colleges, Alley figured he would likely end up at a local Oregon school until a teacher—Mrs. Luella Metcalf—encouraged him to think about school further from home.[27] He remembers that she told him that "Stanford [University] was at that time like Andover . . . and was really trying to reach out and broaden its student body from the wealthy Californians to bring in more people from more places, and that [Alley] could probably receive a scholarship."[28]

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[22] *Id*. at 17.
[23] *Id*. at 17–18.
[24] *See generally* http://www.andover.edu/Pages/default.aspx (last visited Feb. 18, 2009).
[25] Oral History (1st Session), *supra* note 9, at 19.
[26] *Id*. at 20.
[27] *Id*. at 21.
[28] *Id*.

She even helped him fill out the application. He was subsequently accepted and received a full academic scholarship.[29]

Alley was thrilled; but again, his parents opposed him leaving Oregon in consideration of Stanford University's distance from their home in Portland. But this time, Mrs. Metcalf went out of her way to personally advocate to his parents for the opportunity posed by the school, and after much machination the opposition to Stanford ceased; the decision was made.[30] Alley notes:

> That was really a major turning point and there is no way I can overemphasize or even begin to describe the actual education experience at Stanford or the mileage that I got out of that Stanford degree. It was an excellent university. . . .[31]

Alley graduated number two in his high school class in May 1948, at age sixteen, and entered Stanford the following fall. The difference between schools and academic culture could not have been more striking. Alley remembers that in high school—despite his obvious accomplishments—success was not valued in the same way it would later be in college:

> I didn't study hard in high school because of other activities and was almost apologetic for it. A good student in my school was not an admired person and probably was even kind of suspect. . . . Well, at Stanford . . . It was like coming out of the closet . . . I could be as good a student as I wanted without embarrassment. . . ."[32]

Undergraduate school was a tremendous experience for Alley. Academics, certainly, played a pivotal role and were center stage in his focus and energies, but they were not alone. In his second year he pledged the Sigma Chi Fraternity, where he served as a hasher in the Fraternity dining room to supplement his income. Alley proudly covered nearly all his collegiate expenses without assistance from his parents

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[29] *Id*.
[30] *Id*. at 22.
[31] *Id*. at 23.
[32] *Id*. at 23–24. Alley recalls: "It was so much more sophisticated and engaging and demanding and interesting and fascinating than anything I'd done in high school that my first year there—even though I had fun—was caught up in the course work." *Id.*

through his part-time work and savings from a summer job at a dog racing track.[33]

Stanford is also where he was first introduced to the military via the Reserve Officer Training Corps (ROTC) program. His father, who "was too young for World War I, and just too old for World War II," had contemporaries who had served in the military. Their experiences confirmed in Leonard Alley's mind that if his sons were to be drafted then they would be drafted as officers.[34]

So Alley entered ROTC in the fall of 1948 with fifty-five others, frustrated by what he initially considered a "waste of time," and watched as the class increased to over 800 students eighteen months later with the advent of the Korean War in June 1950.[35] Alley recalls that early on ROTC "was a nuisance," but later thanked his father for leaning on him to join and for the prescience in knowing "that there was going to be another war . . . and that the Alleys would be in it."[36]

His feelings for the Army started to change in 1951 with his experience at ROTC summer camp held in Fort Lee, Virginia. Of the officer training camp, Alley recalls: "I had so much fun around the old World War II barracks with the people there. In our barracks we had contingents from Stanford, Cornell, and [the University of] Alabama. They were just terrific."[37]

Fortified by the positive experience and quality of people at Fort Lee, Alley returned to Stanford and completed his senior year with a major in medieval history, and in the summer of 1952 was promptly drafted on active duty as a Quartermaster Corps officer. He completed the officer basic course, where he was the class honor graduate, and remained on the faculty at the Quartermaster School, Fort Lee, from 1952-1954.[38] Looking back, Alley found the regimented life and environment of the Army very satisfying, and not unlike the family regime back in Portland:

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[33] *Id*. at 29.
[34] *Id*. at 30.
[35] *Id*. at 30–31.
[36] *Id*. at 31.
[37] *Id*. at 32.
[38] *Id*. at 34.

> There was a lot about [the Army] that [resembled] the way the way I grew up. It had structure—it had discipline—there were expectations of punctuality and performance—it was a hierarchy and that certainly was true in my family. . . . [N]otwithstanding that you could detect personal ambition and careerism . . . it was obvious that [professional officers] did have a sense of service and subordination of self and attachment to something beyond themselves and which in their view of the world was far more important than self, and these were messages too that I got from my family—especially my mother. So it was a very comfortable environment.[39]

In his final year at Stanford, Alley started to consider a future in academia, reasoning that the quality of life at the university level faculty was a much envied thing. While on active duty, he completed all the necessary applications for and was accepted to the Stanford masters program in history with follow-on plans to complete a Ph.D. at Princeton University.[40] The glow and glamour of university education, however, quickly faded under the brutal gaze of watching others go through the doctoral process. After leaving the Army, Alley entered the Stanford masters program, and there the love affair with higher education waned.

> So I got established in Vets Village. It was a World War II cantonment hospital [for] married student housing—$47 a month including all utilities except telephone. If you could see it now you'd think that this place needs federal funds. It was awful, but we accepted it at the time and I had about three weeks to rattle around there until commencing school. Well, up and down the rows in this hovel were Ph.D. students. Understand that when I was an undergraduate, I was looking *at* the professors. What a life! The contemplative life of the mind, surrounded by admiring students, publishing at leisure. Well, when I was in Vets Village, all I saw was the Ph.D. student who had been struggling along trying to learn Greek for five years, snot-nosed kids, absolutely indignant wife furious

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[39] *Id*. at 41–42.

[40] *Id*. at 35. "In my last year in college I thought, geez, look at these professors around here. What a deal. God. Love to be like that. So I'm going to be a professor." *Id*. at 33.

> because she was [secondary] to his graduate work and so forth, and it was kind of like the scales falling from my eyes—I thought . . . I don't want to do that.[41]

Eventually, looking for a new direction, Alley went to the Veterans Administration where he participated in an aptitude test to identify interests and skills for a future career. The top result—the clergy;[42] number two—the law. With this in mind, he approached a friend on the Stanford Law School faculty for advice on what a future in the law could mean and for some mentoring on what to do next. That was on a Wednesday; by the following Monday, helped by his distinctive undergraduate performance, Alley was admitted to Stanford Law.[43] The only condition was that he take the LSAT to complete the process, which he did in the middle of his first year of law school.[44]

But it was not a happy affair, and from start to finish Alley, liked little about it. Mincing precious few words or emotions, he notes of his law school experience:

> I hated it. I despised it. I didn't have a happy day in law school course work. I liked the people. In fact, it was the most widely read intellectually stimulating capable group of people I've ever been with. . . . [But] I had a bad attitude. I didn't enter law school wanting to be a lawyer. I was invited to join the Law Review and declined because . . . the course work was bad enough and then to have to work on the Law Review was just more of the same distasteful type of experience. . . . when I finished that school I was elated. I used to sit around thinking in connection with some of the course work . . . I can't believe that grown-up people are sitting around here studying this. It's just ridiculous.[45]

More than anything, what Alley disliked about law school was the preponderance of abstraction in both rules and the reasons behind them.

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[41] *Id*. at 35–36 (emphasis added).
[42] *Id*. at 36. "[S]o I took those things and Number One, preacher—preacher—Christ, I'm not even religiously oriented as far as I could see." *Id.*
[43] *Id*. at 37.
[44] Alley Interview, *supra* note 16.
[45] Oral History (1st Session), *supra* note 9, at 43–44.

In a memorable and somewhat ironic reference to this period of his life, he notes:

> The study of law, I think, is something that results in your believing in the supernatural; that all problems are people problems and they are organized in different ways to do different things, and lawyers seem to think there is such a thing as a corporation, for example, which never answers the telephone when you call it and I just couldn't take [any of it] seriously.[46]

To move himself along at the quickest possible pace, Alley entered the law school's accelerated program to complete the curriculum six months early, graduating in December 1956.[47] Others in the program were like him—veterans, married, older, and eager to re-enter the workplace to support families and begin careers. Despite his pronounced dislike of the study of law, Alley graduated Stanford Law in 1957 with honors and near the top of his class.[48]

Two additional things happened during this time which presaged much of his professional life. The first was the opportunity to clerk for the Oregon State Supreme Court while he waited for his bar results, an experience Alley very much enjoyed —"It astonished me how much fun it was to be a law clerk for [the State Supreme Court] compared to how awful it was to be in law school."[49] The second was his serious consideration about a return to active duty. He recalls:

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[46] *Id*. at 45.
[47] *Id*.
[48] *Id*. at 48.
[49] *Id*. at 47. Alley learned a number of valuable lessons while clerking for the Supreme Court of Oregon; first and foremost among them was the importance of a defensible judicial opinion:

> It certainly has to be acceptable to the other justices. It has to be strong enough and well enough supported so that it could stand as precedent and wouldn't draw any jeers and sneers from the Bar. Cases that might draw jeers or sneers tended to be those in which a Justice had a strong personal feeling and got skewed maybe away from where the statutes and precedent would take him—and I say him; there were no women that time—and put out something that really indicated nothing but personal preferences to outcome or, as we learned in Law School, teleological.

OCU Interview, *supra* note 9, at 3.

> I thought about it a lot. Contrasting a positive and pleasurable experience in the Army with an unpleasant experience in the study of law, and then my dad—who was an awfully nice guy really—sprung the trap about. . . . well, come up here and work in the firm in which he was a member . . . So I agreed.[50]

But the arrangement was not meant to last. Alley rapidly came to realize that his father had a distinctly different and irreconcilable approach to the practice of law, and that working as an associate to the senior Alley, who was a partner, created an untenable tension, both personal and professional.

> [T]here were such temperamental difference in the way that people did business there . . . [my father] . . . just did things that drove me crazy, and vice versa. He was a rough and tumble night school law graduate—average or below average student—you could hide $100 bills in his law books and he'd never find them, but he was terrific on the phone; and he was a good settler—good negotiator—good with people, and pretty good in court although I always felt he was under-prepared; and he combined the procrastination of a lot of lawyers with rapid work when he ever did get around to it which was careless, I thought. . . . It was just too different worlds of practice. . . . [A]fter a very few months it was just obvious that I couldn't happily work there.[51]

So one day, Alley took the day off from work and drove from Portland to Fort Lewis, Washington, to visit the Staff Judge Advocate Office and generally look around and ask questions to see what they did there. That was all it took. He recalls of the people he met, "[T]hey were really outstanding people—friendly and receptive. . . . So I transferred my commission and sought a return to active duty and came back to active duty in February of '59."[52] But the decision was not without

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[50] Oral History (1st Session), *supra* note 9, at 47.
[51] *Id*. at 49–50.
[52] *Id*. at 50. Of his impressions of the Fort Lewis office, Alley recollects his positive impression of the nature and character of the work conducted there:

> It seemed to me that the criminal cases had substance and they had military affairs [administrative law] work. The guy in charge of that

controversy, especially from his first wife, who Alley remembers as being "bitter" over his move to return to the Army. "We went through many, many tearful sessions about all that was sacrificed."[53]

III. U.S. Army Judge Advocate General's Corps

In the summer of 1959, Alley completed the thirteen-week Judge Advocate Officer's Basic Course at its former facility in Clark Hall, at the University of Virginia.[54] The return to active duty suited him well and was in stark contrast to the brief experience in private practice; he later described himself as "relaxed, and happy, and full of grins, in contrast to the depression [of private practice]."[55] He immediately enjoyed the return to the structured and "collegial and collective environment" offered by the military,[56] and felt his desire for intellectual challenge was more than met as an Army Judge Advocate because "there was plenty in the practice of law to fully engage the mind."[57]

Although the current notion of judge advocates as "Soldier-Lawyers" had not yet become part of the culture of Army legal service,[58] it was clear to Alley and others that service as a uniformed military attorney was a comfortable blending of the best of military officership and the law, particularly as it applied to Army-client relationships.

> described himself as sort of the house counsel for the Fort Lewis division of the U.S. Army with interesting and important things to do, and it looked like it provided an abundance of food for the mind, as it turned out to be the case. . . [I] didn't think that entering the Army was a flight from the life of the mind at all.

Id. at 56.

[53] *Id.* at 50. At this time it was also required that all judge advocates attend one of the combat arms basic courses, a requirement Alley satisfied with his prior service in the Quartermaster Corps. *Id.* at 57.

[54] Preceding the Officer Basic Course, judge advocates at this time were required to complete the officer basic course for one of the combat arms, which Alley had satisfied by his prior military service. *Id.*

[55] *Id.* at 51.

[56] *Id.* at 54.

[57] *Id.* at 55.

[58] *See generally* Major George R. Smawley, *The Soldier-Lawyer: A Summary and Analysis of an Oral History of Major General Michael J. Nardotti, Jr., United States Army (Retired) (1969–1997)*, 168 MIL. L. REV. 1 (2001).

> We lived in an overlap of two professions, each with very strong conditions, and there is no contradiction [between loyalty as an officer and adherence to legal ethics concerning client relationships]. . . . As a Judge Advocate, you are an attorney within the Department of the Army serving the Army through its delegated leadership as their lawyer. Until they tell you [as in the case of criminal defense attorneys] that you are somebody else's lawyer in which event you are that person's lawyer for as long as that representation lasts, and when it is over you are the Army's lawyer. That just doesn't seem to me to contain the seeds of conflict at all.[59]

Alley graduated at the top of his Basic Course class, and in the summer of 1959 moved to his first duty assignment at Fort Sill, Oklahoma, where he was detailed as a legal assistance officer with additional duty as a criminal defense counsel.[60] This period predated the 1980 creation of U.S. Army Trial Defense Service as an independent activity within the Army Judge Advocate General's Corps.[61] As such, Alley and other criminal defense attorneys worked directly for the senior legal advisor who also supervised military prosecutors and advised court-martial convening authorities.

The conflict of interest—defense attorneys and prosecutors each working for the same supervisor—was rarely an issue in practice as it may have been in appearance. As Alley notes above, judge advocates worked for their detailed clients with rigor and fidelity, and generally saw little material conflict in working against the potential interests of supervisors and peers within the same office. It was, in some ways, a situation of professionalism rising above politics.

From this first sustained experience with criminal practice, Alley recalls that he orchestrated plea agreements for sixty percent of his defense clients, and achieved acquittals for half of those who ultimately went to trial.[62] Throughout, Alley remembers that the staff judge

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[59] Oral History (1st Session), *supra* note 9, at 56–57.
[60] *Id*. at 59.
[61] *See* the Trial Defense Mission, at https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/USATDS.nsf/(JAGCNetDocID)/T+D+S+MISSION?OpenDocument (last visited Dec. 19, 2011).
[62] Oral History (1st Session), *supra* note 9, at 59.

advocate, Colonel Hembry, was "totally complimentary" and allowed Alley to move between both defense and prosecution case work. There were never any career recriminations against Alley's success in defense of soldiers prosecuted under Colonel Hembry's recommendation and supervision.

As for the law officer [military judge][63] at Fort Sill, Alley recalls a colorful Oklahoman, Colonel Curtis "Hogjowl" Williams, who operated out of a courtroom located in the post cantonment hospital. Alley fondly remembers his experience before Williams' court, and considered him a "tremendous and capable" jurist who was also a notable character—a senior officer who maintained a vegetable garden behind his office and who, "when he wasn't at trial, was out digging and watering tomatoes and tending his vines and pumpkins."[64]

He also found his fellow judge advocates to be competent opposing counsel, and thoroughly enjoyed his first year of military practice, recalling: "I loved it. I had interesting work and won a lot of cases, and felt that the other attorneys were capable—I wasn't walking over a bunch of patsies."[65] Alley's time at Fort Sill was cut short, however, when the opportunity arose for an assignment to Okinawa, Japan; remembering all his thoughts of foreign travel when he was a boy, he jumped at the chance to serve overseas.[66]

A. Okinawa, 1960–1964

Due to a housing shortage, Alley spent the first several months of the summer of 1960 in Okinawa alone while his family remained at home in Oregon. By this time, he and his wife had three children—Elizabeth, David, and John, who was born in February, 1961, shortly after the family arrived in Japan. His work was multifaceted, including practice in legal assistance, administrative law, and criminal prosecution.[67] The military justice mission was exceptionally active. Alley and Lieutenant Colonel (LTC) Richard R. Oliver, who was the principal defense attorney, tried cases in opposition to one another throughout Southwest

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[63] Military judges were known as "law officers" prior to the Military Justice Act of 1968.
[64] Oral History (1st Session), *supra* note 9, at 60.
[65] *Id*. at 61.
[66] *Id*. at 66.
[67] *Id*. at 67.

Asia, including Okinawa, Vietnam, the Philippines and Thailand.[68] During this period judge advocates were faced with the unique challenges of working in the complex legal environment of post-war Japan, including the civil administration of the United States and affiliated commands, including the one for the Ryukyu Islands.[69]

The Commanding Officer of the U.S. Civil Administration was a Lieutenant General by the name of Paul Caraway, notable also for being the son of Thaddeus and Hattie Caraway, both former U.S. Senators from Arkansas. His mother, Hattie Wyatt Caraway, was the first woman elected to the U.S. Senate. Alley notes that Lieutenant General Caraway inherited none of his parent's political acumen, and "was a bare your head and charge forward, crunch through the china closet kind of guy [who] viewed the [civilian] legal office of the U.S. Civil Administration as a bowl of mush."[70] Accordingly,

> he looked to his staff judge advocate to provide second opinions [at first] and then just removed whole areas of important business from [the] Civil Administration and simply gave it to the JAG office [where]. . . . we had only five or six attorneys at [the] time. . . . It was like being in an Attorney General's office in a populous state. [I]'d come to work in the morning and here would be prosecutions in large numbers and . . . piles of files two-three feet high of stuff that either I had to review from [the Civil Administration] or had to do as an original proposition—including legislative drafting.[71]

Alley had numerous accomplishments during this period. As the administrative law officer, he drafted the Auto Insurance Code for the islands, the Controlled Substances Act, the administrative regulations to implement both, as well as the "conceptual work" for the development of rules and regulations dealing with business activities and a professional code for attorneys. Alley remembers the weight, complexity, and

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[68] *Id*. at 89–90. "Richard R. Oliver—nicknamed "Bill"—[was] the greatest guy ever, with the greatest sense of humor ever, and he did almost all the defending when I did almost all the prosecuting. So for four years, day in and day out, we were in court together. . ." *Id*. at 89.

[69] *Id.* at 68. *See generally* U.S. Army Japan, at http://www.usarj.army.mil/history/index_army.aspx (last visited Dec. 8, 2011).

[70] *Id*. at 68–69.

[71] *Id*. at 69.

significance of legal support activities as "crushing—crushing work."[72] In addition, he was the principal criminal prosecutor for Okinawa, and this location served as the General Court-Martial Convening Authority for Vietnam and Army units throughout Southeast Asia.[73] In his final year in Okinawa, BG Alley and a team of five judge advocates tried more general courts-martial than all of the far larger 8th U.S. Army and all Army assets in Korea, with its twenty-five to thirty lawyers.[74]

Unlike today, and the vast technological resources available to judge advocates, the early 1960s required books which were housed in law libraries often shared with other organizations. In Okinawa, this necessarily included judge advocate use of the law library maintained by counsel for the U.S. Civil Administration. In large measure due to General Caraway's increasing reliance upon uniformed attorneys, this sharing of resources was not always easy and tended to exacerbate existing tensions between the military and civilian attorneys. While acknowledging that legal research materials were adequate, Alley nevertheless recalls that,

> the people in the Civil Administration became resentful and subsequently hostile because of the [judge advocates] taking their business away—a kind of silly reaction because we didn't want to. In fact, we were upset that we had to, but that was the way it was. So to use their library was a kind of unpleasant thing. You had to sneak in when nobody was around—and hell, they'd never loan you a book. . . .[75]

Another aspect of service in Okinawa during this period was its relative isolation from the rest of the Army, if not the world. While this was a dramatic time in American history, it seemed to Alley and others that the effect of being on an island with diminished communication capacities seemed to diminish hugely significant world events such as the Kennedy assassination, the Cuban Missile Crisis, and erection of the Berlin Wall. While generally aware of world events and alert to the movement of people and changes in various military posture, Alley

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[72] *Id*. at 69, 72.
[73] *Id*. at 70.
[74] *Id*. at 71.
[75] *Id*.

recalls his relationship to them as distant—"might as well [have been] on the moon."[76]

The exception, of course, was the escalation of military operations in Vietnam. Alley traveled to Saigon and Da Nang an average of every ninety days or so in support of military justice, and remembers "a low level of conflict unobservable in Saigon" in the period before refugees began to move from the countryside into the cities.[77] But there was still an undeniable and growing awareness in 1961–1962 that the conflict was spreading, and that American personnel were increasingly engaged in combat and dying as a result.[78] In particular, Alley recalls the activities of U.S. Special Forces revealed through military justice.

In one memorable case, a former legal assistance client of Alley's, Master Sergeant Troy Dillinger, was prosecuted for the death of an Air Force Noncommissioned Officer (NCO) arising from a party in Da Nang. Dillinger became intoxicated and released a grenade in a room full of partying military personnel, killing the NCO and "putting shrapnel into probably the better class of prostitutes in all of Da Nang, [resulting] in a manslaughter prosecution."[79] The case was significant because, almost immediately following the conclusion of the trial, two Special Forces witnesses against the accused died in combat. Alley, who prosecuted the case, remembers:

> Two of the witnesses against Sergeant Dillinger were a guy named Gabriel and a guy named Marchand. I think we finished [the case] on Wednesday and on Wednesday afternoon or Thursday morning they flew back to Vietnam to join their [Special Forces] team, and on Friday they were dead; and that was about the first sense of immediacy of U.S. combat operations [in Vietnam]. . . . There was [also] a judge advocate who got a Purple Heart [in Da Nang].[80]

Another case with relevance to the gradual increase in U.S. involvement in Vietnam concerned the Ninth Corps Deputy G-3 (Operations), who had "checked out the . . . ground plan for the

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[76] *Id*. at 73–74.
[77] *Id*. at 75.
[78] *Id*. at 78.
[79] *Id*. at 76–77.
[80] *Id*. at 78.

introduction of U.S. divisions in Vietnam in the event of a broader crossing by the Chinese and the North Vietnamese."[81] Evidently, he planned to take it back to his quarters, but along the way decided to stop for a few more drinks, became intoxicated, and left the plans in an Okinawan taxicab.[82] The plans eventually found their way back into American hands, and the loss triggered a court-martial. The interesting thing about it, as Alley recalls, "was thereafter [observing] the introduction of U.S. divisions into Vietnam which followed that plan completely."[83]

One can speculate those plans supported a strategy of measured gradualism in Vietnam that was at odds with many in the military at the time, including BG Alley. His qualified and frank perspective as an Army officer serving during the first crucial phases of President Kennedy's escalation of force in Vietnam, and the aftermath, is worth repeating:

> It was a romantic era concerning U.S. commitment to the cause of freedom wherever and whenever arising from [President Kennedy's idealism]. I [heard] grumbling within the military and was one of the grumblers—that from '63 and '64 it was evident that the basic approach to this gradual measured response…was a crock of crap if there ever was one and I never talked to a single experienced combat arms officer in Okinawa who disagreed. [They] thought no question about it, if we are going to fight a war down there it would require reserve mobilization and go in and hit it hard and with maximum air power and just—if we can't do it with an all out effort now, it can't be done. But the gradualism—the approach that we took—was the subject of embittered professional comment at the time and that, of course, persisted within the Army in the mid-60s and much of it directed at Secretary [of Defense] McNamara. . . . [T]he officers I knew thought it was a disaster [and it was].[84]

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[81] *Id*. at 79.
[82] *Id*. at 79–80.
[83] *Id*. at 80.
[84] *Id*. at 80–81.

> [W]e have to start with this preposition: if you take the king's shilling you go where you are sent and you do what you are asked and personal opinions about things are immaterial. But I thought it was a bad mistake. . . . [I]t just seemed to me that we missed opportunities and the principal one was that in view of the relations we had with Ho Chi Minh in WWII, that with more adept diplomacy we could have made him the Tito of South East Asia. Which he subsequently became . . . but all those lives later . . . You could probably take ten Sergeants Major and put them in a war room and they could come up with a better plan for executing the war than General Westmoreland did. I lost friends in the war, and I just think it was a great American tragedy.[85]

B. The Judge Advocate Career Course, Charlottesville, Virginia, 1964

By the summer of 1964, BG Alley had been selected early for promotion to major and was reassigned to the Judge Advocate General's (TJAG) Corps Career Course, a ten-month period of advanced military legal education for field grade officers. There he came to know Professor Edwin W. Patterson, a scholar in residence at the University of Virginia School of Law and a retired member of the Columbia University Law School who was contracted by the Judge Advocate General's School to teach jurisprudence.[86] Patterson was author of one of the leading books on the subject at the time,[87] and Alley considered it a privilege to be a part of the class which, much to Patterson's surprise, was an exceptional academic experience.[88]

Alley, true to form, was the class's top student, and so impressed Patterson that he recommended Alley to Dean Hardy C. Dillard, Dean of the Law School at the University of Virginia, as a potential faculty

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[85] OCU Interview, *supra* note 9, at 10.
[86] Oral History (1st Session), *supra* note 9, at 83.
[87] *See* EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF LAW (1955).
[88] Another notable classmate in the jurisprudence course was Hugh Overholt, who later became The Judge Advocate General of the Army, and friend to BG Alley. Oral History (1st Session), *supra* note 9, at 98. For more on Major General (MG) Overholt, see Major George R. Smawley, *Shoeshine Boy to Major General: A Summary and Analysis of an Oral History of Major General Hugh G. Overholt, U.S. Army (Retired)* (1957–1989), 176 MIL. L. REV. 309 (2003).

member. After meeting Alley, Dean Dillard offered him a visiting professorship for the following academic year with strong prospects for subsequent tenured appointment to the university faculty.[89] This was remarkable for a man who had once considered and then abandoned a career in academia. Alley ultimately declined the offer, recalling that the idea "was very flattering . . . but that he just did not want to abandon the Army."[90]

In the spring of 1965, Alley was due to move to Washington, D.C., with an assignment to the Office of The Judge Advocate General, Headquarters, Department of the Army.[91] His wife took ill, however, and because her care was based in Charlottesville the Commandant of the School, Colonel John F. T. Murray, allowed him to remain at the school as a member of the Military Affairs Department faculty teaching claims, among other subjects.[92] He enjoyed the lecture podium, and found affinity with a small group of officers, many of whom later left the Army for careers in academia.

As a member of the Judge Advocate General's School faculty, Alley also took the time to consider the Army's institutional approach to legal education for both the active Army and the Reserve and National Guard components. He considered the management and education of Reserve component judge advocates a "perpetual problem," given their essential role in the Army.[93] He found that Reserve officers "brought . . . a fresh perspective and the practical sense of things,"[94] but that while the training they received in Charlottesville was superb, the *ad hoc* training they developed and executed within their units in the field was "very mediocre—in fact barely adequate."[95]

The solution—in Alley's view—was centralized training in Charlottesville, or an effort to send Judge Advocate School instructors out to regional conferences attended by Reserve personnel. After Alley left, a new commandant, Colonel J. Douglass, began a program of "on-

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[89] Oral History (1st Session), *supra* note 9, at 84.
[90] *Id*.
[91] In 1965 the office was known as the Military Affairs Division, Department of the Army.
[92] Oral History (1st Session), *supra* note 9, at 86–87.
[93] Oral History (2d Session), *supra* note 9, at 3.
[94] *Id*.
[95] *Id*.

site instruction" to address the issue, and this type of instruction continues today.[96]

Alley also observed that the JAG Corps, and the Army, might benefit from a program of sabbaticals for select officers who would spend a year or more in Charlottesville to consider broader issues of institutional relevance to the Army. It has often been said that when pressed, organizations cease future planning in deference to the urgencies of the moment. Alley recognized this, and thought the investment of a few officers with unencumbered time would benefit the JAG Corps. He recalls:

> The Corps was busy toward the time that I left [Charlottesville] in 1968. We had a lot of commitment in Vietnam, and the JAG School was busy. . . . But there wasn't any "think tank" down there . . . And why wouldn't it be possible out of all our assets to give a sabbatical to two or three of [our thoughtful officers] and bring them into the JAG School for a year where they'd just sit around and think about things. Nobody does that in the JAG Corps at all. . . . We do engage in long-range planning and the TJAGs have been influential in bringing about legislation and so forth, but even that's reactive and not reflexive.[97]

Later, as the Dean of the University of Oklahoma School of Law, Alley saw the value-added benefit to the institution—and the profession—of individuals who were able to step back from what they were doing and take on projects that might otherwise never be considered. Examples included one professor who compiled a bibliography from comparative literature of tort law, and another who won a grant to develop a state-wide appellate public defender program that was later implemented into law as a state agency.[98]

Alley thought that with its close association with the University of Virginia, the Judge Advocate General's School would benefit from "a grand opportunity to pick the brains of people in the sabbatical sense if

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[96] *Id*.
[97] *Id*. at 12–16.
[98] *Id*. at 15–16.

the Corps were willing to make the investment."[99] He maintained that such a program "would be rather refreshing" from an institutional perspective.[100]

While he did not directly participate in the teaching of military justice, Alley's interest in the area of criminal law was hardly diminished during his three years in Charlottesville. In 1968, as he prepared to go to Vietnam, he made it clear to the judge advocate personnel office that he wanted to be a military law officer—a military judge.[101]

C. Of Military Justice and the Uniform Code of Military Justice

Throughout its roughly 235 year history, the American military justice system has played a small but critical role in the nation's overall approach to treatment of its citizens through the administration of the Uniform Code of Military Justice (UCMJ).[102] The criminal codes, rules of evidence, composition of jury panels, and the primary role of commanders as convening authorities for courts-martial are all tailored to the special needs and requirements of the military in peace and in war.

The military justice paradigm has served the military and country well. But in many quarters this unique system retains elements and characteristics many Americans would find unrecognizable given the general public's understanding of civilian criminal proceedings. Of the UCMJ's origin and evolution, BG John Cooke, former Commander, U.S. Army Legal Services Agency/Chief Judge, U.S. Army Court of Criminal Appeals (ACCA), has written:

> The dissatisfaction with military justice during World War II and the reformation of the defense establishment led to the enactment of the Uniform Code of Military Justice in 1950. The UCMJ was clearly intended to limit the control of commanders over courts-martial; it increased the role of lawyers and established a number

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[99] *Id*. at 13.
[100] *Id*.
[101] Oral History (1st Session), *supra* note 9, at 102.
[102] The UCMJ was enacted on May 5, 1950. Act of May 5, 1950, 64 Stat. 110 (codified as 10 U.S.C. § 801–940 (1959)); *see* DANIEL WALKER, MILITARY LAW (1954); JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE (1953); James Snedeker, *The Uniform Code of Military Justice*, 2 HARV. L. REV. 1377 (1949).

> of important rights for Servicemembers, including extensive appellate rights. Among its most important features was the Court of Military Appeals, which was intended to play, and has played, a critical role in protecting the integrity of the system. At the same time, the code preserved many unique features of the old system that would remain responsive to the special needs and exigencies of the military. . . . *In essence, enacting the UCMJ was the beginning of an effort to erect a true judicial system within the body of the military organization*.[103]

Despite the institutional and systemic differences between military justice and its civilian counterpart, the overarching narrative of fairness, professionalism, and objectivity remain a central theme binding both. In her concurring opinion in one of the rare military cases to reach the court, *Weiss v. United States*, Supreme Court Justice Ginsberg acknowledged this evolution of standards and judicial competence of legal practice in the Armed Forces in a case specifically questioning the constitutionality of methods used to appoint military judges:

> The care the [Navy Marine Court of Military Review] has taken to analyze petitioner's claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards behind when they enter military service. Today's decision upholds a system notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally-trained officers preside or even participate as judges.[104]

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[103] John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20x*, 156 MIL. L. REV 1 (1998), *in* EUGENE FIDELL & DWIGHT SULLIVAN EDS., EVOLVING MILITARY JUSTICE 178 (Naval Institute Press, 2002) (emphasis added). Brigadier General John S. Cooke (U.S. Army Ret., 1972–1998) served over twenty-six years as an Army judge advocate, culminating in his assignment as Commander, U.S. Army Legal Services Agency/Chief Judge, U.S. Army Court of Criminal Appeals, Falls Church, Virginia.

[104] Cooke, *supra* note 103, at 179 (citing Weiss v. United States, 510 U.S. 163, 194 (1994)).

D. The Jump to the Judiciary—the Beginning of an Enduring Commitment to the Bench

After several years of successful developmental positions in the Judge Advocate General's Corps, Alley made the somewhat fateful decision in 1968 to leave the more typical course of leadership positions for the very different challenge of service as a military judge. The judiciary, at that time, was a road less traveled for a highly competitive officer like Alley, as he recalls:

> I told my assignments officer I would like to be a law officer or military judge. There really was *not* a great deal of impetus on the part of most people to get into that program. It was regarded as an interesting kind of work that provided no opportunity for promotion to the higher ranks . . . judges had a reasonable prospect for promotion to colonel, but that was the highest grade. . . . *The nature of the work and enjoyment of the work was always the most important thing*, and I'd observed that lots of other people carefully charted out the course of their lives, carefully tried to punch tickets [for a realistic prospect for promotion to general officer]. It didn't seem to me to be the kind of thing realistically that a person could plan for.[105]

His entry into the Army trial judiciary could not have come at a more challenging time. The Military Justice Act of 1968 did not become effective until mid-1969, and therefore most military trials presided over by law officers or judges were general courts-martial with panels, and there were no bench trials.[106] Second, his transition into the court would begin in the war-time camps and stations of Vietnam, where the stakes were high, the crimes serious, and environmental and logistical conditions harsh. Finally, Alley also carried the difficult weight of family concerns arising from his wife's ill health.[107]

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[105] Oral History (1st Session), *supra* note 9, at 102–03 (emphasis added).
[106] *Id*. at 104.
[107] *Id*.

IV. Vietnam, 1968–1969

Follow justice and justice alone. . .[108]

A. Impressions of a War-Time Judge

Alley arrived in Saigon in the spring of 1968. From that base of operation he routinely traveled to forward operating bases in Saigon and elsewhere, recalling, "We tried cases at division and brigade and support command headquarters. I think I calculated at the end of my year there I spent an average of four days *a month* in my own bed in Saigon, and the rest of the time was out trying cases in the field."[109] Alley's experience was common for judge advocates in Vietnam, where the workload for military justice practitioners during the mid and late 1960s was unprecedented. Of the high level of military justice cases worked in Vietnam in the late 1960s, Colonel Frederic Borch (U.S. Army Retired), Regimental Historian & Archivist for the U.S. Army Judge Advocate General's Corps notes:[110]

> The gross numbers tell the story. [US Army Vietnam] and its subordinate units conducted roughly 25,000 courts-martial between 1965 and 1969. Of these, 9,922

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[108] *Deuteronomy* 16:20 (New International Version). Deuteronomy is generally ascribed to Moses; the book itself is translated as "repetition of the law" and details enduring principles of what men and society expect of the law and those who adjudicate it. The complete passage addressing judges reads as follows:

> Appoint judges and officials for each of your tribes in every town the Lord your God is giving you, and they shall judge the people fairly. Do not pervert justice or show partiality. Do not accept a bribe, for a bribe blinds the eyes of the wise and twists the words of the righteous. Follow justice and justice alone, so that you may live and possess the land of the Lord your God is giving you.

Id. *Deuteronomy* 18-20.

[109] Oral History (1st Session), *supra* note 9, at 104 (emphasis added).

[110] FREDERIC L. BORCH III, JUDGE ADVOCATES IN COMBAT, ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 29 (2001) [hereinafter BORCH, ARMY LAWYERS IN MILITARY OPERATIONS] (U.S. Army Center for Military History). *See id.* at 3–51 (providing a comprehensive overview of the role of Judge Advocates in military operations during Vietnam). *See also* FREDERIC BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959–1975 (2003) [hereinafter BORCH, JUDGE ADVOCATE IN VIETNAM] (U.S. Army Command & Gen. Staff Coll. Press, Combat Studs. Inst.), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/JAs_Vietnam.pdf (last visited Dec. 19, 2011).

> courts-martial were tried in 1969 alone, at the peak of the U.S. buildup, of which 377 were general courts, 7,314 were special courts, and 2,231 were summary courts. Similarly, a large number of Article 15s [non-judicial punishment] were administered between 1965 and 1969—66,702 in 1969 alone.[111]

Of the case load, BG Alley remembers:

> The cases were great—by and large the counsel were good—only the most serious cases were tried. We had nothing that was minor. It was all murder, rape, arson, kidnapping. I presided over 136 cases [in eleven months], virtually every one contested. We tried cases seven days a week—often from eight in the morning until midnight. We had to keep up with the docket because we were docketed at the various [combat] divisions . . . if you missed the flight and didn't get to the next place the domino effect on the docket was just horrible. So it was demanding for the judges who were out there. But the cases—heavy stuff.[112]

Against this backdrop were the harsh realities of his wife's illness, which in 1969 required Alley to take emergency leave to return home to tend to his family. Even in this, he could not escape the war itself as the interposition of anti-war feelings pervaded the very medical care he and his wife desperately sought. He remembers,

> My kids had been farmed out to three different families in Charlottesville and I collected them again in my own house. My wife was under the care of a psychiatrist who was a death-on war protester and extremely hostile to anything military and exhibited hostility and repugnance toward me when I showed up. . . . I would try to get him to talk about my wife and her diagnosis and her

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[111] *Id*. at 29 (citing Dennis R. Hunt, *Viet Nam Hustings*, JUDGE ADVOCATE J., NO. 44, July 1972, at 23).
[112] Oral History (1st Session), *supra* note 9, at 105.

> prospects and so forth and would have to listen to this diatribe about the war.[113]

B. Military Jurisdiction over Civilians

In this difficult personal circumstance, Alley presided over a full spectrum of serious crimes involving complex issues of fact and law. One of Alley's most significant decisions during this period came in *U.S. v. Averette*,[114] and the assertion of UCMJ Article 2 military jurisdiction over civilians.[115]

He recalls that the government would assert jurisdiction over certain civilians under the theory that they were accompanying the force in the field and offer the Gulf of Tonka Resolution and appropriations acts as evidence of Congressional intent, only to contest motions by defense counsel that Article 2 required a formal declaration of war by Congress.[116] Alley oversaw the trial of at least three civilians.[117] As circumstances would have it, one of them—*Averette*—was addressed by the appellate court which held a formal declaration of war by Congress was required as a predicate to military jurisdiction over civilians.[118]

Frederic Borch has summarized the issue this way:

> The increase in serious crimes committed by U.S. civilians . . . soon made criminal prosecutions appropriate. But who would prosecute? Although some American laws applied extraterritorially, only two practical possibilities existed: U.S. military or Vietnamese civilian authorities. While American

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[113] *Id*. at 104–06.

[114] United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970). The U.S. Court of Military Appeals considered the matter of military jurisdiction over a civilian. The court noted that the operative determination laid in UCMJ Article 2(10) and the requirement that civilians accompany the military "in time of war." *Id.*

[115] *See generally* Colonel Kevan F. Jacobson, U.S. Army War College Strategy Research Project: Restoring UCMJ Jurisdiction over Civilian Employees During Armed Hostilities (Mar. 15, 2006) (unpublished manuscript), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil374.pdf (last viewed Dec. 8, 2011).

[116] Oral History (1st Session), *supra* note 9, at 107.

[117] Alley Interview, *supra* note 16.

[118] *Averette*, 41 C.M.R. at 365. The court found that "for a civilian to be triable by court-martial in 'time of war,' Article 2(10) means a war formally declared by Congress." *Id.*

> military authorities could exercise control over uniformed personnel using the Uniform Code of Military Justice or Military Assistance Command Vietnam (MACV) directives, their authority over civilians in Vietnam was tenuous at best. Although Article 2 of the Uniform Code did permit the courts-martial of civilians "accompanying an armed force in the field," that provision applied only "in time of war," and it was unclear as to whether the fighting in Vietnam legally constituted a "war." Additionally, even if such was the case, criminal jurisdiction over civilians extended only to those civilians accompanying U.S. forces "in the field." Consequently, while civilian employees of government contractors engaged on military projects, war correspondents with troops on combat missions, and merchant sailors unloading cargo in U.S. Army ports might be subject to criminal jurisdiction, the more than 6,000 U.S. civilian employees of private contractors, independent businessmen, and tourists in Vietnam were not . . . [and] the Vietnamese were either unable or unwilling to prosecute Americans.[119]

As a result, Alley and other judges presided over cases involving military assertions of jurisdiction over civilians accompanying the force, under the provisions of Article 2, UCMJ.[120]

To try to mitigate media concerns that correspondents could be subject to military justice, the U.S. Embassy in Saigon unilaterally prescribed conditions by which such jurisdiction could take place and limited them to serious felony-level offenses.[121] The policy articulated two key prerequisites to the assertion of military jurisdiction: first that the status of U.S. forces accompanying the force was very clear; and second, that the Vietnamese Foreign Ministry was consulted and consented to the exercise of jurisdiction.[122] Alley recalls, "[I]t was just

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[119] BORCH, ARMY LAWYERS IN MILITARY OPERATIONS, *supra* note 110, at 23.
[120] UCMJ, 10 U.S.C. § 802 (UCMJ art. 2); John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 70A Stat. 601 (2006). *See* Dan E. Stigall, *An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice ("UCMJ") over Civilians and the Implications of International Human Rights Law*, 17 CARDOZO J. INT'L & COMP. L. 59 (2009).
[121] Oral History (1st Session), *supra* note 9, at 109.
[122] *Id*.

luck of the draw; I tried the case in which such a motion was denied [which then went on to appellate review]."[123]

The *Averette* case involving a civilian contractor, Raymond Averette, convicted before a general court-martial of conspiracy to commit larceny and attempted larceny. BG Alley was the presiding judge, and denied the defense motion to dismiss for lack of jurisdiction. The central question at both the trial and appellate level was whether or not Averette was subject to the military court's jurisdiction by operation of Article 2's requirement for a "declared" war.[124] The Court of Appeals for the Armed Forces (CAAF)[125] took a literal construction approach to the language "in time of war" and so concluded that a Congressional declaration was required, effectively ending all future assertions of military jurisdiction over civilians.[126]

At the time *Averette* was tried, the idea that Vietnam was a war in name and sanction was entirely reasonable to those who were living the experience of the conflict first-hand. In a separate case of a civilian tried for manslaughter before a general court-martial, *United States v. Grossman*, Alley remembers the flight from Dong Tam to Long Bihn en-route to a motions argument where the helicopter incurred damage resulting from small arms fire:

> We took some hits in the tail assembly, but it didn't hit any vital part of the aircraft. So I grabbed my briefcase and I rushed into the courtroom and we started motions—the round of motions in Grossman's case in which his counsel argued artfully—there is no war in Vietnam—I thought was a great irony under the circumstances, and he was right, wasn't he—as the Court of Military Appeals subsequently decided.[127]

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[123] *Id*. at 107–10.
[124] United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).
[125] The Court of Military Appeals was first established in 1950 by Article 67, UCMJ. Comprised of five civilian judges, it is the highest appellate court within the military justice system. In 1994, Congress renamed the court the U.S. Court of Appeals for the Armed Forces (CAAF). *See generally* U.S. COURT OF APPEALS FOR THE ARMED FORCES, *About the Courts*, at http://www.armfor.uscourts.gov/Establis.htm (last visited Dec. 8, 2011).
[126] *Averette*, 41 C.M.R. at 365.
[127] Oral History (1st Session), *supra* note 9, at 110–09. Describing the nature of trying cases forward in the battlefield, he also recollects "four or five times being out trying a case when we had a mortar or rocket fire into the situs of the trial—either during the trial

The *Grossman* case ended when Alley found that the government had failed to meet the Embassy requirement for Vietnamese concurrence in the matter, but not before a truly memorable cross examination that contributed to the failure of the government's case. To prove the Vietnamese consultation and concurrence, the government used the testimony of Colonel (COL) Hank Ivey, the MACV Staff Judge Advocate, who testified on direct examination that he had personally garnered the approval from an official at the Foreign Ministry for military jurisdiction over Mr. Grossman. As Alley retells the story:

> [O]n cross-examination the defense counsel (D) asked COL Ivy (W) to speak Vietnamese.
>
> W: Well, I can't speak Vietnamese.
> D: Well, were you accompanied by an interpreter?
> W: Yes, I was, but I could communicate [with the Vietnamese official] by myself.
> D: How?
> W: In French. We both spoke French.
> D: Oh. Well, Colonel Ivey, was the conversation entirely in French?
> W: Yes it was.
> D: Well, tell us how you say in French—it is our intention to try Mr. Grossman. (Silence). Well can you?
> W: Well, no.
> D: Tell us in French how you would ask the question: Do you waive jurisdiction? (Silence). Well can you?
> W: Well, no.
>
> And it was one of those occasions that really don't happen often in life—a totally destructive cross-examination; and there was no question, Ivey couldn't speak French and it was impossible that a meaningful conversation could have been conducted in French. So I abated the proceedings, conceding on the record that I didn't really know where we were, but that the government had to prove jurisdiction, and it hadn't . . . Well, Ivey was furious. As a matter of fact his first response, according to his warrant officer with whom I

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or at night—usually at night—and two or three time in-flight when the aircraft had been hit. . . . " *Id.* at 113–14.

> was friendly, was to try and evict the law officers from their office in Saigon and relocate them in Long Bihn.[128]

In 2006, nearly four decades later and in response to military operations in Iraq and Afghanistan, Article 2 was ultimately amended to authorize a process by which commanders may assert military jurisdiction over civilians "serving with or accompanying an armed force in the field" under circumstance of a "declared war or *contingency operation*."[129] Two years later, Secretary of Defense Robert Gates set out processes and procedures for the assertion of jurisdiction over civilians, including notification to the Department of Justice and the option for the government to pursue the case in U.S. courts.[130]

C. The Murder Syndrome

More than most anything, Alley recalls the extraordinary number of murder cases brought before his courts: "[T]he cases were heavy stuff. I think I had . . . 35 contested cases [that year] in which the charge was [premeditated murder]."[131] Of these, the victims were "divided almost half and half between American victims and Vietnamese victims."[132] Alley notes that "in the case of Vietnamese victims the case was characteristically not a crime for gain, but was just a senseless shooting . . . like shooting bottles off a wall."[133] In a 1969 presentation at The Judge Advocate General's School, Alley noted the distinctive natures of the violent crimes committed against Americans and the local Vietnamese:

> I talked about the murder syndrome—that when there was a murder with the U.S. Forces victims there was a formula of fatigue, grudge, alcohol or drugs, and of course the accessibility of a weapon; and when those things collide, the object of the grudge lay dead on the

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[128] *Id*. at 111.
[129] UCMJ art. 2 (2008) (emphasis added).
[130] Memorandum from Robert M. Gates, Sec'y of Def., subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (Mar. 10, 2008).
[131] Oral History (1st Session), *supra* note 9, at 106.
[132] *Id*.
[133] *Id*.

> floor. [But] when there was a Vietnamese victim, when it wasn't robbery or something like that, the accused seemed to me to exhibit a thought or the lack of a thought that the victim was really a human being—just like shooting objects . . . soulless objects.[134]

In particular, Alley recalls telling the assembled audience, which included the incoming MACV Judge Advocate, Colonel Bruce C. Babbitt, that they "were going to be very lucky if there isn't some terrible war crime-type atrocity . . . And, in fact, it had already happened at My Lai, but no one knew about it."[135] Alley would revisit the My Lai Massacre cases four years later as the authoring appellate justice in the case of *U.S. v. William L. Calley*.[136]

D. The Importance of Trying Cases Forward

Despite chronic problems with Vietnam-era technology, particularly court reporter stenographic machines,[137] Alley was an avid advocate of trying military courts-martial cases in the middle of the environment in which the crimes occurred; in which the participates operated; and where the atmospherics of combat—the sometimes harsh realities in which soldiers lived, fought, and interacted with others—could best inform the process. For these reasons Alley strongly advocated on behalf of judicial integration in the battlefield.

> I think we should try cases forward so that judges should be out there traveling as far forward as they could be, and [that] they should be located in theater.[138] . . . There's an atmosphere. When a case is a combat refusal to join your unit in the line or refusal of an order in the field, or failure to do the utmost and so forth, the people who ought to be trying that case are officers of the division or the brigade. That's not a rear area case. If it's a case of a homicide in the field, in most instances where there was a U.S. service member victim, there was a lot

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[134] *Id*.
[135] *Id*. at 107.
[136] 46 C.M.R 1131 (1973); 1973 CMR LEXIS 843 (1973).
[137] Oral History (1st Session), *supra* note 9, at 114.
[138] *Id*.

> of extenuation and mitigation because of stress and fatigue operating to the benefit of the accused that I don't think could be appreciated from the perspective of a [garrison court]. I presided over tragic trials of people who had killed other Americans who were thoroughly worthwhile people who had hit a breaking point and broke. . . .[139]

As an example, Alley cites the case of a young African American soldier who had been a model leader in his unit; a reconciler at a time of racial tension, and a team builder who consistently sought to bring people together and by creating distractions that enabled soldiers to take a break from the stress of intense combat operations.[140] One day, on his birthday, the soldier uncharacteristically drank too much beer and endured a vicious and prolonged taunt by African American soldiers in a neighboring unit to the effect that his team-building efforts made him an "Uncle Tom . . . that he had sold out."[141] Over a period of several hours, and after complaining to his chain of command, the soldier went into his hooch, drew his weapon, came out, and shot three of his antagonists, killing them.[142]

Alley uses the case to highlight the atmospherics of military justice in combat, concluding:

> [The soldier] was guilty and he had to be convicted and punished, and he was punished in a clement way, and I just don't think we could remove a case like that from the setting in which it happened and have people understand it. So it is that kind of thing that ought to push the business [of courts-martial] forward.[143]

Another case, involving a soldier with a grudge against his captain, similarly makes the point.

> The accused lay in wait with an automatic weapon and fortunately was all beered up or certainly would have

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[139] *Id*. at 115–16.
[140] *Id*. at 117.
[141] *Id*.
[142] *Id*.
[143] *Id*.

> killed his captain because at fairly short range he let fly with a barrage of bullets and just stitched the captain's arm right off. The captain got medical assistance, subsequently a prosthetic and was doing pretty good under the circumstances. At trial. . . . the prosecutor brought the captain up to the point of the shooting, and said "[A]nd when you fell did you see anybody with a weapon in his hand?" "Yes" [the captain testified], "I saw Specialist so and so." "Is Specialist so and so present in this room?" "Yes," and he points to the accused with his [amputated] stump.[144]

The case, which was referred capital but resulted in a life sentence, is precisely the sort of matter best heard by those most familiar with the experience of war giving rise to the crime. The stress of combat, the impact of an officer severely wounded by one of his own (intoxicated) soldiers, and the sheer drama of the victim demonstrating the consequence of the crime, has intrinsic impact that may easily be internalized differently by those unfamiliar or unaccustomed to the operating environment of Vietnam.

During this period, nearly all general courts-martial were panel cases requiring members to travel to the seat of the trial.[145] Despite the obvious personal inconveniences and break in operations required by senior officers and non-commissioned officers to participate in criminal cases few, if any, ever balked at the responsibility to do so. Of the importance of participating in trials while forward deployed in a combat zone, Alley notes: "I think if you polled commanders at the Brigade and higher levels and asked them—is this the price you're willing to pay in order to dispose of business in your [Area of Operations], they would have said yes, without exception."[146]

Moreover, Alley not only found the intelligence and judgment of the panel members exceptionally good, but also reassuringly committed to exercising fair and thoughtful consideration of the facts as they found them in the context of the war itself. This sometimes flew in face of the formal analysis applied by the judge advocates involved and, in Alley's

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[144] OCU Interview, *supra* note 9, at 12.
[145] Oral History (1st Session), *supra* note 9, at 118.
[146] *Id*.

mind, could lead to a more rational, common sense reading of the underlying offenses.

> I thought the court members used superlative judgment. Their exercise of good sense was in many instances superior to that of the Staff Judge Advocate who tended to look at a [report of investigation] in a legalistic way—isolating out the elements of the offense—looking at the Table of Maximum Punishments—saying man, isn't this something, sending it to trial and then fortunately common sense prevailed.[147]

While the judicial offices and living accommodations in Vietnam were more than adequate,[148] the court facilities were often field-expedient and designed purely for efficiency over aesthetics. In the case of the 1st Infantry Division area, Alley remembers somewhat fondly that the

> [L]ittle court facility was a SEA [Southeast Asia] hut with the usual plywood walls up about five feet and then screening to the corrugated iron roof. The law officers' bench as you entered the courtroom from the spectator section was on the left by the screen and not six feet outside the building behind the screen was the Headquarters and Headquarters Company latrines . . . and trying a case there was like trying one in the middle of the Chicago stockyards.[149]

It is worth noting that forty years later many American soldiers had their cases tried in very similar facilities, despite more than eight years of conflict and an ever maturing theater of operations. The author recalls that trials at the U.S. Division–North (USD–N) headquarters on Contingency Operating Base Speicher was simply a converted utility shed with plywood walls, benches, witness stand, and judge's bench; the building lacked plumbing and was situated next to a set of portable latrines.[150] Functional, but hardly ideal.

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[147] *Id*. at 122; *see also* Alley Interview, *supra* note 16.
[148] Oral History (1st Session), *supra* note 9, at 118.
[149] *Id*. at 120.
[150] In 2009, the author served as the SJA for MND–N, later designated USD–N, and struggled, without success, to move the court facility into a more appropriate fixed structure.

E. Impressions on the Role and Status of Trial Defense Counsel in Vietnam

Another worthy footnote in the Vietnam experience was the quality and status of criminal defense attorneys. This was, as noted earlier, a period prior to the establishment in 1980 of the U.S. Army Trial Defense Service (TDS) with its accordant and extensive institutional support and leadership.[151] Alley specifically recalls the advantages a TDS-type organization would have brought to the military justice practice: "Looking back, I think that the Defense Services in Vietnam would have been—as good as they were and they were perfectly adequate—but they would have been better if there had been something like a TDS." [152]

Alley observed many of the problems that later became the rationale for the creation of a centralized, semi-autonomous defense services organization. Among them was the lack of flexibility to assign defense counsel across the Army units to which they were assigned. Because defense counsel originated from a particular staff judge advocate's office, their jurisdictions (for lack of a better term) were limited to that command regardless of the respective case loads and requirements elsewhere. A key advantage of present day TDS is the flexibility of Regional and Senior Defense Counsel to assign attorneys where they are most needed regardless of units of assignment.

A second concern was the lack of available mentors to guide and develop defense counsel, and assist them with their cases without creating conflicts of interest with the supervising staff judge advocate or compromising privileged client information. Alley recalls:

> When I traveled around it just seemed to be that a lot of the defense counsel were thirsty for somebody to talk [to]—"[H]ow am I doing and how do I do this, what do I do better," and all that sort of thing. I didn't encounter a single defense counsel who alleged interference in his work by his SJA . . . but they were not going to go there for their professional advice. So, in [future combat

[151] Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983).
[152] Oral History (1st Session), *supra* note 9, at 26.

> situations] I think the needs of the defense will be better met than they were [during Vietnam].[153]

F. The Law of Armed Conflict

In many respects, Vietnam was the first major American conflict in which notions of the law of armed conflict filtered down from the strategic level to the tactical level of small units and individual soldiers. Still fresh from the lessons of World War II, Nuremberg, and their progeny, the notion of international standards of conduct in combat were sorely tested in the late 1960s and early 1970s, with highly public cases such as *Calley* capturing the imagination of soldiers, lawyers, and the nation at large.

Quite naturally, Army judge advocates, including Alley, were often at the center of alleged war crimes, serving as legal counsel to commanders or investigators, government and defense counsel, or acting as judges in all manner of litigation against U.S. personnel accused of violations of the law of war. In most cases, Alley's personal observations of the success and interest of young Army lawyers in the topic was decidedly mixed. He recalls that individual judge advocates were consciously aware of the applicable rules and standards, but that they rarely moved beyond that to integrate their understanding into the training of individuals units.

> I suppose most JAGs were sufficiently sensitized to the law of war to know a violation when they say one, and most were good enough to have read the MACV Directive on the reporting and processing of suspected cases and maybe put out some local implementation, but I don't think many bestirred themselves to go beyond that, and I don't think that many trained [outside legal channels]. I don't think that they used their knowledge to train and sensitize units in which they were.[154]

Alley observed that what the Army needed then—and in subsequent decades actively adopted—was multi-tiered training interjected with senior leader emphasis and a very public acknowledgement that

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[153] *Id*. at 26–27.
[154] *Id*. at 131.

Americans who violate the law of war risk criminal exposure and possible trial by court-martial.[155] Interestingly, Alley sensed that in many instances young enlisted soldiers had a more keenly developed sense of internal right and wrong than did their superiors. He recalls:

> I think a lot of Soldiers have more conscience than their junior officers because the Soldiers—let's take Vietnam for example—the Soldiers might be bucking for [a promotion] but I don't know that they would particularly relate that to body count. But the captains [who were bucking for promotion to major] did . . . [and so] I felt that a lot of Soldiers had more sense about that than some of the officers. The Soldiers over whose cases I presided in Vietnam, who had slaughtered Vietnamese, knew they shouldn't have and they never defended on the basis of [not understanding the underlying criminality of the conduct]. Never—not once.[156]

G. Race Relations—Mirror of the Nation's Struggle with Civil Rights

One of Alley's lasting observations from the Vietnam War was the dire nature of race relations, imparted to some degree through his personal experience with the trials that followed from the 1968 mutiny at the U.S. Army Vietnam Installation Stockade at Long Binh.[157] The cases arose from an August 29, 1968, racially motivated riot at the stockade in which two prisoners were murdered.

Alley specifically recalls, "The mutineers burned the place down . . . I tried a lot of those cases and that was a sensitizing experience to try cases into matters of race relations in the Army. [It] really brought the subject to the fore starkly."[158] He specifically remembers that the racial divisions among soldiers in Vietnam remained stressed for the duration

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[155] Alley Interview, *supra* note 9; *see also* Oral History (1st Session), *supra* note 9, at 131–33.
[156] Oral History (1st Session), *supra* note 9, at 133.
[157] *See generally Long Binh Jail Riot During the Vietnam War*, *available at* http://www.historynet.com/long-binh-jail-riot-during-the-vietnam-war.htm (last visited Dec. 8, 2011) ("Voluntary social segregation became the norm. Black and Hispanic inmates stayed together, as did the whites. The environment was dangerous and frustrating for inmates and guards alike, with morale a daily challenge for both groups.") *Id*. *See also* BORCH, ARMY LAWYERS IN MILITARY OPERATIONS, *supra* note 110, at 40–41.
[158] Oral History (2d Session), *supra* note 9, at 19.

of his time there, and that they seemed even worse when he returned for a short-duration stay in 1971.[159]

> The drafted Army harbored a lot of resentments that you don't find now. [The] young people who were drafted had come out of urban communities that were experiencing these tremendous dislocations . . . Watts riots and problems in Chicago and the arsons in Washington after the [Dr. Martin Luther King] murder [in April 4, 1968]. It's just like drugs, I think. These young people didn't change when they came into the Army. They brought [with them all] they had previously experienced, and that was a great deal of embitterment.[160]

Of the ten or so contested cases Alley presided over arising from the Long Binh Stockade incident, he remembers: "The most striking thing . . . was the intelligence and the leadership abilities of the mutineers, and a sense of what a waste it is to the extent that there are race limitations . . . because of economic and other problems."[161] He also recalls that the senior Army leadership recognized both the challenges and the obvious need for action, both in the interest of the Army and as a moral imperative.

> It wasn't a lack of will. As a matter of fact, I think the best intentions were there. . . . the higher management of the Army was, first of all, sensitive to the human potential. As long as you have blacks in the Army, they have to be good Soldiers, so it's to our own advantage. And second, I think that most people had a feeling from a moral sense of the necessity to grapple with this problem and provide real opportunity and equality and high regard.[162]

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[159] *Id*.
[160] *Id*.
[161] *Id*. at 18.
[162] *Id*. at 20.

By the late 1970s, Alley noted a real difference in the tenor and tone of race relations in the Army, observing that "tensions had abated greatly" and attributed the change to

> [T]he volunteer Army and the underlying fact that most minority Soldiers were ambitious [to perform well], and ambition is a good thing, and [that] in the bigger society these problems had just quieted down a little bit. [The] Civil Rights legislation in the 60s accomplished a lot and it had both real and symbolic significance for black people.[163]

He also recalls the dramatic change that Civil Rights legislation had for African Americans in Charlottesville, Virginia, for example, where the U.S. Army Judge Advocate General's School was located.

> When I went to Charlottesville in 1964, before the Civil Rights Acts, in stores of white patronage, there wasn't one—not one single checker, clerk, ticket-taker at the movie . . . you name it, there wasn't one black employee in that city that dealt with direct customer service—not one. And blacks were not permitted in any accommodation . . . nor permitted patronage at restaurants—no blacks. . . . [T]he very next year the law was enacted and when I left in 1968 the most visible difference was in employment.[164]

H. Contrast to the Experience of Army Judges in Iraq

For the limited purpose of this article, it is perhaps worthwhile to briefly compare the experience of BG Alley and the Vietnam generation—the last time the nation maintained a large and sustained forward deployed military force during hostilities—to the conflicts in Iraq and Afghanistan, and to recognize the extraordinary ability and dedication of military legal practitioners to ensuring the fair and professional treatment and administration of military justice, regardless of their location.

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[163] *Id*. at 22.
[164] *Id*. at 23.

Military judges and the role of military justice in *Operation Iraqi Freedom*, *Operation Enduring Freedom*, and *Operation New Dawn* are worth mentioning because when the histories of these conflicts are finally written there should be a well earned place for the work done by military judges in their role in the system that ensured defendants' rights, guaranteed commanders the full spectrum of disciplinary options for the maintenance of good order and discipline, and protected soldiers who look to the Army for assurance against criminal activity.

Since the beginning of large-scale American hostilities in 2003 through the start of 2009, the Army judiciary handled over 650 general and special courts-martial cases *inside* combat zones and affiliated staging areas in Iraq, Afghanistan, and Kuwait, with Iraq cases making up the considerable majority of cases at 532.[165] The volume and complexity of cases were so great that the Army created a special senior supervisory position for the management of the large number of Trial Defense Service (criminal defense) counsel providing services throughout the region.[166]

However, in important contrast to their counterparts in Vietnam forty years earlier, the Army generally did not deploy active duty military judges for conventional service tours inside combat zones. Instead, through at least mid-2010, the Army drew military judges from throughout the judiciary on a rotating basis, with European and east coast judges carrying most of the burden in Iraq, Afghanistan and Kuwait.

This is surprising, given the permanent assignment of a military judge to Korea as part of the Army 4th Judicial Circuit. With a 2007 peak of over 170,000 personnel, the United States had nearly five times as many servicemen in Iraq as Korea, which had approximately 37,000 personnel. In the summer of 2010 the Army judiciary finally deployed a highly regarded and experienced active duty trial judge, Colonel Michael Hargis, to Kuwait in order to administer cases on a more integrated basis.

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[165] Colonel Stephen R. Henley, Chief Trial Judge, U.S. Army Legal Servs. Agency (USALSA), Briefing to Brigadier General Clyde J. Tate, II, Commander, USALSA and Chief Judge, U.S. Army Court of Criminal Appeals (14 Jan. 2009) (notes on file with author).

[166] Personnel, Plans & Training Office, OTJAG, Washington, D.C.

In the case of judicial presence in Vietnam, Frederic Borch notes in his seminal history on legal operations in Vietnam, *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia, 1959-1975*,[167] that:

> The small number of general courts-martial tried in Vietnam in late 1965 and early 1966 meant that a law officer [military judge] traveled to Vietnam on temporary duty to judge the case. As general courts increased, however, a more permanent presence was needed in Vietnam and by 1967 there were two law officers assigned for duty in country. Lt. Col. Paul Durbin, who had been the first judge advocate in Vietnam from 1959 to 1961, was one of them . . . Col. James C. Waller [was the other]. Durbin and Waller tried cases seven days a week. Sometimes they used a chapel as their courtroom.[168]

One of the many Army judges to preside over courts-martial in the Iraq and Afghanistan theaters of operation was Colonel Denise R. Lind, currently the Circuit Judge for the First Judicial Circuit based in Arlington, Virginia.[169] Colonel Lind served as one of three full time military judges for the Army's Fifth Judicial Circuit based in the Federal Republic of Germany, from June 2004–June 2006. As the theaters of operation matured Iraq, Afghanistan, and Kuwait were made part of the Fifth Circuit, which detailed military judges to travel to hear cases as required and also as part of routinely scheduled trial terms.[170] Colonel Lind served in five such terms from 2005–2006, hearing cases from Tikrit to Doha, and from Bagram to Bagdad.

Of the conditions, she recalls that the courtroom at Camp Victory (Baghdad) was occasionally shelled because of its proximity to the Al Faw Palace and of the "ornate, but cheap interior" of Saddam Hussein's Water Palace in Tikrit.[171] The weather, too, offered its own set of challenges. In one case, a sandstorm delayed an arraignment and individual military counsel (IMC) request, forcing the accused, escorts, and the prosecuting trial counsel to collectively sleep in the courtroom,

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[167] BORCH, JUDGE ADVOCATES IN VIETNAM, *supra* note 110.
[168] *Id*. at 70 (citing an Interview with James C. Durbin, and author (1 July 1996)).
[169] Interview with Colonel Denise R. Lind, in Ballston, Virginia (29 Jan. 2009) [hereinafter Lind Interview] (on file with author).
[170] *Id.*
[171] *Id*.

an experience that also repeated itself in more modern Kuwait.[172] Of the facilities in Tikrit, COL Lind recounts from her experience there in 2005:

> From a distance it was rich and imposing, but the plumbing didn't work most of the time. The courtroom was in the command conference room; there was no dedicated court facility. Our chief challenge was getting the court reporter equipment to work under the dust and (un-air-conditioned) heat. All participants in the trials in Tikrit were armed—the military judge, panel (jury) members, and the witnesses. Only the accused was unarmed, an issue sometimes argued as a UCMJ Article 13 matter.[173] But despite the ad hoc court facilities reasonable accommodation was always made for all parties. It worked.[174]

In particular, COL Lind observed that the process worked in large measure due to the efficiency and ready availability of the latest information technology, which she describes as a "leap of light years" from fifteen years earlier when she was deployed to Saudi Arabia, December 1990–May 1991, in support of *Operation Desert Storm*.[175] She recalls back then that "the courtroom was in a general purpose utility tent; there was no email and poor telephone communications. If you needed to talk to someone more often than not you just had to go and physically find them."[176] But no longer.

> Automation today has made a great difference in our ability to responsibly administer courts and supervise trial litigation. The Military Judge's Benchbook, for example, which assists military judges in preparation of trial instructions is easily transported on a CD ROM and

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[172] *Id.*

[173] UCMJ art. 13 (2008) (Punishment prohibited before trial). Defense argued that disarming an accused in a combat zone made him vulnerable to attack and denied him the ability to defend himself; or, conversely, that the lack of a weapon was a negative stigma at the dining facility, where they were required.

[174] Lind Interview, *supra* note 168. Colonel Lind later recalled that when she returned to Tikrit again in 2006, the palace had been turned over to the Iraq government, and Contingency Operating Base Speicher was left with no dedicated court room. She recalls conducting three trials in a temporarily converted Morale, Welfare, and Recreation room. *Id.*

[175] *Id.*

[176] *Id.*

> was usually pre-loaded on laptop computer provided by the staff judge advocate for the general court martial convening authority. The technology has vastly enhance our ability to conduct pleadings, schedule cases, transmit records of trial and post-trial matters, receive motions . . . even coordination for transportation to and from hearings. It enabled military judges to focus on cases at hand without some of the distractions that could have come from logistics and administrative challenges.[177]

Colonel Lind was the military judge for a particularly dramatic 2005 case involving the 2004 mercy killing of a sixteen-year-old Iraqi civilian who was severely burned and suffered dire abdominal injuries sustained after an American convoy on night patrol in Baghdad's Sadr City engaged a suspicious dump truck carrying Iraqi civilians with small arms fire and 25 mm cannon fire, causing the truck to catch fire. There were several dead and wounded Iraqis in and around the truck. The sixteen-year-old was badly burned but still alive. He was shot several times in a conspiracy by American soldiers who argued they meant to ease the man's suffering because his wounds were untreatable.[178]

Another tragic case involved the negligent homicide of a contract interpreter, who was killed when two soldiers were casually mishandling a weapon in their billets and held the weapon up to the interpreter's head and pulled the trigger, not realizing the weapon was loaded.[179]

But in Lind's mind, nothing was worse than the trials back in Germany as returning servicemen went from deserved "war hero to discharge and jail" following post-redeployment misconduct upon their return from hostilities.[180] Lind also commented that "To watch as the great young men would make it back safely and then get into trouble with drugs, alcohol, and assaults after they had served and survived in Iraq . . . it was just heartbreaking."[181]

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[177] *Id.*
[178] *Id.* (with follow-up correspondence) (on file with author).
[179] *Id.*
[180] *Id.*
[181] *Id.*

I. Observations of the Army and the Judge Advocate General's Corps in Vietnam, 1968–1969[182]

From his service in Vietnam, BG Alley remembers a fighting Army and a "well disciplined force that was engaged in the field . . . People had something to do. There was very little drug usage—only two or three drug cases among the 136 cases" he tried.[183] He recalls that "it was a good Army; well led."[184] Juxtapose that experience with an extended tour or temporary duty two years later, in 1971, when he observed a sudden almost inexplicable change in the nature of the U.S. force characterized by a "deterioration of discipline . . . and pervasiveness of drugs."[185]

As for the Army JAG Corps, Alley recalls a legal presence in Vietnam that was adequate for the roles and missions it had at the time. There was sufficient manpower, albeit much of it borrowed from other branches of the Army in the form of licensed attorneys serving two-year commitments in the Field Artillery, Signal Corps, or Transportation Corps.[186] Alley recalls that judge advocates generally held four-year service commitments while the combat and service support branches of the Army only had two-year obligations.

> When the Justice Act of 1968 became effective in '69 our missions were much enhanced, especially in the military justice field [due to the detail of military judges to special courts-martial], and we needed more manpower and the Army staff had not approved the build-up of JAG [assets to] accommodate that. So units were borrowing the many, many lawyers who were needed in the other branches who had elected not to even apply [to the JAG Corps].[187]

Still, while the Army was able to meet the legal services requirement in the short run, the harder issue of retaining those officers was another matter entirely, a challenge found across the force during the difficult period of an unpopular war.[188] In Alley's mind, this was partially

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[182] *See generally* BORCH, JUDGE ADVOCATE IN VIETNAM, *supra* note 110.
[183] Oral History (1st Session), *supra* note 9, at 113.
[184] *Id*.
[185] *Id*.
[186] *Id*. at 127.
[187] *Id*.
[188] *Id*.; *see also* Alley Interview, *supra* note 16.

generational; a feature of a post-World War II culture that simply did not value traditional notions of military service—the selfless nobility of it—the same way previous generations had. This also applied to many unwilling military spouses, as Alley recalls:

> In the JAG Corps you could find people who just despised the Army and you'd find their wives who were even more vociferous[189] . . . One of the most disturbing things to observe during that period was the junior officer's wife who couldn't wait for the husband to get out of the Army. They all seemed to think that hubby would leave active duty and go out and immediately get a $60,000 job in Aiken, South Carolina or something like that. I thought they had tremendously inflated ideas of their husband's prospects. [R]elative to the welfare of others—the community, lower grade enlisted families - and financial difficulties and so forth, this generation—not uniformly, but far too many people exhibited just a flight of fancy—very self-centered, irresponsible attitude, and I'm glad it's over.[190]

Even so, Alley is quick to recognize the critical role and presence of a majority of young JAG officers—and their families—who fought and sacrificed mightily on behalf the nation's interests in Vietnam.[191] "There were many heroes in that war, JAGs and others, who spent each day risking everything to do what was right. Many lost their lives as a result."[192]

V. Command and General Staff College and the Trial Court at U.S. Army Hawaii, 1969–1972

In early 1969, Alley received word from Major General (MG) Kenneth Hodson, The Judge Advocate General, that he was selected as one of the four of judge advocates to attend the resident U.S. Army Command and General Staff College at Fort Leavenworth, Kansas, for

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[189] Oral History (1st Session), *supra* note 9, at 127.
[190] *Id*. at 128.
[191] Alley Interview, *supra* note 16.
[192] *Id*.

the 1969-1970 academic year.[193] Having mostly completed the correspondence course equivalent, Alley initially resisted attendance at the resident course,[194] but finally relented.

In the fall of that year he and his family moved to Kansas, where he enjoyed himself in what he later described as a "tremendous year":[195] "It was like sitting down and playing a board game for a whole year in a nice group of people, social, pleasant, relaxed."[196] Indeed, Alley found the year at Fort Leavenworth a bit of a lark, although he excelled in the academic program while quietly questioning the program's worth to Army lawyers.

> I don't think any one of the four of us learned anything that was of the slightest assistance in our subsequent careers in the Army . . . The acquaintances that we made I think are people we kept running into in later life and probably a personal acquaintance around the Pentagon or around [a] major command, that's helpful to have. [W]hether we were torches of pure light amidst the line officers so that they got a lot from us and our benign influence rubbed off on them so that they were changed, I couldn't begin to tell you. But that seemed to be part of the justification for sending us there.[197]

But even in the amenable academic environment of Fort Leavenworth, where he graduated on the Commandant's List,[198] Alley

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[193] Oral History (1st Session), *supra* note 9, at 120–21, 137. The other judge advocates were Hal Miller, Thomas Murdock, and Barney Brannen. *Id.*

[194] Alley did not think much of the correspondence course, which satisfied the technical requirements of the year—long resident program at Fort Leavenworth. He recalls:

> So I enrolled in [the correspondence course] and got about a third of the way through it—incidentally without understanding very much. This mysterious stuff had come in the mail and I would read it and just couldn't make any sense of it, and after awhile a multiple choice exam would come in the mail and I would poke holes on paper without knowing what I was doing. I never failed a course, but never had a sense that I really understood the course either.

Id. at 119.

[195] *Id*. at 105, 121.

[196] *Id*. at 134.

[197] *Id*. at 137–38.

[198] *Id*. at 134.

was planning his way back into the judiciary. With the selection of Colonel John J. Douglass as the Commandant of The Judge Advocate General's School, there would be an opening on the court down the road at Fort Riley, Kansas, a position Alley had been led to believe he would occupy upon graduation from Command and General Staff.[199] It was not to be.

U.S. Army Hawaii

In 1970, Alley was assigned to the U.S. Army Judiciary with duty at Schofield Barracks, Hawaii—not quite Kansas, but back on the bench nevertheless.[200] And what a bench it was. Built amidst the pineapple plantations of the mid-island Oahu planes, set against the backdrop of the Wainanae Range—the highest point on the island—and Mount Kaala, Schofield Barracks is justifiably considered one of the most picturesque and remarkable Army posts in the world.[201] At the time, the Army lacked the resources to fully reconstitute the 25th Infantry Division on Hawaii, and so the division consisted of a single Infantry brigade plus the Hawaii National Guard.[202] All of this made for a slow pace and a high quality of life; almost too good for the hard-working Alley.

> [I]n a busy month I might try ten cases and in an average month probably six to eight. . . . Nobody was checking up on my office hours, so at least two afternoons a week I went to the beach and played a lot of tennis, got to work late in the morning, and left early in the afternoon, and took long lunches, and after not too many months went by I got a little bit bored by that. So I wrote The Judge Advocate General [requesting to do other things]. Contract appeals, civil service dispute resolution—anything adjudicative, and you know—I never got a direct answer back. It just kind of hung in the air, even though I was told from time to time [they were thinking

[199] *Id*. at 135.
[200] *Id*. Alley remembers that he thought the assignment was "fabulous," a view not shared by his teenage daughter, who "broke into bitter tears—bitter tears—because she had assumed from [conversations] that we were going to stay at Fort Leavenworth, Kansas, which was so wonderful. How could it possibly be nice in Hawaii compared to this?" *Id.*
[201] *See generally* http://www.globalsecurity.org/military/facility/schofield-barracks.htm (last visited Dec. 8, 2011).
[202] Oral History (1st Session), *supra* note 9, at 136.

> about it]. I guess they were worried about the precedent.[203]

Instead, Alley found work throughout the Pacific region as a traveling judge in support of the judiciary in Alaska, Korea, and Vietnam. "As time went on I kept occupied and had a great time—just loved it. Who wouldn't?"[204]

VI. The Army Court of Criminal Appeals and *United States v. Calley*, 1972–1973[205]

Despite his best efforts, Alley would not linger long in the Pacific trial judiciary. As he memorably recalls:

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[203] *Id.*

[204] *Id.*

[205] United States v. Calley, 46 C.M.R 1131 (C.M.A. 1973). The Court of Military Appeals affirmed on December 21, 1973, United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973), and denied a petition for reconsideration on February 4, 1974. The Secretary of the Army approved the findings and sentence of the court-martial on April 15, 1974. In a separate action, the Secretary commuted the confinement portion of the sentence to ten years. The President of the United States notified the Secretary of the Army on May 3, 1974, that he had reviewed the case and had determined that no further action would be taken. The U.S. Court of Appeals for the Fifth Circuit rejected Calley's *habeas corpus* petition on September 10, 1975. Calley v. Callaway, 519 F.2d 184 (1975). For an analysis of the legacy the *Calley* case and the My Lai massacre had on military justice generally, see Norman G. Cooper, *My Lai and Military Justice—To What Effect?*, 59 MIL. L. REV. 93 (1973). *See also* WILLIAM R. PEERS, SEC'Y OF THE ARMY, REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT (1970). *See also* WILLIAM R. PEERS, THE MY LAI INQUIRY (1979); Stanley R. Resor, Sec'y of the Army, *Official U.S. Report on My Lai Investigation*, U.S. NEWS & WORLD REP., Dec. 8, 1969, at 78–79; *Investigation of the My Lai Incident: Hearings Before the Armed Services Investigating Subcommittee of the House Committee on Armed Services*, 91st Cong., 2d Sess. (1970). It is worth noting that Calley was charged with common UCMJ violations: article 118 (premeditated murder) and article 134 (assault with intent to commit murder); he was not charged with war crimes. At the beginning of the *Calley* opinion, the court wrote that "all charges could have been laid as war crimes" and cited as support the Army field manual on land warfare. *Calley*, 46 C.M.R. at 1138 (citing U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 507b (18 July 1956)). Paragraph 507b itself is devoid of reference to black letter law on this point and states: "Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code." *Id.* Neither Calley nor the Army's field manual provides any further discussion on the amenability of U.S. personnel to trial by a military tribunal other than court-martial.

> I'm out in Hawaii plotting—how am I going to extend my three-year tour into a four-year tour having succumbed to the languorous pace of island life, having learned to like a month in which I'm only trying six cases, with occasional forays elsewhere. [Then] I received a call from Colonel Thomas Jones, administrative officer [to the Army] judiciary. . .[206]

The call was on behalf of MG Kenneth Hodson,[207] formerly The Judge Advocate General of the Army then serving as the Chief Judge of the Army appellate court. The subject was the *Calley* case currently under review, which was a matter of considerable interest both in and outside the Army requiring superior judicial expertise. Major General Hodson wanted the best, and Alley immediately came to mind. He recalls Colonel Jones explaining,

> I have been going through the UCMJ and we don't see anything whatsoever that would prohibit the assignment of a sitting trial judge to the [Army Court of Criminal Appeals] by designation paralleling the situation where a U.S. district court judge sits by designation on a U.S. Court of Appeals. General Hodson thought that you would do a good job on this case and he'd like to know would you take the appointment by designation to the ACMR for this case only?[208]

Brigadier General Alley responded with enthusiasm: "Love to—love to. I'm underemployed here and that will solve my problem of staying in Hawaii, but still having something to do."[209] So the court soon followed by sending approximately 50,000 pages of transcripts to assist him with the expected oral argument and associated proceedings.

But after about a month a second call came, again from Colonel Jones. The Judge Advocate General, MG George S. Prugh,[210] was

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[206] Oral History (1st Session), *supra* note 9, at 140.
[207] Major General Kenneth J. Hodson (1913–1995). The Judge Advocate General of the Army, 1967–1971; Chief Judge, U.S. Court of Military Review, 1971–1974.
[208] Oral History (1st Session), *supra* note 9, at 141.
[209] *Id*.
[210] U.S. Army, 1942–1975. *See generally* Lieutenant Colonel George R. Smawley, *The Past as Prologue: Major General George R. Prugh, Jr. (Ret.) (1942–1975)—Witness to*

increasingly concerned about the controversy surrounding the case and didn't want to create more issues with the designation of an appellate judge. Therefore, BG Alley was given a choice: remain in Hawaii and send the case materials back to the court, or agree to move to Washington and accept a formal assignment to the court with the understanding that he would sit on the *Calley* hearings. With barely a blink, Alley agreed to return to Washington.[211]

He formally joined the ACCA in July 1972. Oral arguments came in the spring of 1973, about the same time Alley was assigned a military commissioner named John T. Willis to assist with the case.[212] Willis, who was later extremely active in Democratic Party politics and served as the Maryland Secretary of State from 1995-2003, is given great credit for his extraordinary efforts and service in the preparation of the case and the timely publication of the opinion a few weeks after oral argument.[213]

A detailed case history of *Calley* is simply beyond the scope of this article. The facts of the case have been well reported, [214] and essentially concern U.S. Army Second Lieutenant William Calley's role in the March 16, 1968, slaughter of over 500 Vietnamese civilians at My Lai. Calley was ultimately convicted by military court-martial of "the premeditated murder of twenty-two infants, children, women, and old men, and of assault with intent to murder a child of about two years of age."[215]

Among the issues raised at trial and later upon appeal were whether Calley was justified in his perception that his actions were in response to the lawful orders of his superiors, that pre-trial media prejudiced his ability to receive a fair trial, and that certain instructions by the military judge, Colonel Reid W. Kennedy, violated his rights.

Insurgent War, The Law of War, and the Expanded Role of Judge Advocates in Military Operations, 187 MIL. L. REV. 96 (2006).

[211] Oral History (1st Session), *supra* note 9, at 142.

[212] *See generally* The Former Maryland Secretaries of State, at http://www.msa.md.gov/msa/mdmanual/08conoff/former/html/msa12062.html (last visited Dec. 19, 2011).

[213] Oral History (1st Session), *supra* note 9, at 144.

[214] *See* MICHAL BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND COURT-MARTIAL OF LIEUTENANT CALLEY (LANDMARK LAW CASES AND AMERICAN SOCIETY) (2002); DR. KENDRICK OLIVER, THE MY LAI MASSACRE IN AMERICAN HISTORY AND MEMORY (2006); DOUG LINDER, AN INTRODUCTION TO THE MY LAI COURTS-MARTIAL, *available at* http://www/law/umkc/edu/faculty/projects/ftrials/mylai/my1_intro.html (last visited Dec. 19, 2011).

[215] United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973).

The trial court convicted Calley on March 31, 1971, and sentenced him to life in prison. The ACCA upheld the conviction on February 16, 1973; the CAAF concurred later that year on December 21, 1973. In a move widely considered political, the Secretary of the Army approved the findings and sentence of the court-martial on April 15, 1974, but by separate action commuted the confinement portion of the sentence to ten years.

From the appellate perspective, the *Calley* case was one of the court's most watched decisions in the Army's history and engendered considerable media and political interest within the tumult that consumed the nation during the final phases of U.S. involvement in Vietnam. The ACCA ultimately affirmed the court-martial of Lieutenant Calley, with Alley authoring the majority opinion. Looking back several years later, Alley viewed the convicted officer with disdain:

> I thought Calley was a person deficient in officer-like qualities who was dumber than the average guy; less well trained than the average guy; less will powered than the average guy; more child-like of a desire to please his superiors than the average guy; and without thinking at the time for a moment that he was legally justified, he slaughtered these people so as to win the approval of [his company commander] Captain [Ernest] Medina and if anybody had walked up to him and said "are you justified in doing this?" he would have said—"yeah," [but] that's beside the point. I think he did it and he liked it.[216]

Alley sat on the case as part of a three judge panel. The other two judges were Colonel Douglas Claus and Colonel William Vinette.[217] It was Alley's job to produce the draft decision which was circulated and adopted by the full panel. His reflections on the case and in particular how it was reported at the time are worth recalling, and afford an interesting perspective on the politicization of a dramatic crime during a polarizing period in American military history.

> Public discussion of the case, I think, reflected great misunderstandings of the facts. For example, in public

[216] Oral History (1st Session), *supra* note 9, at 144–45.
[217] *Id*. at 147.

discussions you kept encountering this: First, here is this guy in the horror of combat, fatigued and bled and so forth finally reaching his breaking point, etc. Well, Calley never had one day of combat—not one day. His platoon had been in operations and drawn fire and booby traps. He had never been with them when that happened and he was not a combat tried officer. [Certainly], there is a strain in being a platoon leader even if you never get shot at if you're serving in Vietnam, but he never got shot at. So I was highly critical of the press for circulating that when it was so wide off the factual mark.

Second, there were lots of editorial comments to the effect that since they were only examining the results in the My Lai cases, how come of all these people who have committed atrocities Calley is the only guy in the course of the war ever to be tried, convicted and sentenced for something like this? Well, now, that wasn't true. That was true out of the My Lai group, but it wasn't true out of the [Army's] experience of the war in general. Hell, I put all kinds of people away as a presiding judge.

Of course, the court members sentenced them, but for similar things as I mentioned and the other judges over there at the time had their share of lots and lots of convictions of people for this kind of thing. So Calley was not a scapegoat. The explanation for the differing verdicts in the My Lai trials is a very simple one. In some of the enlisted cases the defense of obedience to Calley's orders was a successfully invoked defense, and I think that [the] court-martial was very conscious about enlisted people and they'll buy that defense on the part of the average GI.

More legalistically, in some of the trials—I guess in fact in all of the trials before Calley's trial . . . there were only three or four—the presiding judge at trial ruled that the government could not offer the testimony of a witness where that witness had earlier been summoned to testify before a committee of the Congress and pursuant to its explicit constitutional authority the

> committee of the Congress had sealed that record and refused to make it available to the defense. Colonel Reid Kennedy [the military judge] in the *Calley* trial ruled to the contrary. He permitted the issuance of a subpoena to the custodian of the congressional records, who responded "no way."
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> But [Kennedy] said that first of all, this is not the Jencks Act because "Jencks" means ["]that which is available in the prosecution["] and this material is equally inaccessible to the prosecution as to the defense. You can't invoke the *Brady* case because God only knows what these people said to the Congress and the prosecution's responsibility is only to turn over exculpatory material and they can't do that if they don't know what it is. And in terms of any general due process right to the examination of other statements so as to assist in the preparation of cross-examination, "show it to me" says [Kennedy]. If you can't find it in *Brady* and if you can't find it in Jencks, it isn't there. So he permitted witnesses to testify when the other judges did not.
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> . . . In affirming [Kennedy] on that point—now . . . the court-martial is not an Article III court, but nevertheless its process ought to be treated as if it were. It should have the same independence. It should have the same sphere for decision-making, to the extent of its jurisdiction, as an Article III court. If you follow the point of view of the prior cases not permitting this list of witnesses to be offered at trial, that means that because of some political inspiration by a congressman, he [can] through his committee, schedule hearings, subpoena all the witnesses, take their testimony, seal the record and legislatively foreclose the trial; and in my opinion that was an impermissible violation of the principle of separation of powers. The result is essentially a legislative acquittal, and the difference of approach between Kennedy and the other [trial judges] explains a lot of the varying verdicts.[218]

[218] *Id*. at 148–51.

As for the court itself, Alley recalls enjoying the experience as one of the thirteen judges on the Army appellate court where he was the junior member and its only lieutenant colonel.[219] But Alley later acknowledged that he preferred the experience of being a trial judge—"in the mix with counsel and the excitement and intellectual rigor of watching the advocacy process unfold live, and to be a part of it."[220]

Still, there were interesting cases of huge institutional relevancy before the Army appellate court, and Alley readily acknowledged the role the court could have in shaping events and policy. Much to Alley's amazement, one such issue involved the Army's efforts to criminalize certain personal appearance and uniform issues for an Army at war. He recalls that

> I began to get hair cut cases and penny ante uniform cases, and it did make me wonder why the U.S. Army which began as a revolutionary Army and which wasn't doing well in combating other revolutionary Armies had become [a] kind of a Prussian Army. What was there about a haircut that was so important that we were willing to send people to prison because they didn't have the right haircuts? . . . It brought to mind—in Countess Longford's biography of Wellington, when he was in the Peninsular Wars—she wrote of an official of horse guards who came over and started criticizing the uniforms of Wellington's soldiers in the field who had been there a long time and had suffered a lot, and she quotes him as saying that Wellington replied, "Well, sir, you have descended from matters of effective discipline to mere nagging." [I thought] it just seemed like there was an awful lot of penny ante imposition of nagging type discipline that I could observe at Schofield Barracks . . . We were spending an awful lot of effort on trivia and destroying lives over trivia.[221]

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[219] *Id*. at 146.
[220] Alley Interview, *supra* note 16.
[221] Oral History (1st Session), *supra* note 9, at 151–52.

VII. The First Military Judge Selected to Attend Senior Service College; Chief Trial Judge; Chief, Criminal Law, Office of The Judge Advocate General, 1974–1978

The Army, quite understandably, has long been an institution that rewards successful leadership of one kind or another in increasingly challenging hierarchal positions. For Army legal services, leadership generally manifests itself through assignments as a staff judge advocate or similar command counsel at the division, corps, or installation level, advising commanding generals and supervising large legal staffs,[222] or in similar supervisory positions within the Army JAG Corps itself. Judge advocates with proven leadership are highly competitive for advanced military schooling, including the senior service colleges.[223]

So, it was a bit surprising when, in 1974, The Judge Advocate General, MG Prugh, selected Alley—an officer who had never served as a staff judge advocate or similar command counsel—for attendance at the Industrial College of the Armed Forces (ICAF). This otherwise routine act of selecting a deserving officer for advance schooling was significant, because it was the first time a sitting military judge was identified as among the institution's key senior leaders. This was not lost on Alley, who suspected at the time that

> [B]y virtue of the Military Justice Act of '68 the judiciary was a statutory creature and it assumed greater importance in the JAG [Corps] because of the changes in the special courts-martial accomplished by the '69 [implementation] of the act. . . . Sitting on special courts vastly increased the judicial business and the importance of the judiciary in the JAG [Corps] scheme of things and I think General Prugh made his recommendation on the basis that, well, it's about time to recognize the judge. I was the first one…whose primary experience had been in the judiciary to be sent to the War College, and I think it was because of that.[224]

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[222] *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 1-104, LEGAL SUPPORT TO THE OPERATIONAL ARMY paras. 4-20 through 4-25 (15 Apr. 2009).
[223] These include the U.S. Army War College, the Industrial College for the Armed Forces, and the National War College, as well as the Navy and Air Force equivalents.
[224] Oral History (2d Session), *supra* note 9, at 28–29.

Although honored by his selection, it was not something he sought. "The decision that a person made then to have successive assignments in the judiciary meant that you were never going to be promoted to general. So if I'm not going to be promoted . . . I was already a colonel, [why] go to the War College?"[225] Nor, when he was finally enrolled in the resident course at the ICAF, did he particularly like it. Indeed, he considered it "the worst year [he'd] spent in the army" because the curriculum had little or no applicability to what he was interested in or what he was doing as a judge advocate.[226] Of course, that did not stop him from graduating on the Commandant's List and publishing a paper, *Determinants of Military Judicial Decisions*,[227] so the experience was not without quintessential accomplishment.[228]

By the time of Alley's graduation from ICAF in 1974, the Army had formally upgraded the Chief Judge of the service appellate court to a brigadier general billet, and he freely admitted that it was something he occasionally thought of over "a bourbon and soda."[229] Since his promotion in September 1973, it was Alley's view that he had effectively missed the time when he would be an appropriate selection for certain senior staff judge advocate positions.[230] It was no surprise, therefore, when TJAG returned Alley to the ACCA, confirming Alley's view that the war college selection was a gesture to the judiciary. He could not have been happier, recalling the U.S. Army Legal Services Agency *circa* 1974 as a "delightful place . . . with great atmosphere . . . a pleasant building . . . and the people there were fun."[231]

A. A Lonely Splendor . . . . Alley's Brief Return to the Trial Judiciary, 1975

Upon his return to the appellate bench, Alley noted some tensions between certain senior jurists and others in the JAG Corps. He attributed this to a misunderstanding of the roles and relationships between the

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[225] *Id*. at 32.
[226] *Id*. at 33.
[227] Wayne E. Alley, *Determinants of Military Judicial Decisions*, 65 MIL. L. REV. 85 (1974).
[228] Oral History (2d Session), *supra* note 9, at 34. Notes Alley, "Any lawyer who can write at all can write a paper that will absolutely dazzle the folks at ICAF." *Id.*
[229] *Id*. at 35.
[230] *Id*. at 36.
[231] *Id*.

military trial judiciary and its approximate peers in the civilian community, leading some on the court to assume an unattributed, defiant independence to the Army legal community.

> Military judges have a highly specialized function . . . . the worst things a military judge can do is to visualize himself as [an equivalent equal of] a real judge of a court of general jurisdiction because it's not the same thing at all, and the purposes are different.[232]

This, in part, led the Chief Judge at the time, BG Emory Sneeden, to seek out Alley as the future Chief Trial Judge for the Army trial judiciary and, perhaps, help make him competitive for the Chief Judge (BG billet) on the appellate court.[233] Both were well aware that Alley had not held a supervisory position in over eleven years; management of approximately 54 Army trial judges would change that.[234]

It is also worth noting that BG Sneeden was the first career judge advocate to be appointed to the federal court when President Reagan nominated him to sit on the 4th Circuit Court of Appeals, where he served from 1984-1986. Alley was the second.[235]

So in 1975, after a total of more than seven years in the judiciary, Alley assumed responsibilities as the Chief Trial Judge for the Army.[236] He relished the role. In particular, he strove mightily to recruit quality officers into the judiciary and made the case for service as a military judge:

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[232] *Id*. at 37.
[233] *Id*.
[234] OCU Interview, *supra* note 9, at 15.
[235] *Id*.; Alley Interview, *supra* note 16.
[236] Of his qualifications to serve as the Chief Trial Judge and his relationship with the other trial judges, Alley recalls:

> I'd had two assignments as a trial judge—including one in Vietnam. I'd had two interrupted assignments on [the Army Court of Military Review], and so relative to people who were senior to me in the judiciary, I think they regarded me as senior to them in experience. . . . I had a kind of a authority [and] platform that they would listen under the circumstances.

Oral History (2d Session), *supra* note 9, at 45.

> We are talking about two categories of people. For special court-martial judges who are quite senior captains and we hoped majors, I think they were attracted to the work and were dazzled by the title. By the time you get up to the senior lieutenant colonels, you'd better be a little more cynical than that and the appeal has to be in the nature of the work and a comparison of the advantages and disadvantages.
>
> [By comparison] A staff judge advocate is kind of a harassed guy in many ways and people call him up in the middle of the night, and he's off in the field, and his time isn't his own and he has to cope with stuff - frequently a staff who takes very different positions on things and so forth. I think an SJA's life is a pretty tough life, and I tried to present the judgeship when recruiting people in this kind of a life of lonely splendor . . . you never get a call from the Provost Marshal at midnight; you don't have to hustle over and see the general; the time is your own and the independence and the fascination of the work are advantages that make up for whatever disadvantages there are. . . . [To senior officers near retirement he would say. . .] Wouldn't it be fun to just give it a flyer for a couple of years?[237]

Alley was convinced that the Army JAG Corps did well by its judges professionally, and avoided the untenable situation where general court-martial judges felt concerned about the career implications of certain decisions or rulings. Still, he favored the idea of fixed tenures or appointments for military judges for a period of years to give them the confidence to learn their trade unencumbered by the idea that someone somewhere was second-guessing their work in unconstructive ways.[238]

Detailing himself to cases in Panama and the Southwestern United States, Alley reveled in the return to trial work and the chance to coach and mentor other judges. But it did not last. In the summer of 1975, Alley got the call from The Judge Advocate General, MG Persons, that the Chief of the Criminal Law Division, Office of The Judge Advocate General, had unexpectedly announced his retirement and that a

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[237] *Id.* at 39–40.
[238] *Id*. at 46.

replacement was needed almost immediately. Alley was chosen to fill the billet—one of the JAG Corps' most significant and prestigious—but a far cry from the judiciary he had come to enjoy so much.

B. Chief, Criminal Law Division, Office of The Judge Advocate General, 1975–1978

The move from the U.S. Army Legal Services Agency over to the Pentagon was sudden, but smooth. Alley remembers that the office was populated by a team of some of the Army's most gifted and energetic attorneys including: Thomas Murdock, James Kucera, John Bozeman, Michael Carmichael, Thomas Culman, Charles Giuntini, James Gravelle, James Smith, and Michael Cramer. Most went on to have distinguished careers as staff judge advocates and judges, and many had equally distinguished careers after leaving military service. Alley recalls that "if you have people like that, it's going to be a good division, and it was. It was an outstanding organization."[239]

Alley was just as enthusiastic about the JAG Corps leadership at the time, in particular his relationship with The Judge Advocate General, MG Wilton Persons, from July 1, 1975, through June 30, 1979. He remembers MG Persons as

> [A] man of wide interests . . . who read a lot and was attentive to culture and so forth, and whenever I got in there, why, we'd sit down and talk at length about matters other than the business at hand and his schedule would get behind and his secretary would be mad and so forth, but I found General Persons to be probably the most cultivated and broadly educated man in the Pentagon and it's a shame that the boss is the guy that's so busy and you can't just sit around and chew the fat with him.[240]

As for the job itself, Alley freely acknowledged that "the bulk of the work was response to correspondence—congressional complaints about courts-martial and staff papers that [float] around the other agencies in

[239] *Id*. at 54–55; *see also* Alley Interview, *supra* note 16.
[240] Oral History (2d Session), *supra* note 9, at 55.

the Pentagon . . . just putting out fires."[241] But he was quick to realize the potential the office had for meaningful contributions to the institutional JAG Corps and the general practice of military law.

One of Alley's first actions was the staffing of a short paper advocating the removal of The Judge Advocate General from the decision-making process of which cases from the Army appellate court made it to publication. Until then, the Office of The Judge Advocate General (OTJAG), Criminal Law, would review, on a weekly basis, the decisions from the ACCA and recommend to The Judge Advocate General which ones should be included in the published reports. Having served on the court, Alley opposed this as "intrusive on the proper independence of the judiciary," and the consequence of the change had "some profound implications on the way the judiciary regarded its own opinions."[242]

Of even greater enduring institutional importance was the role Alley played as Chairman of the Joint Services Committee on Military Justice. The Committee is comprised of the respective chiefs of criminal law among the military services and one non-voting representative each from the Office of the Department of Defense General Counsel and the Court of Military Appeals [now the CAAF] which collectively develop and coordinate policy proposals deemed important by the military services. The Committee also works to keep the UCMJ and the Manual for Courts-Martial current with respect to developments in both military and civilian jurisprudence.

As happened to be the situation at the time, the uniformed services and the Chief Judge of the Court of Military Appeals, Albert B. Fletcher, Jr., had competing legislative proposals that would significantly alter the nature and delivery of military justice.[243] It fell on Alley to manage the differences between the two.

One interesting idea championed by the Secretary of the Army and MG Persons concerned amending certain rights to counsel for non-judicial punishment when instituted in a designated combat zone, or else

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[241] *Id*. at 57.
[242] *Id*. at 57–58.
[243] *Id*. at 58–60. Albert B. Fletcher, Chief Judge of the Court of Military Appeals, April 3, 1975, to September 11, 1985. *See generally* www.armfor.uscourts.gov/judges.htm (last visited Dec. 8, 2011).

elect to decline the Article 15 and demand trial by court-martial. Alley endorsed the idea:

> [I]n any hostile fire zone or [Secretary of the Army] designated isolated area of service, the Article 15 rule would be the same as for a person on a vessel; in Vietnam it was so hard to Article 15 a guy it was ridiculous. But for some reason . . . the Navy and the Air Force were just kind of reluctant to buy that.[244]

Another idea endorsed by both the Army and Chief Judge Fletcher concerned the establishment of general courts as courts of permanent existence rather than *ad hoc* tribunals. Alley remembers that the other services "reacted with horror" at the idea:

> [B]ut then the Air Force TJAG, General Hague, got to thinking about the Air Force organization of its judiciary and when you really come down to it their courts, because they had less business, were [already] courts of permanent existence. Their courts were organized in teams, with a judge, and a judge's assistant and a trial and defense counsel co-located, and . . . if you could iron out some technical problems, why, it looked like what they already had.
>
> I thought it was a very advantageous proposal from the standpoint of justice administration; . . . the Navy, however, fought the idea bitterly. . . . [P]eople got upset about this idea of a permanent court because the next thing you know they'd be issuing writs and letting people out of jail and again acting like an Article III judge, presumptuously taking motions out of time and all that sort of thing.
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> From my standpoint it would have been a tremendous advantage in the disposition of work if a trial judge could hear motions before a case was referred to trial. Can you imagine how that would ease the referral

[244] Oral History (2d Session), *supra* note 9, at 60.

> decision? . . . But when General Persons . . . left[,] the Navy scuttled the idea . . . just vetoed it.[245]

C. Development of the Military Rules of Evidence

One of Alley's proudest initiatives to come out of the Joint Services Committee during his time there was the development and implementation of the Military Rules of Evidence (MRE).[246] Up until that time, under UCMJ Article 36, military practice was required to conform to the extent "practicable" to the Federal Rules of Evidence, but nothing more.

As the Chairman of the Joint Services Committee in 1975—the same year that President Ford signed the legislation establishing the Federal Rules of Evidence—Alley worked diligently to achieve a consensus among the military services regarding a parallel simplification of the evidentiary rules for the uniformed services. As then-Major Fredric Lederer, a member of the working group, recalls, Alley felt the project:

> [W]ould achieve three separate goals: first, it would meet the Article 36 requirement that [the military] generally apply federal rules; second, it was a discrete project that could be accomplished in one year's concerted effort, establishing a pattern of work that the Joint Service Committee could carry into the future; and third, the efficiencies in trial practice generated by the new rules would demonstrate to the services the benefits of serious attention to the law reform on a sustained basis.[247]

Lederer goes on to state:

> Colonel Alley's instructions not only made pragmatic sense, they incorporated a fundamental philosophical position:

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[245] *Id*. at 61–62.

[246] *See generally* Lieutenant Colonel Fredric Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5 (1990). Lederer currently serves as Chancellor Professor of Law at William and Mary Law School. He served as one of the co-authors of the Military Rules of Evidence in his capacity as the Army's representative to the Joint Services Committee on Military Justice Working Group that developed them.

[247] *Id.* at 11.

> military evidentiary rules should be as similar to civilian law as possible. Military evidentiary law as found in the Manual for Courts-Martial had begun as nearly identical with the prevailing civilian federal law . . . Nevertheless, the process of incorporation of case rulings without periodic systemic revision had created a wide gap between civilian and military practice in some areas, a gap that the advent of the Federal Rules of Evidence broadened considerably. Colonel Alley intended not just that the codification reflect the Federal Rules of Evidence, but that all *future* military evidentiary law echo it as well, unless a valid military reason existed for departing from it.[248]

The new MRE were issued by President Carter in 1980. More than twenty years later, this effort remains widely recognized as a seminal development in the advancement military jurisprudence. Indeed, during a 1987 speech to the annual All-Services Military Judges' Conference, the General Counsel for the Department of Defense, H. Lawrence Garrett III, commended Wayne Alley as the "godfather" of the Joint Service Committee for the way in which he was able to move the Committee to achieve highly significant and lasting institutional results.[249] Alley justifiably regards the project to codify the MRE as his principal contribution during his tenure as the Chief of the Criminal Law Division and Chair of the Joint Services Committee on Military Justice.[250]

Finally, although the idea was born of MG Person's own vision and persistence, Alley spearheaded the effort leading to the establishment of the Trial Defense Service (TDS). Under his leadership, the Criminal Law Division conducted the various staff studies and managed the coordination within and between the stakeholders on the Army staff, including the Deputy Chief of Staff for Personnel (G-1) and the Army General Counsel.[251]

The TDS concept entered field testing in Europe in 1978, Alley's final year on the Army staff, and lasted until 1980. It was an immeasurable success then, and remains so today. It is a lasting

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[248] *Id.* at 14.
[249] The verbatim transcript of the presentation can be found in H. Lawrence Garrett, III, *Reflections on Contemporary Sources of Military Justice*, ARMY LAW., Feb. 1987, at 38.
[250] Oral History (2nd Session), *supra* note 9, at 63–64.
[251] *Id*. at 65.

testament to the vision of MG Persons and the creativity and determination of officers like Alley, who were the midwives to one of the Army's greatest institutional contributions to fair and professional exercise of military justice.

VIII. United States Army Europe

Following three exceptionally productive years on the Army Staff, Alley again received short notice of his next assignment as the Judge Advocate (the senior staff judge advocate) for United States Army Europe (USAREUR), headquartered in Heidelberg, Germany.[252] Despite only about two weeks' notice of the new assignment, it was a welcome event both personally and professionally. Alley had recently remarried; his second wife, Marie, was a German native who had immigrated to the United States in 1961, and was enthusiastic about the prospect of returning to Europe.[253] It seemed like the perfect fit, albeit a disquieting one for an officer who had never before served as a command legal counsel:

> A person who had been a staff judge advocate and who had been through those experience daily—going over to the commanding general and so forth—probably would have accepted this [position] without a blink, but I had never had those experiences. I'd never worked for a [non-JAG] general officer—ever, and all of a sudden here it's a four-star [commanding general] . . . So there were some anxieties; in fact a very high degree of anxiety. I'd never served in Europe. Imagine, I'd never been an SJA and never served in Europe. Put those two together and I'm the [senior] SJA in Europe.[254]

The USAREUR Combatant Commander in Europe at the time was General George Blanchard.[255] The services provided by the USAREUR Judge Advocate's office were far-ranging, but principally concerned just about everything that was new to Alley, including international affairs,

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[252] *Id*. at 78.
[253] *Id*. at 81.
[254] *Id*. at 83.
[255] *Id*.

contracting, and administrative and fiscal law.[256] Working closely with so many non-lawyers was also something relatively new, and the cast of characters was rich, including:

> [A] guy named General Crizer who came there with the reputation of really being a fearsome, smoke belching dragon. Actually a wonderful man . . . and the Chief of Staff, a man named Richard Groves—the son of General Leslie Groves who was the administrator of the Manhattan Project—a hard-driving "we'll do the job at all costs; lawyers are obstructionists; don't tell me no, and anyway I don't like your whole profession" kind of guy.[257]

Despite his generally good and productive relationship with General Blanchard, it was not without challenges. One example of the sort of issues staff judge advocates work through was Blanchard's initiative to turn USAREUR into a lighter, highly mobile fighting force with logistical responsibility exclusive to war-fighting units. Known as "USAREUR an Army Deployed" (UAD), the idea was to shift most other logistics and community sustainment functions to the host nations.[258] Alley recalls, with a bit of disdain, the enormous legal and practical complexities of executing the UAD concept:

> And so we would get rid of our civil servant[s] and we would contract out and we would relinquish our bases and we would get Germans or other people to contract our schools and would be nothing but a lean fighting force, and gee we had treaties, we had contracts, we had this, we had that, which you just couldn't shake.[259]

Perhaps Alley's greatest frustration, and the leading detractor for his overall professional satisfaction as the USAREUR Judge Advocate, was the strategic theory of defense against the Communist Warsaw Powers whereby European-stationed units would hold the defensive line long

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[256] *Id*. at 84.
[257] *Id*. Alley warmly remembers Crizer's successor, MG Robert Haldane, as a "genuine war hero" he knew fifteen years before and "who was a gem of a Chief of Staff—effective and supportive." Telephone Conversation with Brigadier General Alley and the author (Sept. 8, 2010) (notes on file with author).
[258] Oral History (2nd Session), *supra* note 9, at 86.
[259] *Id*.

enough for reinforcements to fly from the continental United States and then fall in on existing stocks of equipment—a program known as the Prepositioning of Materiel Configured in Unit Sets, or POMCUS.[260] Alley considered the entire strategic concept completely unworkable.

> [T]he screwiest thing I ever heard. . . . absolutely preposterous. For one thing, the notion that the POMCUS stocks would be undisturbed [was unrealistic]. [We] were worried that they would be bombed. Well, if that happens, then we'd go and use host nation equipment. That's just not going to happen . . . you'll have rioting Germans. You're going to have civil disturbances and sabotage and fifth column. Well, let the German police take care of that. Well, they can't take care of it. I mean it was absolutely ridiculous, and yet most of my professional life for three years [at USAREUR] was devoted to the care and feeding of the POMCUS concept, the acquisition of real estate and base rights agreements. The lack of professional satisfaction was that I didn't think it was toward an end that I could believe in at all.[261]

By contrast, one thing he did believe in—and perhaps his greatest success in USAREUR—was his enduring contribution to the establishment of the NATO Mutual Support Act of 1979,[262] consolidating and simplifying inter-governmental acquisition procedures. Alley traveled to Washington, D.C., and worked with a Senate Armed Services Committee staffer named Tom Hahn, and together with the Office of the Deputy Under Secretary of Defense for Policy, worked on a bill for introduction to the Senate.[263] Hahn later requested that the Department of Defense provide a senior USAREUR officer schooled in the legal and logistical implications of the proposed statute to testify before the Armed Services and Foreign Affairs Committees, which Alley did.[264]

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[260] *Id*. at 87.
[261] *Id*.
[262] North Atlantic Treaty Organization Mutual Support Action of 1979, Pub. L. No. 96-323, 94 Stat. 1159 (1980) (currently known as the Acquisition and Cross-Servicing Agreement (ACSA)).
[263] Oral History (2d Session), *supra* note 9, at 90.
[264] *Id*.

The final legislation provided simplified authority for acquiring NATO support in exchange for cash or in-kind replacement of equipment, and authorized the U.S. government to enter into agreements with NATO allies and subsidiary organizations to provide support free of many of the myriad domestic conditions, controls, and complexities otherwise present in the government contracting system.[265]

A. Promotion to Brigadier General, September 1, 1979

Commensurate with Alley's assignment as the USAREUR Judge Advocate, the Army made a key change to its manning structure for the USAREUR staff that upgraded the rank of the position from colonel to brigadier general. Alley arrived in August 1978; the billet was upgraded that November and a promotion selection board was convened the same month.[266] Shortly thereafter, in January 1979, he received a telephone call from MG Persons informing him that the selection board had selected three judge advocate officers for promotion to BG—Hugh Overholt,[267] Richard Bednar, and Wayne Alley.[268]

Alley recalls that "as is true for most matters of mere status, you know, it's a great thrill. It was the greatest thrill of my life up to that point for a few days and then it just kind of ceased to have any significance . . . [*sans* my daily work] . . . and that I started getting invited to [general officer parties]."[269] Looking back, despite sterling performance reviews and casual conversations with superiors about his general officer potential, Alley never convincingly felt as though either his career pattern or personal ambition would lead him to flag officer status:

> [A]t no time [as a military judge] did I ever have any particular ambitions to be a general officer. I had been around the Pentagon enough to have made the observation it didn't look like a particularly good job. . . .[270]

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[265] *Id*. at 88–91.
[266] *Id*. at 92.
[267] *See generally* Smawley, *supra* note 88, at 309.
[268] Oral History (2nd Session), *supra* note 9, at 94.
[269] *Id*.
[270] *Id*. at 32.

B. USAREUR as a Test Site for the Trial Defense Service, 1978–1980

Having earlier played an important role in shepherding MG Person's vision of a formalized, institutionally distinct criminal defense bar, Alley also derived particular satisfaction as the USAREUR Judge Advocate in securing Europe as the test site for the future Trial Defense Service. His association with the idea was well known by SJAs throughout Europe, and perhaps for that reason Alley thought that they "would be too tactful to raise hell about it."[271]

An officer by the name of Kevin McHugh was selected to serve as the supervising USAREUR defense counsel, with three subordinate regional senior counsels.[272] During an early conference with all USAREUR SJAs (where some initially "wished the whole thing would just blow away")[273] the principal concern was the carving and allocation of personnel from existing SJA staffs to create the new TDS offices. In particular, Alley and others were concerned that subordinate SJAs would inadvertently undermine the process by keeping their best and brightest at home while offering up others to serve in the new TDS billets:

> At the conference [COL Bob Clark] said, and I certainly reinforce this, that the recipe for disaster is for the SJAs to contribute their weakest and worst. . . . I [agreed] that it is going to be a personal disaster for [the SJAs] because your weakest and worst you have some control over now, and if [they] go into TDS and you have no control over them they are going to give you more fits than you can imagine.[274]

A key hurdle for the nascent TDS came shortly after the test program got underway, when unlawful command influence allegations resulted in the retrial of over 100 cases out of the 3rd Armor Division. Alley recalls that "we just had to make a theater-wide sweep of defense counsel to go up there and service [those cases], and with TDS it was a snap—just automatic." The alternative without TDS would have been for the SJA at the time, LTC William Eckhardt, to either detail the large number of

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[271] *Id*. at 99.
[272] *Id*. at 100.
[273] *Id*.
[274] *Id*.

counsel required from his own staff, or seek some sort of assistance from other SJAs.[275] With TDS, Alley recalls,

> [M]ysteriously people showed up to defend [the] cases and get them off his books. Thereafter, the program had a high degree of acceptance. I think there was such careful selection at the Regional Counsel [level] and such good and close cordial relationships between those people and the SJAs that a successful program like this started.

So in the end, despite some disappointing efforts by a few SJAs to shed from their offices less competitive officers into TDS, organization and manning of TDS in Europe got underway with real leadership from LTC Kevin McHugh and strong and capable judge advocates at every tier of the USAREUR organization. The Army's experiment with a semi-autonomous defense service was an absolute success.

C. Legal Obstructionism: A Lesson for Integrating Lawyers Early and Often

One of the first things Alley encountered as the USAREUR Judge Advocate were certain key leaders who were almost physiologically predisposed to think of lawyers as obstructionists—there to tell them "no" rather than contribute constructively to practical problem-solving. This was most often the case in complex procurement and fiscal law matters where projects had been planned and assumed in advance of legal review, which found them wanting for legal sufficiency.[276]

Alley's observation was that these criticisms were not entirely unfair, and that "there was a little something to the proposition that some lawyers are more obstructionist than they have to be."[277] When staff attorneys provided adverse opinions on matters of significant import to the command, it became apparent that the desired end state often could be achieved by different means. Additionally, failure to identify an alternative for the command was often a function of poor integration: lawyers who failed to get into the planning process early enough to

[275] *Id*. at 101.
[276] *Id*. at 97.
[277] *Id*.

influence and shape law or policy. Alley advises lawyers, along with the staffs they serve, to integrate into any process as early as possible:

> [I]t's one thing to get an accomplished fact [legal] concurrence. You have to say yes or no. It's another to be involved in early planning where you can say when you come to these forks in the path, then we can keep you on the fork which will be trouble-free; and the only reason why you've detected legal obstructionism is timing.[278]

D. Support to African-American Soldiers Denied Access to Public Accommodations

One of Alley's important initiatives as the USAREUR Judge Advocate concerned support to African-American soldiers who were discriminated against by local European businesses. The problem came to his attention while he was placing a renewed emphasis upon substantive, programmatic improvements to the Black History Month activities, including the integration of a qualified historian to present the actual history of African Americans.[279]

Through this, Alley learned that African American soldiers had been denied entry to certain guesthouses and related establishments in Germany and elsewhere. So he had his administrative law office research the availability of funds normally used to hire host nation civilian defense counsel for soldiers being tried overseas. The question was whether the same authorization of money could be used to hire civilian counsel to pursue civil cases under local law for discrimination.[280]

The research quickly revealed that the authorizing statute simply said that the money was available to represent service members in overseas courts, and that the Secretary of Defense had discretion on how the fund was used.[281] So Alley forwarded a proposal to the Pentagon with a recommendation that the Secretary allow the money to be used to allow soldiers to hire local counsel to essentially sue discriminating businesses

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[278] *Id*. at 97–98.
[279] *Id*. at 103.
[280] *Id*. at 104.
[281] *Id*.

under the law of the host nation. His efforts garnered the endorsement of the Army, the U.S. Ambassador to Germany, the Justice Department's overseas litigation office, and finally from the Department of Defense General Counsel.[282] Alley recalls:

> [W]e finally got approval to use the funds for this purpose, and [the test case] was settled. [I was then] able to announce through German [channels] . . . that here is something to inform the good citizenry of your area, and that these cases are now going to be financed by the Army; and they just began to fritter away. I think that did a lot of good.[283]

E. Early Retirement from the Army

In the middle of his first assignment as a senior command legal advisor, BG Alley decided that it would also be his last. In the summer of 1980, after almost a quarter century of military service, he quietly began to notify friends and superiors of his surprising decision to retire the following year. His consideration was serious and thoughtful, and the reasons both professional and personal.

As noted earlier, Alley had worked among general officers before becoming one, and despite the obvious allure of the highly visible status and accordant vestiges of authority that go with flag status, the reality of what they actually *did* never captured his imagination as something particularly attractive. He observed,

> [W]hen I was at the Pentagon in the Criminal Law Division I had a great time. I enjoyed the work, I enjoyed the people. I disliked the Pentagon as a place, as most people do, but that's minor. We did enjoy living in Northern Virginia, but I didn't want to go back. . . . [I] thought that being Chief of a division there was the highest level which one can serve in the Pentagon and enjoy it. . . . [M]y boss didn't seem to have any fun. I couldn't see that TJAG and the rest—except General

[282] *Id*. at 104–05.
[283] *Id*. at 105.

> Williams, he always had fun everywhere—just didn't seem to like their work much.[284]

Alley was also dispirited by the prospect of working for certain members of the Judge Advocate General's Corps leadership.[285] But more important than the Pentagon or its personalities was the simple fact that for more than a decade he had privately thought that the best thing for him to do was retire while he was still young enough to have a second career beyond the military. In 1981, at age forty-nine, he had reached that milestone—without regret.[286]

> Not one—not one moment—nor any regrets of having served as long as I did; that is, I certainly would never want to be interpreted as leaving the Army with a feeling that it had let me down or that I had anything negative to say about it. It was superb. . . . The fact that it does come to an end when you are a relatively young man or woman is one of the strongest features of it.[287]

Almost thirty years later at Schofield Barracks, in a well received leadership lecture to the Army judge advocates, paralegals, and civilian legal professionals of Hawaii, Alley recalled with genuine humor and nostalgia his military service.[288] Despite all that would follow as a law school dean and federal judge, he forever considered his "real career" as that of a soldier and military jurist. "It was just the most wonderful personal and professional experience of my life. I commend it to anyone interested in intellectual pursuits, the almost indescribable sense of camaraderie, and the opportunity for adventure so hard to find in our profession of law."[289]

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[284] *Id*. at 111.
[285] *Id*. at 109–10, 112–16. Alley would have returned from Europe at the mid-point of MG Alton H. Harvey's tenure as The Judge Advocate General, and for personal reasons decided he did not want to work for him. *Id*. at 112. As it turned out, MG Harvey retired early on July 31, 1981, succeeded by MG Hugh L. Clausen (TJAG, August 1, 1981–July 31, 1985).
[286] *Id*.
[287] *Id*. at 117–18.
[288] Major General Wayne E. Alley, Address to U.S. Army Pacific Judge Advocates, Paralegals, and Civilians: Leadership—Military, Academic, and Collegial (29 Apr. 2010) [hereinafter Alley Leadership Lecture] (notes on file with author).
[289] *Id.*

IX. Dean, Oklahoma University School of Law, July 15, 1981

> *"The developed mind can part the shadows of chaos, disorder, and confusion to create a vision and pursue it with conviction, keeping the organization on the proper azimuth to achieve its purpose."*[290]

There is a career point at which many accomplished professionals lose the motivation to remain fully engaged in their chosen field, preferring instead to gravitate to a much deserved established reputation as an expert in their field and ease into a life of pedestrian-paced interests, ventures, and social relaxation. Not Wayne Alley.

Early on in his retirement planning, Alley had made the decision to seek an academic appointment more than two and half decades after he had once abandoned the idea of "[t]he contemplative life of the mind, surrounded by admiring students. . .".[291] He seamlessly transitioned from one to the other, and recalls simply that after "a long terminal leave—a terrible phrase, incidentally—we came to [Oklahoma] and I started working [at the Oklahoma University Law School] on 15 July 1981."[292]

But that road to Oklahoma from Heidelberg was also quite long. Like most other aspiring academics, Alley registered his resume with the Association of American Law Schools (AALS), for both administration and faculty positions.[293] These were distributed nationally to law schools seeking to fill various positions, and while he was able to avoid the AALS's annual hiring conference in December 1980—a "meat market," as Alley recalls—he was still required to interview with interested institutions.[294] From Heidelberg, he recollects now

> [S]elect[ing] from those people who were willing to see me—the American University, University of Virginia, Oklahoma University, Wake Forest, University of Pacific [McGeorge School], Southwestern in Los Angeles, Whittier, and the University of San Diego. Those eight places. So I came out from Heidelberg,

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[290] KOLENDA, *supra* note 11, 24–25.
[291] Oral History (2d Session), *supra* note 9, at 117–18.
[292] *Id*. at 118.
[293] *Id*. at 118–19; Alley Interview, *supra* note 16.
[294] Oral History (2d Session), *supra* note 9, at 119; *see also* Alley Interview, *supra* note 16.

> arriving in the states on a Saturday and I started with the American University . . . and just worked across the country in a two-week period, which believe me is a blur.[295]

In the end, five of the eight schools prepared to welcome Alley to their faculty when he decided to accept the offer made by his first preference—the Oklahoma University (OU) School of Law. Despite his preference for a professorial position, the University offered, and Alley accepted, the deanship of the law school:

> They got to my ego. You know, it's a nice title . . . One of the most flattering things in the world is to be told "we need you" and I heard that informally from some of the faculty members when I was there, and that was very strong in my [decision]. As the President [of the University, Bill Binowski] regarded it, the law school had been led by persons of superior scholarship which wasn't the need. That the leadership and setting goals, and motivating, and unifying and so forth, those were the needs which the University administration thought would probably not be satisfied by someone coming out of an academic background. So OU, they got to me. They presented a challenge and said that I had a background that fit their needs . . . [296]

Much of what the University saw in Alley was his demonstrated ability to help the law school achieve its institutional purpose—the preparation of superior lawyers for the practice of law in the state of Oklahoma, and to do so in the sober fiscal environment Oklahoma faced in the early 1980s when the predominant oil and gas industries nearly collapsed, along with the tax revenue they generated.[297] He recalls, "It may have been fortunate for OU that someone who had gone through the

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[295] Oral History (2d Session), *supra* note 9, at 120–21. A brief highlight of the trip came following the interview with American University, when a cab driver, having learned that Alley was retiring from the Army, made a curious but well meaning pitch extolling the many virtues of driving a cab as the ideal post-military retirement career, including walking Alley through the cab drivers' exam, providing the answers and identifying the trick questions, and offering his personal assistance to get him a job. It was the only effort anyone made to move him in a direction other than academics. *Id.* at 121–22.
[296] *Id*. at 126.
[297] Alley Interview, *supra* note 16.

experience of cuts . . . in the Army served at that time because in the University no one had ever experienced that, and it can lead to panic."[298] As any private or public leader will attest, "there is probably more intricacy in the management of austerity than in management of prosperity."[299]

Even so, despite restrained resources, Alley's leadership as the Dean of the OU Law School was well received by faculty and students alike and resulted in a number of important program and curriculum developments. Among them was a determined focus upon the moot court and forensic advocacy programs. Outstanding coaches and dedicated students were afforded the attention and opportunity to develop and demonstrate advocacy skill on an expanded scale, leading to regional and national championships and a genuine "morale stimulant" for the entire university.[300] It also assisted in the development of a group of superbly self-motivated students, nurturing an imagination for the art and science of litigation that endured throughout their careers.

Under Alley's direction, the law school also made a concerted effort to recruit high quality minority students, with lasting results.[301] It was clear to him from his experience in the Army that any worthwhile institution had to reach out to non-traditional groups for recruiting and matriculation. The potential and professional talent resident within minority groups for advanced study and career leadership at all levels was simply too great to ignore.[302]

In keeping with his own long-developed views on excellence in education and learning, Alley worked extremely hard to fortify a culture of academic excellence among the OU law faculty. He did so by restructuring the grant program for summer research projects, mostly involving writing. Rather than broadly distributed grants of modest amounts, the law school began a program of far fewer awards but of considerably larger pecuniary value: as much as three times more than in previous years. Alley made it worth their while and rewarded performance, and was unapologetic that the money would only go to the best people on merit alone.[303] The scholarly output that resulted during

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[298] Oral History (2nd Session), *supra* note 9, at 128.
[299] *Id*.
[300] *Id*. at 129.
[301] *Id*. at 130.
[302] Alley Interview, *supra* note 16 (notes on file with author).
[303] Oral History (2d Session), *supra* note 9, at 130.

this period was exceptional, and included significant work by Fred Miller and Alvin Harrell on the Oklahoma payments code, Joseph Long on Blue Sky Law, Mack Reynolds on local government law, and Frank Elkouri on arbitration. Alley recalls that these, and other works, "constituted the national standard [in] their field."[304]

Along the same lines, and perhaps the greatest legacy Alley left at OU, was the highly regarded legal writing program developed by retired Army Colonel Robert Smith. Smith had led the writing program at the U.S. Army Command and General Staff College at Fort Leavenworth, Kansas, and was recruited by Alley to do the same at the law school as the director of the legal research and writing program.[305] Alley remembers the resistance from some on the faculty on the grounds that Smith was a personal friend and that the appointment was unseemly for the appearance of personal favoritism.

> When [Bob Smith] came down we had of course faculty meetings . . . and there was carping and griping and [allegations of] cronyism and God damn it, is this going to be . . . another Fort Leavenworth. And I kept telling my friends and colleagues on the faculty that this *is* cronyism. It is blatant cronyism. There is no question about it, but there are capable cronies in this world [a]nd think about this—this guy is going to come here . . . to do something that nobody else wants to do. Ah. . . . By the time we go around to the faculty hiring meetings the next winter . . . [Bob Smith] was the first choice of all faculty members but one.[306] His program is now studied by many other schools for adoption and the legal publisher Butterworth is publishing all his materials commercially. . . .[307]

Additional accomplishments during Alley's tenure included increased fundraising ("a six-or seven-fold increase"), cultivation of alumni programs, development of clinical programs, and the establishment and resourcing of a number of professorships.[308] In all, the

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[304] *Id*. at 131.
[305] *Id*.
[306] *Id*. at 133 (emphasis added).
[307] *Id*. at 134.
[308] *Id*. at 134–35.

four years BG Alley and his wife Marie spent as an integral part of the OU community was highly rewarding and each remembers their time there with a sense of exceptional personal and professional loyalty that continues to this day.[309]

Part of that loyalty is due to the friendships that were forged from the tight fiscal constraints imposed on the school, many begun and developed through the active social life Alley and Marie engendered during his time at the school as a way to build relationships, mitigate conflicts, and help the faculty feel enfranchised. Alley recalls with humor a conversation he had with a fellow law school administrator regarding his approach to the faculty.

> I was at an [American Association of Law Schools] meeting when someone came up and said, "Gee, I understand the financial position of OK is desperate. What can you do for faculty morale under those circumstances?" An answer just popped out, and it was right—I said, "Free booze and shameless flattery. That's what you can do." So we had a lot of parties.[310]

Despite the fiscal challenges Alley experienced during his tenure, it nonetheless proved a special time to a man who decades earlier considered a life in academia, and allowed him to exercise his natural intellectual curiosity for learning with the practical leadership observed during his military service. He was able to move the profession forward through the education and preparation of a new generation of attorneys reflecting—to the degree to which deans can affect such things—his priorities for diversity, scholarship, legal writing, and the enduring institutional framework to support them into the future. In perhaps the final major chapter in an otherwise remarkable professional life, Alley would soon see the fruits of that new generation when he left the University after four years to his return to the sagacious life of the judicial bench.

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[309] Alley Interview, *supra* note 16.
[310] OCU Interview, *supra* note 9, at 20.

X. U.S. District Court for the Western District of Oklahoma

Coincidences played a large part in my life. I think [they] do for everybody. . .[311]

A. Appointment to the Federal Bench

Brigadier General Alley never really imagined he would return to the judiciary almost exactly ten years after departing as the Chief Trial Judge for the U.S. Army in 1975. He remembers, "It just wasn't something I thought would happen, as though it was a great chapter in my life forever closed. Until, completely unexpectedly, the opportunity arose once again through relationships forged as the OU dean."[312]

As Article III judges, federal district courts are filled through nominations by the President with the consent of the U.S. Senate. They are lifetime appointments.[313] Individuals come to the attention of the President through a number of means, quite commonly by the suggestion of U.S. Senators for vacancies arising in their states. Political affiliation helps.

In mid-1984, BG Alley came to the attention of Senator Donald Lee Nickles,[314] a Republican, through a merit search committee the Senator appointed to identify individuals for an opening on the Federal District Court for the Western District of Oklahoma. The chairman of that committee was a distinguished Oklahoma lawyer named Lee Thompson, also a graduate and key benefactor of the OU law school. Thompson was the father of District Court Judge Ralph Thompson, who served on the board of the OU law school alumni association and came to know Alley socially in his capacity as the law school dean.[315]

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[311] Oral History (2d Session), *supra* note 9, at 137.
[312] Alley Interview, *supra* note 16.
[313] *See generally* FED. JUDICIAL CTR., *How the Federal Courts Are Organized*, *available at* http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/183 (last visited Dec. 8, 2011).
[314] U.S. Senate, January 5, 1981, to January 3, 2005.
[315] Oral History (2d Session), *supra* note 9, at 137; *see also* Alley Leadership Lecture, *supra* note 287.

The judicial search committee, composed of a diverse group of thirteen individuals,[316] was supposed to make its recommendations to Senator Nickles in September 1984, but was dissatisfied with the quality and experience of those who had applied and, therefore, solicited one additional applicant—Wayne Alley. As he recalls, there could have been no greater surprise:

> [T]he phone rang and it was Ralph Thompson, who said "I have a question to ask and it's very difficult for me to ask it. I hate to ask it, but I have to . . . Are you a registered voter?" "Well" [Alley replied] "Sure." "Well, in what party?" "Republican." "Okay . . . I want to go ahead and discuss something. My dad from whose house I'm calling has expressed a great deal of disappointment with the 30 or so applications for this position. And [Federal District Court Judge David Russell] is here also, and when we consider your education, your accomplishments, your experience as a military judge . . . it just seems like you are absolutely perfect—I mean—this is absolutely perfect, if you could apply for this position."'[317]

Of course, Alley had not applied for the position because he never considered it a possibility: "No—hell, no—never thought about it. They're going to make me a federal judge? Have you ever heard of such a thing?"[318]

The next day, Alley sent a letter to Lee Thompson asking that his name and resumé be considered, belatedly, by the committee. The next day the Alleys left for a two-week holiday in Hawaii during which they walked up and down the beach, excited at the prospect of a federal judicial appointment but entirely at peace with the good life they had as part of the OU community.[319] They would be happy either way.

Upon their return to Oklahoma, Alley received a note from Lee Thompson requesting he come interview before the search committee the next day at nine o'clock in Oklahoma City. Of the interview, he recalls:

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[316] Oral History (2d Session), *supra* note 9, at 137.
[317] *Id*. at 138.
[318] *Id*.
[319] *Id*. at 139.

> Well, for heaven's sake, the committee included not only Lee Thompson, but three people with whom I had worked very closely in State Bar Committees and cordially, one of whom was a retired [judge advocate] reservist who was a mobilization designee to me when I was on active duty. I was his [commanding officer] so to speak as Chief Trial Judge. And then there was a black woman whose son, a black attorney, and daughter-in-law had been very helpful in our affirmative action efforts. . . . The committee asked questions that primarily went to the lack of civilian trial experience. That was their concern and a very legitimate one. . . . Interestingly, their concern seemed satisfied by the fact that I'd been in private practice [25] years before.[320]

Thereafter, Alley was asked to meet with Senator Nickles privately, during which the two discussed broadly the role of judges with regard to the legislature, "the responsibility of judges, departures from established principles of law, and the proper province of the Senate and Congress in their role as legislating on behalf of the country."[321] It was clear to Alley that, in keeping with the political environment of the mid 1980s, the Senator's central concern was judicial activism. On this, the Senator and future federal judge were in total agreement.

> Here in [the Reagan Administration] and temperamentally I agree with [the concerns of judges overreaching their authority] absolutely; there was no issue of appeasing the Senator. I think judicial activism has been a disaster in the country.[322]

A week or so later, Alley received a phone call from Senator Nickles informing him of his recommendation that Alley fill the vacancy on the court. Subsequent interviews followed with the Justice Department's Office of Legal Policy, a White House vetting committee, and an extensive review by the American Bar Association.[323] Following that, Senator Nickles again called Alley to inform him that Oklahoma's other senator, a centrist Democrat named David Lyle Boren, could effectively veto his nomination. That did not seem likely given that Alley was the

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[320] *Id*. at 140–41.
[321] *Id*. at 142.
[322] *Id*.
[323] *Id*. at 143; *see also* Alley Leadership Lecture, *supra* note 287.

dean of the law school from which Boren had graduated. Nickles also informed Alley that the next day he could expect a personal call from President Reagan.[324]

> [President Reagan indeed called, and said,] "This afternoon I would like to submit your name to the Congress as my nominee if this is in accordance with your wishes." Now I'd been warned about this, [that] he personally makes this last minute check because they'd gotten to this very point with a nominee up in Illinois who said–"The more I think about it, I don't think I can afford it"—and pulled out after the names had gone to Congress. . . . I replied, "Well, Mr. President, I view this just with tremendous enthusiasm as an opportunity in life, to serve in this way." "Well, very well [said Reagan]- I will make the nomination."[325]

The final step was Alley's appearance before the Senate Judiciary Committee, where certain members where considered "most antipathetic to the whole pattern of Reagan nominees."[326] But despite some initial trepidation the entire confirmation process moved along without issue, with Alley's military background considered most favorably by members of the committee.[327] He was later confirmed by the full Senate on July 10, 1985, and was sworn into the federal bench the following month.

An interesting personal footnote for the Alley family was that his first judicial act on the District Court was the admission of his second and current wife, Marie, for the purpose of her U.S. citizenship hearing.[328] Marie, a widow previously married to a well regarded judge advocate, came to America from Germany in 1961. She and Alley were married in 1978 just prior to his assignment in Europe. Like so many others, Marie retained her native citizenship for nearly a quarter century out of an allegiance to family and culture. But by 1985, she decided it was time, and who more appropriate to be a part of the process than her husband?[329]

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[324] Alley, *supra* note 287.
[325] Oral History (2d Session), *supra* note 9, at 144–45.
[326] *Id*. at 145.
[327] *Id*.
[328] Alley Interview, *supra* note 16.
[329] *Id*.

It is fair to say that Marie's role has been no less important to the narrative of Alley's life than any other single influence. The author has personally witnessed the youthful joy they continue to find in one another, and it is clear from the closing words of his Oral History that Alley is one of those blessed individuals who got two chances in life, both personal and professional. Referring to the challenges of his personal life early in his career, he shares that:

> Because of purely personal matters, I went through some very, very bleak days and despairing days, and did not exactly bless the gift of life because of the burdens at the time and yet those turned out to be temporary, although lengthy; and after I went through that period, can you believe it, I went through [it] and then remarried into a situation which is just bountifully happy and [then] got promoted, became a Dean, and now a federal judge, and I have the feeling of my life blossoming—just the sense of coming out of a winter into some glorious spring, belatedly and I think that potential is there for anyone who is in a tough situation.[330]

B. Comparison of the Military Judiciary to the Federal District Court

Alley's return to judicial life was an easy one, despite the considerable workload for the newly established judicial seat he now occupied.[331] Having served as both a military trial and appellate judge, the general atmospherics of the court came easily to him, as did the nuanced issues of court administration. Alley notes that the greatest advantage he had over an appointee with no prior experiences was the level of comfort he had in managing and administrating cases: "In some instances the military experience was inapplicable, but my overall comfort in managing cases was the main thing I brought to the federal bench. Case management is paramount over sitting a trial. My military experience in that regard was invaluable."[332]

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[330] Oral History (2d Session), *supra* note 9, at 156.
[331] Alley Interview, *supra* note 16.
[332] *Id.*

But the case work was something entirely new and covered matters of civil law that had no comparison in military jurisprudence.[333] Nor, for that matter, could military practice compare in terms of the relative experience of the civilian practitioners who appeared before him in the district court or the complex spectrum of disputed civil, criminal, and constitutional law:

> When I was a military judge I had incomparably more experience than anybody who appeared before me. It was easy to get the psychic jump on things better, [but in the federal district court] almost everybody that comes up knows vastly more about the subject than I do. . . The people who practice before me range—oh, for a lead counsel, probably age 35 to age 70, so I'm almost at the midpoint of age seniority; and that too is different. So I cannot equate [the federal court] with the military judge experience at all.[334]

On a more personal level, the federal bench afforded the sort of collegial work environment and considerable intellectual stimulation he very much enjoyed—the camaraderie of bright, engaging professionals who in many ways mirrored the selfless service observed in the Army. It also involved considerably more research, and a dependency on clerks and counsel to inform, substantiate, and qualify the disparate issues of law and fact brought before the court.[335] Alley, a man with boundless intellectual curiosity and always the quick study, found this aspect of the federal district court both challenging, and at times frustrating.

> This type of work . . . has a scholarly component. In fact, the principal frustration of [the federal trial bench] is the limited time. Any case that comes through [the court] is worth a month of study, and it doesn't get done; we can't do it.[336]

Alley assumed senior status on May 16, 1999,[337] after a rewarding and challenging fourteen-year tenure on the court. He volunteered to

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[333] Oral History (2nd Session), *supra* note 9, at 144–45; *see also* Alley Interview, *supra* note 16.
[334] Oral History (2d Session), *supra* note 9, at 30–31.
[335] Alley Interview, *supra* note 16.
[336] Oral History (2d Session), *supra* note 9, at 30–31.
[337] *See* 28 U.S.C. § 371(c) (2006). According to the website for U.S. Federal Courts,

serve an additional five years as a federal trial judge for cases throughout the country, retiring outright in September 2004.

A highly publicized footnote to his time on the district court included his very public recusal from the April 1995 Oklahoma City bombing cases involving Terry Nichols and Timothy McVeigh.[338] In that case, involving a *writ of mandamus*, the 10th Circuit Court specifically noted in its decision recusing Alley from the matter that:

> Beginning at age 65, a judge may retire at his or her current salary or take senior status after performing 15 years of active service as an Article III judge (65+15 = 80). A sliding scale of increasing age and decreasing service results in eligibility for retirement compensation at age 70 with a minimum of 10 years of service (70+10=80). Senior judges, who essentially provide volunteer service to the courts, typically handle about 15 percent of the federal courts' workload annually.

U.S. COURTS, *available at* http://www.uscourts.gov/Common/FAQS.aspx (last visited Dec. 8, 2011).

[338] *See* United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) (providing factual background); *see generally* United States v. McVeigh, 918 F. Supp. 1467, 1471–72 (W.D. Okla. 1996) (citing 28 U.S.C. Section 455(a), which states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"). Timothy McVeigh (later followed by Terry Nichols) filed a motion for recusal of Judge Alley, who had been randomly assigned the Oklahoma bombing cases. By order dated September 14, 1995, Judge Alley denied both recusal motions. Mr. Nichols then filed a petition for *writ of mandamus* with the 10th Circuit Court of Appeals seeking disqualification of all judges of the Western District of Oklahoma (including Alley). The Circuit Court (*per curiam*) found:

> Judge Alley's courtroom and chambers were one block away from the epicenter of a massive explosion that literally rocked downtown Oklahoma City, heavily damaged the Murrah building, killed 169 people, and injured many others. The blast crushed the courthouse's glass doors, shattered numerous windows, ripped plaster from the ceiling, dislodged light fixtures, showered floors with glass, damaged Judge Alley's courtroom and chambers, and injured a member of his staff, as well as other court personnel and their families. Based on these circumstances, we conclude that a reasonable person could not help but harbor doubts about the impartiality of Judge Alley. Because Judge Alley's "impartiality might reasonably be questioned" in the instant case, 28 U.S.C. Section 455(a) mandates recusal.

Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995).

> In light of the settled principle that a judge has as strong an obligation not to recuse when the situation does not require as he has to recuse when it is necessary, we commend Judge Alley for his integrity in upholding what he sees as his clear judicial duty. There is certainly no allegation here of judicial impropriety; Judge Alley has conducted himself and these proceedings with true professionalism.[339]

Indeed, that professionalism during the tumult surrounding the early days of the Oklahoma Bombing cases surprised no one, and rather completely mirrored the steady hand and perspicacious approach to judicial review developed from his time on the military bench on forward.

XI. Closing Perspectives on Law, the Court, and Military Service

"I cannot help observing, that many of those who have written in support of our ancient system of jurisprudence, the growth of the wisdom of man for so many ages, are not as they are alleged by some to be men writing from their closets without any knowledge of the affairs of life, but persons mixing with the mass of society, and capable of receiving practical experience of the soundness of the maxims they inculcate."[340]

—Lloyd Kenyon, Lord Chief Justice of England

A. The Role and Relationship of Military Panels and Judges in Sentencing

Having served as a military judge in peace and in war, as well as a member of a federal district court, Alley developed an informed perspective on the UCMJ's provision that allows a criminal defendant to elect whether to be tried and sentenced by a military judge alone or by a panel comprised of officers alone or one augmented by enlisted service members. The process of sentencing, in particular, concerned Alley.

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[339] *Nichols*, 71 F.3d at 352.

[340] NORTON-KYSHE, *supra* note 2, at 127 (quoting Lord Kenyon, Chief Judge, King v. Waddington (1800)).

He found that cases tried in combat zones benefited from the participation of officers and enlisted personnel in the sentencing phase of a trial through their unique perspective of what soldiers experience under trying, austere circumstances. By contrast, in garrison, he found the situation to be reversed—in peacetime, military judges were better able to evaluate misconduct and dispense sentences that were consistent with and reflective of the broader scope of judicial outcomes.

> In Vietnam, in a combat situation, my feeling was that court members know more—the combat situation is internalized in them and they are better sentencers—and I felt that way even when I went back [in Vietnam to conduct a trial] after the Justice Act of 1968 when most of the trials I had were bench trials and I did the sentencing. However, when I served as a trial judge in peacetime—for instance in Schofield Barracks [Hawaii] or when I was the Chief Trial Judge in trying cases—I thought that the court members were overly lenient in many cases—in a couple of cases ridiculously so. [A]t that time I would have preferred to be able to sentence myself so that there would be comparability and appropriate severity.[341]

From this, Alley posits his recommendation for a legislative remedy vesting military judges with principal sentencing responsibility in courts-martial conducted in garrison, but defer to panels in wartime and contingency operations: "Perhaps it would be defensible to come up with a statute that the judge would [administer sentencing] except in the field in time of hostilities. . . "[342]

B. The Virtue of Brevity in the Trial Judiciary

Having moved from the military trial judiciary to the appellate court, Alley is uniquely qualified to consider the respective merits and approaches to judicial decision-making. In particular, he is a keen advocate of concise decision-making by the trial courts. Originally presented in remarks before the 1981 Homer Ferguson Conference on

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[341] Oral History (1st Session), *supra* note 9, at 125–26.
[342] *Id*. at 126.

Appellate Advocacy, sponsored by the CAAF,[343] he openly counseled that:

> The wise trial judge knows that brevity is the source of salvation. All his opinions and explanations, being subject to subsequent interpretation, may become grounds for reversal even when the ruling, standing alone, might have evoked no such display of appellate hostility. So, from this standpoint, the less said, the better.

While brevity and ingenuity by trial judges are important to avoid the pitfalls of appellate scrutiny, caution should not become a "paramount virtue" leading to a "risk avoidance syndrome," whereby judges seek the most innocuous view at the cost of due and appropriate consideration of justice, whether for the government or the defense.[344] "Caution," Alley maintains, "does not militate for rulings favoring [government] needs as opposed to those of the individual defendants."[345]

C. The Importance of Civility in the Legal Profession

If there was ever a single point of failure for counsel appearing before Judge Alley, it was any indicia of incivility. He had no patience for it, and long felt it was beneath the stature and dignity of the judicial process and, perhaps equally important, the practice of law. In an often cited observation from a case illuminating incivility among contending counsel, Alley is widely regarded for his written order noting: "If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery with other lawyers of equally repugnant attributes."[346]

In Alley's world view, a key fundamental attribute of the legal profession should be and must remain the sense of propitious civility able to rise above the often uncivil conflicts that are so frequently the

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[343] Brigadier General Wayne E. Alley, *Advocacy on Behalf of a Major Field Command: When It Begins, What It Should Accomplish, and Suggestions How It Should Be Done*, 94 MIL. L. REV. 5 (1981).
[344] *Id*. at 8.
[345] *Id*. at 9.
[346] Krueger v. Pelican Prod. Co., No. CIV-87-2385-A, slip op. (W.D. Okla. Feb. 24, 1989) (Judge Wayne E. Alley) (order denying motion to dismiss action).

core of our adversarial processes. The expansive milieu of interests resident before judicial forums—whether conflicts between parties or the state and its citizenry—quite naturally fuel a hyper-competitiveness in its actors. Alley, among many, finds such conduct disruptive and disreputable for the profession and its institutions. Recalling Shakespeare in *The Taming of the Shrew*, he feels that adversaries in law should "[s]trive mightily, but eat and drink as friends."[347]

> As a district court judge I took a very hard line on lawyers' conduct toward their opponents and in fact took a lot of nicks in lawyer evaluations because they thought this unduly harsh. In discovery disputes in civil cases judges absolutely hate that people can't work things out. Many would include in their briefs "my opponent is not acting in good faith and there is an attempted fraud on the court," and when I heard that word I would hold a recorded hearing and tell them that it is one thing to say that into a dictaphone, but a grounded suspicion of fraud requires the suspicious lawyer to report that to the bar association. So, you write a letter to the bar association on what basis you are accusing him of fraud and I want to see a copy of that letter on my desk by Monday. Well, they just panicked over this and finally stopped. I was regarded as a difficult judge by those that engaged in that sort of thing.[348]

For a former military judge and jurist who has experienced war and its effects first-hand, vigorous and zealous advocacy should never implicate the inherent decency and dignity of the bar or the bench. When it does, the product is rarely justice but common frustration with the legal community. It is a lesson for lawyers across the profession, military and civilian. "The best counsel," Alley notes, "Don't whine when they lose or crow when they win."[349]

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[347] WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW, act 1, sc. 2, l. 275.
[348] Alley Interview, *supra* note 16.
[349] Alley, *supra* note 342, at 14.

D. The Military as a Career

As noted in the introduction, BG Alley is remarkable for the success he achieved doing non-traditional jobs to a truly exceptional standard. Service on military trial courts can be difficult, and at times intense. On occasion, this service is woefully unappreciated for the institutional impact it has on discipline within the force. As stated in the opening Norton-Kyshe quotation, judges are indeed *constantly brought into direct personal relations, not only with members of a large and active profession, but with men in all ranks of life, and on every sort of subject*.[350] Those direct personal relations may not always have the appeal of some other leadership positions, but—properly executed—they can lead to an extraordinarily satisfying military or civilian career. As Alley notes:

> I went through a pattern of assignments in mid-career different from that of the ambitious and motivated officer seeking higher grades and so on; and without exception, it was a lot of fun—I worked hard—I did the best I could in those assignments and developed a reputation [accordingly]. And I still think it is sound to take that approach.[351]
>
> As General Williams used to say so often—saw the wood that is in front of you.[352]
>
> [I told a fellow judge advocate once that] 98% of the time in the Army I have been perfectly happy—satisfied in every respect, with the professional experience as well—but I said the other 2% is when I'm feeling ambitious. Ambitions can make us miserable . . . I think the unhappy officer is the one who [goes down the list of fellow officers] and thinks, "I can get ahead of this guy," or "This guy is ahead of me, and I'm due to get this assignment"—and so forth, consigning [him] to a life of misery.[353]

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[350] NORTON-KYSHE, *supra* note 2 (emphasis added).
[351] Oral History (2d Session), *supra* note 9, at 149.
[352] *Id*. at 148.
[353] *Id*. at 151–52.

Throughout the varied positions he held during his more than twenty years of military service, Alley remains upbeat about nearly all of them because the overarching institution itself afforded him so much satisfaction. Certainly, he could have done other things; ability was never an issue. What sustained him was the same thing that brought him back into the Army in the first place: an emphasis on the Army's advantages over its disadvantages. The Army's variety of rich experiences and the company of superior people still won out over average pay, constant moves, and the risks inherent in combat service.

The rewards of military life were, in his view, about "the unique opportunity to just have a great time in life with a lot of professional stimulation and enjoyment, and enough money to get by."[354] There were good days and bad—personally and professionally—"But everything that is merely situational is just going to pass by."[355]

Toward the end of his career, he took a dim view of zero-defect attitudes and the "bitter edge" to the competitive evaluation system. He never wavered from the view that careerism and the often pernicious obsession regarding jobs and advancement "is a concern and an expenditure of energy [just] frittered away from more positive ends; and also makes one unhappy."[356] His message to young military attorneys and the law students he encountered at OU: pursue what you love, find your career passions, and make them the central focus of your professional life. The details will work themselves out over time.[357]

In his closing remarks at the Homer Ferguson Conference on Appellate Advocacy, made on the eve of his retirement from Army service, Alley reflected on all the military counsel he had observed over the years, and told the assembled audience: "[This] is a fit occasion to express gratitude toward, and affection for, the hundreds of counsel whose advocacy I have heard both at the trial level and on appeal and to remark that the professional practice of these men and women ornaments that most honorable title of 'judge advocate.'"[358]

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[354] *Id*. at 156.
[355] *Id*.
[356] *Id*. at 151–52.
[357] Alley Interview, *supra* note 16; *see also* Alley Leadership Lecture, *supra* note 287.
[358] Alley, *supra* note 342, at 14. Alley elaborates further during his 2008 OCU interview:

> It was wonderful being Dean. It was a great honor being a Federal Judge and I enjoyed it. I whistled on my way to work and so forth.

XII. Summary

Over its long and distinguished history, the military judiciary has steadfastly grown and evolved into a system with much of the character and functionality of its civilian counterpart. Its successful development—from a commander-based system to a paradigm more in keeping with civilian notions of judicial oversight of individual rights—has in large measure been due to the effort and success of judge advocates like Wayne Alley. Throughout his career, Alley championed the professionalization of military jurisprudence through careful adherence and enculturation of modern standards of judicial review.

Author, columnist, and former Reagan speechwriter Peggy Noonan, writing about the importance of clarity in describing leadership objectives, once recalled a story told by Clare Boothe Luce "about a conversation she had in 1962 in the White House with her old friend John F. Kennedy. She told him . . . that 'a great man is one sentence.' His leadership can be so well summed up in a single sentence that you don't have to hear his name to know who's been talked about."[359]

In the case of Wayne Alley, that sentence might look something like this: "A committed legal mind who stands among the most accomplished actors of Army jurisprudence, and who dedicated his professional life to the pursuit and exercise of a fair, modern, and responsive military judiciary and the advancement of law through practice, education, and justice." There are few others to whom such a sentence would apply.

Achievement and historical relevancy are hardly rare in the U.S. military, but among its lawyers the numbers are fewer; among its judges, fewer still. BG Alley stands out among those in that very special crowd, and will be remembered and—one hopes—emulated for his commitment to the practice of law: as a judge, a dean, and an officer in the U.S. Army.

> I've told friends and now you, you know when I die I'm going to be in Arlington Cemetery and it is not going to say Judge on my tombstone. That was my most satisfying work [but] General was my most satisfying title.

[358] Peggy Noonon, *To-Do List: A Sentence Is Not 10 Paragraphs*, WALL ST. J., (Saturday/Sunday), June 27–28, 2009, at A3.

FRAGGING: WHY U.S. SOLDIERS ASSAULTED THEIR OFFICERS IN VIETNAM[1]

REVIEWED BY FRED L. BORCH III[*]

This is an important book for judge advocates, because it is the first in-depth and comprehensive study of the crime of "fragging" during the Vietnam War. It also is important because it shatters the myth that the killing or maiming of Army and Marine Corps officers and non-commissioned officers (NCOs) with fragmentary grenades or other weapons occurred mostly on the battlefield. Finally, the book is important because it disproves the claim by Vietnam anti-war activists and various academics that anti-war ideology and political antipathy to the United States presence in Southeast Asia played a *direct* role in the fragging of officers and NCOs.

As author George Lepre acknowledges at the outset, soldiers have tried to "frag"—kill or harm—"unpopular comrades since the earliest days of armed conflict."[2] It was during the war in Vietnam, however, that such incidents became sufficiently prevalent to cause the Army and Marine Corps to take institutional steps to stop it. Starting in 1970, prominent U.S. news media sources like the *New York Times* and *Newsweek* began reporting that "fraggings"—a slang word used in both the Army and Marine Corps—were no longer isolated instances, but instead "were averaging about twenty per month."[3] More importantly, some journalists and anti-war activists suggested that these fraggings were proof that the U.S. Armed Forces was disintegrating. Finally, when respected politicians like Montana Senators Mike Mansfield and Lee

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Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (2001), *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia* (2004), *Geneva Conventions* (2010) (with Gary D. Solis) and *For Military Merit: Recipients of the Purple Heart* (2010).

[1] GEORGE LEPRE, WHY U.S. SOLDIERS ASSAULTED THEIR OFFICERS IN VIETNAM (2011).
[2] *Id.* at 1.
[3] *Id*. at 48.

Metcalf insisted on the floor of the U.S. Senate in April 1971 that fragging was a manifestation of a "failure of order within our armed forces" and that the murder of a young West Point officer with a fragmentary grenade was the "insane and senseless action of one soldier" in "an insane and senseless war,"[4] many Americans concluded that the phenomenon of enlisted men assaulting their superiors must be the direct consequence of the unpopular war in Southeast Asia.

The book *Fragging* begins by explaining in general terms that by 1970, the draft, a strong anti-war movement, student protests, and strife in American society resulted in the Army and the Marine Corps being unable to either attract the best young men to serve in uniform or maintain the high disciplinary standards that had existed in both services just five years previously. Subsequent chapters then explain the fragging phenomenon,[5] motivations for it,[6] and institutional steps taken by both the Army and the Marine Corps to stop it—or at least mitigate its effects.[7]

The book illustrates conclusively—chiefly through an exhaustive examination of military police investigations and courts-martial records[8]—that virtually all fraggings or attempted fraggings occurred not on the battlefield, but in rear areas geographically removed from the battlefield. For example, Lepre shows that an oft-repeated claim by a Marine that he witnessed the murders of "five or six officers" during combat in Vietnam was simply false. The story was revealed as a total fabrication after Lepre examined unit personnel rosters and interviewed every commissioned officer assigned to the unit in question; all were still "alive and kicking nearly thirty years later."[9]

But even if fraggings occurred mostly in rear areas—away from the dangers of combat—what was the motivation of those enlisted soldiers who tried to kill or maim their leaders? According to Lepre, the likelihood that a soldier might engage in fragging depended on a variety

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[4] *Id*. at 52–53.
[5] *Id*. at 19–60.
[6] *Id*. at 61–127.
[7] *Id*. at 128–84.
[8] Lepre consulted investigations conducted by the Army and the Marine Corps in Vietnam and also examined the records of trial of fifty-four soldiers and seventeen Marines who were convicted by courts-martial of assaults with explosive devices against fellow servicemembers. *Id*. at 67.
[9] *Id*. at 134.

of factors. For example, McNamara's Project 100,000 permitted the induction of men who previously would have been rejected for military service because of their failure to meet intelligence standards, and who were less adaptable and more likely to have psychiatric problems.[10] Additionally, the degradation of a professional *junior* NCO corps, and its replacement with 'Shake 'n' Bake' NCOs,[11] caused a crisis in small-unit leadership. Finally, drug and alcohol use impaired judgment and lowered inhibitions about using violence against fellow soldiers and Marines.

An additional motivation for fragging was frustration with officers and NCOs who insisted on "vigorous conduct"[12] of military operations, even though President Nixon had announced that American Forces were being withdrawn from Southeast Asia. No soldier or Marine—especially a draftee—"wanted to be the last man killed on the last day of the war."[13]

Finally, racial strife was a factor in some fraggings involving black soldiers and white officers and noncommissioned officers. In particular, African-American soldiers were increasingly angry with what they saw as unfair and racially discriminatory treatment, especially after the shocking assassination of Dr. Martin Luther King, and this anger sometimes led to assaults on superiors.[14] Racial animosity in Vietnam was certainly inflamed by statements from prominent African-American activists like Black Panther Eldridge Cleaver. In writing *To My Black Brothers in Vietnam*, for example, Cleaver exhorted his readers to "start killing the racist pigs who are over there with you giving you orders. Kill General Abrams and his staff, all his officers. Sabotage supplies and equipment, or turn them over to the Vietnamese."[15] While there were no reported attempts to kill Army General Creighton Abrams, the four-star general commanding the Military Assistance Command, Vietnam, or members of his staff, this sort of language must have caused unease among more than a few white officers in Vietnam.

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[10] *Id*. at 63-64.
[11] "Shake 'n' Bake" was pejorative slang referring to "hastily trained or newly assigned or promoted noncommissioned officers in combat units during the Vietnam War." The three word phrase came from a well-known and widely used packaged food product designed to reduce the meal preparation time for baked chicken. Chan Floyd, "Shake 'N' Bake," HISTORICAL DICTIONARY OF THE UNITED STATES ARMY 427–28 (2001).
[12] LEPRE, *supra* note 1, at 84.
[13] *Id*. at 94.
[14] *Id*. at 100–12.
[15] *Id*. at 106–07.

Ultimately, *Fragging* shows that there were a multitude of motivations for soldier and Marine assaults on superior officers and NCOs, and Lepre examines these motivations in a nuanced and logical manner. He does, however, conclude from an analysis of court-martial records that "perceived harassment of subordinates was the *primary reason* for most grenade assaults."[16]

The book's section on "fragging and anti-war activism"[17] is particularly noteworthy, because Lepre concludes that there was no *direct* link between anti-Vietnam War activism and fragging. While conceding that the war was unpopular with many GIs—as it was with many Americans—and that this antiwar sentiment did shape Vietnam-era enlisted culture (and therefore influenced the fraggers), there is no evidence that assaults on superiors were part of a widespread "GI revolt" or "part of a larger political struggle against immoral U.S. policies at home and abroad."[18] On the contrary, Lepre's examination of individual cases found only two instances in which "antiwar or antigovernment utterances" were referenced.[19]

One of the most interesting cases cited by Lepre—demonstrating again that soldiers had very different motivations for assaulting a superior—involved Staff Sergeant Allen G. Cornett, Jr. In 1972, he fragged his unit's executive officer, Lieutenant Colonel (LTC) Donald Bongers, after Bongers made repeated racist, sexually offensive, and vulgar remarks about Cornett's Vietnamese wife and made Cornett's life unbearable by forbidding him from either visiting his wife on weekends or bringing her onto their base. Although Cornett complained about this mistreatment, he was unable to get a satisfactory resolution and took to drinking heavily. On the afternoon of November 30, 1972, Bongers was sitting in the unit's radio room when Cornett tossed a grenade into the building. The quick-acting Bongers managed to jump clear of the blast. Cornett was taken into custody and court-martialed for attempted murder.[20]

At his trial, Cornett was found guilty. But most of his fellow officers and NCOs appeared as witnesses on his behalf and testified that he was a

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[16] *Id*. at 97 (emphasis added).
[17] *Id*. at 115–23.
[18] *Id*. at 115.
[19] *Id*. at 116.
[20] *Id*. at 81–83.

good soldier while LTC Bonger was a poor leader and had treated Cornett unfairly. The fact that Cornett had volunteered for Special Forces, served seven years in Vietnam, been decorated with the Bronze Star Medal with "V" for Valor, and been recommended for the Silver Star almost certainly influenced the court-martial panel that heard his case. The members sentenced Cornett to a year in jail—but no punitive discharge. Consequently, when Cornett finished his time in prison, his request to be restored to duty was approved. He served another seventeen years and retired as a master sergeant in 1989. Since this reviewer served briefly with Cornett in 1983—and heard Cornett talk openly about having been court-martialed for trying to kill a lieutenant colonel—Lepre's recitation of this story is no tall tale.[21] But Cornett's case also shows that, in those few cases where it was appropriate, a fragger could remain in the Army—despite the fact that assaulting a superior officer with the intent to kill or maim him strikes at the very heart of good order and discipline.

Two minor criticisms of this book should be mentioned. First, the subtitle is somewhat off-putting: NCOs were just as likely to be the victims of fraggings as commissioned officers. Second, the book would be better if the author had not included a fifteen-page "comparative analysis" of fragging in the U.S. and Australian armies. Fragging in the Australian forces was never as prevalent as in the U.S. Army and Marine Corps and this explains why the Australians never took any "command-wide action"[22] to prevent fragging. More importantly, since Lepre spends more than 200 pages examining the fragging phenomenon in the Army and Marine Corps, it is difficult for this reviewer to understand how fifteen pages on the Australian experience allows anything but the most superficial comparison to be made. But these are minor criticisms of an otherwise valuable book that deserves to reach a wide audience.

A final note: while fragging is rare in today's professional Army, it is not unheard of, as evidenced by the recent court-martial of Staff Sergeant Alberto B. Martinez for allegedly killing two officers by placing a claymore mine near the window of their office in Tikrit, Iraq, in 2005.

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[21] In 2000, Ballantine Books published Cornett's *Gone Native: An NCO's Story*, in which Cornett recounted his multiple tours as a soldier in Vietnam. In this memoir, he freely admits attempting to murder his superior commissioned officer with a fragmentary grenade.

[22] *Id*. at 199.

Martinez was acquitted by a military panel at Fort Bragg in 2008.[23] Similarly, Army Sergeant Joseph Bozicevich was court-martialed for killing two fellow NCOs "after they criticized him for a series of battlefield blunders" in Iraq in 2008.[24] He was convicted of pre-meditated murder by a panel sitting at Fort Stewart and sentenced to life imprisonment without parole.[25] Both the *Martinez* and *Bozicevich* cases demonstrate that the phenomenon of fragging can also be akin to a war crime. The unfortunate reality is this: no matter how well-trained, well-educated or disciplined its troops; whether deployed on the battlefield or in the rear detachment; a frustrated and discontented soldier among the military ranks can still possess the motivation to commit this type of crime.

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[23] Joe Gould, *Widow Sues for Court Transcript of Husband's Accused Killer*, ARMY TIMES, Feb. 7, 2011.
[24] Michelle Tan, *Trial Begins for Soldier Accused of Killing 2 NCOs*, ARMY TIMES, May 2, 2011, at 32.
[25] Russ Bynum, *Soldier Gets Life, No Parole, in Iraq Slayings*, ARMY TIMES, Aug. 14, 2011, at 3.

KING'S COUNSEL: A MEMOIR OF WAR, ESPIONAGE, AND DIPLOMACY IN THE MIDDLE EAST[1]

REVIEWED BY MAJOR CHARLES C. MCLEOD, JR.*

I. Introduction

Passed on November 22, 1967, United Nations Security Council Resolution (UNSCR) 242 calls for an end to Israeli occupation of Egyptian, Syrian, and Jordanian territory and respect for the sovereignty, territorial integrity, and political independence of every State in the area.[2] Amid revolutionary uprisings in the Middle East and North Africa, President Barack Obama appeared before the Department of State and delivered his "Arab Spring" speech of May 19, 2011, issuing, among other things, an explicit call for Arab-Israeli peace negotiations.[3] The president's desired end state would result in "a viable Palestine and a secure Israel" including a specified task that "negotiations should result in two states, with permanent Palestinian borders with Israel, Jordan, and Egypt . . . based on the 1967 lines with mutually agreed swaps."[4] The words were no sooner uttered than State Department officials began to wring their hands,[5] foreign dignitaries gasped,[6] and political pundits clamored for specificity. The point of contention? Seemingly innocuous

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[1] JACK O'CONNELL WITH VERNON LOEB, KING'S COUNSEL: A MEMOIR OF WAR, ESPIONAGE, AND DIPLOMACY IN THE MIDDLE EAST (2011).

[2] S.C. Res. 242, U.N. Doc. S/RES/242 (1967).

[3] *Obama Announces "New Chapter" in U.S. Mideast Diplomacy*, CNN.COM, May 19, 2011, http://articles. cnn.com/2011-05-19/politics/obama.mideast_1_president-barack-obama-arab-spring-major-policy-speech?_ s=PM:politics.

[4] Barack Obama, President, U.S., Keynote Address at the United States Department of State: A Moment of Opportunity (May 19, 2011) [hereinafter Obama].

[5] Jay Solomon, *Israeli Leader, Obama Clash*, WALL ST. J., May 21, 2011, http://online.wsj.com/article/SB1000 1424052748704904604576335071093979138.html.

[6] Many articles have documented the Israeli reaction to President Obama's address. *See, e.g.*, *Obama: 1967 Lines With "Swaps" Means Different Israeli Border Than in 1967*, FOXNEWS.COM, May 22, 2011, http://www.foxnews.com/politics/2011/05/22/ears-obama-israel-lobby-conference; Dan Murphy, *What's So "Shocking" About Obama Mentioning 1967 Borders?*, CHRISTIAN SCI. MONITOR, May 20, 2011, *available at* http://www.csmonitor.com/World/Backchannels/2011/0520/What-s-so-shocking-about-Obama-mentioning-1967-borders; and Uri Friedman, *What Obama Meant by "1967 Lines" and Why It Irked Netanyahu*, ASSOCIATED PRESS, May 20, 2011, *available at* http://www.theatlanticwire.com/global/2011/05/what-obama-meant-1967-lines-why-irked-netanyahu/37977.

language may have signaled a significant shift in the United States' position in Middle East peace negotiations for the first time in more than four decades.[7]

In *King's Counsel*, Jack O'Connell[8] draws from his experiences as a Central Intelligence Agency (CIA) operative and station chief in the Middle East; advisor, attorney, and diplomatic counselor to King Hussein bin Talal[9] of Jordan; and stakeholder to the shuttle diplomacy[10] that resulted in UNSCR 242,[11] in order to memorialize one man's unyielding quest for peace in an uncertain and volatile region. O'Connell's background is significant, as he "had a closer relationship with King Hussein than any other American official before or after, one that was based on mutual respect and absolute trust."[12] Broadly, O'Connell's purpose in writing *King's Counsel* was to provide a historical account of King Hussein's political betrayals by Arab, Israeli, and American officials and "to tell the world why peace [in the Middle East] had failed."[13] More specifically, O'Connell's purpose in writing *King's Counsel* is to fulfill a promise to King Hussein to depict the Jordanian perspective regarding Arab-Israeli relations. In Jordan's eyes, Israel returned control of the Sinai to Egypt, its main enemy, and announced its willingness to return the Golan Heights to Syria, yet remained unwilling to make peace with Jordan on the same basis because of historic, religious, and nationalist interests in East Jerusalem and the

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[7] Solomon, *supra* note 6, at 2.

[8] The author was a former naval officer and CIA officer. He received a baccalaureate in Foreign Service and juris doctor from Georgetown University, a master's in Islamic law as a Fulbright Fellow at the Punjab University in Lahore, Pakistan, and a doctorate in international law from Georgetown. *See, e.g.*, O'CONNELL, *supra* note 1, at ix–xii, and T. Rees Shapiro, *Jack O'Connell, 88, Dies; Diplomatic Adviser to Jordan's King Hussein*, WASH. POST, Jul. 18, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/17/AR2010071702682_pf.html.

[9] *Biography – His Majesty King Hussein bin Talal*, http://www.kinghussein.gov.jo/biography.html (last visited Sept. 5, 2011).

[10] Within the context of diplomacy and international relations, shuttle diplomacy is action in which an outside party serves as an intermediary between principals in a dispute. The intermediary successively travels from the working location of one principal to that of another, and principal-to-principal contact is thus avoided. Shuttle diplomacy is often used when a principal refuses to recognize a party to mutually desired negotiations. *See, e.g.*, GEORGE LENCZOWSKI, AMERICAN PRESIDENTS AND THE MIDDLE EAST 131 (1990).

[11] O'CONNELL, *supra* note 1, at 68-74.

[12] AVI SHLAIM, LION OF JORDAN: THE LIFE OF KING HUSSEIN IN WAR AND PEACE 230 (2007).

[13] O'CONNELL, *supra* note 1, at xviii

West Bank.[14] While the subject matter of *King's Counsel* has been studied extensively, O'Connell's proximity to the king for more than 35 years provides the reader with exclusive details and behind-the-scenes insight to political maneuvering in the Middle East from 1963 to 1999.

Though it shares its central theme with a number of works,[15] what distinguishes *King's Counsel* from other contemporary accounts of "the father of modern Jordan"[16] is the author's unique perspective based on his shared adversity with King Hussein through the most trying of times.[17] In the summer of 1958, O'Connell, an agent with the CIA, was assigned to Amman, the capital of Jordan, when he first met King Hussein. Despite being a western outsider, from 1963 to 1971, O'Connell earned the king's trust throughout his assignment as the CIA station chief in Amman, during which time he stood shoulder to shoulder with King Hussein as Israeli warplanes bombed the palace.

Following his resignation from the CIA in 1972, O'Connell was retained both as Jordan's American legal and diplomatic counsel and King Hussein's personal advisor. In this capacity, O'Connell prepared position papers for the king and his aides; wrote the king's speeches delivered in the United States; and, as directed by the king, served as principal advisor on Jordanian matters of state and foreign affairs, including the 1973 Yom Kippur War, the Camp David Accords, and ceding of the West Bank to the Palestinian Liberation Organization (PLO). It is O'Connell's direct exposure to the heart of Jordanian politics that bolsters the author's credibility throughout the book while it simultaneously undercuts his objectivity. Accompanied by tales of violence and cloak and dagger diplomacy, the military reader will appreciate O'Connell's perspective and find modern application for some of the premises advanced by the book. In the end, the reader will find *King's Counsel* adds chilling color and texture to the fabric of Arab-Israeli relations.

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[14] *Id*. at xvii, 247.

[15] Many books document King Hussein's attempts to solidify Arab-Israeli relations following the Six-Day War. *See, e.g.*, SHLAIM, *supra* note 13 and NIGEL ASHTON, KING HUSSEIN OF JORDAN: A POLITICAL LIFE (2008).

[16] O'CONNELL, *supra* note 1, at 247.

[17] O'Connell recounts the life and exploits of King Hussein, describing the irrepressible optimism, persistence, and keen political instincts that enabled him to become the United States' most reliable Middle East ally. Despite coup attempts, decisive military defeat and loss of territory, civil war, unpopular support for Saddam Hussein, and remaining the only Arab leader unwilling to join the United Nations coalition to liberate Kuwait, King Hussein's relations with the United States and the West recovered completely. *Id*. at 248.

II. Piecing Together A Patchwork Quilt: Tenuous Connections in *King's Counsel* Between Historical Fact and Subjective Conjecture

While *King's Counsel* is not an objective account of Middle Eastern relations or American diplomatic intervention in the region, the reader may find it was never meant to be. Commissioned by King Hussein in the early 1990s to engage a respected American author to tell his story of the vain quest for peace in the Middle East, O'Connell finds himself obligated to write *King's Counsel* by default due to the untimely passing of two predetermined authors and King Hussein himself. As the author recounts, "not to tell the story would cheat history, break a trust with the king, and probably evade an ethical duty."[18] Although the author presents facts that support his conclusion, the subjective manner in which it is done occasionally reads like tabloid reportage, and throughout the text, the author depicts several prominent American statesmen as subservient to Israel[19] or purposefully deceptive in their support for the country.[20] For the most part, O'Connell provides a logical interpretation of events, but his occasional speculative digressions and sometimes conspiratorial premises may hamper the reader's ability to clearly differentiate between conjecture and historical accuracy.

Fighting on multiple fronts against the combined might of three Arab armies, Israel won a war in merely six days and occupied territory in Egypt, Syria, and Jordan.[21] In particular, on June 5, 1967, Israel delivered a stunning opening blow in the Six-Day War.[22] Within several hours, Israeli air strikes devastated opposing air forces and suppressed many maneuver elements.[23] Upon cessation of military activities, the three nations called for the immediate withdrawal of Israeli forces and the return of all seized territory. Israel continued to maintain possession of the territories, and in September 1967, the Khartoum Arab Summit announced there would be no recognition, no negotiation, and no peace

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[18] *Id*. at xx.
[19] *Id*. at 234–35.
[20] *Id*. at xix.
[21] Jordan had previously executed the Arab Mutual Defense Pact with Egypt, and King Hussein considered the political price of withholding military support from Egypt would result in Jordan's ostracism in the Arab world. *Id*. at 57. Within sixty hours of launching his forces in support of Egypt, King Hussein lost "much of his army, the whole of his air force and half of his territory." SHLAIM, *supra* note 13, at 254.
[22] *Committee for Accuracy in Middle East Reporting in America—The Six-Day War*, http:// www.sixdaywar.org/war.asp (last visited Dec. 27, 2011).
[23] *Id*.

with Israel.[24] On November 22, 1967, the United Nations Security Council unanimously adopted UNSCR 242, calling for the withdrawal of Israeli forces from territories occupied since June 1967. Once this resolution was announced, nearly every negotiation between Israel and Jordan centered specifically on trading land for peace.[25] In contrast, American presidential policy statements about these negotiations have remained conspicuously ambiguous.

From the start, O'Connell stimulates the reader with many of the action-packed scenes one would expect of a spy memoir—a nearly compromised deep cover visit to Egypt in the 1950s; clandestine operations to bug the Soviet Ambassador to Jordan's desk in the 1960s; and a close call as the PLO firebombed his residence in Amman in the 1970s. Despite these engaging scenarios, the reader is ultimately left unsatisfied by the lack of background information provided by the author about the heart of the issue: the state of Arab-Israeli relations previous and subsequent to the Six-Day War.[26] Instead, *King's Counsel* follows the sequence of events in which O'Connell transitions from one CIA assignment to another until conflict arises among Israel, Egypt, Syria, and Jordan. The author's straightforward approach does not produce a deliberate, comprehensive history of the Middle East or Jordanian-Israeli relations that would help a reader understand the nature of the conflict within an accurate historical and political framework.

Additionally, the narrative is filled with anachronisms interspersed with facts and questionable information, making it often unclear as to whether information was redacted prior to publishing a narrative that remained in compliance with CIA rules of confidentiality. Finally, unfounded assertions unnecessarily complicate the author's assessment of Jordanian peace efforts. For instance, O'Connell unequivocably states that he believes former Secretary of State Henry Kissinger instigated the 1973 Yom Kippur War,[27] and that President Johnson, President Nixon, and Harrison M. Symmes, former Ambassador to Jordan, were

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[24] O'CONNELL, *supra* note 1, at 64–66.
[25] *Id*. at 63.
[26] In stark contrast to other works, *King's Counsel* contains no notes, maps, tables, photographs, illustrations, chronologies, or appendices. Though O'Connell's credentials are impeccable and his first-hand knowledge of events is unquestionable, his presentation of the material lacks formality and relegates the reviewer—and potentially the military reader—to research alternative sources for clarification.
[27] *Id*. at xix.

collectively indifferent to the Middle East peace process.[28] O'Connell also incorrectly assumes that the reader understands basic pre-1967 Middle East geography, Jordanian-Israeli relations, and the history of Palestinian displacement in the region. This untenable assumption, coupled with the author's stream of consciousness writing style that was often steeped with his foreign policy expertise, forces the reader to conduct independent research in order to better understand the author's detailed analysis.

The author also relies heavily upon primary sources, most derived from his personal involvement in the Arab-Israeli peace process spanning the Johnson,[29] Ford,[30] Carter,[31] Reagan,[32] George H. W. Bush,[33] and Clinton administrations,[34] coupled with his expectation that resolution could occur during the George W. Bush[35] and Obama administrations.[36] Additionally, the author provides details from events and conversations that transpired twenty, thirty, and forty years before, including discussions with Secretary of State George P. Shultz to

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[28] *Id*. at 91–93.

[29] President Johnson argued a return to pre-1967 borders was not a prescription for peace but for renewed hostilities. Instead, he advocated Israeli security against terrorism, destruction, and war. *Id*. at 71–74.

[30] President Ford wrote to Israeli prime-minister Yitzhak Rabin that, "[t]he U.S. has not developed a final position on the borders. Should it do so it will give great weight to Israel's position that any peace agreement with Syria must be predicated on Israel remaining on the Golan Heights." Solomon, *supra* note 6, at 2.

[31] President Carter, following the Camp David peace negotiations, suggested a framework for further talks based on United Nations Security Council Resolution (UNSCR) 242 without directly referring to pre-1967 borders. O'CONNELL, *supra* note 1, at 142–43.

[32] President Reagan discouraged a return to Israeli pre-1967 borders, as "the bulk of Israel's population lived within artillery range of hostile armies." Solomon, *supra* note 6, at 2.

[33] The George H. W. Bush administration co-sponsored peace negotiations with the Soviet Union and included the Israelis, Syrians, Lebanese, Jordanians, and Palestinians based on UNSCR 338, a cessation of the 1973 Yom Kippur hostilities and a call for the implementation of UNSCR 242. O'CONNELL, *supra* note 1, at 184.

[34] President Clinton endorsed a lasting peace achieved through territorial swaps, without mentioning pre-1967 borders. Solomon, *supra* note 6, at 2.

[35] President George W. Bush wrote to Israeli prime minister Ariel Sharon that realities on the ground prevent a complete return to pre-1967 boundaries and all previous peace talks have reached the same conclusion. The administration, nevertheless, encouraged Israeli-Jordanian border changes. *Id*.

[36] O'Connell asserts that President Obama, the constitutional law professor and Christian son of a Kenyan Muslim, "is the ideal guy to bring about real change in the Middle East." O'CONNELL, *supra* note 1, at 238.

revitalize the peace process in December 1982;[37] conversations with King Hussein about the King's political options during the PLO occupation of Amman and the Syrian invasion of Jordan in 1970;[38] and exchanges with Arthur J. Goldberg, the U.S. Representative to the United Nations, in November 1967 throughout the development of UNSCR 242.[39] Though loosely organized chronologically, O'Connell's unrelated anecdotes, conspiratorial speculation, and gratuitous digressions are sprinkled liberally throughout the text.

In fact, the reader might expect Vernon Loeb, O'Connell's co-author and local editor for the Washington Post, to have done more to edit, arrange, and better organize *King's Counsel*. Although the author's conclusions are conveyed relatively clearly, one cannot help but detect a partisan approach to the subject matter. O'Connell fails to recognize his close relationship with King Hussein and, at times, the direct involvement in matters of prolific consequence that degrade the author's ability to provide an objective account of events and detract from a straightforward examination of controversial issues that remain the subject of bitter international debate.

III. *King's Counsel* and Renewed Israeli-Palestinian Peace Negotiations

In addition to touching off a veritable firestorm in the mainstream media and diplomatic circles by endorsing pre-1967 Israeli borders, President Obama's May 19, 2011, speech—A Moment of Opportunity[40]—provided an overview of three major issues. First, it indicated America's changing Middle East policy in the wake of the Arab Spring[41] that began in Tunisia on December 10, 2010, and a reversal of President Obama's February 2010 estimate for his administration to restart the Middle East peace process—a calculation significantly criticized by O'Connell in his book.[42] Second, the speech

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[37] *Id*. at 146–49.
[38] *Id*. at 95–105.
[39] *Id*. at 69–74.
[40] Obama, *supra* note 5.
[41] The Arab Spring, also known as the Arab Awakening, describes the pro-democracy rebellions and protests that have occurred throughout the Middle East and North Africa since December 2010. *See* Gary Blight, Sheila Pulham & Paul Torpey, *Arab Spring: An Interactive Timeline of Middle East Protests*, THE GUARDIAN, Nov. 29, 2011, *available at* http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline.
[42] O'CONNELL, *supra* note 1, at 240.

announced support for political and economic reform in the Middle East, which O'Connell asserts will not only strengthen Arab countries individually, but also unite them even more than the Khartoum Arab Summit of 1967.[43] Finally, the president recognized that the demands for greater political and economic opportunity in Arab nations could be used as a catalyst for Israeli-Palestinian peace talks. In his book, O'Connell similarly endorses the promises expressed by the Arab peace initiative: that all twenty-two Arab nations would make peace with Israel and recognize its right to exist in exchange for full implementation of UNSCR 242.[44]

The Obama administration focused on the "democratic wave"[45] sweeping the Middle East and North Africa to justify its expectation that peaceful coexistence in the Middle East and consonance with UNSCR 242 was possible. Although the administration contended that negotiations based on territory and security would result in "a lasting peace that ends the conflict and resolves all claims,"[46] several significant obstacles were largely ignored. Most notably, the May 2011 agreement between Fatah and Hamas, in which the two Palestinian factions agreed to form an interim government to negotiate peace with Israel,[47] was largely disregarded when the Obama administration concluded "how hard [resuming peace negotiations] will be."[48] Further, the president acknowledged years of steadfast American support for Israel and claimed it was "precisely because of [this] friendship, it's important that we tell the truth: The status quo is unsustainable, and Israel too must act boldly to advance a lasting peace."[49]

The bold action President Obama prescribed "will involve two states for two peoples: Israel as a Jewish state and the homeland for the Jewish people, and the state of Palestine as the homeland for the Palestinian people, [with] each state enjoying self-determination, mutual recognition, and peace."[50] More specifically, the president explained that:

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[43] *Id*. at 245.
[44] *Id*. at 241.
[45] Obama, *supra* note 5, at 3.
[46] *Id*. at 5.
[47] Maggie Michael, *Fatah, Hamas Reconciliation Pact Ends Four-Year Rift*, HUFFINGTON POST, May 4, 2011, *available at* http://www.huffingtonpost.com/2011/05/04/fatah-hamas-reconciliation-deal_n_857336.html.
[48] Obama, *supra* note 5, at 6.
[49] *Id*. at 5.
[50] *Id*. at 5–6.

> [t]he United States believes that negotiations should result in two states, with permanent Palestinian borders with Israel, Jordan, and Egypt, and permanent Israeli borders with Palestine. We believe the borders of Israel and Palestine should be based on the 1967 lines with mutually agreed swaps, so that secure and recognized borders are established for both states. The Palestinian people must have the right to govern themselves, and reach their full potential, in a sovereign and contiguous state.[51]

While President Obama's speech and *King's Counsel* both resonate with hopes for peaceful resolution to Israel's occupation of the West Bank, cessation of "illegal" settlement construction, and affording refugees the right of return, both also fail to provide a deliberate plan to accomplish such goals. Additionally, neither Obama's speech nor O'Connell's book provides a meaningful assessment on the bleak consequences such a "peace" would have on effective border security and continued acts of terrorism against Israeli civilians.

Although *King's Counsel* does analyze failed peace initiatives and discusses the potential for successful negotiations, the author improperly focuses more on the personalities and motives of bureaucrats with vested interests in the outcome of Arab-Israeli peace negotiations rather than the settlement process itself. O'Connell's overemphasis on the interaction between multiple personalities and state governments, coupled with his preconceived notion that ominous Israeli and American intentions stymied the peace process, leads the author to three erroneous conclusions.

First, O'Connell implies Israel cannot be persuaded to accept a meaningful peace.[52] Second, O'Connell suggests a meaningful peace is possible, but ignores the fact that major elements within a divided Palestinian movement clearly challenge Israel's right to exist.[53] Third, the author's anticipation that each administration in the Middle East—some of which are clearly unstable regimes—would agree to a lasting

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[51] *Id*. at 6.
[52] O'CONNELL, *supra* note 1, at 240–41.
[53] Anthony H. Cordesman, *Obama, Netanyahu, and the Future of U.S.-Israeli Relations*, CTR. FOR STRATEGIC AND INT'L STUD., May 15, 2011, *available at* http://www.csis.org/publication/obama-netanyahu-and-future-us-israeli-relations.

peace with Israel and abide by the terms of an international agreement is unrealistic, misplaced, and fundamentally flawed.

Surprisingly, O'Connell only tangentially addresses what appears to be the three most significant points in a potential Arab-Israeli settlement. The author fails to acknowledge trading territory for peace[54] would be an attempt to trade terrorism for settlements.[55] Additionally, though glossed over in the final pages of *King's Counsel*, demographics make a major Palestinian return highly improbable, if not impossible. Finally, O'Connell disregards the considerable logistic, economic, and civic challenges associated with the creation of a Palestinian state, or allowing Israel to maintain much of the land gained in its 1967 conquest.[56]

In 1999, O'Connell was introduced to Efraim Halevy, head of the Mossad,[57] when O'Connell met the Israeli delegation that attended King Hussein's funeral. Like O'Connell, Halevy was highly regarded for solving more than one impasse to Jordanian-Israeli peace accords. Upon meeting O'Connell, Halevy complimented him for his service to King Hussein and Jordan. In response, O'Connell stated:

> I would like to say the same thing to you, but I was with the King for forty years, and all he wanted to do was make peace with Israel, that's all he really wanted to do, and he spent most of his time trying. I just happened to be at his side while he was trying. You could have made peace with him, in a real sense, any time along the line, and you never did. And I hold you responsible for that. You could have saved the whole area a lot of trouble if you had just not been so selfish and made peace with Jordan. You had a leader here with his hand out, and so I can't say the same thing to you that you said to me—I think you blew it.[58]

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[54] O'CONNELL, *supra* note 1, at 241–42.
[55] Cordesman, *supra* note 54, at 2.
[56] *Id*.
[57] The Institute for Intelligence and Special Operations, otherwise known as the Mossad, is the agency appointed by the Israeli government to collect information, analyze intelligence, and conduct special, covert operations. *See About Us—State of Israel, Israel Secret Intelligence Service*, http:// www.mossad.gov.il/Eng/AboutUs.aspx (last visited Dec. 27, 2011).
[58] O'CONNELL, *supra* note 1, at 211.

Despite advising King Hussein throughout the failed peace process and having witnessed firsthand the changing political landscapes of the Middle East and Washington, D.C., O'Connell fails to acknowledge his own partiality for his former client,[59] his bias against Israel,[60] or his skepticism toward American intervention.[61] The author's overall ability to address Middle East relations with a predominantly objective lens may leave the reader convinced that there are no issues with the author's academic integrity. However, such sentiments are clearly born from both the diplomacy that took place before the Six-Day War and O'Connell's own personal experiences during the conflict.

Through its analysis of peripheral activities that impacted various American presidential administrations' positions on the Arab-Israeli peace process, *King's Counsel* effectively highlights the basis for the diplomatic conflagration caused by President Obama's explicit call for 1967-based Israeli borders. Remarking on Secretary of State Hillary Clinton's comment in February 2010 that the pre-1967 Israeli borders should be used as a starting point for peace negotiations, O'Connell observed that "[t]he very fact that [Clinton's] remark caused a stir shows how far we've come, or regressed."[62]

IV. Conclusion

In spite of its weaknesses, *King's Counsel* provides an opportunity for the military reader to assume an Arab view of the Middle East dilemma. With few servicemembers today understanding the genesis of Palestinian upheaval in and around Israel, O'Connell examines the virtual annexation of territory that has doomed most attempts at accommodation between Israel and Jordan.[63] With uncharacteristic optimism, O'Connell consistently focuses the reader's attention not on the tensions between Israel and Jordan, but rather on the continuing dialogue between them.[64] His clear articulation of King Hussein's perspective toward failed peace negotiations with Israel delivers an unbalanced, yet entertaining and insightful, read.

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[59] *Id*. at 212–13.
[60] *Id*. at 238.
[61] *Id*. at 237.
[62] *Id*. at 240.
[63] SHLAIM, *supra* note 13, at 261.
[64] O'CONNELL, *supra* note 1, at 85–91.

Military readers seeking a deliberate and comprehensive explanation of Middle East diplomacy would be best served reading another title. For those with a historical understanding of the region and a penchant for international intrigue, *King's Counsel* deftly illustrates that the political sensitivities associated with Arab-Israeli relations are as relevant today as they were in June 1967.