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# THE ISSUE OF "INSANITY" IN THE ADMINISTRATION OF MILITARY JUSTICE

Clarence E. Brand<sup>1</sup>

Insanity of an accused soldier, either at the time of the alleged offense or at the time of trial, is a complete defense and bar to his trial by court-martial. By "sanity" is meant mental capacity on the part of accused to commit the crime charged, or mental capacity to understand the nature of the proceedings of the trial and intelligently to conduct or cooperate in his defense.

While an accused person, like any other, is presumed to be sane, this presumption is displaced, for purposes of the trial, by the slightest of evidence to the contrary. The issue of insanity must therefore be recognized and dealt with as soon as it presents itself in the course of court-martial proceedings, and it may be raised at any time, even after the sentence has been adjudged. The following provisions of the *Manual for Courts-Martial*<sup>2</sup> indicate in outline the continuous attention directed to this issue throughout the consideration and trial of court-martial charges:

*(Before Charges Are Preferred)*

30. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—*Submission of and Action Upon Charges—General.* \* \* \*

Third: No charge will ordinarily be referred for trial if he (commanding officer of accused) is satisfied that accused

is insane or was insane at the time of the offense charged. (See 35 c.)

\* \* \* \* \*

*(When Charges Are Investigated)*

35. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL—*Submission of and Action Upon Charges.—Investigation of charges; reference to staff judge advocate; suspected insanity.*

c. *Suspected Insanity.* An appointing authority may, in his discretion, suspend action on the charges pending the consideration of the report of one or more medical officers, or the report of a board convened under AR 600-500<sup>3</sup> in a case where that regulation applies and it is practicable to convene such a board. The medical officers or board will be fully informed of the reasons for doubting the sanity of the accused and, in addition to other requirements, should ordinarily be required to include in the report a statement, in as non-technical language as practicable, of the mental condition of the accused both at the time of the offense and at the time of the examination. The appointing authority may, in his discretion, attach the report to the charges if referred for trial or forwarded.

\* \* \* \* \*

*(At the Trial)*

63. COURTS-MARTIAL—PROCEDURE—*Inquiry into Sanity of Accused.*—The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include

<sup>1</sup> Lt. Colonel, Judge Advocate, V Army Corps, Camp Beauregard, Louisiana.

<sup>2</sup> Manual for Courts-Martial, U. S. Army (1928).

<sup>3</sup> Army Regulation 600-500, providing for a board of medical officers to determine appropriate administrative dispositions of mental cases.

anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense. For instance, the actions and demeanor of the accused as observed by the court or the bare assertion from a reliable source that the accused is believed to be insane may be sufficient reason. It should be remembered, however, that while a person who is insane to the extent indicated above should not be tried, nevertheless, until the contrary is shown, a person is presumed to be sane, and a mere assertion that a person is insane is not necessarily and of itself enough to impose any burden of inquiry on the court.

The request, suggestion, or motion that such an inquiry be had may be made by any one of the personnel of the court, prosecution, or defense. If such an inquiry is determined upon, priority will be given to the determination of the matter, and the inquiry should exhaust all reasonably available sources of information with respect to the mental condition of the accused. If it appears that such inquiry may be a long and expensive proceeding, or if the court desires to hear competent expert testimony, the court may adjourn and report the matter to the appointing authority with its recommendation in the premises. Such recommendation may include in a proper case a recommendation that the accused be examined as indicated in 35 c, and that the officer or officers, or some of them, conducting the examination be made available as witnesses.

If the court finds that the accused is insane, the proceedings so far as had embodying the finding to that effect will be forwarded to the reviewing authority; otherwise the trial proceeds.

\* \* \* \* \*

(At Conclusion of Trial)

75. COURTS-MARTIAL—PROCEDURE—Introduction of Evidence.—*a. General Duties, etc., of court.* \* \* \*

If at any time before the court announces an acquittal or imposes a sentence it appears to the court for any

reason that additional evidence with respect to the accused's mental responsibility for an offense charged should be obtained in the interest of justice, the court will call for such additional evidence. The court may adjourn pending action on a request made by it to proper authority that the accused be examined by one or more medical officers and that such officer or officers be made available as witnesses. See 35 c (Suspected insanity) in this connection. A request, suggestion, or motion that additional evidence be called for by the court as contemplated herein may be made by any one of the personnel of the court, prosecution, or defense. The court may, in its discretion, give priority to evidence on such issue and may determine as an interlocutory question whether or not the accused was mentally responsible at the time of the commission of the alleged offense. See 78 a (Reasonable-doubt). If the court determines that the accused was not mentally responsible, it will forthwith enter a finding of not guilty as to the proper specification. Such priority should be given where the evidence on the matters set forth in the specification is voluminous or expensive to obtain and has little or no bearing on the issue of mental responsibility for such matters.

\* \* \* \* \*

(By Reviewing Authority)

87. COURTS-MARTIAL—Reviewing Authority.—\* \* \* *b. Powers and duties.* \* \* \*

The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial or of how it was determined if raised.

Army Regulations provide, as an administrative procedure, that a soldier suspected of insanity or mental incapacity will be placed before a board of three medical officers, one of whom must be a psychiatrist or a specialist

in nervous and mental diseases, with a view to the transfer of the soldier to a hospital for the insane or his discharge from the service, if his mental condition be found by the board to be such as to incapacitate him for further service. According to the usual procedure, if a soldier under court-martial charges is suspected of mental abnormality of any character, the officer responsible for the pre-trial investigation (normally the regimental or post commander) orders the soldier to a hospital under this Regulation for observation and for the action of a board of medical officers with regard to his sanity.

The period of observation in such cases of suspected insanity normally extends over several weeks, at the conclusion of which the board makes its formal findings and recommends disposition of the case. If the board finds the soldier to be insane, and therefore incapacitated for further service, it recommends his discharge from the service, or his commitment to a hospital for the insane, as the circumstances may require. Action is taken, however, only upon approval of the findings and recommendation of the board by the commanding general of the area in which the hospital is located, based of course upon the advice of medical and legal staff officers who review the proceedings.<sup>4</sup> Court-martial charges are in this case automatically dropped. If on the other hand the soldier is found to be sane, the report of the medical board is attached to the court-martial charges, which are then (if otherwise

sufficient) ordered to trial. If the charges are of such serious nature as to warrant trial by general court-martial they are, under requirement of law, examined by the staff judge advocate (legal adviser) of the commanding general before they may be ordered to trial, and further observation or investigation into accused's sanity may be ordered upon the advice of this officer if reasonable ground therefor appears.

When the case is brought to trial the issue of accused's insanity, if raised, comes squarely before the court for determination *ab initio*, normally upon motion by accused or his counsel, in the manner indicated in paragraph 63 of the *Manual* quoted above. The defense has full liberty to raise the issue at any time and present its evidence thereon as it chooses. It may introduce psychiatrists of its own choosing (though it rarely does so) and such other witnesses as it sees fit, subject only to the usual rules of evidence. These are in fact tempered by a broad tolerance which gives an accused soldier unusually wide liberties in his defense before military courts. The defense may thus, and often does, inject the insanity issue into the trial in the midst of the prosecution's presentation of its case, at a point designed to be of most benefit to the accused, or the most damaging and disconcerting to the case of the prosecution; for this issue, once raised, is given priority, and all other matters are temporarily set aside.

If the question has been raised prior to trial, the trial judge advocate (prosecutor) will now be prepared with the

<sup>4</sup> If commitment to a hospital for the insane is indicated, a judicial hearing before an Army Commitment Board is also required.

report of the board of medical officers, and will call one of its members—normally its expert on mental disorders—for detailed examination and explanation of the board's report. If the issue has not been raised before, and there is substantial question with regard to accused's sanity, the court will normally adjourn and recommend to the appointing authority that accused be placed under observation in a suitable hospital and that a board be appointed for his examination. The hearing is then resumed after sufficient time has elapsed and the board has reached its findings. The defense has of course full right of cross-examination of the Army psychiatrist, may call other members of the Army board, or psychiatrists of its own, and present other evidence as it sees fit in rebuttal of the findings of the Army medical board.

If the defense does not raise the issue of insanity, or if it fails in any particular to develop its case fully after it has been raised, the court will not hesitate to take the matter into its own hands. Upon appearance of reasonable cause, any member of the court may take the initiative in this matter at any stage of the proceedings, with practically the same liberties as are allowed the defense. It is indeed the duty of every member, and of the court as a whole, to see that this important matter is not overlooked, and when once raised that it is fully developed through competent testimony based upon adequate observation by qualified witnesses.

The question of accused's insanity thus expressly raised is determined by

the court as an interlocutory question. That is to say, it is ruled upon in open court by the law member, subject to objection by any other member. Objection, if made, is decided in closed session, by secret written ballot, by majority vote of the court. In practice the law member will usually ask to have the court closed for deliberation before making such ruling, especially in close cases, in order to forestall objection by coming to agreement with the majority of the court.

If accused is found insane on the interlocutory question, a finding of not guilty is entered at once, and the trial is ended. If accused is found to be sane, the trial is continued. The issue is again before the court inferentially, however, when the final vote is taken upon the general issue, since any member who believes accused to be insane, or that he was insane at the time of the alleged offense, should vote "not guilty." Since at least two-thirds of the members present at the time the vote is taken must concur in a finding of guilty, it is thus possible for a minority of the court to cause an acquittal on the actual ground of insanity through vote on the general issue.

When the case comes before the reviewing authority for approval or disapproval of the action of the court, and in serious cases is referred for review to the staff judge advocate before it reaches the reviewing authority, the issue of insanity is again considered, if it has been raised; and it may be here raised for the first time if circumstances exhibited in the record or brought to official attention apart there-

from indicate substantial question of accused's sanity.

It is to be observed that the sentence of a court-martial is not effective until it has been approved by the reviewing authority and has been ordered executed. Approval may not be given in serious cases without the prior advice of the staff judge advocate, and execution of the most severe sentences must be withheld pending automatic appeal to a board of review and the Judge Advocate General, and in some cases confirmation by the Secretary of War or the President. Action of any one or more of these reviewing and confirming authorities may be delayed pending any further investigation into accused's sanity which any one of them may deem appropriate (subject to legal limitations upon *unnecessary* delays); and in case of determination at this time that accused was insane at the time of commission of the offense or at the time of trial, the sentence will be disapproved and accused placed before a medical board for disposition as an insane soldier, through commitment to a hospital for the insane, discharge, or otherwise.

All records of trial by court-martial are again critically examined after they have been finally acted upon by the reviewing authority—in the case of inferior court records by the staff judge advocate of the officer exercising general court-martial jurisdiction, in the case of general court records by the Judge Advocate General of the Army. The issue of insanity again receives full consideration upon this post-examination if it has been previously raised,

and may be here raised for cause shown in the record or otherwise. If the convicted soldier is found to be insane, based upon past examination or upon examination now ordered, his sentence will be forthwith remitted as having been adjudged through error, and the case disposed of through administrative proceedings prescribed in the case of an insane soldier.

It must not be presumed from what has been said that the sanity of the accused is always a major issue for the determination of the various agencies of military justice which have been discussed. On the other hand it is in its nature simply one of the issues which may or may not arise. In the large majority of cases it of course does not arise at all. Its existence as a potential issue, however, and its high importance and relevancy as such to the trial and determination of the criminal offense charged is always a matter for express consideration. Notwithstanding the presumption of sanity, it is therefore customary for the pre-trial investigating officer to include in his formal report of investigation in *all* cases in which the issue of insanity does not receive more specific consideration a statement to the effect:

"I have no reasonable ground for belief that the accused is, or was at the time of any offense here charged, mentally defective, deranged, or abnormal."

From the above outline of procedures followed in the case of an accused soldier suspected of insanity it must be clear that every reasonable effort is made to determine in an impartial and objective manner whether such

suspicion is well founded, and if so to substitute for the criminal proceedings appropriate hospitalization or other non-punitive humanitarian disposition. At only one stage of these proceedings, however, has the accused, or counsel in his behalf, the *right* to contest the proposed disposition of his case, although his assistance and cooperation are at all times encouraged. At all other stages of the proceedings, however, the soldier is a "patient," and decisions concerning him are made by medical and administrative officers in very much the same manner as his tactical commander would decide on his appropriate employment in battle. His own individual good is by no means lost sight of in either case; but the paramount consideration in both instances is his conservation, disposition and employment as a component of the Army of which he forms a part.

The one stage of the proceedings where the accused soldier becomes primarily an individual, with individual rights such as a citizen has, is before the court-martial, in case he is brought to trial.<sup>5</sup> Here he has benefit of counsel of his own choosing and may introduce in evidence in his own behalf for the impartial consideration of the court any competent evidence he may choose. Notwithstanding the report of the Army medical board and testimony of its psychiatrist and other witnesses called by the prosecution, the accused may here introduce psychiatrists of his own choosing and

may, through his counsel, subject the Army medical officers to the most searching cross-examination.

Why, then, we may well ask, does not the battle-royal of psychiatrists and counter-psychiatrists occur before courts-martial as it not infrequently does before the ordinary criminal courts? Or does it? The answer is that it does not; but the explanation is not to be found in the difference in procedure before the courts themselves. The difference begins long before the trial. It appears most significantly in the coldly purposive detachment and objective impartiality of the entire chain of medico-judicial proceedings, of which the trial may or may not form a part. This chain of proceedings has as its essential motivation not simply "justice to the accused," but primarily "the good of the service," through necessary adjustment of relations between the individual soldier and his military environment. It must not be inferred that the court-martial or other proceedings are devoid of human sympathies; but such sympathies for the individual are distinctly and definitely subordinated to the controlling consideration of reasoned justice in the best interests of the service.

In the first place the court-martial recognizes the board of medical officers which has examined the accused as an impartial, competent and well-informed agency of the service, like itself. Its interests and motives are identical with the court's own. Its individual members are unprejudiced (except in the interests of the service), utterly honorable and fair. Like the members

<sup>5</sup> Before commitment to a hospital for the insane he is likewise entitled to a judicial hearing before an Army Commitment Board.

of the court, they know the soldier intimately and understand him thoroughly. The medical officer can honorably and reasonably have no interest in the case as a criminal trial other than to convey to the court what he has learned of accused's mental capacity and responsibility. This is the obligation of honor which he owes to the service as well as to his own conscience. He can in the nature of things owe the accused nothing but justice. His opinion given on the witness stand is essentially a professional diagnosis upon which vital operative procedure must be based. Since the court must of necessity perform the operation, the importance of utter frankness between the witness and the court is obvious to both. Not only frankness, but indeed a high order of proficiency in the fine art of the precise communication of ideas in ordinary language is essential; for it is here necessary to make and convey to the court a diagnosis of most difficult and elusive subject-matter without the aid of the diagnostician's technical vocabulary.

The Army psychiatrist therefore proceeds with great caution on the witness stand, avoids positive or categorical statements from which erroneous inferences might be drawn in borderline cases, and keeps constantly in mind the importance of creating no more assurance of accused's sanity in the minds of the court than he himself feels. He explains in a proper case that there are *degrees* of mental unbalance or disturbance, and undertakes to picture to the court his

estimate of accused's mental state or capacity by reference to a graduated scale and with regard to norms which the court understands, so that it may feel the degree of doubt or assurance which he himself feels—not more, nor less. While the court must answer "yes" or "no" with regard to accused's sanity, and his guilt, it is not uncommon for the Army psychiatrist to decline to be so pinned down to a categorical answer. In a close case he may take the position, in effect: "I describe, as accurately as I can, accused's mentality. You, the court, must determine his legal responsibility."

After painstaking examination of such a witness, in such an atmosphere—and the court will rarely content itself with the questions of the opposing counsel—it is easy to understand that conclusions tentatively reached thereby are not easily disturbed by the testimony of a doctor or psychiatrist of unknown prejudices and background, of whatever reputation for competence and expert knowledge, who may be introduced by the defense. While to be sure the ears of the court are formally open to receive any and all such evidence, their minds are only partially so; for the court must *weigh* evidence as well as hear it, and the partisan viewpoint of a "defense witness" to such a matter as this would necessarily discount his credibility. The most effective defense that can be made on this issue is therefore, in the usual case, to supplement the observations of the Army medical board by testimony with regard to accused's

conduct prior to its period of observation and otherwise unknown to it. The wise defense counsel will then recall the Army psychiatrist, bring out through proper questions that the newly discovered evidence was unknown to him at the time of his observations of accused, and then put the question, in effect: "If you had known these facts, what then would have been your estimate of accused's mental responsibility?"

It must be observed that the prosecution would never consider the introduction of evidence of accused's sanity other than the proceedings of the Army medical board and the testimony of its psychiatrist. The position of the prosecution in this matter is in itself of high significance, for it colors the entire court-martial proceeding. The prosecutor, or trial judge advocate as he is known in military terminology, has no duty to *convict* the accused in any event, but merely to present to the court *all* the evidence, fairly, and with scrupulous honesty. An attitude of hostility toward the accused or his witnesses, other than that necessarily involved in the impeachment of a witness in a proper case, would be instantly resented by the court, to the prosecutor's own discredit. Extended argument to the court, about matters which it understands quite as well as he, would be virtually an impertinence, and such arguments are therefore not made. Certainly the court would not be favorably impressed by any attempt of the trial judge advocate to explain and interpret the testimony of the psychiatrist which the court had itself

elicited in detail from the psychiatrist himself.

It must be observed further that while the prosecution normally presents the proceedings of the Army medical board in evidence, and calls its psychiatrist as a witness, this is simply because of the fact that the case is not brought to trial if the findings of the board are in favor of the defense. The board is always appointed to determine *whether* accused is or was insane, and in the usual case before a prosecutor was appointed to try him. In no sense can it be considered the "prosecution's board," nor can it properly be considered prejudiced except in the sense that its wholly impartial examination and deliberations have led it to more or less definite conclusions. In every meaningful and significant sense the Army medical board and its psychiatrist are witnesses of the court. In substantial effect they are more than mere witnesses. The medical board is virtually the official fact-finding agency with regard to this particular matter within the scope of its especial competency, subject only to the adoption by the court of its conclusions.

Whether the above outlined system of dealing with mental cases in their relation to criminal administration could be adopted more generally in the ordinary criminal courts is to be doubted. This specialized procedure was expressly devised for and is peculiarly applicable to our military service. That such an improved procedure was compatible with the requirements of military justice—and the

need therefor as a measure of military efficiency as well as of individual justice—appears to have been first effectively recognized during World War I, when no less a legal scholar than Colonel John H. Wigmore, then associated with the Judge Advocate General's Department of the Army, actually surveyed the situation and drew the specifications for the required procedure. When the *Manual for Courts-Martial* was next revised, in 1921, it was upon the background of this work that the present system was elaborated. When the *Manual* was again revised, in 1928, the wording of these provisions was condensed, but their substance was not changed, and they remain the same today.

Experience has amply justified this method of dealing with mental cases in the Army. As has been at least broadly suggested, the issue of insanity is in fact effectively determined by the medical board, either directly through administrative action instituted by it, or indirectly through its expert testimony before the court-martial if the case is brought to trial. With the good of the service and justice to the individual soldier as its guiding lights, the Army medical board approaches its determination of each case with a high sense of responsibility and professional detachment which immunizes it from any extraneous influence that might

otherwise distort or confuse its views. Criminal responsibility of the soldier for the specific offense charged is but one aspect of the case. The mental capacity of the soldier for further military service, and his conservation for such service or his elimination therefrom if unfit, is the larger aspect of the case. If his separation from the service is necessary there arise further questions whether he should be committed to a hospital for the insane (after judicial hearing provided, and within limitations imposed by law), discharged in the custody of relatives or friends, or otherwise disposed of.

Focused upon these larger aspects of the case, both the medical board and the court-martial retain a perspective which embraces both the individual soldier and his military environment and effectively exclude from their consideration irrelevant emotions of which juries sometimes make bad law. Through twenty years of experience with this system the Army has virtually removed the insanity issue from the courts to the hospitals—without, however, depriving the courts of their jurisdiction or the accused of his individual rights. It appears fair to conclude that this procedure must have fulfilled the expectations of its distinguished progenitor, and that it has justified his estimate of the judicial capacity of officers of the Army to administer it.