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

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ABSTRACT

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 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 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 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 thesis proposes convening authority clemency as a method to implement treatment-based suspended punitive discharges for combat-traumatized offenders. Without rewriting 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 thesis 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 about 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 the 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.

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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 and a military courtroom located thirty miles apart—are purely fictional, they easily reflect El Paso County, Colorado's Veterans Treatment Court, 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 Veterans Treatment Court, 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 Veterans Treatment Court, 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 Veterans Treatment Court, 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 Veterans Treatment Courts (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 Nov. 7, 2010) (listing established VTCs throughout the Nation). For a graphic depiction of Veterans Treatment Courts in the United States, see *infra* Appendix 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 serve in or near areas of active combat").

[3] This description summarizes the common experience of participants in Veterans Treatment Courts, 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.

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 Veterans Treatment Court (VTC), an innovative court program, modeled after fifty-seven similar programs in sixteen states.[5] After Sergeant Davis rises to the call of his name and assumes the customary position of parade rest like the other program

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Observers remark, "There's a lot of clapping in 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, Tex., VTC, he provides praise to Air Force veteran Carolos Melendez, who remained clean on drug tests and has held gainful employment since his entry, "You're probably our No. 1 success story." Merten, *supra* note 2. 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 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] 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; Interview with Major (Ret.) Brian Clubb, Veterans Treatment Court Project Director for the Nat'l Ass'n of Drug Court Prof'ls, in Santa Clara, Cal. (Aug. 6, 2010) [hereinafter Clubb Interview] (discussing statistics). 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 2000 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, 2011), *available at* NADCP.ORG, http://www.nadcp.org/sites/ default/files/nadcp/SITREP%20005-10%20FINAL_2.pdf. [hereinafter JUSTICE SITREP]. Buffalo's program and other states' VTCs have also paved the way for congressional 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).

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 deadly ambush in which his squad suffered several casualties.[8] After his civilian arrest

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[6] Along with the respectful comments "yes sir," or "yes ma'am," observers of VTCs instantly recognize the engrained 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 prior to the return 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.").

[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/.

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 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]

Soldiers 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 69.

[9] Although VTCs have different eligibility criteria, aggravated assault is an offense that commonly leads to enrolment 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 2 (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 . . . "). 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*. Some have gone further to suggest that precluding violent offenders in VTCs courts 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 bring veterans into the criminal justice system in the first place").

[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

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 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 $10,000, 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 Posttraumatic Stress Disorder (PTSD),[13] though not at a level that would render him

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> 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*.

[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 non-military 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).

incompetent to stand trial.[14] After his plea, Sergeant Keedens's Trial Defense Counsel 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:

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[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).

[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).

> 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 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 Veterans Administration (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

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[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] Significantly, 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 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*.

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

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 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, 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

[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).

[22] *Infra* discussion accompanying notes 85–87.

[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 12, Need 1.6 (Jan. 2011).

[26] Letter from Admiral Michael G. Mullen, Chairman of the U.S. Joint Chiefs of Staff, to Hon. Eric K. Shinseki, Secretary of the Department of Veterans Affairs 1 (Feb. 15, 2011) [hereinafter Admiral Mullen Letter].

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 thesis 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 thesis proposes that the military can immediately use convening authority clemency to implement a treatment-based approach for 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 unique considerations. Chiefly, the return to combat could compound existing

[27] *Id*.

[28] *See supra* notes 13 and 17 (describing diagnostic criteria for PTSD and common experiences of active duty personnel that match the diagnostic criteria).

[29] *Infra* Part I.C.

[30] Psychiatrist and retired Colonel 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.

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 or court-martial convening authority exercises decisional authority in a system of "command control."[32] Under this system, military judges and panels may 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 pretrial agreements, through the support of staff judge advocates 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

[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 County, 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).

[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).

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 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-Martial*, is seen by many as no more than a fossil in petrified wood, preserved only as an artifact after generations of non-use.[35] History reveals the misleading nature of this limited view.

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[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].

[35] *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*

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 the Army Chief of Staff's current efforts to identify and "own" the Army's ethic of professionalism; 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 programs from the early 1800s, exploring the underlying philosophies for investing time

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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%").

[36] *See* Major Chris Case et al., *Owning Our Army Ethic*, MIL. REV.: THE ARMY ETHIC 2010, at 3, 10 (describing how Army Chief of Staff General George Casey has "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").

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 thesis 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, staff judge advocate, 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 installation-based programs 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 crucial and effective aspects 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 the Veterans Treatment Court, 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]

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

The tools in the appendixes provide a treatment-based alternative to incarceration and discharge that permits staff judge advocates, 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 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 like sitting civilian judges.[39] Furthermore, unlike civilian

[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 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. 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,

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 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

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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 Veterans Treatment Courts' 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 (2010) (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).

[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 James A. Young III, who spent time as a Staff Judge Advocate 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":

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 prosecutors who refute the suggestion that mental disorders caused an offense have an incentive to belittle a Soldier for raising such conditions in extenuation or mitigation.

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.[46] To avoid the appearance of

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> 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 Military Justice System*, 114 MIL. L. REV. 87, 135 & 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] *See, e.g.*, United States v. Eslinger, 69 M.J. 522, 531–34 & 534 n.12 (A. Ct. Crim. App. 2010). In laying the necessary foundation for opinions of rehabilitative potential counsel need only "establish that the witness knows

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."[47] 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 modifications.[48] 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.[49]

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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.

[47] *Id*. 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*.

[48] 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").

[49] 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

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.[50] Second, service-connected mental illness should make commanders, military judges, and panels more concerned about the future than the past because it suggests strongly that offenders will continue to find themselves in the same circumstances that led to the offense if they fail to obtain necessary cognitive tools.[51] 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"[52] of Iraq and Afghanistan service, affects between ten[53] and thirty-five percent of veterans,[54] making these servicemembers more likely to commit criminal offenses.[55] Studies reveal that this diagnosis is

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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.

[50] 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.

[51] *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.").

[52] 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.").

> 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, loading guns with the purpose of suicide in mind, and patrolling their property with loaded weapons.[56]

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."[57] Reflecting awareness of these trends, in a 15 February 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."[58]

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[53] *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").

[54] 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).

[55] 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 Service members 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.").

[56] 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 matrixes 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").

[57] 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).

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

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."[59] Even while lacking refined diagnostic criteria for PTSD in the 1940s, corrections professionals observed the "crime wave"[60] perpetrated by returning "problem veterans," who suffered trauma during the course of a war that rapidly degenerated their mental abilities.[61] 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.[62] Little has changed for veterans or

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[59] 130 S. Ct. 447, 455 & 455 n.8 (2009). Public concern for Service-connected criminal offenses dates back centuries. Writing in the sixteenth century, Sir Thomas Moore 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.

SIR THOMAS MOORE, 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* YOUNG VETERANS: A RESILIENT COMMUNITY OF HONOR, DUTY & NEED 17–19 (Diann E. Cameron-Kelly et al. eds., forthcoming 2011) (Widener Legal Studies Research Paper No. 10-43), *available at* http://ssrn.com/abstract=1706829.

[60] *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).

[61] 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).

society at large.

Today, however, faced with recurring broadcasts of severe veteran meltdowns[63] and exploding rates of veteran suicide,[64] government 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."[65] 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

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[62] 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).

[63] 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* 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).

[64] 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).

[65] 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").

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."[66]

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 officer 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.[67] 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.[68] And, many veterans who would otherwise have been arrested and confined are being diverted by police to mental health centers in lieu of arrest.[69]

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[66] 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.

[67] *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").

[68] *See* G.A. CODE ANN. § 40-5-38 (2010). 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).

[69] *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 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*

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.[70] The Navy is similar.[71] 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.[72] The lack of concern for treatment is troublesome 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

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note 51, 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).

[70] Citing to various provisions in a collection of consolidated guidance, Lieutenant Colonel 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 Lieutenant Colonel Christopher G. Jarvis, Battalion Commander, in Charlottesville, Va. (Oct. 22, 2010). To prevent violation of admission requirements, he routinely conducts independent investigations of Soldiers' criminal status prior to admitting new participants. *Id*.

[71] Telephone Interview with Captain Key Watkins, U.S. Navy, Commander, U.S. Navy Safe Harbor Program (Oct. 21, 2010) [hereinafter Captain 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).

[72] *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 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 all).

"deprives one of substantially all benefits administered by the Department of Veterans Affairs and the [military] establishment."[73]

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.[74] Civilian judges call this phenomenon the "revolving door syndrome" because many of the mentally ill return to prison shortly after their release.[75] After civilian courts continually observed this familiar pattern of repeat incarceration, judges responded by developing sentencing alternatives to divert the mentally ill into treatment programs.[76] Whether labeled as "treatment courts,"[77] "therapeutic courts,"[78] or "problem-solving

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[73] 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*.

[74] 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).

[75] 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).

[76] *See, e.g.*, Kondo, *supra* note 75, 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").

[77] *See, e.g.*, GOV'T ACCOUNTABILITY OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS (1997), http://www.ncjrs.gov/txtfiles/dcourts.txt (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").

courts,"[79] these new programs all exist to "merge intensive treatment with the power of a court."[80] 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 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 range and emotion,[81] it constitutes a threat to public safety.[82]

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[78] *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.").

[79] 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).

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

[81] 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 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 done 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

Although commanders and courts-martial sentencing authorities may be blind to the revolving door syndrome and its results,[83] 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."[84] The punitive discharge builds on this quagmire in two ways. First, confinement tends to aggravate mental illness,[85] and PTSD becomes more difficult to manage when effective treatment is delayed.[86] While an inmate with PTSD may be able to see a therapist when

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LIEUTENANT COLONEL DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1996).

[82] *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).

[83] 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.).

[84] Amir Efrati, *Judges Consider New Factor at Sentencing: Military Service*, WALL ST. J., Dec. 31, 2009, WWW.WSJ.COM, http://online.wsj.com/article/SB126221697769110969.html (citing Judge Kane).

[85] 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 74, at 8 (observing that "[i]ncarceration poses a number of important problems and obstacles to treatment and rehabilitation" for the mentally ill).

confined in a military facility, such treatment is not optimal.[87]

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,[88] there is great danger in assuming that *all* inmates can avail themselves of these limited exceptions.[89] The success of new programs for veterans who are involved in the civilian justice system and the rapid establishment and funding of Veterans Treatment Courts rest entirely on the presumption that incarcerated veterans are still eligible for VA benefits and that they

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[86] *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).

[87] 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 74, 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).

[88] 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; 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.").

[89] 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 56, 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.

received discharges under honorable conditions.[90] 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.[91] 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.[92] Civilian programs without VA funding may not prioritize treatment for veterans and are rarely able to provide the same quality of care.[93]

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. 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

[90] 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 2 (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").

[91] Letter from Michael J. Kussman, Veterans Affairs Undersecretary for Health: Information and Recommendations for Services Provided by VHA 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).

[92] *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).

[93] *See, e.g.*, Brunswick, *supra* note 50, at 1A (observing the need for the VA to supplement state VTCs as "state court funding becomes more sparse and federal funding remains flush").

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 for 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.[94]

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 legal "revolution."[95] 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.[96] 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.[97]

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[94] *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).

[95] BERMAN & FEINBLATT, *supra* note 75, at 3 (characterizing the phenomenon of therapeutic courts as a "quiet revolution among American criminal courts").

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

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

II. The Common Aims of the Treatment Court Movement

Scholars fear that the rehabilitative ideal has given way to retributive theories of justice.[98] 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.[99] 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 2011, there are 3000 problem-solving courts in the United States[100]—an increase of 500 since 2009[101]—including 2147 drug treatment courts,[102] 250 mental health treatment courts,[103] and 57 Veterans Treatment Courts operating nationally.[104] In Dallas, Texas, alone, the inauguration of the first VTC marked the 14th type of treatment court, among the ranks of specialized

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[98] *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.").

[99] *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").

[100] McMichael, *supra* note 5, at 10.

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

[102] 2 C. WEST HUDDLESTON, III ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING PROGRAMS IN THE UNITED STATES 2 (May 2008) (representing "a 32% increase from 2004").

[103] *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.

[104] McMichael, *supra* note 5, at 10.

programs for prostitutes and perpetrators of domestic violence, to name a few.[105] 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.[106] 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."[107]

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.[108] 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.[109]

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[105] Merten, *supra* note 2 (describing "13 other specialty courts," in addition to VTCs). *See also* HUDDLESTON ET AL., *supra* note 102, at 21–23 (identifying thirteen different types of problem-solving courts, excluding Veterans Treatment Courts).

[106] 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.

[107] American Bar Association, ABA Resolution 105A (2010).

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

[109] *See infra* note 119 (describing the heightened requirements of judicial oversight in VTCs).

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 at the state level 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.[110] However, amid the great variance, all treatment courts adhere to certain unifying principles, normally fashioned as "Key Components"[111] or "Essential Elements."[112] With slight variations, the principles remain constant through different program types; all feature "ongoing judicial interaction with each [participant],"[113] use interdisciplinary teams to respond to the offender's individual needs,[114] hold the offender accountable for lack of adherence to specifically-designed treatment plans,[115] and require

[110] *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).

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

[112] *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).

[113] 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).

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

[115] THOMPSON ET AL., *supra* note 112, 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.").

both the willingness to innovate in treatment approaches and to incorporate lessons learned.[116] A list of the Ten Key Components of Veterans Treatment Courts appears in Appendix C for further illumination.[117] 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[118] and the demanding responsibilities required for the offender to remain in the program.[119]

Within the broad parameters of basic treatment court principles, common attributes of these programs have led to program success.[120] Studies reveal that drug courts reduce

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[116] Russell, *supra* note 113, at 367, Key Component 8 ("Monitoring and evaluation measures the achievement of program goals and gauges effectiveness."); THOMPSON ET AL., *supra* note 112, 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.").

[117] *Infra* app. C.

[118] *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").

[119] 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").

[120] 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.

recidivism and save more costs than traditional probation or prison.[121] 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.[122] Even at their current infantile stages, Veterans Treatment Courts too show promising results.[123] While these general gains do 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.[124] 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 programs.

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[121] *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").

[122] Redlich et al., *supra* note 118, 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.").

[123] *See, e.g.*, Holbrook, *supra* note 59, at 36–37 (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); McMichael, *supra* note 5, at 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.").

[124] 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).

The following Part traces military discharge remission programs from their genesis in the early 1900s. From these largely forgotten chapters of military history, it will be evident that military corrections specialists and psychiatrists themselves developed problem-solving approaches that came very close to the contemporary treatment court. The recognition that these concepts are not foreign to the Profession of Arms should encourage innovation within the court-martial system and collaboration with civilian agencies currently operating at the tip of the spear in treatment court programs.

III. Precedents from Military Discharge Remission Programs

A. 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,[125] the first national-level discharge remission programs emerged in relation to

[125] 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").

desertion offenses, in the form of executive orders. Building on President Thomas Jefferson's initial pardon of deserters in 1807,[126] President Andrew Jackson developed a program to return incarcerated convicts to duty in General Orders 29 of 12 June 1830.[127] 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."[128] 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."[129] However, by 1893, another congressional act effectively muted all restoration provisions by preventing the reenlistment of any servicemember whose prior period of enlistment had not been "honest and faithful."[130]

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*.

[126] 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").

[127] 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.

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

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

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

1. Major General Enoch Crowder's Guiding Vision

When Major General Enoch H. Crowder assumed duties on 11 February 1911 as the Army's 13th 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 inspecting military confinement facilities throughout the United States.[131] Later, he conducted "firsthand study of the military penal systems of England and France" and the theories of international penologists.[132] 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.[133]

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."[134] The new measures represented "a policy of pursuing all deserters vigorously and bringing them to punishment if possible."[135] As part of the effort, executive

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

[132] *Id*. (recognizing the influence of theorists, including F.H. Wines, E.S. Whitlin, C.R. Henderson, and the reports of the International Prison Congress).

[133] 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].

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

[135] *Id*.

orders removed court-martial provisions on leniency for youthful offenders,[136] resulting in so many discharges that it appeared most courts-martial awarded dishonorable discharges automatically, even though they had the option of retention.[137] 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.[138]

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[136] 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 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 . . . .

[137] *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.").

[138] 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 134, 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.

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.[139] He, like others, saw that most dishonorably discharged inmates were approximately 23 years-old and was concerned that these men were wasting away in cells with eroded skills and little to offer.[140] 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.[141] 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."[142]

1910 Judge Advocate General's Report, *supra* note 136, 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*.

[139] 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).

[140] *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.

[141] Smith, *supra* note 139, 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).

[142] LOCKMILLER, *supra* note 131, at 135.

General Crowder consulted with President Taft and others to share ideas for a new military corrections framework.[143] He also observed as the U.S. Navy established its first disciplinary barracks at Port Royal, South Carolina, on 1 September 1911.[144] From these collaborations grew the revolutionary concept of "honorable restoration to duty"—a "kind of reform school" approach[145]—that entered the national agenda after Crowder presented it to the Military Affairs Committee of the House of Representatives in 1912.[146] Modeled on the British system, which had provided the very impetus to create a military prison in the late

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[143] 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.

[144] 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 140, app. B, at 70–71.

[145] *Id*. General Crowder, himself, expressed so much in a letter to the Secretary of War in 1919. 1919 Crowder Letter, *supra* note 133, 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").

[146] *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 COLONEL JAMES J. SMITH, MILITARY CLEMENCY AND PAROLE: DOES IT WORK? 102 n.25 (1993), *available at* WWW.DTIC.MIL, http://www. dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD =ADA276635 (describing other aspects of General Crowder's presentation before the House's military committee).

1800s,[147] the plan featured six components, all tailored toward the inmate's eventual restoration to duty.[148] Cementing a patchwork of executive orders with legislation, Congress gradually implemented Crowder's Army restoration scheme, allowing reenlistment of peacetime deserters in 1912,[149] permitting suspended sentences for dishonorable discharges in 1914,[150] and, on 4 March 1915, christening a U.S. "Disciplinary Barracks" with

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[147] *See, e.g.*, SMITH, *supra* note 146, 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 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) (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).

[148] 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 131, 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 144, 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].

[149] 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 144, at 101.

[150] 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 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.

"legislative authority for employment and training of offenders with a view to their honorable restoration to duty or reenlistment."[151] 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."[152]

Significantly, what began as a proposal to address the crime of desertion in no time grew to encompass all military-related offenses,[153] with immediate transfer of murderers and career criminals in different facilities than those designated for restoration.[154] The new restoration program functioned chiefly through the "indeterminate (or probationary)" court-martial sentence, in which, "having no minimum, only a maximum, the confinement may be

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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.").

[151] LOCKMILLER, *supra* note 131, 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 for 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*, at 137.

[152] LOCKMILLER, *supra* note 131, at 137.

[153] 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 133, at 35.

[154] Alcatraz Island, recognized as the Pacific Branch of the U.S. Disciplinary Barracks, 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 139, at 102 n.25.

terminated at any time, and the offender . . . may be restored to duty" upon the satisfaction of program criteria.[155]

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.[156] In these units, participants were treated differently than 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.[157]

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.[158]

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[155] 1919 Crowder Letter, *supra* note 133, 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.

[156] Headquarters, War Dep't, Gen. Orders 56 (17 Sept. 1913). *See generally* 1914 Military Prison Report, *supra* note 155, 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, was to consist of 86 prisoners, with a proper compliment 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.

[157] Smith, *supra* note 139, 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).

[158] 1914 Military Prison Report, *supra* note 155, 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

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 Disciplinary Barracks' Department of Psychiatry.[159] 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 offense for which he was convicted.[160] After evaluation, it was ultimately the medical examiner who assessed future capacity for restoration.[161]

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-to-duty program to address an anticipated explosion in wartime courts-martial.[162] 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 that inmates should be placed in disciplinary companies within two weeks after commencing the service of their sentences and restored to duty within

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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*.

[159] 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).

[160] *Id*. at 421–22.

[161] *Id*. at 424.

[162] *See generally* Lieutenant Colonel John H. Wigmore, *Modern Penal Methods in Our Army*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 163 (1918).

three months' time.[163] 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."[164] By this measure, 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.[165]

3. WWII Rehabilitation Centers

Between WWI and the 1940 mobilization for WWII, responsibility for restoration to duty of military offenders was split between local stockades and the U.S. Disciplinary Barracks (USDB or DB),[166] whose restoration programs grew more stringent and selective over the years, ultimately restoring only 10 out of every 200 inmates.[167] By 1942, the War Department sent representatives from its nine service commands to visit the USDB in preparation for a plan to open official Service Command Rehabilitation Centers (SCRCs)

[163] *Id*. at 165.

[164] *Id*. at 168–69.

[165] SMITH, *supra* note 139, at 6 (relating restoration statistics from Fort Leavenworth).

[166] 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).

[167] 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.* ¶ 9, at 1 (n.d.), *in* 1 REHABILITATION AT TURLOCK (on file with the California State University Stanislaus Library, Turlock, Cal.).

both domestically and in theaters of war.[168] The War Department ultimately decided to model the centers after the DB's honor units, but with far more "liberalized" standards.[169]

By the end of 1942, nine SCRCs operated domestically[170] and eleven operated internationally as "Disciplinary Training Centers" or "Detention Rehabilitation Centers."[171] The programs varied to some extent, but all generally reflected the Ninth SCRC's philosophy, "Put out and you will get out."[172] On this model, trainees "put out" by complying with orders and successfully completing vigorous physical exercises and training events designed to provide them with a quality of discipline that would prevent future crimes.[173] Though restoration rates generally varied, offenders who were committed to the

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[168] Major Isidore I. Weiss, *Rehabilitation of Military Offenders at the Ninth Service Command and Rehabilitation Center*, 103 AM. J. PSYCHIATRY 172, 172 (1946); Major Perry V. Wagley, *The Army Rehabilitates Military Offenders*, 8 FED. PROBATION 14, 15 (1944).

[169] 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) ("Consideration and action under existing regulations which permit suspension of sentences, reclassification, and restoration of general prisoners to duty will be liberalized.").

[170] The locations of the original nine Service Command Rehabilitation Centers 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 Service Command); Camp Bowie, Tex. (Eighth Service Command); and Turlock, Cal. (Ninth Service Command). U.S. DEP'T OF ARMY, THE ARMY CORRECTIONAL SYSTEM 5 (2 Jan 1952). 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. Colonel Marion Rushton, *The Army's New Correction Division: Its Purposes, Functions and Organization*, PRISON WORLD, Nov.-Dec. 1944, at 4, 6.

[171] Austin 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.").

[172] 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.).

[173] *See, e.g.*, CARLING I. MALOUF, REHABILITATION AT TURLOCK: LIFE IN AN AMERICAN PRISON CAMP DURING WORLD WAR II, at 23 (n.d) (unpublished manuscript), *in* 1 REHABILITATION AT TURLOCK (on file with the

program were likely to return to service with a clean slate, usually after approximately thirty-two weeks.[174]

Ultimately, in the two-and-a-half years that rehabilitation centers existed, they collectively restored 42,373 dishonorably discharged offenders to honorable service, which equated to roughly the size of "three full infantry divisions" and accounted for half of all dishonorable discharges adjudged during WWII.[175] Impressively, the recidivism rate was only twelve percent, or the size of "one and two-thirds infantry regiments."[176] While certain types of offenses and mental conditions were supposed to preclude offenders from participating in these programs,[177] many of these ineligible offenders became trainees due to the lack of

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California State University Stanislaus Library, Turlock, Cal.) ("A military training was regarded as adequate therapy for most of the prisoners.").

[174] U.S. DEP'T OF ARMY, *supra* note 170, at 22. 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. Weiss, *supra* note 168, at 173.

[175] Austin MacCormick & Victor H. Evjen, *The Army's Postwar Program for Military Prisoners*, PRISON WORLD, May-June 1947, at 3, 5, 6 (reporting 84,245 as the total number of dishonorable discharges for the period from December of 1942 to May of 1946). 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." Don Wharton, *The Army Saves its Black Sheep*, READER'S DIG., Nov. 1943, at 77, 77. For a modern use of the analogy, see Colonel Ralph F. Miller, *The Lost Battalion: Courts-Martial for Minor Offenses is a Strain on Precious Resources*, MARINE CORPS GAZ., Jan. 2007, at 53, 53 (describing the status of Marines on appellate leave who are "largely forgotten" following their adjudged sentences).

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

[177] *See, e.g.*, 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 rather than rehabilitation centers: "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 United States Disciplinary Barracks: officers, drug offenders, "sodomists or other sexual perverts," those with unsuspended discharges, and "[e]stablished incorrigibles and soldiers convicted of crimes involving aggravated violence . . ."); Major Herman B. Snow, *Psychiatric Procedure in the Rehabilitation Center, Second Service Command Rehabilitation Center*, 25 MIL. NEUROPSYCHIATRY 258, 259–60 (1946) (providing a representative list of prohibited psychiatric conditions).

screening mechanisms or resources at transferring stockades.[178] As an unintended consequence of the presence of mentally-ill offenders, psychologists developed useful treatments.

Military psychiatrists at rehabilitation centers had more freedom to evaluate these offenders and use therapeutic techniques in corrections settings than they did in regular military outfits.[179] In many cases, a center's psychiatric review marked the first time that anyone comprehensively evaluated the offender's background and the circumstances that contributed to the offense.[180] Not only psychiatrists,[181] but commanders of rehabilitation centers recognized that a number of offenders should have been medically discharged rather than court-martialled based on their acute need for mental health treatment and the

[178] *See, e.g.*, MALOUF, *supra* note 173, 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").

[179] *See, e.g.*, WILLIAM C. MENNINGER, PSYCHIATRY IN A TROUBLED WORLD: YESTERDAY'S WAR AND TODAY'S CHALLENGE 200 (1948) (describing the unique role of psychiatrists in correctional versus traditional military settings).

[180] The standard 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 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. Miguel Oviedo, *Federal Probation During the Second World War—Part One*, 67 FED. PROBATION 3, 6 (2003) (addressing the period between 1942 and 1945).

[181] *See, e.g.*, Captain Morse P. Manson & Captain Harry M. Grayson, *The Psychological Clinic at the MTOUSA Disciplinary Training Center*, 1 AM. PSYCHOLOGIST 91, 94 (1946) ("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-martialled and sentenced."); Major Perry V. Wagley, *The Army Rehabilitates Military Offenders*, 8 FED. PROBATION 14, 18–19 (1944) (proposing 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).

relationship between their mental illness and the charged offenses.[182] Over time, this recognition led to an alternative policy that permitted offenders with mental illness to be discharged administratively if the illness made them ineligible for restoration-to-duty, but they would have successfully completed the restoration program otherwise.[183]

Psychiatrists at rehabilitation centers also grew to observe the differences between offenders with different types of mental illnesses. Major Harry Freedman, for example, used

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[182] For example, shortly after the opening of the Sixth Service Command's Rehabilitation Center, its commander, Major General 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 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.*

Wagley, *supra* note 168, at 18 (citing letter dated 13 September 1943) (emphasis added).

[183] To aid in the development of the Army's programs, in 1952, the Adjutant General published *The Army Correctional System*, which described 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.

U.S. DEP'T OF ARMY, *supra* note 170, at 53. The above policy also codified restoration practices developed at the rehabilitation centers and disciplinary training companies. *See, e.g.*, Memorandum from Colonel Chas. C. Quigley, Adjutant Gen., HQs Ninth Service Command, Office of the Commanding Gen., to Commanding Officer, Ninth Service Command Rehabilitation Center, 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.) (observing that 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 168, 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 181, 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).

the term "Soldier-patient" to address the servicemember whose criminal activity arose from combat trauma.[184] In conceptualizing the special problems presented by this unique category of offender, military psychiatrists identified special modifications that were necessary in the criminal justice system to address treatment-based concerns.[185] Major Freedman's recommendations, sixty years ago, envisioned the exact approach now used by mental health and Veterans Treatment Courts. 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.[186]

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."[187] Major Freedman likewise discussed alternatives to incarceration that would benefit both the Soldier-patient and society, such as occupational therapy, in which "a combat-experienced soldier continued to render effective service where otherwise a stockade

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[184] 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, 53 (Marjorie Bell ed., 1946) (using the term to describe a Soldier for whom, "[b]y reason of his participation in combat and the minute to minute existence which he had been living, his values were distorted and in his illness there can be seen the motivating forces which might easily bring him in conflict with the law"). *See also* Major Harry L. Freedman, *The Mental-Hygiene-Unit Approach to Reconditioning Neuropsychiatric Casualties*, MENTAL HYGIENE 269, 270 (1945) ("The status of soldier in this therapeutic company is somewhat of an anomaly. It is that of a soldier-patient.").

[185] *See, e.g.*, Major Ivan C. Berlien, *Rehabilitation Center: Psychiatry and Group Therapy*, 36 J. CRIM. L. & CRIMINOLOGY 249, 249 (1945) (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).

[186] Freedman & Rockmore, *supra* note 184, at 44, 57.

[187] *Id*. at 57.

prisoner might have been the only result."[188] The Army's disciplinary policy soon reflected these sentiments in the 1950s, recognizing "combat exhaustion" as an exception that would permit restoration to duty, despite a conviction for desertion from a combat setting.[189]

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 restoration responsibilities returned to the DB and the stockades, the infant Air Force provided a chance to continue the Army's rehabilitation center experiment.[190] In 1951, armed with the ambition to innovate better systems than the Army and some corrections personnel who had migrated from the Army,[191] the Air Force created the 3320th Corrections and Rehabilitation Squadron (3320th). This program emphasized a

[188] *Id*. at 52–53.

[189] 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 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.

[190] The Air Force, in fact, continued the tradition of the most innovative SCRC in Fort Knox, Ky., where the group treatment environment functioned on a "24-hours-a-day" basis. Lloyd W. McCorkle, *Group Therapy in Correctional Institutions*, 13 FED. PROBATION 34, 34–35 (1945). For a discussion of the 5th SCRC's unique features and detailed accounts of actual cases, see Joseph Abrahams & Lloyd W. McCorkle, *Group Psychotherapy of Military Offenders*, 51 AM. J. SOCIOLOGY 455, 460–63 (1946).

[191] ROGER G. MILLER, CRIME, CORRECTIONS, AND QUALITY FORCE: A HISTORY OF THE 3320TH CORRECTION AND REHABILITATION SQUADRON 1951–1985, at 17 (1987) ("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.").

therapeutic environment over rigorous training,[192] 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.[193]

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 Force's restoration program,[194] 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.[195] 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.[196]

Although Mr. Moye could not recall specific statistics, he reports that there were "definitely cases" where offenders diagnosed with combat fatigue received suspended

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[192] *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").

[193] *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. Capenter'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").

[194] 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)).

[195] Telephone Interview with John Moye, Senior Partner, Moye White LLP (Jan. 10, 2011).

[196] *Id*.

discharges in order to undergo comprehensive and individualized treatment.[197] Alternatively, many of these offenders would be discharged administratively with a characterization that enabled them to obtain benefits from the VA.[198] 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 in Camp Gordon, Georgia,[199] and Germany,[200] it 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.[201] 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

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[197] *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*.

[198] *Id*.

[199] *See, e.g.*, MILLER, *supra* note 191, at 26 ("The Army activated a rehabilitation center at camp Gordon, Georgia, similar to those it had operated during World War II."). For a description of this Pilot Rehabilitation Center, and comparison with the WWII rehabilitation centers, see generally Sterling Slappey, *Cure Adjusts 'Bad' Soldier Into Good GI: Normal Treatment Proves Success at Vast Military Jail*, SUNDAY TIMES (Cumberland, Md.), Aug. 17, 1952, at 40.

[200] *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 7727 USAREUR Retraining Center located in Kaufbeuren, Germany) (on file at the U.S. Dep't of Army Mil. Police History Office, Fort Leonard Wood, Mo.).

[201] 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 Mil. History, U.S. Cavalry Museum & 1st Infantry Div. Museum, Fort Riley, Kan.).

trainees.[202] Unlike the 3320th, however, the USARB mainly relied on the concept of intense military training similar to basic infantry training and the physical fitness programs implemented at the rehabilitation centers in the 1940s.[203] Within the framework established at the USARB, like all restoration programs, alternative methods were used to address offenders with PTSD, who were often medically discharged based on their mental illness.[204]

Although the end of the draft in 1973 and the concept of a "quality force" pushed service-wide restoration programs into sharp decline and eventual dormancy by the late 70s,[205] the Army's Judge Advocate General and other officials encouraged local commanders to continue their use of suspended punitive discharges.[206] Despite the fact that the Air Force is

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[202] *See, e.g.*, Mary C. Femmer, *A Second Chance: The Retraining Brigade*, ARMY MAG., Sept. 1980, at 25, 26 & Call- Out Box titled "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 201, at 39–40 (describing the innovative involvement of social workers in the USARB's retraining operations).

[203] 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 201, at 3, 5 (describing organizational and training structures).

[204] 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, Associate Professor, Washburn University School 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 today develop. 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 201, 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.*

[205] *See, e.g.*, LIEUTENANT COLONEL THOMAS R. CUTHBERT, MILITARY CLEMENCY: EXTRA-JUDICIAL CLEMENCY IN THE UNITED STATES ARMY PRISON SYSTEM 13 (May 20, 1977) (unpublished manuscript) (on file with author) (observing how restoration programs came to "retain only historical significance" by 1977); FOX, *supra* note 201, at 124 (tracing how it came to be that the "retraining mission [has] remained . . . in name only").

[206] In May of 1975, Major General George S. Prugh, the Army Judge Advocate General, dispatched a memorandum to all staff judge advocates, promoting the suspended sentences as a valuable tool available to

the only service with a functioning program,[207] now called the "Return-to-Duty Program"—which has, at times, been populated by only one trainee—the programs were still extremely successful, with their disuse resulting from policy preferences, rather than legal mandates.[208]

In fact, based on existing statutory mandates to operate military restoration programs,[209] scholars suggest that these restorations programs have been "mothballed," rather than terminated, so that they can be resurrected in times of national emergency when a significant number of sevicemembers are again mobilized to defend the Nation.[210] Without question, however, in addition to the 42,373 Soldiers rehabilitated by the SCRCs and Disciplinary

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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,

> [A]ll 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 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 191, 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).

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

[208] 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, 84 (1997) ("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).

[209] *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).

[210] MILLER, *supra* note 191, 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 205, at 16 (observing that the Army's secretarial restoration program exists on paper "probably as a safety valve . . .").

Training Centers, the USARB restored an additional 37,801 Soldiers by 1992,[211] and the Air Force an additional 8252 Airmen by 1985.[212] 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.

B. Legal Lessons Learned from Military Restoration Programs

As discharge remission programs evolved over the years, military courts recognized their success[213] and resolved a number of important issues that could one day be important if such programs emerge from their 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.[214]

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[211] FOX, *supra* note 201, at 163.

[212] MILLER, *supra* note 191, app. X, at 251.

[213] *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).

[214] United States v. Wise, 20 C.M.R. 188, 192 (C.M.A. 1955).

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 *Code*.[215] Hence, the *opportunity* to participate 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[216]—even if the individual ultimately fails to complete the program.[217] 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.[218]

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[215] *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.

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).

[216] *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).

[217] *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.").

[218] 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).

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.[219] Convening authorities cannot, therefore, preemptively remove the suspended punitive discharge from their clemency practices or philosophies.[220]

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,[221] even if he otherwise meets the enrollment criteria for a specific program,[222] and even if an experienced military judge "strongly recommend[s]" a suspended discharge to permit participation in a rehabilitative program.[223] However, when the military

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[219] *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 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).

[220] *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).

[221] In fact, a staff judge advocate 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.").

[222] *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).

[223] *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").

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 staff judge advocates to alert the convening authority.[224]

It is sometimes the case that the aims of courts-martial or convening authorities clash with service-wide 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.[225] The Board recognized, "[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,"[226] and thus eliminated the "self-contradictory" clemency terms (six months' participation time limit) that had originally been

[224] The requirement to inform the convening authority of the recommendation for a suspended sentence under this circumstance derives from Rule for Court-Martial 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 Advocates 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 staff judge advocate's failure to bring matters to the convening authority's attention when,

> [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.

[225] 33 C.M.R. 742 (A.F.B.R.), *pet granted*, 33 C.M.R. 435 (C.M.A. 1963).

[226] *Id*. at 745.

recommended in the panel's contingent sentence.[227] Other cases similarly nullified inconsistent provisions of judicial clemency recommendations,[228] 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 service-wide restoration programs is necessary only to the extent that the court-martial invokes a specific restoration program; regulations governing programs at the secretarial level do not, and should not, control participation in treatment programs that operate locally through civilian or military channels.[229]

Additional court decisions counsel toward use of post-conviction agreements in all cases that involve treatment plans, 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

[227] *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.").

[228] *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).

[229] 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* Richard L. Henshel, *Military Correctional Objectives: Social Theory, Official Policy, and Practice*, *in* THE MILITARY PRISON: THEORY, RESEARCH, AND PRACTICE 28 (Stanley L. Brodsky & Norman E. Eggleston eds., 1970).

of responsibility for enrollment.[230] 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.[231] *Rogan*, as 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 therefore maximize the opportunity to benefit from the program by setting the maximum length of the program (up to 24 months) and, alternatively, attainment of specific goals, whichever occurs sooner.[232]

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

[230] 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 staff judge advocate 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).

[231] Clubb Interview, *supra* note 5 (describing how the majority of VTCs are post-plea programs that require admission of guilt). 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).

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

program."[233] 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."[234] 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,[235] when the accused changes his mind regarding intentions to participate prior to the convening authority's action,[236] or when an accused desires to un-volunteer himself from a restoration program after enrollment (based on its demanding requirements).[237] Together, such cases reveal how a comprehensive post-conviction agreement would cure many of these potential problems.[238]

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

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

[235] 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.

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

[237] *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).

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

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[239] and a court-martial's recommendation of a suspended sentence to effectuate them.[240] 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.[241] Civilian jurisdictions that permit juries to recommend sentences of probation like the military have

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[239] *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."

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

[241] *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").

recognized this same "gravitational influence"[242] 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."[243] 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 suspend the sentence, "in partial recognition of the military judge's recommendation."[244] Because of the undeniable value of clemency recommendations in courts-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.

In the backdrop of an Air Force program that was still producing annual restoration rates in the triple digits,[245] *United States v. McBride*[246] articulated a rule for the propriety of a contingent sentence based on treatment, rather than fines or more familiar conditions. Airman McBride asked his panel not to adjudge a Bad-Conduct Discharge 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]

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

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

[244] 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").

[245] MILLER, *supra* note 191, app. II.

[246] 50 C.M.R. 126 (A.F.C.M.R. 1975).

know what the situation is, have been through it, and who would work with him.'"[247] The panel, after considering the unique factors in the case, attempted to adopt the suggestion by adjudging a Bad-Conduct Discharge, 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.[248]

The military judge, noticing the apparent "inconsisten[cy]" between a Bad-Conduct Discharge and an administrative discharge, which the panel could not lawfully adjudge,[249] did not permit the sentence to be announced as written.[250] 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 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.[251]

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[247] *Id*. at 130–31.

[248] *Id*. at 131.

[249] 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 member 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*.

[250] *McBride*, 50 C.M.R. at 126.

[251] *Id*. at 131.

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.[252]

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.[253] *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 . . . ,"[254] and (2) the recommendation is in some way based on observation and "evaluation" of the "accused's conduct between trial and discharge."[255] *McBride*'s continued validity is evident in cases upholding various types of "contingent

[252] *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.").

[253] *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.").

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

[255] *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.").

sentences" on the grounds that remission is conditioned on a future event.[256]

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."[257]

At the other pole, because rehabilitation is undoubtedly one of five permissible rationales

[256] *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").

[257] 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 Bad-Conduct Discharge. 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.

for punishment in the military,[258] military judges 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.[259] An increasing number of opinions regarding rehabilitative potential evidence has since removed many issues from *Quesinberry*'s exclusionary domain.[260] Although Rule 1001(b)(5) does not limit the defense the way it limits the Government,[261] it is a good point of reference for the defense because the defense is accorded even greater latitude to introduce mitigation evidence related to rehabilitative potential.[262] The liberalization of opinions offered by experts under Rule 1001(b)(5) has occurred especially in the domain of future dangerousness, which contemplates many of the same evidentiary issues as treatment programs, including features that would make the

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[258] 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 Agreements Terms Affecting Sentencing to Sentence Rehearings*, ARMY LAW., July 2004, at 110, 112–113 (describing different views 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).

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

[260] *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 R.C.M. 1001(b)(5) "greatly modified" its provisions on rehabilitative potential opinions).

[261] 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).").

[262] 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).

accused more amendable to reformed behavior.[263] Because defense evidence on rehabilitation is even broader, *Quesinberry* is now mainly limited to optimal program completion times, rendering such evidence irrelevant on the basis that it is collateral.[264]

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 helpful 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 to the single-digits, a drug offender desired to use his unsworn statement as a means to inform the panel of his desire to participate in the 3320th.[265] Under *Quesinberry*,

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[263] *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 Veterans Treatment Courts 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).

[264] *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).

[265] *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 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.[266] 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."[267] In pertinent part, the accused would have stated,

> 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.[268]

The *Rosato* court found that the proposed statement was not so extensive or convoluted as to "muddy[ ] the sentencing waters,"[269] and that any potential confusion could have easily been

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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.

[266] 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.

[267] *Id*. at 95.

[268] *Id*. at 94–95.

[269] *Id*. at 96.

remedied with a standard instruction on the limited nature of an unsworn statement.[270] Invoking the enduring concept of "soldier[ing] . . . back" from a conviction, the 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.[271] *Rosato*'s holding also reflects the longstanding rule that an accused has a "broad right during allocution" to "attempt to demonstrate . . . readiness for rehabilitation."[272]

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."[273] There, the staff judge advocate 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.[274] By adopting a policy little different from the Service secretaries' presumption against discharge

[270] *Id*.

[271] *Id*.

[272] 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).

[273] 23 C.M.R. 94, 95 (C.M.A. 1957).

[274] *Id*. at 95–96.

remission for crimes of moral turpitude[275] the convening authority's lack of "conscious discretion" on review amounted to prejudicial error.[276]

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 reaching the conclusion a particular offender is worthy of another opportunity to serve.[277]

United States v. Johnson[278] revived the *Wise* rule in a case involving a military judge's "very strong[ ]" clemency recommendation for a suspended Bad-Conduct Discharge and "with provision for automatic remission."[279] 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

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[275] *Id*. at 96.

[276] *Id*. at 97.

[277] 36 C.M.R. 470, 473–74 (C.M.A. 1966) (biblical citation omitted).

[278] 45 C.M.R. 44 (C.M.A. 1972).

[279] *Id*. at 45.

sentence."[280]

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.[281] 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.[282]

Ultimately, while the trial counsel may incite passion when he argues that the military "is not a rehabilitation center,"[283] 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 for over a dozen years or because military regulations 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.

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[280] *Id*. at 46.

[281] *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).

[282] *See, e.g.*, United States v. Bennett, 39 C.M.R. 96, 99 (C.M.A. 1969) (finding prejudicial error in the staff judge advocate'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 staff judge advocate'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").

[283] United States v. Metz, 36 C.M.R. 296, 297 n.1 (C.M.A. 1966) (relating the trial counsel's representative argument).

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,[284] 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,[285] 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.[286] Panels also attempt to construct contingent sentences, often without the benefit of instructions from the court or even knowledge of their right to recommend clemency.[287] The rehabilitative ethic, has, in

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[284] 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).

[285] *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.

[286] 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 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.

[287] *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

essence, enabled them to rise above the artificial limitations imposed by the sentence worksheet and to construct more meaningful sentencing alternatives.[288]

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 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.[289]

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

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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 Discharge, 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).

[288] *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?").

[289] 1 M.J. 657, 660 (N.M.C.C.M.R. 1975).

th[e] judicial shoalwater" that results from discussions of administrative options.[290] *King* thus signals a reason why judges have often been reluctant instruct on clemency.[291] 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 judge's and panel's 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 Major 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.[292] Second, and closely related, the persistent endorsement of the same "constructive" sentencing philosophy—especially despite the lack

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[290] *Id.* at 661.

[291] 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.").

[292] *See supra* Part III.A.2 (describing Major Freedman's theories).

of judicial instructions spelling-out its dimensions—demonstrates an underlying rehabilitative ethic at work within the Armed Forces. 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.[293] Third, and perhaps most concerning, panel members' continuing attempts to adjudge contingent sentences suggest that, lurking below the surface of many adjudged punitive discharges, are 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 Major 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 courts-martial members have often voiced additional concerns for the accused.[294]

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

[293] 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." 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) (on file with author) (citing 1945 interim report).

[294] 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).

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.[295] Lacking any 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,"[296] the military incurred a special obligation to treat it, even though Airman McBride engaged in criminal behavior: "I felt strongly, and still do, that the military environment in South East Asia brought about Airman McBride's change of attitude, and that the Air Force was therefore at least partially obligated to provide him medical or psychiatric treatment."[297] 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.[298] 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.[299]

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[295] United States v. Mcbride, 50 C.M.R. 126, 134 app. A (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 Airman McBride 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.").

[296] *Id*.

[297] *Id*.

[298] *Id*. at 132–33.

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

> From the choice of sentences available, which I felt were insufficient, I envisioned the capability for Airman 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

The 2010 *Knight* opinion is also valuable for the purposes of this thesis. There, even though the accused had not been diagnosed with a psychiatric disorder, the military judge—much like federal judge Kane had in the Colorado *Brownfield* case[300]—suspected that the accused suffered from PTSD based on his combat experiences in Iraq.[301] 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.[302] Upon sentencing the accused to a Bad-Conduct Discharge 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.[303]

Adoption of the clemency recommendation would have reduced the accused's confinement

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> conduct discharge is appropriate in this case; the court awarded a Bad Conduct Discharge 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, Airman 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.

[300] *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).

[301] United States v. Knight, 2010 WL 4068918, at *1 (A.F. Ct. Crim. App., June 28, 2010) (unpublished).

[302] *Id*. at *3–4.

[303] *Id*. at *4.

by several months.[304] In the staff judge advocate's (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.[305]

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.[306] The case also suggests that 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

[304] The current standard for processing a court-martial is 120 days. United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).

[305] *Knight*, 2010 WL 4068918 at *1.

[306] In United States v. Mack, 56 M.J. 786 (A. Ct. Crim. App. 2002), for example, the accused was a Colonel in the Chaplain's Corps, who perpetrated an elaborate fraud scheme 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 Post-Traumatic Stress Disorder 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 . . .").

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.[307] 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 probationary terms.[308] 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.

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[307] 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).

[308] 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*).

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 with the objective of selling the items to support 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 suffered from "hallucinatory episodes" in which he believed his father was telling him to support his mother.[309] After a sanity board found the Sailor competent to stand trial, he was convicted on a plea and sentenced to thirty days confinement at hard labor and a Bad-Conduct Discharge.[310] The convening authority in the case suspended the sentence for six months because he suffered from "acute situational turmoil" and because "the offender's difficulties were largely neurotic."[311]

The convening authority 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."[312] The appointment was also based on the fact that,

> particularly during the probationary period, the parolee would need help, because the threat of a bad conduct discharge might 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

[309] Kramer & Young, *supra* note 308, at 455.

[310] *Id*. at 455–56.

[311] *Id*. at 455–57.

[312] *Id*. at 456.

caused him to feel unwanted.[313]

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."[314]

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,[315] appears to be an early variant of the contemporary mental health probation officer now assigned to various mental health treatment courts.[316] 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.[317] 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

[313] *Id*.

[314] *Id*.

[315] *Id*. at 457.

[316] 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).

[317] Kramer & Young, *supra* note 308, at 454, 457.

after the implementation of the *Uniform Code of Military Justice* (UCMJ), and within its statutory limitations. Also important is the fact that the local commander instituted a mental health treatment program using base resources rather than requiring entry 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 accused's punitive discharge was remitted after he successfully completed treatment for PTSD under the terms of a suspended sentence.[318] 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 improvised explosive devices. 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]."[319] When he received word that the insurgent suspected of the killing was detained, 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."[320]

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[318] Interview with Major Jeremy Larchick, Chief of Military Justice, Fort Drum & 10th Mountain Div., at Charlottesville, Va. (Nov. 3, 2010).

[319] Trial Transcript, United States v. Miller 68 (10th Mountain Div., Fort Drum Apr. 23, 2010) (on file with author).

[320] *Id*.

Sergeant Miller experienced increasing symptoms of PTSD through the rest of the deployment, and thereafter.[321] 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."[322] One-and-a-half months before the date of his ETS, 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. Sergeant Miller experienced the feeling that he had done his "time" and "combat deployments" and simply "couldn't take it anymore."[323] 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,"[324] Sergeant Miller left a second time, for seventeen months, until he was stopped 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."[325] 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 Bad-Conduct Discharge, in pertinent part, arguing that "Staff Sergeant

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[321] *Id*. at 69 ("I have anger issues and did not sleep most nights.").

[322] *Id*.

[323] *Id*. at 20.

[324] *Id*. at 70.

[325] *Id*. at 75.

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."[326] 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 soldiers 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 Soldiers, the same Soldiers who lost friends, did what a Soldier in the U.S. Army does, they Soldiered on. . . .
>
> If we allow Staff Sergeant Miller to get off easy, what kind of message will that send? We cannot do that. It would tell all those Soldiers, lower Soldiers it is okay to go AWOL, which it is not.[327]

Sergeant Miller's defense counsel asked for no confinement. He first explained,

> [t]his is not a Soldier who failed to perform his duty; this is a Soldier 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.[328]

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.[329] 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

[326] *Id*. at 70, 72.

[327] *Id*. at 73, 74.

[328] *Id*. at 74.

[329] *Id*. at 75.

> obligation to fix the enemy, do we have no less of an obligation to our own?[330]

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 negative effects that flow from the adherence to this common but outmoded belief.
>
> Accused and Counsel, please rise.[331]

After sentencing the accused to seven months confinement, reduction to the lowest enlisted grade, and to be discharged from the service with a Bad-Conduct Discharge, 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."[332] Unlike *Knight*, the convening authority, Major General 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

[330] *Id*. at 77.

[331] *Id*. at 78.

[332] *Id*. at 79.

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 forced-choice format of the Sentence Worksheet and the lack of clarity in panel instructions, the following Part proposes simple, non-legislative 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 operate.[333] 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.[334] 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—

[333] *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 83, 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").

[334] 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).

medication, phases, the nature of counseling.[335] 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.[336]

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 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

[335] *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 333, at 56 (describing how instructions that "place the treatment programs and their availability to the accused in proper focus" can "lead to more intelligent sentencing").

[336] *See supra* Parts I & II (describing how judges developed problem-solving treatment courts to assure such accountability because it was lacking in traditional programs).

Students of panel sentencing in the military justice system have criticized standard instructions for failing to define important concepts.[337] 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.[338] 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.[339]

At sentencing, panel members are charged to consider "rehabilitation of the wrongdoer"

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[337] *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).

[338] *See generally* DA PAM. 27-9, *supra* note 43 (addressing mental health concepts in various sections on sexual assault, alcohol offenses, and defenses).

[339] *Id*. *passim*.

as one of the "five principal reasons for the sentence of those who violate the law."[340] They are normally instructed to consider 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.[341] 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)."[342] 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."[343]

While government evidence of future dangerousness is routinely admitted under a principle of rehabilitation,[344] 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

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[340] *Id*. instr. 2-6-9, at 92. The other four rationales are "punishment if the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the 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*.

[341] *Id*. instr. 2-5-23, at 71–72 (items 6, 7, 16, 20, & 21)

[342] *Id*. instr. 2-5-23, at 72 (items 8 & 9). In a capital case, the panel must additionally 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).

[343] *Id*. instr. 2-5-24, at 76.

[344] *See generally* United States v. Ellis, 68 M.J. 341, 345 (C.A.A.F. 2010).

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 on the issue and indicate the respective contentions of counsel for both sides).)[345]

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 provides these additional considerations:[346]

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;

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[345] DA PAM. 27-9, *supra* note 43, instr. 6-9, at 952.

[346] *Id*. instr. 6-6, at 942–43.

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 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 R.C.M. 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.[347]

[347] *Id*. instr. 8-3-34, at 1071.

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."[348]

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.[349]

Although unlike earlier versions of the *Military Judge's Guide*, which explicitly provided for improvement in "health" as a contingency for remission,[350] 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.

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[348] *Id*.

[349] *Id*. instr. 2-7-17, at 134.

[350] Remily, *supra* note 256, at 530–31.

C. Precedents from Arkansas and Texas

Among six states that authorize juries to sentence defendants in criminal cases,[351] both Arkansas[352] and Texas[353] further permit juries to recommend probationary terms to enable participation in rehabilitative programs.[354] 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.[355] 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.[356] 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

[351] 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.

[352] *See* ARK. CODE ANN. § 16-97-101(4) (2011) (permitting the jury to consider a defense request for an alternative probationary sentence); ARK. CODE ANN. § 16-93-201 (2011) (describing various types of community punishment that can be requested by the jury as part of its recommendation for an alternative sentence).

[353] TEX CODE CRIM. PROC. §§ 37.07(f), 42.12(4) (2010) ("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.").

[354] 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 companions that do not allow such recommendations offer little useful guidance.

[355] TEX. CODE CRIM. PROC. art. 42.12 § 4(d) (2010).

[356] ARK. CODE ANN. § 16-97-101(4) (2011) (stating that the jury's recommendation for an alternative sentence "shall not be binding on the court").

be a basis, *viz*., the other completed verdict from for a sentence."[357] 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."[358] 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,[359] some of which include straight probation,[360] more complex conditions,[361] or involvement in community corrections facilities where a defendant can obtain mental health treatment.[362] 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

[357] ARKANSAS MODEL JURY INSTRUCTIONS-CRIMINAL ¶ 2-91 (2d ed. 2010).

[358] *Id*. at AMCI 2d 9111 (closing instruction).

[359] *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").

[360] ARK CODE ANN § 16-93-1202(2)(A) (2010) (defining the term as a "criminal sanction permitting varying levels of supervision of eligible offenders in the community").

[361] 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 to 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).

[362] 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." ARK CODE ANN § 16-93-1202(2)(A) (2010). They can include "boot camps," drug treatment programs, and educational programs. *Id*.

programs for correctional clients."[363] 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,[364] 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.[365]

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.[366]

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[363] *Id*. at § 16-93-1202(2)(M).

[364] *See, e.g.*, Najar v. State, 74 S.W.3d 82, 87–88 (Tex. Crim. App. 2002).

[365] HON. ELIZABETH BERRY & HON. GEORGE GALLAGHER, TEXAS CRIMINAL JURY CHARGES § 4:420 (2009).

[366] *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

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 objectives, not just to sustain.[367] 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

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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 365, at § 4:260.

[367] United States v. Cadenhead, 33 C.M.R. 742, 745 (A.F.B.R.), *petition granted*, 33 C.M.R. (C.M.A. 1963).

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 1, 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 [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:_____.

Fig. 1 Excerpt from Modified Sentence Worksheet

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.[368] However, these provisions have the power to transform the sentencing process into a far more constructive

[368] *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).

one, 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."[369] The common problem, which is plainly apparent in the standard force-choice form, has been revealed in an experiment where 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 would inform the bystander 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.[370] The situation is practically no different from cases where panel members would have recommended contingent sentences, but refrained owing to forced-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.

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[369] ELLEN J. LANGER, MINDFULNESS 16 (1989).

[370] *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).

Beyond the mechanics of contingent sentences, the following section considers more complicated methods to analyze mental health conditions for the purpose of recommending treatment.

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 a defendant.

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 staff judge advocate'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,'"[371] may be shared by panel members during their sentencing deliberations. Civilian cases rectify these matters by revealing the importance of context. Oftentimes, such standards of proof are necessarily heightened to urge the adoption of a "narrow" categorical exclusion.[372] Likewise, the circuit-splits among federal courts regarding how they will interpret the rules on downward departures for diminished capacity are similarly limited by the strict requirements of Federal Sentencing Guideline 5K2.13, which does not apply to the military.[373]

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."[374] 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.[375] The

[371] United States v. Knight, 2010 WL 4068918, at *1 (A.F. Ct. Crim. App., June 28, 2010) (unpublished).

[372] 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).

[373] *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)).

[374] Johnson v. Singletary, 612 So. 2d 575, 578, 578 n.4 (Fla. 1993) (Kogan, J., concurring specially).

[375] *Id.* at 580.

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.[376] 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."[377]

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.[378]

This instruction, which follows Justice Kogan's distinction, is also consistent with the *Benchbook*'s current guidance on the consideration symptoms suffered at times other than the date of the charged offense, which could reasonably include behavior in response to a full

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[376] To this end, Representative Jane Harman recently 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 AND 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 Veterans Treatment Courts, some women offenders have suffered such trauma, requiring a different approach to their treatment and rehabilitation. *See* Clubb Interview, *supra* note 5.

[377] Giardino, *supra* note 372, at 2965 n.61.

[378] *Infra* app. F.

range of trauma.[379] 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 burned, raped, or tortured to death.[380]

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 control 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 rather to get "normal."[381] 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."[382] 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

[379] DA PAM. 27-9, *supra* note 43, instr. 6-6, at 942.

[380] *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).

[381] 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.

[382] *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).

> 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.[383]

Along the same lines, the purposeful failure to obtain treatment, as underscored by the military judge in *United States v. Miller*,[384] 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."[385] 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,

> [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.[386]

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

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[383] United States v. Perry, 1995 WL 137294, at *8 (D. Neb., Mar. 27, 1995) (unpublished).

[384] Trial Transcript, *supra* note 319, at 78 (noting a "common but outmoded belief" to abstain from assistance to avert perceived weakness).

[385] *Perry*, 1995 WL 137294 at *10.

[386] *Infra* app. F.

superiors who would not permit the accused to obtain treatment or otherwise interfered with the ability to be treated.[387]

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.[388] Its admonishments to consider "appearance, behavior, speech, and actions" still fall short of meaningful guidance based on the near-endless reach of these terms.[389] 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.[390] In this respect, "nightmares," "flashbacks to scenes of combat," "intrusive thoughts [and images]," "rage," "paranoi[a]," and "explosive[ness]," all have value when they are considered for their "effect on [one's] mental process."[391] Clinical studies have categorized the nature of mental impairments like PTSD in a helpful way.

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[387] *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 SERVICES 582, 585 tbl.3 (2010).

[388] *See* DA PAM. 27-9, *supra* note 43, instr. 6-6, at 942.

[389] *Id*.

[390] 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).

[391] *Id*.

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."[392] Others have identified specific executive functions that are commonly linked to criminal offenders with mental illnesses.[393] 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."[394] It then provides specific categories in the notes to help the members consider specific behaviors that are evidence of a mental condition as defined.[395]

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

[392] 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.

[393] *See infra* app. F (citing Russell Stetler, *Mental Disabilities and Mitigation*, THE CHAMPION, Apr. 1999, at 49, 51).

[394] *Id*. (providing additional commentary).

[395] *Id*. at n.

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.[396]

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.[397]

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.[398]

Should the defense offer evidence concerning a specific treatment program, the instructions provide additional guidance, advising the members that they may consider the

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[396] *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 disorder or what they have learned in the media).

[397] *Infra* app. F.

[398] 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.

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.[399] In addressing preadmission to a specific program, the instruction also explains that, while the panel is free to consider such evidence, it "should not assume that the absence of evidence about a specific program would disqualify the accused from participating in one."[400]

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.[401] 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

[399] *Infra* app. F.

[400] *Id*.

[401] Foreman, *supra* note 229, 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").

effective treatment options appears in the decades of precedents addressing such terms in pretrial agreements. 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 pretrial agreements with innovative provisions for Soldiering-back from punitive discharges.[402] 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 history in construing such terms.[403] The position apparently remained unchanged in 2010.[404]

This trend is mirrored in military pretrial agreements (PTAs), which sometimes include terms permitting offenders to benefit from state and local treatment programs unavailable in the military.[405] 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.[406] Military law

[402] *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").

[403] *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.").

[404] 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.").

[405] *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 . . .").

[406] *Compare* U.S. Naval Inst. & Mil. Officers Ass'n of Am., War Veterans Reintegration Panel (CSPAN television broadcast Sept. 10, 2010), *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 265, at 53, 57

upholding such PTA terms permits military offenders to benefit from all existing problem-solving courts, including Veterans Treatment Courts. 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 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.[407] 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.[408]

(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").

[407] United States v. Wendlandt, 39 M.J. 810, 812–13 (A.C.M.R. 1994).

[408] 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.

Importantly, while the convening authority cannot delegate the individual discretion accorded to her by Article 71(d) of the UCMJ, and R.C.M. 1108(b),[409] she 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 R.C.M. 910(f) to require the accused to manifest understanding of not simply all material PTA terms, but also the corresponding consequences of violating them.[410] 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 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,[411] these

[409] 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.").

[410] 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 R.C.M. 705, which covers, among other things, both prohibited and permissible plea terms. Notably, R.C.M. 705(c)(2)(D) authorizes the accused's "promise to confirm [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 R.C.M. 1108(c)(1) mandates that all conditions of suspended sentences must be further specified in writing.

[411] 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 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]."

minute details far exceed the convening authority's legal requirements.[412] 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[413]—PTAs concerning treatment programs require a bit more illumination.[414]

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.[415] Moreover, due to the legal context surrounding programs administered by treatment *courts*, many of these programs use *legally-vetted*, written participation agreements.[416] During a providence inquiry, it is insufficient merely for the accused to silently read the treatment program description and

[412] *Id*. at 576.

[413] *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 a pre-existing treatment conditions, hence prior knowledge of its terms.

[414] 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.

[415] For example, in accordance with the eighth Key Component of Drug Courts, which applies to all veterans treatment courts, the Santa Clara County Veterans Treatment Court 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 Assn. of Drug Court Prof'ls, Justice for Vets, Alexandria, Va.).

[416] *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 MENTAL HEALTH COURT DESIGN AND IMPLEMENTATION 91–92 (2005) (providing a detailed representative example).

associated requirements and then to acknowledge his understanding of the terms he read.[417] Although each of the program's requirements need not be reproduced verbatim, and can be summarized in writing,[418] 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.[419]

Because relapse and dishonesty are not only possible but *expected* as part of the recovery process in any treatment program,[420] 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 required voluntary submission to polygraph examinations and the discussion of his past sexual behaviors.[421] The court addressed significant "gaps" between PTA's terms and consequences for noncompliance that rendered those terms unenforceable;

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[417] 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.").

[418] *Id*.

[419] *Id.*

[420] *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").

[421] 60 M.J. 501, 505 (C.G. Ct. Crim. App. 2004).

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."[422] The court explained that the 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."[423] 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.[424]

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."[425] The connection between specific terms and "specific consequences" eliminated the problem

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[422] *Id*.

[423] *Id*.

[424] *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).

[425] 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 basic principles and scripts for vacation proceedings). At the most basic level, the procedures of R.C.M. 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).

of "unlimited and undefined discretion on the part of the Convening Authority."[426]

2. Completion Times

Like the early military rehabilitative programs, treatment courts have learned through experience that, despite ideal timeframes for program completion, individualized treatment requirements may exceed them. Many Veterans Treatment Courts last longer than the twelve-month period recommended for drug courts, with most VTCs approaching twenty-four months due to mental health treatment requirements.[427] 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,[428] or two years for any punitive discharge (presumably a BCD or Dishonorable Discharge) adjudged at a General Court-Martial.[429] However, these periods are conservative compared with Rule for Court-Martial 1108(d)'s requirement that the timeframe not be "unreasonably long," in all instances.[430]

In the case of *United States v. Spriggs*, the Court of Military Appeals concluded that five years' completion time approached the "outer limits" of suspension of a punitive discharge

[426] *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.

[427] Clubb Interview, *supra* note 5 (observing a range for VTCs between nine and twenty-four months). 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 Assn. 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").

[428] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ¶ 5-35*a*.(2), at 37 (16 Nov. 2005) [hereinafter AR 27-10].

[429] 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." *Id*. ¶ 5-35*a*.(3), at 37.

[430] 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.").

for sex offender treatment permitted by Rule 1108.[431] On this conclusion, the court found the indefinite and impermissible terms of a program that required treatment for up to five years, followed by up to ten years supervision.[432] Despite the insufficiency of the treatment terms in *Spriggs*, the court otherwise encouraged and "commend[ed]" treatment plans with civilian agencies.[433] Following the lesson that automatic remission of a probationary sentence not tied to treatment progress or the participant's performance provides disincentives to attain program objectives,[434] the proposed pretrial agreement reflects terms which condition remission on the maximal time contemplated, or graduation from the program, in the alternative.[435] In any event, the PTA must specify a date certain for remission of the suspended portions of the sentence.

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 Airman 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

[431] 40 M.J. 158, 163 (C.M.A. 1994).

[432] *Id*. at 160, 162.

[433] *Id*. at 163.

[434] United States v. Cadenhead, 33 C.M.R. 742, 745 (A.F.B.R.), *pet granted*, 33 C.M.R. 435 (C.M.A. 1963).

[435] *See infra* app. G (providing a model pretrial agreement for modification).

"without use of Air Force Funds."[436] The practical effect of these requirements left Airman 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.[437]

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.[438] While *Spriggs* does not foreclose alternative arrangements that might take funds out of an accused servicemember's control,[439] 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 to noncompliance, despite those efforts.[440] As not to provide the accused with a financial windfall during the course of

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[436] *Spriggs*, 40 M.J. at 159.

[437] 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").

[438] *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.

[439] *Id*. at 163.

[440] Judge Cox, in addressing the requirements for vacating a suspended sentence under R.C.M. 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).

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.[441]

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.[442] 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.

In pertinent part, the model provision resembles the Texas legislature's approach to the issue in its community supervision statute, which draws the distinction nicely. Article 42.12 of Texas's *Code of Criminal Procedure* provides that a court may require, as a condition of

[441] 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 the granting of requests for deferments to provide 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 maintain an allotment for the benefit of [his] dependents").

[442] *See supra* Parts I & II (discussing the concept of legal leverage and its value in treatment court settings).

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.[443] 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.[444] 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.[445] Furthermore, as long as the accused understands the relationship and interplay between therapeutic incarceration and material terms that do require vacation proceedings, the potential for ambiguity in understanding would be eliminated.[446]

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

[443] TEX. CODE CRIM. PROC. art. 42.12, § 12(a) & (c) (2010).

[444] *See supra* discussion accompanying notes 407–408 (discussing *Wendlant*'s prohibitions on delegation of the convening authority's functions).

[445] *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).

[446] *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).

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 action.[447] 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.[448] 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."[449]

The courts have been clear that the current system imposes only a default standard, which is not mandatory.[450] 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.[451] Even where the case is fully contested, a preliminary agreement

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[447] *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.").

[448] *Supra* Part I.

[449] MILLER, *supra* note 191, at 179.

[450] *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.").

[451] 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).

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 Veterans Treatment Court 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, 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 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,[452] such law would not apply to a military accused. As long as it is

[452] *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

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 the Rules for Court-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 Veterans Treatment Court as a condition of the pretrial agreement.[453] 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.[454]

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 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.[455] Because complexities of time, money, discipline, and the

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judge reinstituted a felony sentence after taking the word of the program administrators that there was a valid basis for terminating his participation).

[453] *See infra* Part VIII.B (describing the Department of Justice's cross-jurisdictional arrangement).

[454] *See infra* Part VII.D (describing alternatives to VTCs).

[455] Vowell, *supra* note 45, at 149 (citing United States v. Hill, 4 M.J. 33, 34 (C.M.A. 1977)).

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.

A. Defense Counsel

Although the nature of mental illness creates additional challenges for defense counsel,[456] the court-martial sentencing format is of great benefit. Despite longstanding recommendations to eliminate panel sentencing,[457] or, at least substitute a traditional presentence report for the adversarial penalty phase,[458] the existing sentencing format has withstood 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 nether be questioned nor interpreted independently from the shaded perceptual lenses of its originator.[459] In a necessarily limited environment where staff judge advocates can satisfy their statutory responsibility with mere formulaic statements indicating disagreements with summarized positions,[460] and where a busy commander might have five

[456] *See, e.g.*, Seamone, *supra* note 64, 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).

[457] *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).

[458] *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.").

[459] *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").

[460] *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 allegation of legal error

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.[461]

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.[462] 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.[463] If defense counsel recognize their potential during the sentencing proceedings, not only will staff judge advocates be required to brief clemency recommendations to the convening

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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)).

[461] *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.

[462] 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 265, at 53, 53.

[463] *See id.* at 53, 54 (recommending a "defense presentence report format").

authority in addition to the standard boilerplate,[464] 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.

B. Staff Judge Advocates

The Staff Judge Advocate 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.[465] Clemency policy is as much one of leadership and setting the right example for subordinate prosecutors as it is 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.[466] 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

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[464] MCM, *supra* note 34, R.C.M. 1106(d)(3)(B) (requiring "concise information" on such recommendations in the SJAR).

[465] *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).

[466] Byers, *supra* note 461, at 100 (discussing the SJA's incentive not to recommend suspension of the adjudged sentence).

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.[467] In 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 a threat.[468]

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.[469] 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

[467] 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 principle 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).

[468] *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).

[469] United States v. Weatherspoon, 44 M.J. 211, 213 (C.A.A.F. 1996) (observing that the practice "must be encouraged") (internal citation omitted).

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.[470] Despite the fact that military judges often prefer quick cases that move directly to sentencing after the findings,[471] more complicated cases can require delays for a period of weeks.[472] In recognition of this inherent flexibility, especially where the defense favors a delay, military judges can facilitate more "intelligent sentencing" in the complex

[470] 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. 906(b)(1) (discussion) (describing the discretionary nature of determinations to grant continuances).

[471] *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 . . . .").

[472] Grove, *supra* note 44, at 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.").

area of mental health.[473]

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 over participation of military judges who risk later disqualification from cases involving an accused who violates the terms of such agreements,[474] this thesis 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 who conducts the revocation proceedings—and not the military judge—who ultimately makes the

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[473] 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).

[474] *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).

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."[475] Although true in some—or, even, most—cases, convening authorities' continuing development of innovative alternatives to incarceration, such as Major General 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.[476] Second, the 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.

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[475] COLONEL PATRICK R. LOWREY, MILITARY CONFINEMENT: NEEDLESS LUXURY OR VIABLE NECESSITY?: AN INDIVIDUAL RESEARCH REPORT 1–2 (1974).

[476] 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.").

Even in contested cases where a treatment-based contingent sentence arises from a military judge 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.[477] Commanders regularly direct pretrial investigations that *never* result in the convening of courts-martial, despite the investment of substantial resources.[478] When this occurs, SJAs and commanders do not normally conclude that such efforts were *wasted* if they led to the production of helpful information.[479] 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 selected successful

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[477] *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).

[478] *See, e.g.*, Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 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").

[479] *Id*.

attributes of treatment courts, even when full transformation is not possible,[480] but Judge Robert Russell Jr., the innovator of the Buffalo Veterans Treatment Court, also believes that a standing military board can attain similar goals as veterans treatment courts like his own.[481]

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,[482] as does Captain Charles Zimmerman's further suggestions for an organization to set the conditions of pretrial diversion.[483] Other useful lessons exist in the Family Advocacy Program's Case Review

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[480] *See, e.g.*, JOANN MILLER & DONALD C. JOHNSON, PROBLEM-SOLVING COURTS: NEW APPROACHES TO CRIMINAL JUSTICE 197 (2009) (explaining that "the practices of the [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").

[481] 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*.

[482] 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.

[483] 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

Committees, which already operate on all major Army installations to develop plans for dealing with domestic violence allegations.[484]

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.[485] The Mandatory Supervised Release Program, which has recently been implemented to maintain accountability over military offenders released from confinement

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> participate. It shall be the function of the committee to advise the diversion authority 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 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).

[484] 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).

[485] 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 71. 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 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*.

early, also provides a useful framework to maintain oversight over military members receiving PTSD treatment in the community.[486] 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.[487]

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.[488] While active duty servicemembers currently

[486] 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 on an involuntary basis 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 involuntarily 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 207 (describing attributes of administrative processing for members under Mandatory Supervised Release).

[487] *See, e.g.*, Watkins, *supra* note 406 (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).

[488] *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 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)).

participate in state treatment court programs as a consequence of state law violations,[489] the same cannot be said regarding purely military offenses or offenses committed within federal lands.[490] Contrary to this position, three 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,[491] these rules do not apply so broadly to administrative matters involving protection of the public or an individual at risk.[492] 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."[493] Under this rule, which trended in the 1990s,[494] the courts essentially find that "all state laws are valid within federal

[489] *See, e.g.*, Lindley e-mail, *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 County, Tex., Veterans Treatment and Mental Health Court (Oct. 15, 2010) (confirming that active duty Army Soldiers have participated in his MHC for state offenses).

[490] Clubb Interview, *supra* note 5 (confirming no known cases of active duty offenders charged with purely military offenses).

[491] 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.").

[492] *Id*. at 130.

[493] 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).

[494] *See, e.g.*, Castlen & Block, *supra* note 491, at 116 n.10 (observing how, in 1997, "recent developments are changing th[e courts'] traditional view"); Malinowski, *supra* note 493, 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").

enclaves unless they interfere with the jurisdiction asserted by the federal government."[495] Their major anchor has been the 1953 Supreme Court opinion of *Howard v. Commissioners of the Sinking Fund of the City of Louisville*,[496] 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."[497] Rather than adopting this "fiction," the Court identified "friction" as the basis for its intervention to exclude state interests.[498] 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."[499] Importantly, *Howard* has been used to justify a variety of state involvements including the provision of welfare benefits,[500] the revocation of drivers' licenses,[501] the removal of children from abusive military homes,[502] and the institutionalization of the mentally ill.[503]

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[495] Malinowski, *supra* note 493, at 203.

[496] 344 U.S. 624 (1953).

[497] *Id*. at 627.

[498] *Id*. ("It is friction, not fiction to which we must heed.").

[499] *Id*.

[500] Castlen & Block, *supra* note 491, at 123.

[501] Williams v. Dep't of Licensing, 932 P.2d 665 (Wash. Ct. App. 1997).

[502] *In re* Terry Y., 101 Cal. App. 3d 178 (Cal. Ct. App. 1980).

[503] 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

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 Veterans Treatment Courts, 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 Veterans Treatment Courts exist to *prevent* the exercise of—rather than to exercise—the state's criminal jurisdiction and power to punish offenders.[504] For this 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 Veterans Treatment Court 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.[505] Although some have referred to

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enclaves within the state, for the state is best fitted to know the requirements of its particular locality and to deal with them").

[504] As reflected in the discussion of VTCs, *supra* Parts I & II, these programs are diversions from traditional sentencing and alternatives to confinement. If termination 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.

[505] Dan Herbeck, *Veteran Gets 2nd Chance From a Court with a Heart*, BUFFALONEWS.COM, Sept. 14, 2010, http://www.buffalonews.com/city/communities/buffalo/article189920.ece.

Walker's case as "the first federal criminal case in the nation ever to be transferred to a [state] veterans court,"[506] 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."[507] 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.[508] Under the agreement, Walker will remain subject to federal prosecution and continued federal supervision until he has successfully completed treatment.[509]

Viewed along the same lines as the U.S. Department of Justice, the participation of active servicememebers in VTCs hardly raises concerns of Federal Supremacy or related constitutional conundrums. Instead, the participation contemplated by this thesis 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

[506] *Id*. (citing comments of Walker's Federal Public Defender Tracy Hayes).

[507] Telephone Interview with Assistant U.S. Attorney Edward H. White, U.S. Department of Justice, Western District of New York (Oct. 15, 2010).

[508] *Id*. 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. *Id*.

[509] *Id*.

members awaiting court-martial and for offenders sentenced to minimal terms of confinement.[510] 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.[511] It was not until an agreement between the Department of the Army and the Administrative Office of the United States Courts in 1946[512] that Federal Probation replaced these thousands of "first friends"[513]—with some still retaining their roles in cases where parolees lived in remote areas.[514] Considering President Obama's recent endorsement of Veterans Treatment Courts as a means to "make court systems more responsive to the unique needs of veterans and their families," these programs are ripe for cooperative

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[510] *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 . . . .").

[511] Colonel Lloyd R. Garrison, *The Military Parolee and the Federal Probation Officer*, 14 FED. PROBATION 65, 65–68 (1950).

[512] *Id*. at 66.

[513] 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.

[514] 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.

arrangements enabling participation by active duty servicemembers with identical "unique needs."[515]

C. The Benefits of Federal Veterans Affairs Participation in State Veterans Treatment Courts

A third, and final, 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.[516] 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,[517] these factors remove many obstacles in active duty offenders' successful participation in state VTCs. Past VA programs have also recognized the same sorts of capabilities.[518]

IX. Conclusion: Reclaiming the Rehabilitative Ethic in Military Justice

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[515] OBAMA, *supra* note 25, at 12, Need 1.6 (further recognizing such needs as ones related to "PTSD, TBI, and substance abuse programs").

[516] *Supra* Part I.

[517] 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 RC 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 four military personnel wounded in combat and other active duty personnel").

[518] MILLER, *supra* note 191, 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).

Medical professionals who work in the field of veteran rehabilitation describe the daunting challenges of unseen injuries.[519] 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."[520] 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, who might require trials of medications with devastating side effects before a treatment works.[521] This thesis has attempted to strike a balance between these polar extremes and to adopt a reasoned approach.

The Army Chief of Staff's quest to "own" the Army's professional ethic,[522] indeed, translates to military justice, where practitioners must reorient 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

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[519] *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").

[520] Ralph Slovenko, *The Watering Down of PTSD in Criminal Law*, 32 J. PSYCHIATRY & L. 411, 420, 432 & 432 n.8 (2004).

[521] *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).

[522] Case et al., *supra* note 36, at 3, 3.

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.[523] 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 center,"[524] 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.[525] 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

[523] Like the fictional story in *The Dirty Dozen*, some courts and commentators adopt the limited view that discharge remission during and since the 1940s was only granted to offenders in situations where an individual had a unique skill or where he was unlikely to survive a suicide mission deep behind enemy lines. *Compare* E.M. NATHANSON, THE DIRTY DOZEN (Random House Book Club ed. 1965) (appearing later in a series of films including THE DIRTY DOZEN (M.G.M. 1967)), *with* Hamner, *supra* note 35, at 1, 18 (suggesting that clemency in the form of restoration-to-duty might have been reserved only for an individual "integrally involved in the creation of the atomic bomb" and further that, "[i]n today's Army, it seems very unlikely that one Soldier is so crucial that it demands the commander to exercise his prerogative to keep that Soldier for the war effort"). Part III.A, above, in demonstrating this modern view to be clemency fiction, rather than fact, will hopefully motivate military justice practitioners to seek out and apply historical examples of the rehabilitative ethic in action. *Cf.* Hon. Andrew S. Effron, *Military Justice: The Continuing Importance of Historical Perspective*, ARMY LAW., June 2000, at 1, 7:

> 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.

[524] United States v. Metz, 36 C.M.R. 296, 297 n.1 (C.M.A. 1966).

[525] See, particularly, *supra* Part III.A.3 (discussing Major Freedman's conception of the Soldier-patient and the precursor to the veterans treatment court in the1940s).

their collective efforts, military commanders, staff judge advocates, defense counsel, military judges, corrections specialists, and civilian agencies, such as the Department of Veterans Affairs 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.[526] 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.[527]

"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, Major 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

[526] Clark et al., *supra* note 41, at 195 n.3.

[527] MacCormick & Evjen, *supra* note 175, 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").

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."[528] 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.[529]

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 remembrance that without him the new show would be a command performance of storm troupers.[530]

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 must accept

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[528] Berlien, *supra* note 185, at 255.

[529] *Id*.

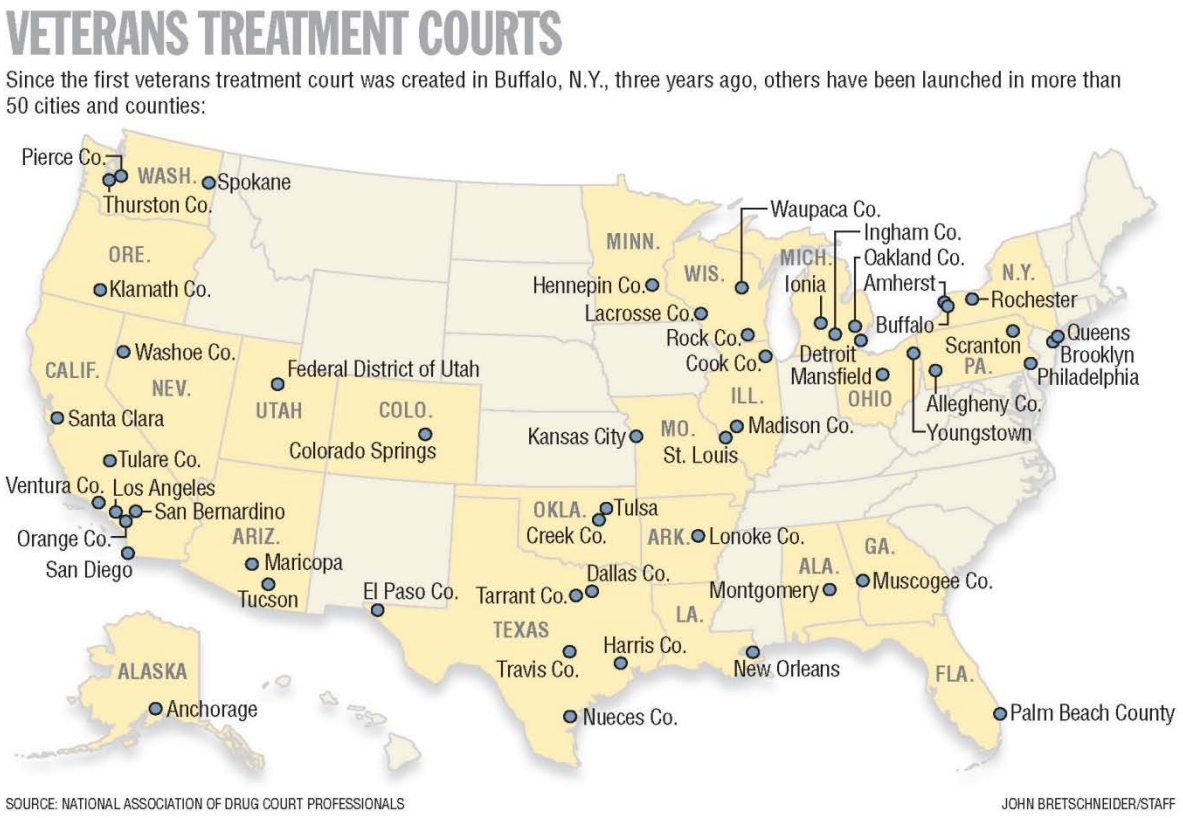
[530] Thomas J. Lunney, *A Veterans' Counselor Goes to Prison*, PRISON WORLD, Mar.–Apr., 1949, at 14, 28.

its own casting function in the finale for the PTSD and TBI-afflicted offender; through the intelligent exercise of clemency, he can take the lead in his own recovery with the ability to obtain future care, or he can continue playing the role of the villain, as a civilian offender in a caste system that reduces him to little more than a domestic terrorist.[531]

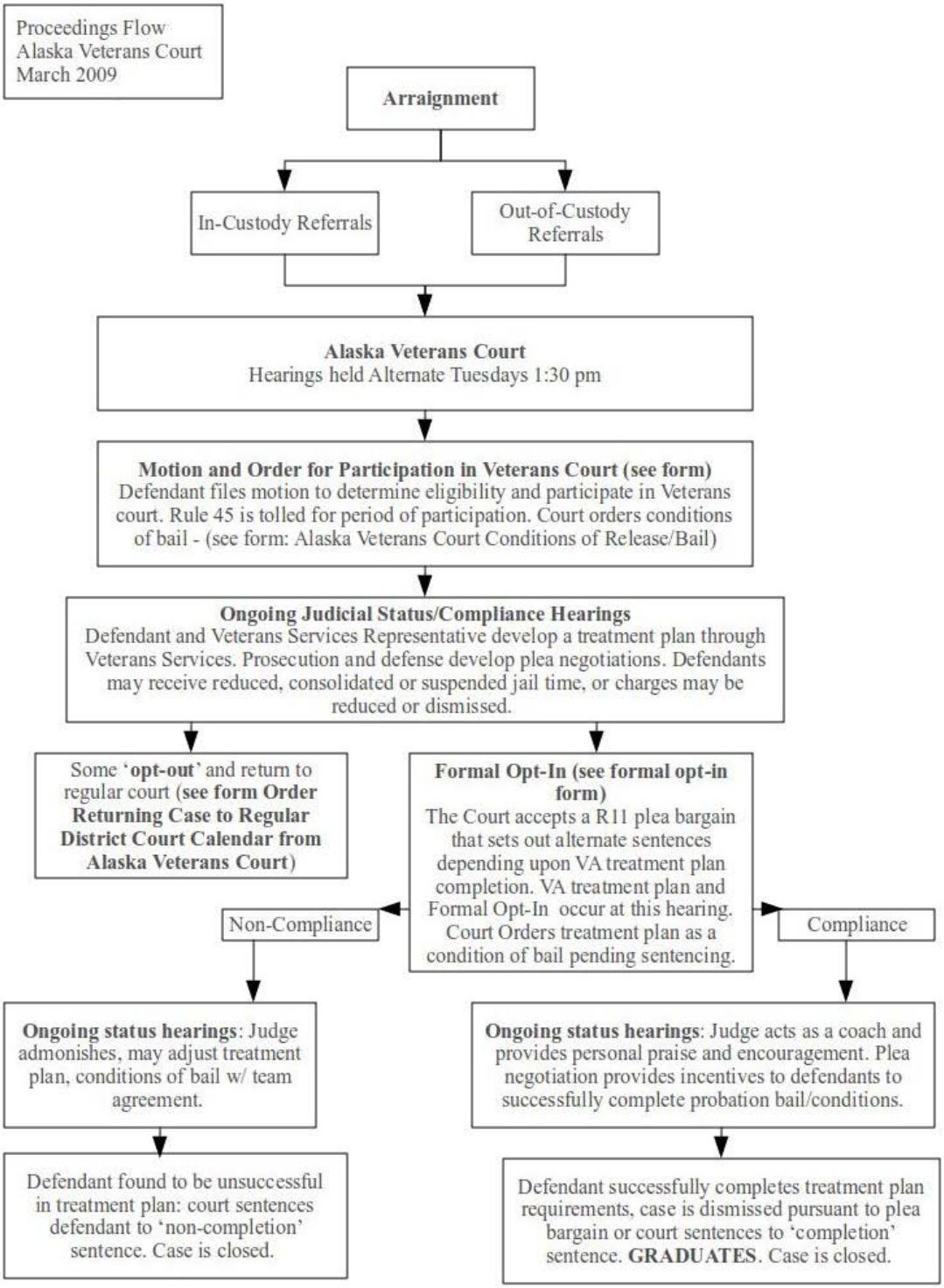
[531] *See supra* Part I.C (describing the national security consequences of indifference in the military justice system).

Appendix A. Graphic Dispersion of Veterans Treatment Courts

Note: The graphic immediately below appeared in the 21 February 2011 edition of the *Army Times*. The author requested permission from Gannett Government Media to reprint the figure (verbally and in writing) and is still awaiting a response. © 2011 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[532]

1. Key Component One: Veterans Treatment Court integrates alcohol, drug treatment, and mental health services with justice system case processing.

2. Key Component Two: Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

3. Key Component Three: Eligible participants are identified early and promptly placed in the Veterans Treatment Court program.

4. Key Component Four: The Veterans Treatment Court provides access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services.

5. Key Component Five: Abstinence is monitored by frequent alcohol and other drug testing.

6. Key Component Six: A Coordinated strategy governs Veterans Treatment Court responses to participants' compliance.

7. Key Component Seven: Ongoing judicial interaction with each veteran is essential.

8. Key Component Eight: Monitoring and evaluation measures the achievement of program goals and gauges effectiveness.

9. Key Component Nine: Continuing interdisciplinary education promotes effective Veterans Treatment Court planning, implementation, and operation.

10. Key Component Ten: Forging partnerships among the Veterans Treatment Court, the VA, public agencies, and community-based organizations generates local support and enhances Veterans Treatment Courts' effectiveness.

[532] Russell, *supra* note 113, at 365–67 (also cited in Holbrook, *supra* note 59, at 35–36).

Appendix D. Proposed Modified Sentence Worksheet

United States		
v.	)	
SPC James D. Jones 123-45-6789 A Co 1/504 PIR 82d Airborne Division	)	SENTENCE WORKSHEET

[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 [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 (she) (he) deserves.[533] It can include reduction, suspension or remission of all or part of the legal punishment.[534] 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 and can make your own recommendation separately 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.

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

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[533] 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).

[534] Commander Raymond W. Glasgow, *Clemency*, JAG. J., June 1952, at 7, 7.

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 honorably and faithfully 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.[535] 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).[536]

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.[537]

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 suspended, such as the discharge, rank reduction, and confinement, and the duration of the suspension. If you adjudge confinement, a term of suspension can last as long as the confinement period, but should not exceed five years.[538] You should only consider eligibility

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[535] United States v. Guernsey, 2008 WL 8087974 (A. Ct. Crim. App., Jan. 22, 2008) (unpublished).

[536] 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).

[537] The above wording appeared in the *Miller* Trial Transcript, *supra* note 319, at 79, in which the military judge recommended a suspended punitive discharge for treatment of diagnosed Posttraumatic Stress Disorder.

[538] 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).

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, (he) (she) 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 or the sentence in its entirety is solely a matter within the discretion of the court.

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. It is entirely for the court to 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;[539] which can include regulating emotions, maintaining self- or social awareness, organizing and remembering information and events, or distinguishing between past and present.[540]

> ***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, courts may highlight behavioral factors that have been linked to "criminality and violence," which include: Sustaining attention and concentration; understanding, processing, and communicating information; planning, organizing, and initiating thoughts and behavior; understanding others' reactions; abstracting and reasoning; controlling impulses/stopping behavior/emotional regulation; inhibiting, unsuccessfully, inappropriate or impulsive behaviors; using knowledge to regulate behavior; behavioral flexibility to changing contingencies; modulating behavior in light of expected consequences; distraction from persisting with appropriate behavior; lacking appreciation of impact of behavior on others; and manipulation of learned and stored information when making decisions.*[541]
>
> *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.)."*[542]

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[539] United States v. Cantu, 12 F.3d 1506, 1513 (9th Cir. 1993).

[540] Atkins, *supra* note 381, at 38.

[541] John Matthew Fabian, *Forensic and Neuropsychological Assessment and Death Penalty Litigation*, THE CHAMPION, Apr. 2009, at 24, 27–28.

[542] Stetler, *supra* note 393, at 49, 51. Additional guidance for describing behaviors that indicate mental conditions can be found at Logan, *supra* note 392.

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. What a mental health professional may or may not consider a mental condition for clinical purposes, where their concern is treatment, may or may not be the same as 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 were 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:

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.[543]

[543] 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).

3. The accused's attempts to rehabilitative (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 (his) (her) 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."[544] This can occur in a number of ways, such as where an accused becomes highly paranoid and believes that "everyone is out to get" (him) (her).[545] While this symptom may not have *caused* the offense, it may have been a "contributing factor"[546] in the sense that it explains "how the offense 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."[547]

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 . . . during which components of [a past] event are relived and the individual behaves as though experiencing the event at the moment."[548] 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,"[549] 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.

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[544] Atkins, *supra* note 381, at 38, 40.

[545] LEVIN & FERRIER, *supra* note 62, at 83.

[546] United States v. Perry, 1995 WL 137294, at *8 (D. Neb., Mar. 27, 1995) (unpublished).

[547] Atkins, *supra* note 381, at 38, 40.

[548] LEVIN & FERRIER, *supra* note 62, at 77, 83.

[549] Atkins, *supra* note 381, at 38, 39–40.

(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 (he) (she) was prior to the trauma; how the accused responded to the trauma when it occurred, and any "family history of psychiatric vulnerability."[550]

> ***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."*[551]

9. "The nature and extent of support [the accused] received following the traumatic experience(s)."[552]

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.[553] 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.[554]).

(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

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[550] Kathleen Wayland, *The Importance of Recognizing Trauma Through Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 936 (2008).

[551] C. Peter Erlinder, *Vietnam on Trial: Developing a Conceptual Framework and Explaining PTSD in a Forensic Setting*, 42 GUILD PRAC. 65, 73 (1985).

[552] *Id*.

[553] Bell v. Cone, 535 U.S. 685, 712 (2002) (Stevens, J., dissenting).

[554] Johnson v. Singletary, 612 So. 2d 575, 578 n.4 (Fla. 1993).

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.[555] You may further request the court to 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;[556]

2. The accused's personal understanding of the program's requirements;[557]

3. Any plans the accused may have developed in order to avail (herself) (himself) of the benefits of treatment;

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.[558]

7. The potential impact of treatment on the accused's family or significant other(s).

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[555] MCM, *supra* note 34, MIL. R. EVID. 614.

[556] United States v. McBride, 50 C.M.R. 126, 132–33 (A.F.C.M.R. 1975).

[557] United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991).

[558] United States v. Flynn, 28 M.J. 218 (C.M.A. 1989).

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 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/Post-Conviction Agreement for Mental Health Treatment Programs[559]

United States	)
	)
v.	)
SPC James D. Jones	)
123-45-6789	)
A Co 1/504 PIR	)
82d Airborne Division	)
	)
	)

I, SPC James D. Jones, U.S. Army, the accused in a General court-martial, in exchange for good consideration and after thorough consultation with my defense counsel, offer to plead as follows . . . .

***

13. That 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 the Uniform Code of Military Justice (UCMJ) or any act or failure to act by which I fail to comply with this agreement. 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 time frame 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 pleas; (2) from the time the military judge accepts my pleas 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;

14. That 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 pleas, 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;

15. That I further understand that, if based on my misconduct, the Convening Authority acts on this agreement after the time the military judge accepts my pleas 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

[559] This template excludes other standard pretrial agreement provisions. It can be modified to accommodate post-conviction agreements.

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

16. That 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 in this pretrial agreement or as otherwise approved by the Convening Authority.[560]

Specially Negotiated Provisions:

As consideration for this agreement, and after having carefully discussed the issue with my defense counsel:

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Waiver of Administrative Discharge Board

20. 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.

Restitution

21. 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 orders 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 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.

Treatment Court Participation and Completion

22. As further consideration of this agreement, I agree to voluntarily enroll into the _____ County Veterans Treatment Court, located at _____, for evaluation and participation in the Veterans Treatment Court program. If it is determined that the 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 30 months.[561] Graduation must be certified by the Veterans Treatment Court Judge and I will provide a duly certified report of completion to the Convening Authority's Staff Judge Advocate.

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[560] *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).

[561] *See* Spriggs v. United States, 40 M.J. 158, 163 (C.M.A. 1994) (requiring a clear understanding of treatment program duration).

Program Description for Veterans Treatment Court

23. The Veterans Treatment Court is a special intensive treatment program for criminal offenders who have served in the military. It 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.

Rules and Obligations[562]

24. As a participant in the Veterans Treatment Court, I will be subject to the following rules:[563] refrain from violating state and local laws, in addition to the UCMJ, which include traffic offenses and driving without a valid license; attend all Veterans Treatment Court-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 your 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.

25. I will also subject to the following obligations: [564] making weekly or bi-weekly "court" appearances as determined by the Veterans Court 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 one 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 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 Veterans Treatment Court, I may also be required to meet with a military probation officer.

26. 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 Veterans Court 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.

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[562] These basic rules and obligations, which are applicable in almost all Veterans Treatment Courts are provided as an adaptable template to meet the requirements articulated in *Coker*, 67 M.J. at 576.

[563] 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.).

[564] These obligations are modeled off of THE SUPERIOR COURT OF CAL., *supra* note 427.

Sanctions

27. 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 court 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.

Intermittent Confinement

28. I fully understand that, if permitted to participate in a Veterans Treatment Court, I agree to serve a term of up to sixty (60) days intermittent confinement in a confinement facility chosen by the Veterans Treatment Court. 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 may be a basis for vacating suspension of a suspended sentence, intermittent confinement, alone, is not a basis for vacating any suspension.

Relationship Between Veterans Treatment Court Rules and Conditions of Suspension[565]

29. Violation of the Veterans Treatment Court rules and obligations will normally be addressed by the treatment team assigned to my case, and could lead to termination from the Veterans Treatment Court Program. If violations of the Veterans Treatment Court rules and obligations constitute violations of the UCMJ, or if I am terminated from the Veterans Treatment Court program 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.

30. Upon successful completion of the promises and conditions above, that portion of the sentence related to the suspension of a punitive discharge shall, unless sooner vacated, be remitted; and upon successful completion of the promises and conditions numbered _____, above, that portion of the above sentence related to suspended confinement, unless sooner vacated shall be remitted.

Requirement to Extend Enlistment Past ETS for the Minimum Period of Treatment Court Participation

31. I understand that I am expected to participate in the Veterans Treatment Court program, continuously, for a period of _____ months. The current Expiration of my Term of Service (ETS) occurs on _____, which is a date that will not 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 Veterans Treatment Court program and the Convening Authority can determine the disposition of my charges. I also understand that by extending my enlistment, I will be subject to confinement and discharge if I have been found in violation of the terms of this agreement, even though my current ETS will be expired and I will be operating under a new ETS date.

32. Under Service regulations, [I am required to participate in the _____ Program, in addition to the Veterans Treatment Court program. I will comply with the terms of this program, which include [. . . . .]. Termination from the program will constitute a material breach of this agreement.] 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

[565] 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 violation 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).

violation of a material term of this agreement. Furthermore, after an initial extension, I am required to request further extensions of my enlistment every ____. To ensure that I am compliant with these rules, I will submit each of my periodic requests ___ days before the standard deadline. If I fail to timely submit any of these required requests, this is also grounds for vacation of any suspension.[566]

33. If I successfully complete the Veterans Treatment Court program, and the other terms of this agreement, my adjudged punitive discharge will be remitted. My conviction may be remitted at the convening authority's discretion. The Convening Authority will have the option of separating me with an administrative discharge at this time or 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 a subsequent ETS date that was provided to enable my completion of a Veterans Treatment Court program, unless the Convening Authority provides 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.

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[566] 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*. at ¶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 ETS 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").