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## **NAGELL v. UNITED STATES**

United States Court of Claims

July 2, 1982

No. 1-73

### **Reporter**

1982 U.S. Cl. Ct. LEXIS 2377 \*

**RICHARD C. NAGELL** v. THE UNITED STATES

### **Core Terms**

**Nagell**, Army, disability, patient, brain, diagnosis, brain injury, psychiatric, resignation, paranoid, rating, psychiatrist, personality, symptoms, illness, interview, airplane crash, Clinic, stress, impaired, concussion, suicidal, paranoid personality, physical examination, diagnosed, psychotic, chronic, head injury, hospitalization, manifestations

### **Case Summary**

#### **Procedural Posture**

Plaintiff Army officer filed an action in the court to reverse a decision by Army Board for Correction of Military Records (ABCMR) that refused to change the officer's record to show retirement for disability. Cross-motions for summary judgment were denied, and the cause was remanded for resolution of several issues.

#### **Overview**

An army officer received several head injuries while on active military duty, the most severe being a head injury received in a plane crash in Maryland in 1954. Prior to the crash he was a combat officer and worked in military

intelligence. Subsequent to the crash, evidence showed that the officer went steadily downhill. Thereafter, he resigned as an army officer and sought disability. The government argued that the claim was barred by the statute of limitations and by laches. The officer disagreed and argued that limitations had not run because he was under a legal disability since 1954. [28 U.S.C.S. § 2501](#) stated that a petition on the claim of a person under legal disability at the time the claim accrued could be filed within three years after the disability ceased. The court held that the officer's cause of action accrued in 1963 on the date the ABCMR first denied his application for a neurological examination and retirement on account of his medical disability. Further, the disability was service-connected, the officer had been under a legal disability since 1963, and under a continuous disability since 1954. A determination of the amount due the officer was thus required.

#### **Outcome**

The court concluded that the officer was entitled to payment of military disability pension from the time of his resignation in 1959 and other sums provided by law. The cause was remanded for a determination of damages.

### **LexisNexis® Headnotes**

Governments > Legislation > Statute of Limitations > Time Limitations

Military & Veterans Law > Veterans > Claim Procedures

Governments > Legislation > Statute of Limitations > General Overview

## [HN1](#) Statute of Limitations, Time Limitations

[28 U.S.C.S. § 2501](#) states: A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

**Counsel:** [\*1] Richard C. Nagell, pro se.

*Francis J. Sailer, with whom was Assistant Attorney General Alice Daniel, for defendant.*


**Opinion by:** SCHWARTZ

## Opinion

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OPINION \*

SCHWARTZ, Trial Judge: Plaintiff Richard C. Nagell, who resigned as an Army officer in 1959, sues to reverse the decision of the Army Board for Correction of Military Records refusing to change his record to show retirement for disability. He also seeks retirement pay from the date of his discharge.

Both parties moved for summary judgment, the Government contending that the claim is barred by the six-year statute of limitations in [28 U.S.C. § 2501](#) and by laches. Plaintiff disputed the date upon which his claim accrued, and argued alternatively that limitations had not run because he had been under a "legal disability" since 1954, within the meaning of the third paragraph of [HN1](#)  [Section 2501](#):

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\*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

Plaintiff contended that his legal disability [\*2] is a mental illness caused by head injuries suffered while on active duty, and that the disability has continued to date.

On cross-motions for summary judgment, the court has by an order dated November 19, 1976, held that the plaintiff's cause of action accrued on July 10, 1963. On this date, the Army Board for the Correction of Military Records first denied plaintiff's application for a neurological examination and for retirement on account of medical disability. The court denied the cross-motions for summary judgment, and remanded the case for resolution of these issues:

- (1) whether plaintiff was under a legal disability within the meaning of [28 U.S.C. § 2501](#), by reason of insanity or mental incompetence on July 10, 1963, and if so, for how long thereafter plaintiff was continuously under the disability;
- (2) whether the disability was service-connected; and
- (3) if service-connected disability is found, the nature and extent of the disability for the purpose of computing the rate of retired pay to which plaintiff may be entitled if the court holds that he is entitled to recover.

The response herein to these questions is that

- (1) Plaintiff was in 1963 under a legal [\*3] disability, traumatic encephalopathy chronic, a mental disorder, within the meaning of [Section 2501](#), and has been under the disability continuously since then, and indeed since 1954;
- (2) The disability was the result of three head injuries received by plaintiff while in the service, and primarily the head injury received in the crash of a military airplane in 1954, and was therefore service-connected; and
- (3) The extent of the disability is 100 percent.

There is no further issue of liability, and no issue for resolution by the Board. Should the Army and the plaintiff not be able to agree on the amounts due the plaintiff, the case should be set down for further proceedings under Rule 131(c) for the determination of the amount of the award.

The Injuries

The nature of the disability and especially its effect on plaintiff since 1954 will be made evident by setting out--perhaps to an unusually extensive but necessary degree--details of plaintiff's conduct since that time and the medical evidence of his condition.

1. \* Two of plaintiff's three head injuries were wounds in action in Korea in 1952 and 1953. One was a flesh wound, one was a brain concussion. The third, and [\*4] by far the most serious, came in an airplane crash on November 28, 1954. Plaintiff, now transferred from a combat zone in Korea to counterintelligence training in the United States, was a passenger in a B-25 bomber enroute from Los Angeles to Washington. The plane attempted a night landing in bad weather at Friendship Airport in Maryland, and crashed. Plaintiff, the only survivor, was undiscovered in the crash for nearly 12 hours.

2. Plaintiff suffered a concussion of the brain, compound fractures of the cheekbone and jaw, and severe lacerations of the face and scalp. He was taken to the hospital at Bolling Air Force Base, and lay in a coma and then semi-comatose for a month. In January 1955, he was transferred to Walter Reed Army Hospital because of the severity of his head wounds. Recovery at Walter Reed took 6 months.

3. While hospitalized, plaintiff's behavior became so erratic and uncooperative that he was transferred to the psychiatric ward. An electroencephalogram taken of plaintiff at the time registered [\*5] abnormal. While on the ward, plaintiff was examined by Dr. Edwin A. Weinstein of the Neuropsychiatry Division, Walter Reed Army Institute of Research. Dr. Weinstein did not treat plaintiff, but rather studied his case in the course of his research for a study of the behavioral effects of brain injury. Dr. Weinstein's opinion then was that plaintiff had a severe brain injury, but his findings were not made part of plaintiff's clinical record, and his opinion of plaintiff's mental condition was not sought for some years. Description of Dr. Weinstein's opinion and findings in detail are here reserved until the chronological points at which they were given (PP52-55 of this opinion, *infra*).

4. On May 5, 1955, plaintiff was returned to active service by a medical board as fit for duty. The Board found that in addition to his bodily injuries, he had

suffered a concussion of the brain which was cured. The Board made no mention of brain injury, but rather concluded that plaintiff exhibited a passive-aggressive reaction which was unrelated to the crash ("EPTS"--exhibited prior to entry on service), and so not incurred in line of duty.

#### Plaintiff Before the 1954 Airplane Crash

[\*6] 5. Plaintiff's Army record shows him to have been before the crash a brilliantly successful, albeit sometimes tactless and brusque, young officer. He had enlisted at the age of 18, qualified as a parachutist and guitarist, risen to the rank of sergeant and received a commission as a second lieutenant. As an infantry platoon leader, he volunteered for successive combat assignments in Korea and received a battlefield promotion to captain and a medal for his success in leading men in combat.

6. Two of seven Officer Evaluation Reports (OER's) documenting plaintiff's excellent performance also mention his occasional lack of diplomacy and tact. All of them give praise: "a dependable and responsible officer and executes his duties in a most efficient manner"; "earned the respect of his men in a very short time"; "has demonstrated his bravery and coolness while under fire from the enemy"; "one of the finest combat officers I have ever known." This last was said more than once.

7. After plaintiff's performance on 175 patrols, he was described as "fearless and a tower of strength in combat. He held his company together as an efficient fighting force in the face of heavy losses [\*7] and aggressive assaults by the enemy." The officers who recommended his promotion to captain wrote: "a company commander [who] has demonstrated in combat outstanding characteristics of leadership and common sense.... [H]e is outstandingly qualified, both physically and morally, for promotion...." On his reassignment his battalion commander wrote him a letter of appreciation: "You have served the battalion with distinction as platoon leader. Many times on outpost positions of extreme danger, you performed with outstanding success and courage."

The foregoing descriptions of plaintiff as a combat officer are to be contrasted with plaintiff's condition after the airplane crash.

#### Plaintiff After the Crash--1955 to Resignation in 1959

8. After the crash, in the words of Dr. Weinstein as a

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\* Paragraphs are numbered for convenience of reference in this opinion. These paragraphs are not the detailed findings of fact which are separately stated.

witness on the trial, plaintiff went steadily downhill.

9. Five months before the crash, in July 1954, plaintiff had been transferred from the infantry to military intelligence, for training in the Counter-Intelligence Corps (CIC). After the medical board found his concussion was "cured," and returned him to duty, he completed his training, performed an assignment in California for almost [\*8] a year, and then from April 1956 to March 1958, was stationed in Korea and Japan for field intelligence and counterintelligence work. The exact nature of plaintiff's duties appears to be a military secret, but it appears that he worked both in counterintelligence and intelligence field assignments.

10. His performance evaluations began to record his increasing difficulties. In several OER's, his superiors expressed the opinion that the accident had affected his personality. Comments, obviously with sympathy for his history, were these: "lacks self-confidence and is excessively sensitive"; "will often mask his true feelings by calling attention to his rank and status"; "somewhat discontent"; "undecided and spontaneous"; "tendency to resent constructive or critical comment regarding his work and becomes agitated"; "rather erratic handling of his personal affairs." More OER comments were: "apt to lose his temper"; "does not know how to get along with people"; "most obnoxious attitude."

11. He began what became a series of confrontations and charges of persecution. In March 1957, while he was still in Korea, an OER rating officer noted that "he is developing a well-defined 'persecution [\*9] complex' where he thinks some officers make up and report 'stories' to discredit him and other officers are 'too nosey' about his personal affairs." Plaintiff accused the rating officer of prejudice. The investigating officer found no prejudice or bias; plaintiff, he said, made the charges "in a highly agitated state of mind." Plaintiff was given a new assignment.

12. In January 1958, plaintiff received an official reprimand for having entertained a woman in his room at the Bachelor Officer's Quarters. An OER for the six-month period ending January 31, 1958, spoke of the incident as showing a lack of judgment, and also spoke of a persecution complex. Following the reprimand, plaintiff was removed from counterintelligence duties because of the incident and his impending marriage. Plaintiff accused his commanding officer of bias and wrote a letter to the Inspector General and Judge Advocate which an OER thereafter described as "a vindictive and self-admitted effort to bring

embarrassment upon this organization and its commanding officer." The endorsing officer said that plaintiff lacked maturity, judgment and common sense, and suffered a persecution complex. Shortly after this [\*10] incident, plaintiff's commander ordered him to submit to psychiatric evaluation.

13. In February 1958, plaintiff spent five days in the neuropsychiatric ward at the U.S. Army hospital in Tokyo. The examining psychiatrist, Dr. Carl L. McGahee, recorded that the patient "emphasized that he had no problem which merited psychiatric attention." Dr. McGahee found plaintiff to be "quite guarded in his projective responses. However, there was no evidence of a thinking disorder of neurotic or psychotic proportions." Dr. McGahee concluded that plaintiff is "so far free from mental defect, disease and derangement," and that there was no medical reason why plaintiff should not be disciplined or separated from the Army. He recommended plaintiff's return to duty on February 18, 1958.

14. An OER for February 1958 contained a flat recommendation that plaintiff be discharged from the Army because of "certain trends of character and conduct brought sharply into focus during recent months." The criticism focused on plaintiff's charges against his seniors following his reprimand; the endorsing officer wrote: "Captain Nagell lacks maturity, judgment, and common sense; apparently he has been [\*11] unable to adjust himself to the requirements expected of a Captain of the United States Army." These charges were also described by another superior officer as "malicious, unfounded, and further indication of his unsuitability as an officer in the United States Army."

15. In March, plaintiff was relieved of counter-intelligence duties and assigned to personnel administration for the remainder of his overseas tour. He married a Japanese national at the American Embassy in Tokyo. There were two children of the marriage, which lasted until 1963.

16. He was then ordered back to the United States, and in July 1958 took command of an infantry basic training company at Fort Dix, New Jersey. The OER's for plaintiff's first three months in this new assignment were glowing. The reviewers spoke of him as calm, level-headed, patient, tactful, cooperative and possessing excellent judgment. Within a year, however, in the OER for April-August 1959, they criticized his tactlessness, loss of temper, obnoxious attitude. "His behavior

pattern has made it obvious he does not know how to get along with people. If he controlled his temper and made a radical change in his most obnoxious attitude, [\*12] he would undoubtedly be of great value to the service."

#### Attempted Resignation, 1958; Resignation, 1959

17. In October 1958, plaintiff submitted a letter of resignation, but withdrew it less than two weeks later. In the letter, he said he was resigning because his assignment precluded his efficient performance and adversely affected his wife's welfare, and because of the charges he had made against his commanding officer in Japan after critical OER's. A second resignation letter, submitted on August 31, 1959, mentioned "compassionate reasons of a personal nature"; it was not withdrawn. Unlike the first, it contained a request that plaintiff be "considered for disability compensation for applicable line of duty service-connected injuries." Neither the injuries nor the disability was specified.

18. Plaintiff had two discharge physical examinations, one in September 1958, the other in August 1959. (The record is silent as to how or why plaintiff received a separation physical two weeks prior to submitting what both parties treat as his first resignation letter.) Neither examination included examination by a neurologist or psychiatrist. Specialists were consulted as to his [\*13] recovery from the injuries to his face and jaw.

19. Despite his request for disability compensation for service-connected injuries, in setting out his medical history for use by the examining physicians, in both examinations, he said he had never suffered nervous trouble of any sort, denied ever having been a patient in a mental hospital, and described himself as being in excellent physical condition. His examination, over four days, did not include examination by a neurologist or psychiatrist. Plaintiff was found to be physically qualified for separation and free from any disability entitling him to retirement in lieu of discharge.

20. He was given an honorable discharge on October 29, 1959. This was almost four years after his return to duty in 1955 following the airplane crash.

#### Civilian Life

21. After he left the Army, plaintiff applied for work as a policeman in Los Angeles, where a board found him medically disqualified. From December 1959 to March 1961, he worked as an investigator for the California Department of Employment. He got the job without a

medical examination, and thereafter underwent the required examination by his private physician. He was discharged, [\*14] he told a psychiatrist much later, because he made "an indiscreet statement to the press."

#### 1960 - VA Neuropsychiatric Evaluation and Rating

22. Early in 1960, plaintiff applied to the Veterans Administration for a disability rating. In his application he described his 1954 injury as a concussion of the brain. An electroencephalogram showed normal readings for all areas of his cortex; the report of the test contained references to the concussion. He was also seen by a neuropsychiatrist, Dr. A. Trevisano, to whom plaintiff spoke only of a mild concussion in 1953; his description of the injuries in the 1954 airplane crash does not mention a concussion. Plaintiff made no complaint to Dr. Trevisano of any nervous disorder and said that he had not been aware of any personality change.

23. Dr. Trevisano reported that he found no evidence of mental deterioration or psychotic or psychoneurotic manifestations. Particular attention was paid during the physical examination to the permanent effects of the injuries to plaintiff's face and jaw in the 1954 airplane crash.

24. The application ended in a finding by the VA, dated May 16, 1960, of nine combat injuries--compensable and [\*15] service-connected--to the eye, head and ear. For these conditions, plaintiff was given a 64 percent combined wartime disability rating. He was also found to be disabled as a result of a service-connected brain concussion, but because this condition was determined to be less than 10 percent disabling, no compensation was payable for it.

#### 1960--Letter to a Senator

25. In May 1960, plaintiff wrote to Senator Thomas Kuchel asking his help in obtaining a medical retirement from the Army. In his letter, plaintiff complained of the Army's failure, despite his history of head injury, to give him a neurological examination before his discharge; the implication was that a proper examination would have revealed disabling neurological damage:

My Pre-Resignation Physical Examination was hurried and incomplete to say the least. As a prime example, even though I had received a neurological injury in combat, and another--very serious--neurological injury in the aforementioned airplane crash, I did not receive examination by a Neurologist...."

This was the first time that plaintiff specified neurological damage as a basis for his claim of disability.

26. The Adjutant General responded [\*16] on July 1, 1960, in a letter forwarded to plaintiff, that the Surgeon General had approved plaintiff's resignation after considering his request for disability compensation and after careful review of his physical examination. The Adjutant General suggested that plaintiff seek review by the Army Board for Correction of Military Records, and enclosed the appropriate form.

#### 1962--Suicide Attempt

27. Twice in 1962, plaintiff was a psychiatric patient at VA hospitals. In May, he was admitted to a Los Angeles facility because of homicidal and suicidal tendencies. A psychiatric resident, Dr. Harvey Weintraub, diagnosed "acute anxiety reaction with depressive features in a markedly passive aggressive character, passive dependent type." Plaintiff did not disclose to Dr. Weintraub his history of head injury. Plaintiff was not considered an active suicide or homicide threat and was allowed to discharge himself after three days. He was referred to an outpatient psychiatric clinic.

28. Shortly after he was released, plaintiff shot himself, and was again admitted to the hospital. The evidence of this episode is not direct and no scars of the shooting are mentioned in later physical [\*17] examinations in the record. The shooting is mentioned, however, in subsequent medical histories and in a Fifth Circuit opinion, described below, which goes extensively into plaintiff's medical history. In two such medical histories, plaintiff is reported to have said he shot himself, in another that it was an assailant, and in another that he was vague about the shooting incident. In still another it is said that *Nagell* suggested that his wife shot him. The contemporaneous preoccupation with suicide points to plaintiff having shot himself; the variation in plaintiff's accounts is consistent with a symptom of his troubles, diagnosed below.

#### Bay Pines Hospital--December 1962-January 1963

29. In December 1962, after a rebuff by the Army when he sought to reenlist, plaintiff entered the VA hospital at Bay Pines, Florida, where he was placed under psychiatric observation. To Dr. James Martin, Acting Chief of the Psychology Service, plaintiff related in detail his 1954 head injury, his subsequent difficulties in interpersonal relationships, and his previous periods of psychiatric observation in Army hospitals, at Walter Reed in 1954 following the crash, and in 1958, on his

commander's [\*18] orders:

Patient relates that he was in an airplane accident in November of 1954. He reports being unconscious for some 20 days. After a considerable period of hospitalization, the patient was returned to full duty.

At one time the patient became tearful. Patient describes a good adjustment, both civilian and military, up until the time of his accident in 1954. \* \* \* Following the accident, patient noted that his efficiency began slipping, and that he had tendencies to become suspicious and irritable. He finally decided to resign his commission before he was retired for disability. Patient mentions several periods of evaluation and observation in Army hospitals. After his plane wreck, he spent several days in a psychiatric unit for observation. Patient states that at that time he was given a diagnosis of 'passive-aggressive reaction.' Later, following some difficulties in interpersonal relationships in Korea while serving there, the patient was transferred to an Army hospital in Japan for further observation. Here he states, he was diagnosed as a 'passive aggressive personality.'

As mentioned above, patient insists that he had good adjustment prior to the head injury. [\*19] He states that his IQ on the Army General Classification Test was 145. Following the accident, however, it was difficult for him to learn, concentrate, or remember. He denies seizures but alleges amnesic episodes. He states that sometimes his mind goes blank when talking with someone.

Dr. Martin reported:

PERSONALITY STRUCTURE: The patient gave a total of 17 responses to the Rorschach. There are no signs of any major thinking disturbance. Ego control is adequate, and there is sufficient appreciation of social values and expectations. There are indications that the patient has many aggressive impulses and thoughts, and probably fears of releasing these impulses, and of being punished for them. Elements of passivity and dependency, alternate with signs of aggression and hostility. The patient is probably a basically impulsive individual, a facet of his personality which he attempts to control consciously, with only partial success.

IMPRESSION: This appears to be a very interesting case for diagnosis. There are many psychological test signs of inefficiencies of thinking. Substuporous mental states are suspected, and there is a retardation of thought. Level of mental [\*20] functioning is no better

than low-average at the present time, although there are many indications of previously superior mental ability. The psychological testing does not, however, resemble that given by individuals who have impairment of brain tissue. To this examiner, the patient's history, behavior, and test performance strongly resembles that seen in epileptic individuals. The possibility remains that this is a beginning of a paranoid break with reality, possibly a paranoid schizophrenia, although the patient certainly shows no clinical signs of psychosis at the present time.

Dr. Martin's conclusions stated:

CONCLUSIONS: In addition to the reported history of headaches, amnesia, irritability, and confusion, the patient shows on psychological testing many signs indicative of inefficiencies of thought, delayed thinking, inability to integrate, and a waxing and waning of alertness, which resembles that seen in epileptoid individuals. It is recommended that neuro-psychiatric studies be undertaken to rule out this condition.

30. Electroencephalographic test results were borderline abnormal.

31. A Neurosurgical Service physician, Dr. S. M. Wilkes, in a referral request [\*21] directed to the Psychiatric Service in mid-January observed:

[T]his man shows no neurosurgical problems and could be discharged insofar as this is concerned. However, he has shown various degrees of amnesia which was one of his major difficulties when he came in. While the Surgical Service is admittedly not in a position to state incompetency in any individual, having seen this individual since December 20, it would be my opinion that he is not competent to care for himself. In the interest of the individual, I do not believe that this man should be sent out of the hospital with no one to care for him. Further opinion is requested. This man has indicated suicidal tendency most recent 1/12/63.

32. Plaintiff was thereupon seen by the Chief of the Psychiatric Service, Dr. P. C. Clark. Dr. Clark's consultation report, dated January 14, 1963, said, "He is emotionally unstable and continues to be aggressive, critical and paranoid. This type of behavior has been noted since being in the service in 1954 or earlier." Dr. Clark's diagnosis was "Chronic brain syndrome associated with brain trauma, cerebral concussions in 1953 and 1954, with behavioral reaction-passive-aggressive [\*22] type with paranoid traits."

33. After eight days in the psychiatric ward, plaintiff was

examined by a staff psychiatrist, Dr. M. L. Schwartz. For several days, plaintiff refused to discuss his symptoms, saying they were private business, and "was somewhat withdrawn on the ward and showed poor interpersonal relationship." He then changed and "a better rapport was established." Dr. Schwartz's report continues:

He seemed well oriented in all spheres. Speech was of normal flow and coherent. He showed no flight of ideas. He denied delusions or hallucinations. No suicidal or homicidal tendencies were elicited. He states that his main trouble is 'headaches which I have had continuously recently.' He also complains of 'dizziness, and at times an unsteady gait.' These symptoms are sometimes associated with a transient loss of memory. During the interview his retention and recall were good. Sensorium was intact. When I asked him what he thought was wrong he said 'I think my trouble is physiologic.' When I asked him what the meant by physiologic he stated 'My trouble is all due to my head injury.' He felt reassured when I told him that I thought some of his symptoms were due to [\*23] that mishap. Although he smoked continuously during the interview he related quite a story about his Army activities and his domestic situation, but was somewhat evasive about the trouble he was in while in California, especially the trouble involving the F.B.I. and some shooting event. He was presented before the Psychiatric staff and at first was somewhat reluctant to answer questions and when asked a question that was not due to his liking he would relate 'this is my private life.' During the Staff Conference he said 'you Psychiatrists are all stereotyped.' During the Staff Conference, however, his mood was one of friendliness and not one of depression, although he will occasionally get irritable when supposedly asked a personal question. After the interview at the Staff Meeting he approached me saying 'that he did not want any of the nurses aides to know about his business and that was the reason why he refused to give out any information.' He further related that he keeps everything in a little book that he has done or said because he has a poor memory, although some of these memory deficits were not brought out in the interview with him. He was advised to stay on the ward [\*24] for another week or two for further observation but he felt that he did not have to since nothing more could be done for him. He also said the reason for him wishing to leave was that 'he had a job in mind and was going for an interview.' Since his insight and judgment were unpredictable at times and although no psychotic behavior was noted, it was felt that he could leave the hospital AMA. In view of the chronic



nature of his illness the future prognosis must be guarded as to a possibility of a permanent future social economic adjustment. Patient discharged A.M.A. on 1-22-63.

34. Plaintiff refused Dr. Schwartz's suggestion that he remain in the hospital for further observation. Dr. Schwartz's "Final Diagnosis and Present Status," approved by Dr. Clark, continues as follows:

##### 5. FINAL DIAGNOSIS & PRESENT STATUS

1. Chronic brain syndrome associated with brain trauma (by history of) with behavioral reaction characterized by passive aggressive and paranoid features. Treated. Unchanged.

(a) Precipitating Stress: Unknown.

(b) Predisposition: Moderate, by history of, frequent hospitalizations and interview for his present type of behavior.

(c) Psychiatric Incapacity: **[\*25]** Minimal. Patient is competent at this time.

Plaintiff was discharged from the hospital on January 22, 1963.

1963--Letter to the President

35. On January 2, 1963, while he was in the hospital, plaintiff wrote to President Kennedy with virtually the same complaint as in his letter to Senator Kuchel, and with virtually the same result.

36. Of his resignation and his condition since then he wrote:

In 1954 I was the sole survivor of a B-25 bomber crash in which I sustained a serious head injury. Since then I have never been the same--mentally or physically--although the Army returned me to a general duty status \* \* \*. I was aware of my condition but pride made me try to "hang on." Eventually, many of my superiors and co-workers could see that there was something wrong. I know my subsequent military efficiency reports and other records, some of which are buried under the wraps of security classifications, substantiate this. My condition became worse as the years went by.

37. He complained that the Army's response to Senator Kuchel's inquiry had avoided the question of the completeness of the examination he had had at the time of his resignation; it was only a physical **[\*26]**

examination and "incomplete to say the least."

38. As for applying to the Army Board for Correction of Military Records, and submitting "substantial evidence," he had no evidence. "What I claim is a matter of record filed away among the maze of red tape within the Army establishment itself, not just in my so-called medical records."

1963 Application to the Army Correction Board

39. Nevertheless, two weeks later, on February 3, 1963, plaintiff applied to the Army Board for the Correction of Military Records (ABCMR) for a "complete and adequate physical examination by the Army to include a neurological examination and if applicable to receive a disability retirement from the Army." He claimed that though he had suffered two severe brain concussions, his separation physical had not included examination by a neurologist or a "final-type physical examination"; that a doctor, who had in his presence discarded his "Consultation Sheet" to the Neurology Clinic, had promised that he would be given a complete examination by a neurologist at a "final-type" physical examination, but he had not received it.

40. Plaintiff based his application and its implicit contention that such an **[\*27]** examination would have found a disabling condition on his various medical records from 1955-63, specifically citing records held by Dr. Edwin A. Weinstein, M.D., of the Walter Reed Army Institute of Research, Walter Reed Army Medical Center.

41. On June 10, 1963, the ABCMR requested from the Physical Standards Division of the Surgeon General a review of plaintiff's application, medical and military records, and an opinion on the medical issues raised by the application. The Surgeon General's office replied three days later that the 1955 medical board following the crash, the two resignation Army physical examinations and a VA examination failed to show any condition of a lack of fitness; that available records did not indicate a basis for further examination or medical board action, and did not support a finding of physical or mental unfitness at the time of plaintiff's resignation. Presumably on the basis of this report, the ABCMR on July 10, 1963, denied the application. This date, July 10, 1963, is the date on which the court has in the instant **case** held that plaintiff's cause of action accrued.

42. There are several troubling aspects of the decision by the ABCMR. The **[\*28]** Surgeon General's report to the Board cited the date of one of the two Army

physicals said to have been reviewed as May 22, 1958. The record does not otherwise show that such an examination occurred. Plaintiff received the first of his two resignation physicals on September 22, 1958. The dating of the examination at May 22 is doubtless an incorrect reference to the examination on September 22.

43. Another similar error was the reference to a VA examination of "3-17-56." In 1956 and for the two years following, plaintiff was on active duty. On March 17, 1960, plaintiff had an examination at the Veterans Administration, when he was rated 64 percent disabled. The reference to a VA examination as occurring on 3-17-56 was thus doubtless, again, an incorrect dating.

44. Nevertheless, the two errors do not inspire unusual confidence in the basis for the Correction Board's opinion or in the thoroughness of the review given the application. Nor does the three-day extent of the Division's effort. There is, moreover, no indication that the Surgeon General's office or the Board reviewed the records cited or consulted with Dr. Weinstein. From all that appears, the decision of the [\*29] Board was reached with no more than a hasty review of the record for negative purposes.

#### The Bank Shooting Affair--1963-68

45. On September 20, 1963, two months after the ABCMR decision, plaintiff entered a bank in El Paso, armed with a handgun, and fired two shots into a wall. The facts are best briefly stated in two opinions of the Fifth Circuit discussed again below (reversing his conviction after two trials):

The record shows that late in the afternoon of September 20, 1963, appellant went into the State National Bank of El Paso, Texas. He asked where travelers' checks could be obtained, and upon reaching the proper cage asked the teller, a young woman, for one hundred dollars worth of checks in ten dollar denominations. The teller moved to get them, whereupon *Nagell* said, 'Lady, this is a real gun'. She immediately ran, and appellant took several steps away from the cage, fired two shots into the wall at a height of about seven feet, not aiming at the teller, and ran out of the bank. He was followed by a police officer who happened to be in the bank at the time. He was, without difficulty, arrested at a time when he was about to leave in an automobile which he had [\*30] left parked near the bank.

*Nagell v. United States*, 392 F.2d 934, 936 (5th Cir. 1968) (quoting *Nagell v. United States*, 354 F.2d 441, 442 (5th Cir. 1966)).

46. His reason for the entry into the bank and the shooting, plaintiff told a psychiatrist three years later, was that he had tried to get into a VA Hospital and they had refused him and that he had entered the bank and attempted this holdup in order to force the VA to take him.

47. Evidently the unusual behavior exhibited by plaintiff led the Government, shortly after his arrest, to recognize the possibility of insanity. On motion of the U.S. Attorney, the court ordered a psychiatric examination. When plaintiff refused to cooperate with a court-appointed psychiatrist, he was committed to the Medical Center for Federal Prisoners at Springfield, Missouri (MCFP).

48. Plaintiff was observed for a week. The Chief of the Center's Psychiatric Service, Dr. H. Wayne Glotfelty, examined him and noted that his lack of cooperation complicated diagnosis. On February 10, 1964, Dr. Glotfelty recorded his diagnosis as "mental illness, undetermined, in a man utilizing passive-aggressive tactics." Four days later, in a "Report [\*31] of Neuropsychiatric Staff Examination," it was noted that plaintiff "was consistently rational and coherent"; that he "related well to the examiner and showed himself to be oriented in the four spheres of time, place, person and a clear understanding of his present situation." Further, that plaintiff "consistently but pleasantly refused to take part in any psychological testing or psychiatric examination."

49. This report was signed by Dr. Gustave J. Weiland, a staff psychiatrist, for himself, Dr. Glotfelty, and a Dr. Parlato. The three agreed on Dr. Glotfelty's diagnosis of "mental illness, undetermined, in a man who is utilizing passive aggressive tactics." They observed that plaintiff "appear[ed] to possess the capacity for rationally understanding the proceedings against him and of assisting in his own defense." The report concluded that the findings would support an adjudication of competence.

50. Accordingly, plaintiff was returned for trial, and was tried and convicted on May 6, 1964, of entering a federally insured bank with intent to rob and of attempting armed robbery. He was sentenced to 10 years. Several medical witnesses testified at the trial. One called [\*32] him schizoid, one paranoid. All agreed that the accused could distinguish right from wrong.

None testified to what the Fifth Circuit later called the "accused's organic brain damage" in the airplane crash in 1954. Plaintiff's brain damage was unknown to his counsel during the trial.

51. Throughout the trial, plaintiff vociferously denied that he had any mental disease or incapacity. He repeatedly said he would not accept insanity as a defense, and would not cooperate with his counsel in asserting such a defense. He denied that he had ever been treated by a psychiatrist. During the trial, according to the Fifth Circuit's first opinion, "[plaintiff] would interrupt witnesses on the stand, calling them liars, and he would jump up and shout that he was not insane." [354 F.2d at 445](#).

52. An FBI agent, however, had learned from plaintiff of Dr. Edwin A. Weinstein's involvement (see P3 above). This eventually became known to plaintiff's counsel who then made a motion for a new trial. Plaintiff was examined in the El Paso jail by Dr. Weinstein. Dr. Weinstein testified in the full evidentiary hearing on the motion.

53. His testimony is described in the Fifth Circuit's opinion [\*33] on appeal from the denial of the motion for new trial. The court recited Dr. Weinstein's qualifications:

[F]or the past ten years he had been a consultant in neurology and psychiatry for the Walter Reed Army Institute of Research, for the National Naval Medical Center, and the Veterans Administration. For the past five years he had been working on a research contract with the Surgeon General's Office on the investigation of behavior changes following brain injuries. He was the author of many articles on the effect of brain injury. He wrote the chapter on changes of behavior after brain injury in the Handbook of Psychiatry. He had written a monograph concerning the denial of illness in the behavior of subjects following brain injury.

[354 F.2d at 446-47](#).

54. Dr. Weinstein testified that he had examined plaintiff during his 1955 hospitalization at Walter Reed, as part of a research study on the behavioral effects of brain injury. He later included plaintiff's case in an article and then a book on the subject. The court described Dr. Weinstein's further testimony as follows:

He had given the Nagell case intensive study. He had attempted to keep in touch with Nagell, [\*34] after his

release from Walter Reed, but could obtain no reply to his inquiries. He said Nagell had apparently suffered a fracture through the base of his brain, which injured the underside of the brain, and not only damaged the brain but some of the cranial nerves coming off the brain. He described Nagell's 'rather long, stormy, and tragic course' in the hospital. He had a fracture through the orbit and a broken jaw. There was extensive laceration and scarring of the face. He attacked the corpsmen who had charge of him at the hospital. There was behavior interpreted as a suicidal gesture, resulting in his being locked in a psychiatric ward as a precaution against suicide. He was hospitalized from November, 1954, until May, 1955. The doctor did not see him from April 28, 1955 until he interviewed him on June 5, 1964. He got a letter from Nagell dated January 10, 1963, while he was at Bay Pines hospital. He received another letter about two weeks later. These were fully set forth in the evidence. Dr. Weinstein had examined the records from Bay Pines. He testified that unless a psychiatrist had an accurate history of what had happened to Nagell in the past, including the [\*35] brain damage history, he would be very much at sea and confused by the manifestations in his case. He said that one aspect of Nagell's illness, particularly complicating it, had been his denial of illness, and his attempt to conceal information. It was Dr. Weinstein's opinion that Nagell could not completely and accurately differentiate between right and wrong. In response to a hypothetical question, detailing what took place at the alleged robbery, and considering the entire history of Nagell's case, he said, 'I would say that this was a symptom or a manifestation of disturbed brain function and during the period his judgment and perception of reality was seriously disturbed so that he could not accurately differentiate right from wrong', that, in his opinion, Nagell was disassociated with reality at the time of the incident. He gave it as his opinion that the act at the bank on September 20, 1963, was directly related to Nagell's mental illness, that the act was an alternative to suicide. He said the brain damage sustained by Nagell did not affect the ordinary components of intelligence and that he did have sufficient intelligence to know the nature of the charges against him, [\*36] but that he would hesitate to say that he was reasonably able to factually confer with his attorneys or to raise a defense.

[Id. at 447](#).

55. Dr. Weinstein also criticized the diagnosis of "cured concussion," made by the medical board in May 1955,

which returned plaintiff to active duty six months after the 1954 plane crash. He said this diagnosis was inaccurate and at least partly due to plaintiff's deception and repeated denials of any behavioral manifestations of his brain injury. He concluded that an accurate diagnosis of brain injury or traumatic encephalopathy would not have resulted in a return of plaintiff to active duty, and that return of a soldier to active duty under the circumstances of plaintiff and his injuries would be "quite unusual."

56. Following Dr. Weinstein's testimony, medical witnesses, psychiatrists who had testified for the Government on the trial, now reversed themselves. [354 F.2d at 447-48.](#)

57. One said there was no better than Dr. Weinstein in the country and that after consulting with him and further interviews with Nagell, he would now change his testimony and give his opinion that Nagell could not distinguish right or wrong on the day of [\*37] the shooting. The Government's psychiatric witness at the trial testified that he had not known of Nagell's brain injury. After hearing Dr. Weinstein and receiving additional facts, he was willing to concede that Nagell had a mental disorder. He declined to say how serious it was. A third, Dr. Joseph J. Hornisher, a retired Army psychiatrist, who had been consulted after the trial:

agreed with Dr. Weinstein that Nagell was suffering from Anton's disease, which would cause him to deny mental illness and to do anything he could to mislead others with reference to it. He agreed with Dr. Weinstein's diagnosis of organic brain disease. He did not believe that Nagell could distinguish between right and wrong on the day of September 20, 1963.

[Id. at 448.](#)

58. Despite this testimony, the motion for a new trial was denied on May 9, 1964, and plaintiff was again sentenced to the maximum, 10 years in prison.

59. The month following the denial of the motion for a new trial, in June 1964, plaintiff attempted suicide, and was admitted to the prison hospital at Forth Worth, Texas. He had taken an overdose of prescribed drugs which he had secretly hoarded.

60. After close observation, [\*38] without appearance of depression or suicidal intention, plaintiff was on July 16, 1964 discharged from the prison hospital. A Psychiatric Evaluation and Discharge Summary

prepared by the Acting Chief of Psychiatric Service, No. 2 Dr. Norman Wilson and his deputy, Dr. Herbert Rush, gave the following diagnosis:

1. Acute brain syndrome, secondary to drug intoxication, improved. 2. Sociopathic personality, dyssocial type, unimproved.

RECOMMENDATIONS: It is felt that Mr. Nagell is not suicidal at this time nor has he appeared suicidal during the course of this hospitalization. The patient is unwilling to cooperate in order that we might be able to further evaluate him psychiatrically. It is felt that he may now be released to the U.S. Marshal for return to a penal institution.

61. Plaintiff was thereupon transferred to the federal penitentiary at Fort Leavenworth, Kansas. Between November 11 and December 22, 1964, he was a patient at the prison hospital's psychiatric ward. The diagnosis was: "character disorder, sociopathic personality, with emotional instability, malingering, refusal to talk or cooperate." On a visit to the prison psychologist, H. R. Passaro, on February [\*39] 2, 1965, no psychiatric symptoms were noted. In August of that year, Mr. Passaro recorded only plaintiff's statement that he needed psychiatric counseling, particularly after release. There was no record made of any observation of plaintiff's condition and no diagnosis.

62. As already mentioned, in January 1966 the Court of Appeals for the Fifth Circuit reversed the trial court's denial of a new trial. The court held that the district court had failed properly to assess the new evidence of Dr. Weinstein's opinion concerning plaintiff's brain injury in 1954.

63. Recognizing that it was most unusual for an appellate court to reverse an order denying a motion for a new trial, the Fifth Circuit nevertheless did so reverse the denial. To the Government's argument that the motion should be denied for lack of diligence, since the accused knew all the time the crucial facts and concealed them from his counsel, the court responded:

But the proof is really without substantial dispute that appellant was suffering from a mental disorder which caused, if not compelled, him to follow this course. He is thus no more to be bound by it in a serious matter of this kind than in any other [\*40] situation involving mental derangement.

[354 F.2d at 449.](#)

Judge Coleman described the case presented as follows:

Here we have a case in which the defendant exhibited no abnormal traits prior to 1954. On the contrary, by his own merit he became an officer in the Army after enlistment at eighteen. He was, to say the least, an outstanding soldier. After brain damage in 1954, a crucial fact which was unknown to the trial jury, he steadily declined to his present unhappy condition. The former valiant soldier who had sustained wounds on three occasions in defense of his Country had become so completely altered that he announced himself in open court to be a Communist. He had made one serious effort to kill himself by a shot in the left chest.

Every doctor who testified at the trial was of the opinion that Nagell could distinguish between right and wrong on September 20, 1963. As a result of the newly discovered evidence, which the defendant concealed as the result of a damaged brain and a diseased mind, three doctors, one of them an outstanding national authority on brain damage, are now prepared to testify that in their opinions he did not then know the difference between [\*41] right and wrong. This puts an entirely different face on the matter. Of course, we do not decide the merits of the case, but we believe another jury should have an opportunity to decide the guilt or innocence of this man in the light of this new evidence.

Id.

64. On the return of the case to the district court, the district court in April 1966 ordered plaintiff recommitted to the Springfield Medical Center for another competency examination. It was at this Center that he had been examined shortly after his arrest in 1963, found to be unwilling to take part in any psychiatric examination, and diagnosed as suffering from "mental illness, undermined" (PP48-49).

65. At the Center, plaintiff was seen by a clinical psychologist, Dr. Robert J. Murney. Under date of June 8, 1966, he reported that plaintiff told him that the bank incident had been an attempt to gain help after having been turned away on several occasions by VA hospitals. His "Initial Psychodiagnostic Impression" was of a "Paranoid Personality" requiring psychiatric hospitalization and long-term psychotherapy; further as follows:

In my opinion, this patient has both neurotic and characterological problems which [\*42] I would infer at times have reached psychotic proportions. Specifically,

he shows an hysterical component in his personality which tends toward conversion symptoms and psychosomatic reactions but more basically his personality structure is characterized by emotional detachment and withdrawal, guardedness, suspiciousness, and distrust as well as tendencies toward projection. When we view these findings within the context of the patient's behavior over the last four years and particularly in view of his adamant refusal to cooperate on prior occasions, there is strong reason to believe that the underlying paranoid elements may reach delusional proportions under an intense and prolonged emotional stress.

66. Dr. Murney found plaintiff's pathological behavior to be his "almost total denial of psychological problems" and his defensiveness. Dr. Murney noted that he had "fail[ed] to uncover any evidence of an active psychotic process or any convincing evidence of impairment suggestive of cortical brain damage." Test results had ruled out "severe cortical brain damage," but not "sub-cortical injury or generalized traumatic effect."

67. Plaintiff was also examined by the Chief of [\*43] Psychiatric Services at the Center, Dr. Joseph F. Alderete, who made a report dated June 17, 1966. Dr. Alderete, who with Dr. Weinstein testified on the trial of the case in this court, had worked for three years as a psychiatrist at a Public Health Service hospital in Baltimore. He was then a specialist in electroencephalograph, i.e., brain-wave testing. Thereafter, and before the trial in this court, he had a year of specialized training in electroencephalography as a Fellow at Harvard Medical School.

68. Dr. Alderete found plaintiff to be of better than average intelligence, and to be oriented in time, person, and place. He judged plaintiff competent to stand trial, but found him not mentally competent at the time of the alleged crime.

69. Dr. Alderete would neither confirm nor deny that plaintiff had suffered a brain injury. He did not adopt but could not rule out Dr. Weinstein's diagnosis of post-traumatic encephalopathy. His examination EEG and psychological testing had yielded no evidence suggesting that it existed. "Whether or not there is any evidence of brain damage cannot be stated or disputed."

70. His diagnosis of plaintiff was "paranoid personality associated [\*44] with features of a paranoid state, presently in remission." The source was slowly building stress "perhaps secondary to the plane crash of 1954

and subsequently due to marital difficulty." To his diagnosis, Dr. Alderete added definitions of the terms "paranoid personality" and "paranoid state":

A paranoid personality is characterized by many traits of the schizoid personality, that is a tendency of avoidance of close relationships with others, an inability to express direct hostility, coupled with an exquisite sensitivity in interpersonal relationships and with a conspicuous tendency to utilize a projection mechanism, expressed by suspiciousness, envy, extreme jealousy, and stubbornness, all of which Nagell displays.

A paranoid state is a type of paranoid disorder under the classification of paranoid reactions which in turn fall under the general classification of psychotic disorders. The paranoid state is characterized by paranoid delusions. It lacks the logical nature of systemizations seen in paranoia; yet it does not manifest the bizarre fragmentation deterioration of schizophrenic reactions. It is likely to be of short duration, though it may be persistent and chronic.

[\*45] 71. Dr. Alderete summarized his conclusions thus:

In resume, then, the psychiatric symptomatology began some time in 1959 with symptomatology suggestive of paranoid personality and proceeded under ever increasing stress to a paranoid state at the time of the alleged crime, and persisted until recently with a slow remission to his present paranoid personality. A paranoid personality is not a psychotic state; it falls under the general category of personality pattern disturbance. The depth of the psychopathology of a personality pattern disturbance allows these individuals little room to maneuver under conditions of stress except into actual psychosis. It is the opinion of the psychiatric examiner, in closing, that this is exactly what took place, namely that Nagell, a lifelong paranoid personality under slowly building conditions of stress, went into an actual psychosis (paranoid state) and subsequently went into remission, and is now again a paranoid personality.

72. Both Dr. Weinstein and Dr. Alderete testified at plaintiff's retrial for attempted robbery in September 1966.

73. Dr. Weinstein testified that plaintiff was suffering "traumatic encephalopathy," a mental [\*46] disease caused by an injury or trauma, incurred in the airplane accident, to the subcortical, or interior, portion of the brain, the "so-called base of the brain." The disease was

"manifested by emotional instability, passive-aggressive behavior and paranoid trends." He said that his diagnosis was essentially the same as the 1962 diagnosis of chronic brain trauma at Bay Pines (P29-34).

74. Plaintiff had this condition, he said, since 1954. He made this diagnosis from the severity of plaintiff's head injury caused by the airplane crash, from plaintiff's behavior in the hospital following the crash, and from the behavior he exhibited from 1956 to 1963. Such an injury, he continued, would not be revealed by the ordinary encephalogram in which the electrodes are taped to the skull and used to detect cortical or outer layer brain damage. It would not be easy for a psychiatrist to diagnose unless he had been trained in brain function and neurology or had access to a good medical history. Furthermore, a psychiatric diagnosis of plaintiff as having a life-long personality disorder would be incorrect.

75. As a result of the crash, Dr. Weinstein testified, plaintiff had a damaged [\*47] brain which affected his behavior; the brain injury was the cause of plaintiff going downhill since the injury:

here is a man who was a highly successful person as a soldier up to the time of a brain injury. He has gone successively downhill ever since, and I think the brain injury is the major cause of his decline.

76. Among the consequences of plaintiff's illness, he testified, are impaired judgment, confabulations-- "fictitious story" or "delusional formation" with no awareness of falsity-- and anosognosia, or Anton's disease.

77. The brain injury "impairs your judgment on how to deal with your problems and to go about it in a rational way presumably that a normal person without a brain injury has, Mr. Nagell was going about what seemed to be now with rather irrational ways."

78. Confabulation or "fictitious story" is "a symptom of certain forms of mental disorders consisting in making ready answers and reciting experiences without regard to truth." Dorland's Illustrated Medical Dictionary, 335 (24 ed. 1965). Another definition: "The relation of imaginary experiences to fill in gaps in the memory." Taber's Cyclopedic Medical Dictionary, c-79 (11th ed. 1970). See also, [\*48] R. Campbell, Psychiatric Dictionary, 126 (5th ed. 1981) ("The term implies also lack of insight, in the sense that the subject fully believes his answers to be correct. Confabulation is

found in organic brain diseases in which intellectual impairment is a prominent feature.")

79. Dr. Weinstein gave three illustrations of stories that plaintiff made up. One was that he had received a telegram telling him that his two children had been killed, another that he had been blackjacked and robbed in New York and a third that he had been born in Montana. Each had a psychological explanation: The first expressed how much he missed his children; the second his worry about his brain and his poor judgment in controlling himself; and the third his unhappy childhood. "[D]ue to altered brain function you might say his brain was working in a way comparable to someone who might dream something... [W]hen a person uses this method of trying to compensate for problems and dealings with it means to me that his brain function is pretty impaired."

80. Anosognosia, or Anton's disease, was described by Dr. Weinstein as a tendency by the victim to deny that he is mentally ill. He first detected [\*49] this denial of illness in his examination of plaintiff in 1955. The brain injury, Dr. Weinstein said, exaggerated plaintiff's pre-accident tendency to regard illness as a shameful imperfection and consulting a doctor as a confession of weakness. This trait, which before the accident was not abnormal but only distinctive, after the injury became exaggerated to the point of psychosis.

81. Dr. Alderete, substantially repeating his written report described above (PP67-71), testified to his diagnosis that plaintiff was a paranoid personality associated with features of a paranoid state, presently in remission. His opinion was that at the time of the bank incident plaintiff was experiencing a paranoid reaction and was thus suffering from the sort of mental illness commonly termed psychotic.

82. Noting that he was not a neurologist, he testified that he could neither confirm nor deny that plaintiff had suffered brain injury. He did not adopt, but could not rule out, Dr. Weinstein's diagnosis of post-traumatic encephalopathy.

83. On the retrial two psychiatrists-neurologists reversed their prior testimony and with Drs. Alderete and Weinstein testified that plaintiff could not [\*50] distinguish right from wrong at the time he entered the bank, and could not refrain from doing wrong. The testimony did not change the former verdict. Plaintiff was again convicted of attempted robbery of the El Paso bank in 1963. He was again sentenced, in September 1966, to 10 years in prison, and was

returned to the federal penitentiary at Fort Leavenworth.

84. Early in the following year, on February 2, 1967, plaintiff was again transferred to the Medical Center at Springfield for psychiatric evaluation. There Dr. Alderete could find no basis for the transfer. He found plaintiff "rational, coherent, and about the only psychiatric symptomatology that could be called that at present is some mild anxiety and bitterness which is justified [and] well within normal limits." Dr. Alderete's diagnosis was "Paranoid Personality in remission [with] mild schizoid features." On April 5, 1967, after observing plaintiff at the Center for eight weeks, he recommended plaintiff's return to a conventional penal institution.

1967--Application to the VA for Psychiatric Disability Rating

85. Pending the appeal of the second conviction, plaintiff on April 21, 1967, wrote to the Veterans [\*51] Administration for a disability rating based upon his brain injury. This letter is not in the record. After the VA requested evidence as to his neuropsychiatric condition, Dr. Alderete wrote to a VA adjudication officer on May 9 saying that plaintiff was "at least 50%" psychiatrically disabled by reason of the airplane crash:

Now on a psychiatric examination that I completed on this patient dated June 7, 1966 I was of the opinion that his psychiatric difficulties stemmed from injuries he sustained in an airplane crash in November 1954. A careful pursuance of his Army record indicates that Mr. Nagell made a satisfactory adjustment in the Army until his involvement in the airplane crash in November 1954 and thereafter he began to show definite personality changes, and psychiatric symptomatology, and finally reached a climax in 1963 when he attempted to hold up a bank in El Paso, Texas at which time it is my professional opinion that he was psychotic. My diagnosis then and my current diagnosis is that of a Paranoid Personality associated features of a Paranoid State (a psychotic state), presently in remission. Although the Paranoid State is presently in remission, under minor stress [\*52] the symptomatology reappears. It is my current opinion that this patient is still psychiatrically disabled and chronically so. I am of the opinion that this psychiatric disability is at least 50%.

1968--Reversal of the Conviction

86. Plaintiff's second conviction was reversed by the Court of Appeals on April 3, 1968. Nagell v. United States, 392 F.2d 934 (5th Cir. 1968). The court found that the expert testimony as to plaintiff's insanity was so

overwhelming that reasonable doubt must have existed in the minds of reasonable jurors on that issue, and that the trial court, in light of the strong evidence of plaintiff's insanity, erred in not instructing the jury in terms of the specific intent required for attempted armed robbery:

Here the record is replete with expert testimony regarding Nagell's mental condition: 'Mentally disturbed,' the particular characterization being 'chronic traumatic encephalopathy'--a disease of the brain caused by trauma. Its symptoms: paranoia suicidal preoccupations, 'confabulations', tendency toward projection, impaired judgment, lack of contact with reality.

[Id. at 937.](#)

87. In early 1968, plaintiff apparently made a trip to Europe. A [\*53] cable by the U.S. Consulate in Zurich, Switzerland related that plaintiff had appeared at the consulate and claimed he was on a CIA mission. It further described plaintiff as "quite incoherent. In fact, appears psychotic, possibly dangerous." Stories told by plaintiff, both related to this trip and earlier matters, involve work for and persecution by the CIA. For instance, he has told of dealings with Lee Harvey Oswald prior to the Kennedy assassination, as part of what he said was an undercover CIA assignment, and that he staged the bank incident in 1963 to reach the safety of federal custody because he feared a CIA assassination. These are here treated as likely confabulations, i.e., continuing symptoms and manifestations of his brain injury.

The VA Finding--100 Percent Disability by Chronic Brain Syndrome

88. On December 12, 1968, plaintiff was given a neuropsychiatric examination by Dr. Benjamin H. Kagwa of the VA, presumably in connection with the disability claim he had made in the prior April. He complained of headaches, dizziness and loss of memory.

89. The clinical record notes him to be "irritable, hostile and almost combative," to have no insight into his [\*54] condition and to have poor judgment. He was both "somewhat raving literally" and capable of coherent and relevant speech.

90. Plaintiff did not disclose his prior hospitalizations for mental illness, or the diagnoses which were the basis for his convictions and the reversals of those convictions. In fact he disclosed little more than a

"severe head injury" in an airplane crash "while still in service." Nevertheless, the diagnosis was: "Chronic Brain Syndrome, associated with brain trauma, with behavior reaction characterized by passive-aggressive and paranoid features. Incapacity marked. Competent."

91. The Rating Decision on plaintiff found a "chronic brain syndrome associated with brain trauma, service-connected." Plaintiff was on January 9, 1969, rated 100 percent disabled as a result of chronic brain syndrome, effective on April 21, 1967, the date the claim in the form of plaintiff's letter was submitted. The Rating Decision form indicated the Disabled American Veterans had represented plaintiff before the VA.

92. In January 1969, plaintiff was admitted to a VA hospital in Brooklyn, New York with a complaint of severe headaches. He did not stay long enough for a [\*55] full study. Dr. Iris F. Norstrand, a staff neurologist made this diagnosis:

1. Psychophysiologic central nervous system Disturbance, manifested by Headaches.
2. Paranoid Personality
3. Encephalopathy due to Remote Trauma

The diagnosis here was of an underlying personality disorder. Dr. Norstrand reported that the extent, if at all, to which the encephalopathy suffered by plaintiff in the plane crash had aggravated this disorder was unclear.

1969--Reapplication to the ABCMR

93. In May 1969, plaintiff again made application to the ABCMR for correction of his record and disability retirement. The application is not in evidence. Dr. Weinstein's testimony at plaintiff's criminal retrial in 1966 was submitted as new evidence. The Board found that "no basis has been furnished which would justify a decision other than that made by the Board on July 10, 1963"; the Board contemplated no further action. By letter in May 1970, plaintiff again sought the Board's reconsideration, without success. The following November, the DAV Deputy National Service Director who with another DAV officer had represented plaintiff in his application to the Board, by letter advised plaintiff [\*56] that "I assure you that everything possible was done in your behalf at this office. Unfortunately, the Board is the ultimate authority in this matter and I regret very much that we could not persuade them to render a favorable decision in your case."



94. On August 17, 1971, plaintiff was granted legal custody of his two children pursuant to what the record describes only as a written application to a judge. Plaintiff's testimony is that there was no court proceeding and no written application made by him. He intimates that the CIA can explain why the judge gave him custody under such circumstances.

95. An exhibit in the record is a photocopy of a magazine article in which plaintiff is reported to have made a number of statements such as that the FBI/CIA isolated him from his children and used the promise of a reunion to coerce him into a mission in East Germany. Like the stories related in paragraphs 79 and 87, this story is treated as confabulation, a continuing manifestation of his brain injury.

The VA Outpatient Clinic at Long Beach, Calif. --March 1972

96. Plaintiff was seen at the VA Outpatient Clinic in Long Beach, California on March 22, 1972, by a staff psychiatrist, [\*57] Dr. R. E. Cohenour. Plaintiff revealed neither his previous diagnoses nor the details of his injuries, other than that he was unconscious after a head injury in an airplane accident for a period of time and another time he was unconscious "for about a month from, he thinks, some kind of blow to the head."

97. To the doctor he spoke of imprisonment and release in East Germany while working for the CIA; that his case has been mismanaged by the Government and "especially by the FBI/CIA and some others"; that he doesn't feel "like the FBI has been off his back." The doctor's examination report speaks of hostility, paranoid ideations and delusions, an inappropriate affect, and defects in judgment and reasoning. The diagnosis was: "Psychosis organic brain syndrome, brain trauma. Veteran is competent."

Suit in This Court--1973

98. Plaintiff filed suit in this court on January 2, 1973. Shortly thereafter government counsel advised him that on reading his petition the ABCMR felt that it would reconsider his case were he to make a written request, supported by Dr. Weinstein's opinion on any disability at the time of discharge and its causes. Accordingly, plaintiff wrote Dr. Weinstein, [\*58] who replied on March 20, 1973:

In response to your letters of March 7 and March 12, I can state that at the time I saw you at Walter Reed you had sustained a severe brain injury. As to your

condition in October, 1959, I have no first hand information and could not state definitely whether or not you were disabled, in the sense of being unfit for military service at that time. However, in the light of subsequent events, I would be willing to write a letter to the Justice Department for you.

99. Plaintiff thereupon, on March 26, 1973, requested reconsideration by the ABCMR and Dr. Weinstein wrote a letter, dated July 23, 1973, to the Board in support of that request. He wrote that any medical evaluation of plaintiff in 1959 should have considered his severe brain injury as a causal factor in his behavior, and that "[a]fter his injury, he was in my opinion unfit to be an Army Officer":

Mr. Richard C. Nagell has asked me to send you a statement of my opinion of his medical condition in October, 1959. As I did not see Mr. Nagell between April 28, 1955 and June 7, 1964, I can only state my general impression of his medical condition in 1959.

My initial encounter with Mr. [\*59] Nagell was in the course of a research study on the effects on behavior of head injuries. My later examination of him from 1964 was in response to a subpoena from the United States District Court in El Paso. Mr. Nagell is the sole survivor of a plane crash that killed a score or so of people on the night of November 28, 1954. He was brought to the hospital in shock and coma and a tracheotomy was performed. In addition to the putative brain injury, he had fractures of the faciomaxillary bone and numerous lacerations. He went through a delirious stage in which he was restless and violent, evidently imagining he was in battle. He was admitted to Walter Reed on January 3, 1955 and was noted as disoriented for place. He continued to be restless, afraid to sleep and was transferred to a psychiatric ward after threatening to commit suicide. His behavior improved and he was transferred back to an officer's ward in mid April. Following an operation for an anal fissure, he was confused, demanding, and uncooperative for a few days. Though he still had some memory impairment, the patient was insistent on returning to duty. He is said to have destroyed the record of his N.P. examination [\*60] and he later denied to the CIC [Counter-Intelligence Corps] that he had ever had a neuropsychiatric examination.

After Mr. Nagell's release from hospital, he was assigned to CIC school where he had problems with his memory. He then went to Japan where in contrast to his previous good efficiency ratings he received lower

grades. In Japan he was sent to Tokyo Army Hospital in 1958 for psychiatric study because of antagonistic, disrespectful and impetuous behavior. He has also made several suicidal gestures, shooting himself in the chest in 1962 and trying to cut his wrists after his arrest in El Paso in 1963. There also have been periods of confabulation and amnesia.

As I have testified in several court appearances, personality and behavioral changes are common sequelae of brain injuries such as were sustained by Mr. Nagell. These include lapses in memory, denial of illness, outbursts of temper and violence and anti-social behavior. Any medical evaluation of Mr. Nagell made in 1959 should have considered his severe brain injury as a causal factor in his behavior. After his injury he was in my opinion unfit to be an Army officer.

100. When the Board wrote plaintiff, [\*61] asking whether he would appear in person or by counsel, plaintiff replied that neither he nor counsel would attend, giving the reason that because the Board could not subpoena witnesses, he had elected to appear instead before the Court of Claims.

101. On April 3, 1974, the Board found that, although plaintiff had been seriously injured in the 1954 crash, he was again fit for general military service beginning in May 1955, and that his medical records and efficiency reports between 1955 and 1959 gave no basis for a determination that he was unfit for further service on October 30, 1959, when he resigned.

102. The Board reasoned that plaintiff's mental health declined after he left the Army, demonstrated by the VA's 100 percent disability rating in 1969, but held that "this affords insufficient basis for a determination that plaintiff was medically unfit in October 1959." This conclusion, the Board held, was supported by the review of the file by the Surgeon General's Office in 1969 and in 1973, which arrived at the same determination.

103. The Board's conclusion was that neither error nor injustice appeared in the failure to retire plaintiff in 1959 by reason of disability. [\*62] Its recommendation was that the application for correction of his military records be denied.

#### The Decision on Motions for Summary Judgment

104. On November 26, 1976, as noted at the outset of this opinion, the court found, on cross-motions for summary judgment, that plaintiff's cause of action

accrued on July 10, 1963, when his first ABCMR application was denied, and remanded the case for resolution of the three issues which have been stated.

#### Trial and Testimony

105. Witnesses for plaintiff, at trial in this court, were plaintiff, who represents himself, and Dr. Weinstein. Dr. Alderete appeared as a witness for the Government.

106. On the stand, Dr. Weinstein stated that when he examined plaintiff at Walter Reed in 1955, plaintiff had suffered a severe injury to the brain. He reaffirmed his prior diagnosis, in the 1966 transcript, of chronic traumatic encephalopathy and explained it thus:

Post-Traumatic Encephalopathy is very simple. It simply means that something is the matter with the brain caused by trauma and persisting for a long period after the initial injury, manifested chiefly by behavioral disturbances in certain areas, namely the area of social and [\*63] emotional behavior, rather than the ability to use language, to calculate and carry on your ordinary thinking processes of everyday life.

107. Dr. Weinstein testified that when he examined plaintiff in 1955, the period since the injury was too brief to then make the diagnosis of post-traumatic encephalopathy (i.e., persisting for a long period after the injury), but that based on plaintiff's symptoms at the time, including his month-long coma and semi-comatose state, delirium, violence, and other disturbed behavior, he had concluded that plaintiff had a severe injury to the brain. He noted that plaintiff's absolute denial of illness was also observed at that time.

108. Asked about plaintiff and the ordinary processes of life, he said that after all the legal documents he had seen plaintiff prepare, plaintiff's mental processes for a layman are surprisingly good in that area; that when he talked to plaintiff in 1964 it was his opinion that plaintiff could understand his legal rights and that whenever he talked to plaintiff he found him coherent and logical.

109. He testified that he might have to qualify the statement in his letter of July 23, 1973, to the ABCMR (P99, above) [\*64] that plaintiff was unfit to be an Army officer after his accident by the time the judgment was made; that at Walter Reed and at the time he was receiving those "bad officer reports" and having nightmares about men being killed and showing a lot of agitated behavior, "I did not think he was fit to be a leader of infantry soldiers;" also his answer had to be qualified on what military service was involved; that

plaintiff might have functioned in the legal department, "no aspersions on the profession," but he could not have functioned well in a combat situation. "I still think that plaintiff, Mr. Nagell, was unfit for military duty in my estimation, but I do not know much about the requirements of combat military officers."

#### Dr. Alderete's Testimony

110. Dr. Alderete testified on plaintiff's mental condition at the time of the bank incident in 1963, and in 1966 when he examined him. He testified that his first contact with plaintiff was in 1966 when he examined him to determine whether he met the criteria for competency at the time of the crime and at the time of the trial. He found plaintiff capable of understanding his legal rights. When he entered the bank, Dr. Alderete said, **[\*65]** plaintiff was in a "borderline psychosis" and was "probably a fairly severe paranoid personality and probably some of the symptomatology of a paranoid state and was probably bordering a little bit on hysteria." At that time, he possessed some, but not all, of his faculties.

111. On examining plaintiff in 1966, Dr. Alderete continued, plaintiff was in remission, competent to stand trial, free of a mental condition that would keep him from understanding the charges against him and from assisting in his own defense; and further that he was capable of understanding his rights and that there was nothing in his mental condition, other than being in prison, which would have prevented him from bringing suit in the Court of Claims. From 1963 to 1966, Dr. Alderete felt, plaintiff probably vacillated between a paranoid personality and a psychotic state.

112. Plaintiff's exposure to stress, in Dr. Alderete's view, determines the severity of his mental illness. "Under stress he starts to fall apart. The more severe the stress the more he falls apart. Under real severe stress he can go all the way into a borderline psychosis."

#### I. Statute of Limitations

The essential question asked **[\*66]** by the Appellate of the Trial Division is whether plaintiff was under a legal disability and if so for how long the disability continuously existed. The significance of the question is seen in the third paragraph of 28 U.S.C. § 2501, which provides that, notwithstanding the six year limitations period otherwise applicable, the suit of a "person under a legal disability" at the time the claim accrues-- here July 10, 1963--"may be filed within three years after the

disability ceases." From this section arises the two questions asked by the court: was there a legal disability and if there was, how long did it continue.

The purpose of the statute, and others like it elsewhere, is well understood. "The legal disability provisions of statutes of limitations are designed to provide relief from some personal handicap or impediment affecting the individual litigant and preventing him from bringing a timely suit." Marcos v. United States, 122 Ct. Cl. 641, 655 (1952).

In passing on what is a legal disability, the courts have relied on the practical effect of such conditions on claimants' behavior and abilities, rather than technical-medical definitions of conditions claimed to be legal **[\*67]** disabilities. Thus mental conditions sufficient to toll the statute have been described as: those resulting in the inability to carry on one's business affairs, Browne v. Smith, 119 Colo. 469, 205 P.2d 239 (1949); those which actually prevent the sufferer from understanding his legal rights or instituting action, Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 207 A.2d 513 (1965); those which render the claimant incapable of caring for property, or transacting business, or understanding the nature and effects of his acts, Hsu v. Mt. Zion Hospital, 259 Cal. App. 2d 562, 66 Cal. Rptr. 659 (1968); those preventing the claimants from knowing or understanding legal rights sufficiently to manage his personal affairs, Adkins v. Nabors Alaska Drilling, Inc., 609 P.2d 15, 23 (Alaska 1980).

This court, also, has favored such a functional approach, declaring that a "disability" under Section 2501 is one which in some way impairs the claimant's access to the court. Bowman v. United States, 224 Ct. Cl. 640 (Order, May 16, 1980); Goewey v. United States, 222 Ct. Cl. 104, 612 F.2d 539 (1979); Capoeman v. United States, 194 Ct. Cl. 664, 440 F.2d 1002 (1971). In Goewey, the specific showing necessary **[\*68]** to qualify as a disability within the meaning of Section 2501 was described as follows:

[the condition] must in some way prevent his comprehension of his legal rights to military disability retirement pay, the necessity of prosecuting them by timely suit, and/or cause him to deliberately forego the filing of a timely suit to vindicate his rights."

222 Ct. Cl. at 114, 612 F.2d at 545.

On this test, it becomes clear that not every mental

condition will be sufficient to toll the statute; rather only those which will hinder the claimant's access to the court to assert his or her rights. [Goewey, supra](#); cf. [Graboi v. Kibel, 432 F. Supp. 572 \(S. D.N.Y. 1977\)](#) (applying New York law).

Too, it is settled that an actual prior adjudication of incompetence is unnecessary to prove such a disability as will toll the statute of limitations. [Browne v. Smith, 119 Colo. 469, 205 P.2d 239 \(1949\)](#). Thus, many state **cases** in which incompetence was not adjudicated have concerned trauma-caused mental illness, as here, far afield from the more traditional manifestations of insanity. For instance, **cases** holding head injuries legally sufficient to constitute a disability have involved resulting [\*69] conditions such as these: a temporary period of unconsciousness, [Sobin v. M. Frisch & Sons, 108 N.J. Super. 99, 260 A.2d 228 \(1969\)](#); [Alabama Power Co. v. Shaw, 215 Ala. 436, 111 So. 17 \(1927\)](#); mental limitations in "attention span, concentration, and learning," [Hurd v. County of Allegany, 39 A.D.2d 499, 500, 336 N.Y.S. 2d 952, 954 \(1972\)](#); black-out spells, [Hill v. Clark Equipment, 42 Mich. App. 405, 202 N.W.2d 530 \(1972\)](#); and amnesia, slowed reflexes, and difficulty in concentrating, [Adkins v. Nabors Alaska Drilling, Inc., 609 P.2d 15 \(Alaska, 1980\)](#).

With these rules of law in mind, it is on the facts set forth above held that at the time the cause of action accrued in 1963, plaintiff's mental condition was so impaired as to constitute a legal disability under [Section 2501](#). The source of the mental disability was, of course, the airplane crash of 1954, and perhaps the earlier head wound of 1953. Though not officially diagnosed until 1962, the disability was present in 1959, when plaintiff resigned from the Army, only apparently in voluntary fashion. The Government, incidentally, admits, by lack of objection to plaintiff's requested finding, that plaintiff's illness was responsible [\*70] for his resignation. Absent the admission, the fact would be here found.

#### Plaintiff's Mental Disability

Aside from Dr. Weinstein's early research findings, the first accurate diagnosis of plaintiff's condition did not come until 1962, eight years after the injury and three years after plaintiff's resignation. In that year, Dr. Clark, chief psychiatrist at the VA's Bay Pines Hospital, diagnosed chronic brain syndrome associated with brain trauma, with behavioral reaction characterized by passive aggressive and paranoid features. Two years later, when for the first time Dr. Weinstein was asked to diagnose plaintiff's illness, he reported chronic traumatic

encephalopathy, and noted that his diagnosis and that of Dr. Clark were substantially the same. The diagnosis of chronic brain syndrome associated with brain trauma was also made by Dr. Kagwa of the VA in 1968, and forms the basis of plaintiff's 100 percent VA disability rating. The diagnosis was repeated by another VA psychiatrist, Dr. Cohenour, as recently as 1972, when plaintiff visited a Long Beach out-patient clinic.

Plaintiff's brain syndrome has been manifested by severe personality and behavioral disturbances. They [\*71] took the form, over the years since the airplane crash, of suicidal preoccupation (PP27, 31), deliriousness, restlessness, and violence (PP54, 91), paranoid trends and passive-aggressive behavior (PP32, 73), hysteria (P110), psychotic states (PP87, 110, 111), severe headaches (P92), amnesia, dizziness, confusion (PP29, 31, 33), impaired judgment, confabulations, and delusional formations, anosognosia or Anton's disease (PP76-80). Plaintiff attempted suicide in 1962 by shooting himself (P28), and according to Dr. Weinstein in 1963, when he tried to slash his wrists after his arrest (P99), and in 1964, when he took a drug overdose (P59). Dr. Weinstein described plaintiff's suicidal behavior too, immediately after the 1954 plane crash (P54). Plaintiff has been in various mental institutions and psychiatric wards almost a dozen times between 1955 and 1969.

The evidence is unhappily abundant of likely confabulations, or fictitious stories told by plaintiff with no awareness of their falsity. One example surrounds plaintiff's attempted suicide in 1962. He has variously suggested that he shot himself (the most likely), that his wife shot him, and that it was an unknown assailant. [\*72] Stories told by plaintiff throughout the years after his discharge involve work for the CIA and, alternately, persecution by the CIA. He has suggested that the bank shooting incident in 1963 involved undercover CIA activities, that he had dealings with Lee Harvey Oswald prior to the Kennedy assassination as part of an undercover CIA assignment, and also that he sought by the shooting to be taken into protective custody because he felt his life threatened by the CIA. These stories are unsubstantiated and are likely confabulations, continuing symptoms of plaintiff's brain injury.

Drs. Alderete and Weinstein agreed that the effect of the syndrome and slowly building stress, arising among other things from marital problems beginning in 1959 and ending in plaintiff's divorce in 1962, climaxed in the 1963 bank incident, during which period plaintiff was disassociated from reality. The facts developed in the

present **case** leave no doubt but that plaintiff was mentally disabled in 1963. And the recitals of fact in the decisions of the U.S. Court of Appeals for the Fifth Circuit would alone demonstrate that when plaintiff's cause of action accrued in 1963, he was so impaired mentally [\*73] as to be legally disabled under [Section 2501](#). These factual findings are entitled to respect as federal judicial conclusions on a full record, in a proceeding involving the same parties.

#### Continuity and Duration

How long the disability continued is the next question. To toll the statute of limitations, a mental disability must be continuous; if the condition ceases for a period, the statute of limitations begins to run and continues even when the condition resumes. Consistently, disabilities arising subsequent to the cause of action's accrual do not toll the statute. [Goewey v. United States, supra; Marcee v. United States, 197 Ct. Cl. 363, 367-68, 455 F.2d 525, 527 \(1972\); Savings & Loan Soc. v. Culver, 127 Cal. 107, 111, 59 P. 292, 294 \(1899\)](#).

That the disability must be present at the time the cause of action accrues is expressed in the text of most tolling provisions; for instance, [Section 2501](#) provides in part that

[a] petition on the claim of a person under a legal disability... at the time the claim accrues... may be filed within three years after the disability ceases. (emphasis added)

The rule is more often stated than explained. Its basis is presumably a concern [\*74] that defendants not be disadvantaged by an extension of the time for suit by virtue of a disability which sets in after the events giving rise to the cause of action. The thought is that the claimant could have sued in the interlude. [Marcos, supra, 122 Ct. Cl. at 655 \(1952\)](#). Therefore, the strong policy of protecting defendants against stale claims is implicitly deemed to outweigh the potential hardship on a claimant who becomes disabled.

In [McDonald v. Hovey, 110 U.S. 619 \(1884\)](#), the Supreme Court recognized the long history of this rule, when it applied it to a provision tolling for disability a two-year limitation on an appeal. The statute contained no language as compelling as [Section 2501](#), but the Court held that at least where the disability (in that **case**, imprisonment) did not arise until 10 months after the time for appeal began to run, limitations were not tolled.

The requirement of continuity of disability is an old

judicial gloss on the textual requirement that the disability must exist at the time the claim arises. Presumably on the same rationale, the requirement contemplates that a claimant incompetent at time of accrual, but who regains competence for an interval, [\*75] must sue during that interval or be barred by the running of limitations during a relapse which follows. [Goewey, supra, 222 Ct. Cl. at 116, 612 F.2d at 546](#).

The rule that the disability must exist at the time the claim accrues can have a harsh result in tort suits in which the mental disability asserted to toll limitations is caused by the tortious act. The rule is arguably implicated in all such **cases**, for "so long as cause precedes effect, it will be technically true that an injury which causes insanity necessarily precedes it." [Nebola v. Minnesota Iron Co., 102 Minn. 89, 91, 112 N.W. 880 \(1907\)](#). Reacting to the obvious inequity of allowing a defendant's wrongful act to so hinder a plaintiff's suit, the courts have in several ways avoided the harsh result of cutting off such suits. They have held that the disability and the claim arose simultaneously and that this is sufficient, [Hill v. Clark Equipment Co., 42 Mich. App. 405, 202 N.W.2d 530 \(1972\); Sobin v. M. Frisch & Sons, 108 N.J. Super. 99, 260 A.2d 228 \(1969\)](#), or even when the disability did not immediately follow the injury, that a disability arising the same day as the injury is sufficient to toll limitations, on the [\*76] theory that "the law does not consider fractions of a day." [Nebola, supra](#); see, Annotation, [41 A.L.R.2d 726 \(1955\)](#). Some courts have concluded, too, that even a disability arising more than a day after the injury tolls limitations when it was caused by the alleged wrongful act which is the basis for the claim. In [Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 207 A.2d 513 \(1965\)](#), plaintiff became insane subsequent to an allegedly tortious act by defendant. The court held that if the insanity was caused by defendant's wrongful act, the statute would be tolled, notwithstanding that the disability could in no way be said to have existed when the claim arose. It reasoned that a defendant whose negligent act brings about plaintiff's disabling condition should not be permitted to invoke the statute of limitations defense. In [Klamm Shell v. Berg, 165 Colo. 540, 441 P.2d 10 \(1968\)](#), the Colorado Supreme Court applied the same rule where an alleged intentional tort resulted four months later in what was held to be a disabling condition. The court, citing *Kyle v. Green Acres*, held that a fortiori a defendant who intentionally injures a plaintiff could not invoke the statute of limitations [\*77] against the plaintiff's resulting disability.

Thus, mental conditions which are related to the cause

of action in tort asserted by a claimant have been treated differently than an unrelated disability which does not toll limitations if it arises after the cause of action. The same logic applies, though doubtless with much less force, to disability pay cases where service-connected injuries result in disabling conditions. This is for the reason that the Government, though obviously not at fault as in the tort cases, has assumed analogous responsibility for the results of such injuries by promising servicemen disability pay. This court's statute of limitations has been described as jurisdictional, [Nager Electric Co. v. United States, 177 Ct. Cl. 234, 249, 368 F. 2d 847, 857 \(1966\)](#), and so might not permit an equitable extension of the time for suit, as in *Green Acre and Klamm Shell*, if the disability did not exist when the claim arose. Arguably, however, the additional continuity requirement engrafted on the statute, which keeps the statute running despite a relapse from a temporary recovery or brief lucid period, could well be given less force where the waxing and waning of symptoms [\*78] is part of an underlying disorder arising from a soldier's service injuries. Because it is found in this case, however, that some symptoms continued throughout the period in question unabated, it is unnecessary to decide whether otherwise plaintiff's disability would be ineffective to shield him against the running of the statute because not continuous.

At the retrial of the criminal charge against plaintiff in 1966, Dr. Weinstein reiterated his diagnosis given in the hearing in 1964 on the motion for a new trial. He diagnosed traumatic encephalopathy, chronic, manifested by emotional instability, passive-aggressive behavior, and paranoid trends (P73). The consequences of the condition were impaired judgment, confabulations, and Anton's disease, or the necessity to deny mental illness (P76). This latter, he said, by reason of the underlying encephalopathy, exaggerated a preaccident personality trait to the point of psychosis (P80).

The record before and after that point in 1966 is replete with indications that plaintiff had since the 1954 accident, time after time, denied any recognition of mental illness, and often actively hidden, and not disclosed pertinent facts of his [\*79] history to examiners (PP13, 19, 22, 27, 33, 47-49, 51-55, 57, 60, 63, 65, 66, 80, 90, 96). Dr. Weinstein first recognized this phenomenon when he examined plaintiff in 1955 (PP80, 107). He later concluded that the 1955 medical board's diagnosis of only a cured concussion and pre-existing personality disorder reflected plaintiff's success in "conning" the medical board and concealing his

illness (P55).

The most striking illustration of the phenomenon of Anton's disease, and its effect on plaintiff, took place at plaintiff's first criminal trial, where experts testified about plaintiff's mental state at the time of the bank incident. Though it was clearly against plaintiff's penal interest (in fact, he was sentenced to 10 years in prison), plaintiff protested throughout the trial, in ways themselves suggestive of his illness, that he had no mental problems (P51).

Another forceful example came in the examination in December 1968 by Dr. Kagwa of the Veterans Administration. Apart from the other symptoms noted ("hostile," "poor judgment," "raving"), the clinical record showed that plaintiff did not disclose any of his prior hospitalizations for mental illness or the diagnoses [\*80] resulting in reversal of the two criminal convictions (P90). At plaintiff's second criminal trial, Dr. Weinstein testified that plaintiff's constant refusal to acknowledge his illness was responsible for the large variation in diagnoses plaintiff had received over the years.

To pursue a disability retirement, plaintiff has had to show that he was unfit and mentally ill at the time of leaving the service. His impaired judgment and his overwhelming and sometimes psychotic need to deny his illness have necessarily been a constant interference with pursuit of his remedies. It is here found that plaintiff's impaired judgment and refusal to admit his illness resulting from the trauma-caused brain injury were continuous from 1963 and effectively impaired his access to this court. Plaintiff's case is different from *Goewey*, where the court noted the plaintiff's "transactional competency" in writing letters, and otherwise reflecting "cognitive functioning ability." [Goewey, supra, 222 Ct. Cl. at 115, 612 F.2d at 545](#). The court there looked for a cause and effect relationship between plaintiff's condition in its mild or remission periods, and his forbearance from filing suit and thereby [\*81] protecting his rights to disability pay, but found none. In contrast, here, plaintiff's underlying brain injury undeniably continued throughout, as did the manifestations cited above which caused him, in the words of *Goewey*, to "forego the filing of a timely suit." In the nature of things, causation by the impaired judgment and urge to deny illness cannot be mechanically shown. It must be inferred, in order to avoid injustice, that a man who disparately denies his illness, and is the victim of symptoms such as flights from reality expressed in confabulations, is impeded in seeking a remedy whose

premise must be recognition and aggressive representations of illness.

The Government relies on the VA doctors' opinions that plaintiff was "competent" and Dr. Alderete's opinion that nothing prevented plaintiff from earlier instituting suit. These opinions are given little weight, however, because of their failure to consider the effect of Anton's disease on plaintiff's access to this court. Furthermore, the record is clear that many of the diagnoses were defective either because of lack of complete knowledge of plaintiff's case, or because of lack of sufficient expertise with brain [\*82] injuries.

The conclusion that plaintiff's disability was continuous is unaffected by the activities plaintiff did conduct on his own behalf, relied on by the Government to show that plaintiff did at times seek recognition of his rights. The Government relies on plaintiff's applications to the VA for a disability rating in 1967 and to the ABCMR in 1969 for a correction of his record to show disability retirement. The Government points to the statement in Goewey, in which the court referred to the plaintiff's application to the Air Force Board for the Correction of Military Records some four years prior to filing of suit, and said: "If plaintiff was competent to file that application, it is difficult to comprehend why at that time he was not also competent to have filed suit in this court." 222 Ct. Cl. at 107, 612 F.2d at 541.

It would take the statement too far to read it as a fixed rule that application to a Correction Board negates a claim of disability as a matter of law. Plaintiff had different degrees of awareness of his rights, was easily led in one path or carried by his illness to remain silent. He was, however, constantly suffering from his brain injuries. Other cases [\*83] examining the impact of various activities by claimants purportedly under disability, activities which might seem to reflect awareness of legal rights, have concluded that such activities, while the source of a factual inference that the claimant was competent, are not fatal to claims of disability as a matter of law. See, e.g., Adkins v. Nabors Alaska Drilling, Inc., 609 P.2d 15 (Alaska, 1980) (retaining attorney and obtaining workmen's compensation benefits). Hill v. Clark Equipment Co., 42 Mich. App. 405, 202 N.W.2d 530 (1972) (obtaining workmen's compensation and social security benefits, and consulting a lawyer "does not establish incontrovertibly" that plaintiff was competent). Plaintiff's 1969 ABCMR application was before the court earlier on the Government's motion. The remand to the Trial Division of the issue of disability assumed that the facts

might show plaintiff's disability and its continuity so as to toll the statute. Cf. Bowman v. United States, 224 Ct. Cl. 640 (Order, May 16, 1980).

Dr. Weinstein, here credited with providing the most accurate description of plaintiff's disease, thusly described his summary diagnosis of plaintiff:

Post-Traumatic Encephalopathy [\*84] is very simple. It simply means that something is the matter with the brain caused by trauma and persisting for a long period after the initial injury, manifested chiefly by behavioral disturbances in certain areas, namely the area of social and emotional behavior, rather than the ability to use language, to calculate and carry on your ordinary thinking processes of everyday life.

For his conclusion that plaintiff was able to carry on the "ordinary thinking processes of everyday life", Dr. Weinstein appeared to rely at least partly on his belief that plaintiff was responsible for preparing the legal documents involved in his case or cases. He said:

After all the legal documents I have seen Mr. Nagell prepare, I would say his mental capacity for a layman is surprising[ly] good in that particular area.

Plaintiff did indeed represent himself in the above-mentioned proceedings (with the exception of an attorney he retained at the start of this suit), but it is clear that he had substantial assistance, though informal, of lawyer-friends, and specifically of the Disabled American Veterans throughout. Plaintiff testified:

Many of the things that I have done have been on the [\*85] advice of other attorneys, people who are actually attorneys, an individual who is with the Central Intelligence Agency even requested that I not mention his name.

It sort of Burns me up when this is used against me \* \* \* Dr. Weinstein indicated that he had no doubts about such and such because after looking at my petitions and all of this court paperwork, so I want to emphasize that all of this court paperwork which I have submitted does not stem from me personally.

In particular, the DAV acted on plaintiff's behalf in his 1967 application to the VA, and in his 1969 application to the ABCMR. The ABCMR application was filled out by DAV officers.

More significant, though, is that throughout 1967, 1968, and 1969, plaintiff continued to refuse to face his illness.

Too little is known of plaintiff's letter to the VA in 1967, to draw any reasonable conclusions about his ability to protect his cause of action for disability retirement. Though plaintiff admitted at trial that he understood the purpose of the 1969 Correction Board application, it is clear that the allegations and proof of psychiatric symptoms which would be necessary to show unfitness for disability retirement [\*86] were still avoided. Therefore, while the Correction Board and the VA applications might ordinarily raise inferences that plaintiff's access to this court was unimpaired, on the facts of plaintiff's persistent unwillingness--indeed, inability--to recognize and press for official recognition of his illness, it is found that plaintiff's condition was responsible for his failure to institute proceedings earlier than he did. The evidence establishes that plaintiff's mental condition has existed continuously since 1954 and was created by trauma to the brain suffered in the airplane crash. It is for just such **cases** that the tolling provision of [Section 2501](#) was enacted--the **cases** of people with a just claim whose mental disabilities interfere with their ability to bring suit.

## II. Service-Connection of the Disability

In response to the second question referred to the Trial Division it is further found, on the facts set out above, that upon his resignation, plaintiff was unfit to perform his duties because of service-connected injury. The ABCMR's conclusion to the contrary is unsupported by substantial credible evidence and is reversed.

The evidence is overwhelming that plaintiff's [\*87] traumatic injury to the brain in a military airplane crash in 1954 was not recognized at the time by the medical board. The board returned him to active duty. Dr. Weinstein recognized the injury, in the course of his research study. Before long, however, the disability became apparent in a complete change of personality that became progressively more intense. Before the crash, plaintiff was a brilliant, brave soldier, a model warrior. He led charges in battle in Korea, inspired his men--this and more is amply testified to by the ratings periodically made by his seniors--was decorated and received a battlefield promotion to Captain. After the crash he became hostile and paranoid, and he made up stories--the symptoms of his mental disease. As he long afterwards confessed to a psychiatrist, he knew he was failing, but he could not face up to his mental troubles and he preferred to resign voluntarily rather than be retired for disability.

It seems patent even on a casual reading of the record that the disability suffered by plaintiff was service

connected--caused by plaintiff's traumatic head injuries and resulting brain syndrome. This was the opinion of the most credible medical [\*88] witness, Dr. Weinstein. The disability is clearly revealed by the problems, not present or noted before the crash, which appeared in the OER's with more frequency from 1957 until plaintiff's resignation in 1959. Dr. Alderete's diagnosis appear to vary from one of a pre-existing personality disorder which is periodically aggravated into psychosis to one recognizing that the head injury was somehow causative. (see PP71, 82, 85). Dr. Alderete is given less credit because of his lack of expertise in neurology, which would have been essential to properly diagnose plaintiff. Also, Alderete's expertise was in electroencephalography (EEG), whereas plaintiff's brain damage was interior, and difficult, if not impossible, to detect by EEG except very soon after the 1954 accident.

Therefore, Dr. Alderete's medical opinion, also expressed by the medical board in 1955, that plaintiff had pre-existing personality disorders seemingly unrelated to the plane crash is rejected as an unsupported conclusion. There is nothing in the record to support it. In the face of the crash and the almost immediately following change in plaintiff, the opinion becomes incredible. The Army medical board in [\*89] 1955 found that plaintiff had a "concussion \* \* \* cured." Dr. Weinstein testified that a correct diagnosis by the medical board, examining plaintiff six months after the accident, would have resulted in plaintiff being put on the temporary disabled list. Had this been done, it is likely plaintiff would soon have been retired by the Army for disability. But he was not even treated as temporarily disabled.

Plaintiff's brain syndrome was evidently difficult to diagnose, absent expertise in both psychiatry and neurology, though an initial EEG which registered abnormal was never followed up. Yet, Dr. Weinstein made his first assessment of brain injury only on plaintiff's behavior in the hospital immediately following the crash, and considered plaintiff's **case** significant enough to be included in a book on the effect of traumatic brain injuries. The difficulty of diagnosis was compounded, of course, by the symptom--plaintiff's necessity to deny the presence of any mental illness resulting from the injuries. When, however, plaintiff was sent back to active duty, his efficiency ratings changed from picturing him to be a flawless and brilliant officer, to a plainly sick man, who was [\*90] reluctantly understood to be unfit for the Army. The psychologically untrained rating officers, bound by the medical board's



conclusion that plaintiff was fit for duty, attributed his problems to simple personality traits, observing only that he apparently had never fully recovered from the accident in 1954. Finally, his unfitness to serve in the Army was seen, in 1958, in an OER that flatly recommended his discharge because of his problems.

After the accident, plaintiff was increasingly frustrated by his inadequacies; marital difficulties, too, doubtless at least in part rooted in his disturbed condition, put plaintiff under ever-increasing pressure. In turn, his brain syndrome increased in intensity. Finally, convinced that he was unfit--as indeed he was--he resigned, keeping silent as to his mental troubles. He resigned, as he later confessed, to avoid an involuntary retirement for disability. The Government indeed concedes by lack of objection that plaintiff's resignation was caused by, and indeed, compelled by the symptoms and manifestations of his brain damage.

A service member's inability to cope with everyday personal confrontations, reflecting a longstanding personality [\*91] type or mild personality disorder, would not be sufficient to render the member unfit for disability, through it could result in an unsuitability separation. See *Young v. United States*, Ct. Cl. No. 234-79C (Order, January 30, 1981); *Sweatt v. United States*, Ct. Cl. No. 181-80C (Order, July 31, 1981). But plaintiff's problems had their source in his injury in the line of duty. His resignation because of pressure generated by those problems is itself persuasive evidence of his unfitness. In *Manzi v. United States*, 198 Ct. Cl. 489 (1972), a civilian defense department employee contended that his resignation from service was void because caused by a mental condition, and so involuntary under the provisions of the Federal Personnel Manual. The court found that plaintiff

was emotionally disturbed, suffering from an exacerbation of his former illness, a mental disorder known as schizophrenia; his judgment was greatly impaired and he was of unsound mind. His resignation was more determined by internal pressure than by any rational judgment, and he would probably not have resigned had it not been for his mental condition.

[Id. at 505.](#)

The court concluded that the resignation was involuntary [\*92] and thus void. [Id. at 492.](#) In the instant case, plaintiff's resignation--because caused by his brain syndrome, and so affirmative evidence of

plaintiff's unfitness at the time--is equally ineffective to shield the Government from the liability it would otherwise have incurred in retiring plaintiff for disability.

To be sure, with the exception of Dr. Weinstein's conclusions upon first examining plaintiff in 1955, the medical testimony as to plaintiff's condition relied on here is based on examinations at various times after his resignation. The Government argues, from this, that plaintiff's condition may have declined after his resignation, but that as of the time of the resignation in 1959, there is insufficient evidence to show he was then unfit because of disability. This court has long held, however, that evidence of a plaintiff's condition subsequent to leaving the service may be highly probative if the condition was difficult at the time to detect, or the examination preceding release from active duty was insufficient to detect the condition. [Merson v. United States](#), 185 Ct. Cl. 48, 401 F.2d 184 (1968); [Walters v. United States](#), 175 Ct. Cl. 215, 358 F.2d 957 (1966). [\*93]

In *Walters*, the court found that plaintiff could prevail upon a showing that he would have been given a disability retirement if only all the relevant facts regarding his condition had been known prior to his discharge:

Evidence of progressive deterioration and later discovered symptoms and disabilities may be decisive if it can establish that plaintiff's incapacity while in service was substantially more serious than suspected and that previous diagnoses were inadequate or incorrect. [Harper v. United States](#) [159 Ct. Cl. 135, 310 F.2d 405 (1962)].

*Id.* at 225, 385 F.2d at 96.

In *Merson*, the plaintiff suffered violent malarial attacks while on naval duty in the Pacific during World War II. The court found plaintiff entitled to a disability retirement where the medical board which pronounced him fit prior to discharge did not contain a neurologist or a psychiatrist, and showed haste to release servicemen from active duty upon demobilization in 1946. The specialists who thereafter examined plaintiff diagnosed disabling psychiatric and neurologic symptoms resulting from the attacks, and the court cited *Walters* in its reliance on such post-discharge medical opinions.

For its [\*94] determination that plaintiff was unfit because of disability upon discharge, the court in *Merson* also relied on the contrast between plaintiff's

performance prior to the attacks, and his performance after discharge, shortly after the attacks. He was described as a highly successful New York corporation lawyer prior to service, with an outstanding naval career prior to the attacks. After leaving the service, in 1946, he was only sporadically employed, with the longest stint of five years from 1947 to 1952 ended by his termination because of his symptoms. He could not hold a job at all after 1958. The court found especially telling the contrast between his "steadily recurrent failures because of his physical and mental condition," *id. at 53*, and his previous record of success.

Similarly, here, plaintiff's condition, because of the inherent difficulty of diagnosis, exacerbated by its manifestation in Anton's disease, went unrecognized by the medical board and the non specialists who conducted his resignation physicals. Dr. Weinstein, an acclaimed specialist, has convincingly testified to the condition and its symptoms. Plaintiff's unmistakable decline after the crash and in later [\*95] years is, as in Merson, strong evidence of his disability.

On all the evidence in the present record, it can only be concluded that had the 1963 Board known what we know now, it would have given the relief sought. Dr. Weinstein wrote to the ABCMR in 1973 that any evaluation of plaintiff's physical condition in 1959 should have considered his severe head injury as a causal factor in his behavior. While this may have been difficult to determine in 1959, the Army authorities did not try. And the Board did not try in 1963 when it ignored the possibility of obtaining Dr. Weinstein's testimony. The haste and inaccuracies in the Board's treatment of the matter are also suggestive of arbitrariness. The refusal to reconsider the matter in 1969 and 1970 with Dr. Weinstein's testimony at hand seems more a decision by momentum than otherwise. These decisions are therefore held to be unsupported by substantial evidence. They are therefore not entitled to the finality usually accorded correction board decisions by this court and are reversed.

### III. Extent of the Disability

The percentage of disability, the third question referred here by the Appellate Division, is simple to assess at [\*96] 100 percent. The evidence is that plaintiff has a chronic traumatic encephalopathy, has been unable to hold a job since his military discharge, is in and out of mental hospitals, is sometimes suicidal, has impaired judgment, has an urge to deny his illness and to make up delusional episodes. It hardly needs an expert to

assess the extent of his disability at 100 percent, but there is available as confirmatory evidence the fact that the Veterans Administration has done so. See *Daley v. United States*, 180 Ct. Cl. 1136, 1143 (1967); *Smith v. United States*, 168 Ct. Cl. 545, 553 (1964).

### IV. Remaining Issues

Minor issues remain which were not specifically directed to the attention of the trial judge by the order of November 19, 1976. The plaintiff claims that he did not receive the Board's letter of July 26, 1963, informing him of its decision. The argument is apparently of some defect of notice affecting the date on which his claim accrued. The point is put beyond the present inquiry by the Court's decision that the claim accrued on July 10, 1963. *Nagell v. United States*, Ct. Cl. No. 1-73 (Order, November 19, 1976). To the extent that any factual issue remains, the record contains [\*97] a copy of the notice showing it was addressed to a Los Angeles post office box, the address on plaintiff's application. There is nothing to support plaintiff's claim that normal delivery was not effected.

Plaintiff also complains that he was misinformed by officials as to the authority of the ABCMR and the availability of a legal remedy in the Court of Claims. The principle here being invoked is, presumably, that fraudulent concealment by a potential defendant of the facts which would give rise to a cause of action is an implied exception to the six-year limitation contained in *28 U.S.C. § 2501. Japanese War Notes Claimants Association v. United States*, 178 Ct. Cl. 630, 373 F.2d 356, cert. denied, 389 U.S. 971 (1967). Here, however, the only proved misinformation came not from a representative of the Board or the Army but from an official of the Disabled American Veterans. Even if this erroneous advice were to rise to the level of fraudulent concealment (a matter entirely unproved), the doctrine is plainly inapplicable to acts by third parties, unrelated to the defendant. "The fraudulent concealment of the defendant alone will delay the running of the statute." *Hayden v. Thompson*, [\*98] 71 F. 60, 70 (8th Cir. 1895). See also *Powell v. Radkins*, 506 F.2d 763, 765 n. 5 (5th Cir.), cert. denied, 423 U.S. 873 (1975); *Cato v. South Atlantic & Gulf Coast District of the International Longshoremen's Association*, 364 F. Supp. 489, 493 (S. D. Tex.), aff'd, 485 F.2d 583 (5th Cir. 1973).

Finally, the Government has raised the issue of laches, a rather misplaced defense to a suit in which it is concluded that plaintiff has suffered continuously from a service-connected brain injury which has impaired his

access to the court. As described at length above, plaintiff's delay can hardly be said to be due to a lack of diligence, the first element required for the doctrine of laches to apply. *Tyler v. United States*, 220 Ct. Cl. 387, 393, 600 F.2d 786, 789 (1979). Furthermore, no articulable harm has come to the Government. Unlike the "automatic" prejudice in discharge **cases**, where the Government as a consequence of delayed suit may be forced to pay two salaries, see, e.g., *Brundage v. United States*, 205 Ct. Cl. 511, 504 F.2d 1382 (1974), the Government has here incurred no added liability with the passage of time, beyond the retirement pay it should have paid to plaintiff from [\*99] the start. Cf. *Tyler v. United States*, 220 Ct. Cl. 387, 600 F.2d 786 (1979) (suit for pay allowances--no "automatic prejudice"); *Detling v. United States*, 193 Ct. Cl. 125, 432 F.2d 462 (1970) (suit for overtime pay--no manifest prejudice to defendant). Absent a showing of other actual prejudice to the Government, the defense of laches fails. *Tyler, supra*.

There are no remaining issues to justify a remand of this **case** to the Board. Plaintiff has suffered greatly and even miserably in the service of his country, and his suffering is not to end. He was entitled to better treatment than he got. The least that can be done for him now is monetary justice. Just as the Fifth Circuit reversed the second conviction of plaintiff and directed his acquittal rather than remand for a third trial of the criminal charge, so it is here determined without further administrative proceedings that plaintiff was and is entitled to a military discharge with a 100 percent medical disability.

For all the foregoing reasons, it is concluded that on account of his service-connected disability incurred in 1954, from which plaintiff has suffered continuously since then, plaintiff is entitled to judgment [\*100] for whatever perquisites and sums are due to one with a 100 percent medical disability on his discharge from the Army in 1959, the amount to be determined in further proceedings under Rule 131(c).

#### Plaintiff's Military Service

1. (a) Plaintiff enlisted in the Regular Army on August 5, 1948, meeting the standards of medical fitness for assignment to the paratroopers. He was recruited directly into an Airborne Division, where he became qualified as a parachutist and gliderist.

(b) He had no physical or mental defects prior to his enlistment, during his enlisted service, or prior to June 11, 1953.

2. (a) He was commissioned a Second Lieutenant in 1951. More specifically, he was discharged as a Sergeant on August 1, 1951, in order to accept appointments on August 2, 1951, as a Second Lieutenant in the Infantry Branch of the Officers Reserve Corps (ORC) and the Army of the United States (AUS). There was no break in service, and plaintiff remained on active duty until his separation in 1959.

(b) Prior to being commissioned, plaintiff was found to meet the standards of medical fitness for appointment as a commissioned officer in the Infantry.

3. During the Korean War [\*101] plaintiff voluntarily served two successive tours of duty in combat as an infantryman, receiving a promotion to First Lieutenant on December 25, 1951, and a battlefield promotion to Captain on July 15, 1953, at the age of 22.

4. He was wounded in action three times. He received a flesh wound to the head in December 1952, and a brain concussion on June 11, 1953, in Korea, requiring his evacuation from Korea and hospitalization in Japan. In November 1954, he suffered a brain injury in an airplane crash which is the subject of this **case**.

5. On July 1, 1954, plaintiff was ordered to the Counter-Intelligence Corps School at Fort Holabird, Maryland.

6. He was injured in the airplane crash on November 28, 1954, and returned to duty on May 11, 1955.

7. He completed his counterintelligence training on August 12, 1955. He performed counterintelligence assignments in California and, beginning April 23, 1956, in the Far East. He was transferred to other work in March 1958 and to the States in July 1958.

8. He resigned his commission in late 1959, and on October 29, 1959, was honorably discharged from the Army.

#### The 1954 Airplane Crash

9. (a) On November 28, 1954, plaintiff [\*102] was seriously injured when an Air Force B-25 bomber enroute from Los Angeles to Washington, in which he was a passenger, crashed while attempting a night landing in bad weather at Friendship Airport in Maryland. Plaintiff was the sole survivor.

(b) He was found 12 hours later in a deep coma. He was taken by helicopter to Bolling Air Force Base Hospital, Washington, D.C.

(c) He remained in a coma for about a week and then continued semi-comatose and in critical condition until about December 24, 1954.

(d) A Report of Accident dated December 23, 1954, addressed to the Commanding General, Second Army, described the extent of plaintiff's injuries as "PERM. IMPAIR." [permanent impairment], and stated that plaintiff was still in serious condition at Bolling Air Force Base Hospital.

10. On January 3, 1955, plaintiff was transferred from the Bolling Air Force Base Hospital to the Walter Reed Army Hospital which had better facilities for treating brain injuries.

11. (a) Plaintiff sustained, in the crash, compound and comminuted fractures of the left zygoma, zygomatic arch, and orbit, and bilateral compound fractures of the mandible. He also suffered a fracture and permanent [\*103] depression of the left temporal skull bone, and a fracture through the base of the brain. Plaintiff was also found to have suffered a severe brain concussion.

(b) The blow to plaintiff's skull injured the underside of the brain, damaging the brain and some of the cranial nerves.

12. Plaintiff's erratic behavior and uncooperative attitude during his recovery led to his transfer to the psychiatric ward at Walter Reed for observation.

13. (a) On January 7, 1955, an electroencephalogram (EEG) which was performed on plaintiff at Walter Reed showed an abnormal record with questionable focal brain damage.

(b) No follow-up or other EEG was performed nor was a lumbar puncture administered.

(c) Plaintiff's earlier 1953 brain concussion was unknown to the hospital and medical authorities.

14. As a result of the injuries to his face and jaw, plaintiff suffered scars, slight restriction of his ability to open his mouth widely, partial paralysis in one eyelid, and some double vision at extreme eye deflections.

Examination by Dr. Edwin A. Weinstein

15. (a) While hospitalized at Walter Reed, plaintiff was examined by Dr. Edwin A. Weinstein, a research neurologist and psychiatrist, [\*104] board-certified in both specialties since 1942, who was to play a large role

in plaintiff's later medical history.

(b) Dr. Weinstein did not treat plaintiff but rather studied his case in the course of his neuropsychiatric study of the effects of brain injuries on social and emotional behavior. He saw plaintiff three or four times during plaintiff's stay at Walter Reed, and included plaintiff's case in an article, and then in a book on the subject. His opinion at that time was that plaintiff had a severe brain injury, but this opinion did not come to light until several years later (see findings 64, 65).

Return to Duty and Diagnosis

16. (a) On May 5, 1955, a medical disposition board recommended that plaintiff be returned to full military duty. In its report, it concluded that plaintiff had suffered a concussion from the accident, which was cured, and that he exhibited a chronic passive-aggressive reaction which existed prior to plaintiff's entry on active duty, and was not caused by the accident.

(b) Together with diagnoses of plaintiff's numerous physical injuries, which the board described as incurred in line of duty ("LOD: Yes") because caused by the plane crash, [\*105] the board's report further reads:

1. Concussion of brain, accidentally incurred in plane crash...; cured. LOD: Yes, CO and Surgeon agree.

11. Passive-aggressive reaction, chronic, moderate, unchanged. LOD: No, EPTS. ["EPTS" means "exhibited prior to entry of service."]

17. Upon his release from Walter Reed on May 11, 1955, plaintiff was returned to full military duty. He was then a student at the Counter Intelligence Corps Center at Fort Holabird, Maryland.

18. (a) Upon completion of his training on August 12, 1955, at the Counter Intelligence Corps School, plaintiff was assigned counterintelligence duties in Los Angeles.

(b) On April 23, 1956, plaintiff was transferred to the Far East.

(c) While stationed in Korea and Japan from April 1956 to March 1958, plaintiff performed field intelligence and counter-intelligence assignments.

Plaintiff's Performance Before the Airplane Crash

19. In an Officer Efficiency Report (OER) for the period from August 20, 1951 to October 17, 1951, when plaintiff was a leadership instructor in Pennsylvania, his

rating officer spoke of his immaculate appearance, mental and physical alertness and enthusiasm: "a dependable and [\*106] responsible officer and executes his duties in a most efficient manner."

20. (a) Plaintiff was a rifle company platoon leader in Korea from November of 1951 to March of 1953, and thereafter an infantry company commander until June of 1953. During these periods, several OERs on his performance said as follows:

(b) An OER for the period from November 11, 1951 to December 13, 1951, praised him for his mental alertness, high moral character, aggressiveness: "has earned the respect of his men in a very short time"; "exhibited a real capability as a combat leader."

(c) An OER for the period from January 23, 1952 to April 18, 1952:

His ability to quickly and effectively make decisions, his keen analysis of the tactical situation, his clear and concise thinking on subject [sic] of any nature indicate a high mental standard which is of great value to the service.

The endorsing officer said:

This officer has demonstrated his bravery and coolness while under fire from the enemy. \* \* \*. This officer is a distinct asset to the service.

(d) An OER for the period from May 14, 1952 to July 10, 1952:

He is one of the finest combat rifle platoon leaders I have known. A very [\*107] fine officer who is a distinct asset to the service.

The comments by the endorsing officer are illegible.

(e) On August 22, 1952, plaintiff's battalion commander wrote him a letter of appreciation in which he said in part:

2. You have served the Battalion with distinction as platoon leader. Many times on outpost positions of extreme danger, you performed with outstanding success and courage.

(f) An OER for the period from December 23, 1952 to February 16, 1953:

Officer is reserved and unassuming in manner. He is aggressive and empirical and tends to be opinionated. His disposition is usually quiet and reserved. In

appearance he is generally neat and soldierly-looking. Mentally he is careful, level-headed and has a highly retentive memory. He performs his duties energetically and deliberately, usually producing excellent results. His fund of professional knowledge is above average. His physical activity is well above average.

There were no comments by the indorsing officer.

(g) An OER for the period from February 17, 1953 to March 26, 1953:

Subject Officer physically strong, mentally awake, with strong moral principles. Respected and liked by both Officers [\*108] and EM of this company. Completed all assignments in a precise manner. One of the most competent young troop leaders of my acquaintance.

There were no comments by an indorsing officer.

(h) An OER for the period from April 3, 1953 to June 11, 1953:

Lt. Nagell assumed command of Company "C" when this unit was in a very low state of combat readiness. Almost immediately Lt. Nagell's forceful, energetic display of leadership changed the entire complexion of this company from one of a defeatist attitude to an inspired combat effective unit. Lt. Nagell lacks somewhat in diplomacy and tact, however this is completely overshadowed by his loyalty and devotion to his command, and to his commander. This officer has almost completed his second hour in Korea and has been on approximately 175 patrols. He is the type of officer that can be given any type combat mission with the expectation that the job will be done in a superior manner. He is thorough and complete in the performance of all his duties to include minor details. This officer was wounded in action and evacuated as his company successfully recaptured and held a portion of OP Harry on the night of 10-11 June 1953. He is [\*109] fearless and a tower of strength in combat. He held his company together as an efficient fighting force in the face of heavy losses and aggressive assaults by the enemy.

The indorsing officer wrote:

This is one of the finest combat officers I have ever known. As a very successful company commander in combat I recommend him for promotion to Captain, and state that I would make every effort possible to get him back in my regiment.

21. Plaintiff did not perform infantry-type, physically-

exerting field activities after June 11, 1953, when he was transferred from infantry to intelligence work.

22. The recommendation for a battlefield promotion to captain, by plaintiff's regimental commander on July 4, 1953:

Lt. Nagell as a company commander has demonstrated in combat outstanding characteristics of leadership and common sense. In the opinion of the undersigned he is outstandingly qualified, both physically and morally, for promotion to the grade of Captain.

Plaintiff Between the Return to Duty in 1955 and the First Letter of Resignation in 1958

23. An OER for the period from August 16, 1955, to February 29, 1956, a period of three months after his return to duty following [\*110] his hospitalization at Walter Reed, noted lack of self-confidence, impatience, nervousness under pressure and a "slight inferiority complex":

Rated officer [then a security investigation reviewing officer in San Francisco] is serious and presents a very neat appearance. He is friendly and courteous toward his superiors but somewhat impatient with himself and subordinates. He is well-grounded and makes a practical approach to his assigned duties. He is diligent and the results of his efforts are excellent. Rated officer was seriously injured in an accident in 1954 and at times appears to have not fully regained his self-confidence.

The indorsing officer wrote:

Rated officer lacks self-confidence and is excessively sensitive. He becomes extremely nervous when under pressure and when upset will often mask his true feelings by calling attention to his rank and status in the army. It is believed that this sensitivity is actually the result of a serious accident which left a facial scar. Rated officer has developed a slight inferiority complex because of this scar. It is further believed that this complex will gradually subside as the officer matures. He performs his duties [\*111] in a sincere, conscientious manner and is a good officer except for temperament.

24. An OER for the period from March 1, 1956 to May 18, 1956, noted that he was undecided, lacked self-confidence, resented comment on his work and became agitated, and handled his personal affairs erratically:

Rated officer is sincere, courteous and dignified. He is

tall of stature, dresses neatly. He is somewhat discontent in his present assignment. His character can best be described as undecided and spontaneous. He is imaginative, well informed, and usually applies himself diligently, whatever his assigned work and obtains excellent results. At times, rated officer appears to lack self-confidence, possibly due to an accident in 1954, at which time he received a serious head injury.

The indorsing officer wrote:

Capt. Nagell has displayed no mental, moral or physical weakness. He sustained a serious head injury in 1954 which resulted in a rather noticeable scar. In the opinion of this writer, he is extremely conscious of this scar and has temporarily developed a somewhat sensitive attitude. He has a tendency to resent constructive or critical comment regarding his work and becomes [\*112] agitated when such matters are discussed with him. Another manifestation is a rather erratic handling of his personal affairs, such as changing residences and drawing ahead on his pay. From an overall point of view, there is a distinct impression that he has not yet found himself and is groping for a "stabilizer."

25. An OER for the period from June 4, 1956 to January 31, 1957, noted a persecution complex: "at times \* \* \* everyone is against him; thinks officers make up stories to discredit him and are 'too nose' about his personal affairs":

Officer is well-read and serious. He is devoted to the Army. He is alert and dignified. At times he has a persecution complex and everyone is against him. He is a hard worker and devotes considerable time to his job. He is always trying to better himself. He has a high moral standard. I have informed the rated officer of his weaknesses including those contained in this report and have suggested means of improvement. Officer is presently physically able to perform in time of war the duties required by his grade and branch.

The indorsing officer wrote:

Captain Nagell is an officer with possible ability in the investigative field. [\*113] His operating techniques and approach to command problems were discussed with him by the rater and the indorser several times previously. He appears to be oversensitive to a facial scar received in line of duty. He is quiet and retiring to a point of remaining aloof from other officers of the group. He has little sense of humor. I believe he is developing a well defined 'persecution complex' where he thinks

some officers make up and report 'stories' to discredit him and other officers are 'too nose-y' about his personal affairs. He did not get along well with his Korean officer counter-parts. Once his personal outlook changes, Captain **Nagell** has the intelligence to be a good officer.

26. In March 1957, plaintiff made "derogatory allegations" against the officers who made the foregoing rating and indorsement. The investigation officer made these comments, noting that plaintiff has been in "a highly agitated state of mind":

An informal investigation is being pursued at the present time, however, indications are that many of the allegations were made while Capt **Nagell** was in a highly agitated state of mind.

Capt **Nagell** was seriously injured in an airplane crash approximately [\*114] three years ago and has a permanent facial scar and damage to facial nerves requiring intermittent medical treatment. This accident has apparently affected his personality as he is not completely compatible to his associates as is normally expected. This could easily [illegible words] opinion from others of personality conflict or complex.

I do feel that his physical condition and assignment to a remote and unfavorable area in Korea influenced and affected Capt **Nagell** and brought about these allegations. I do not feel that he was sufficiently recovered from his injuries for such an assignment although he performed well for the most of his tour.

27. Plaintiff was given a new assignment.

28. An OER for the period from April 4, 1957 to August 8, 1957, noted no unusual characteristics, other than a tendency to be quick-tempered, which the rating officer said was well-controlled.

29. (a) In January 1958, plaintiff's commanding officer caused an official reprimand to be placed in his service record, after plaintiff entertained a female guest in his room at the Bachelor Officers' Quarters.

(b) An OER for the period from August 9, 1957 to January 31, 1958 spoke of a [\*115] persecution complex and an administrative reprimand for an incident showing lack of "judgment, discretion and common sense":

During the rated period, Captain **Nagell** [then a regarding review officer in the Far East] appeared to be physically qualified to perform those duties required of his grade and branch during time of war. He presented

a neat, well-groomed, military appearance, was courteous in manner, and generally received the cooperation of subordinates and other officers, although he has not been a social mixer to the extent that he could be classified as well liked or disliked. His assigned duties concerned a monotonous, routine requirement but called for considerable attention to detail which indicated the need for an officer to participate in and supervise the activity. These duties were performed conscientiously, expeditiously, and efficiently. Captain **Nagell**, on occasion, has appeared to be overly conscious of his rank and position and on the other hand to disregard certain responsibilities called for by his rank and position with regard to his own actions and relations to subordinates and co-workers. On 15 December 1957, Captain **Nagell** committed an act which resulted [\*116] in his receiving an administrative reprimand on 29 January 1958 from the Commanding Officer, 3rd Operations Group. The action of Captain **Nagell** indicated a lack of judgment, discretion, and common sense and failure to observe basic concepts of conduct expected of an officer.

Potentially, Captain **Nagell** is a capable officer, but more responsible assignments commensurate with his rank will require supervision and guidance.

The indorsing officer wrote:

Captain **Nagell** is a tall, neat, well-groomed officer. He is generally friendly but does not appear to have the circle of friends normally enjoyed by fellow officers. Captain **Nagell** is conscientious and willing to perform duties assigned, completing these duties in a normally efficient manner. Captain **Nagell** demanded strict obedience of subordinates but suffered a persecution complex when he was directed or corrected. On one occasion, during the rating period, Captain **Nagell** displayed poor judgment, discretion, and common sense in observing the basic conduct required of an officer. Captain **Nagell** has the potential of a capable officer, however he will require excessive guidance and supervision.

30. (a) Citing the affair [\*117] of the female guest in the Bachelor Officer's Quarters, and plaintiff's impending marriage to a foreign national, plaintiff's commanding officer removed him from counter-intelligence duties.

(b) Plaintiff accused his commanding officer of personal bias in the above action. In a letter to the Adjutant General regarding the charge, a superior officer observed, "I am acquainted with the allegations made by Captain **Nagell** and consider them as malicious,

unfounded, and further indication of his unsuitability as an officer in the United States Army." Investigation of plaintiff's claim by officers senior to his commander failed to establish any basis for this accusation.

31. (a) On February 13, 1958, plaintiff was by his commanding officer referred for hospitalization and observation to the psychiatric service at the U.S. Army Hospital in Tokyo, Japan.

(b) Plaintiff was hospitalized for 5 days. The Clinical Record by the staff psychiatrist, Captain Carl L. McGahee, describes plaintiff's beliefs of wrongdoing by others, his denials of psychiatric problems and his statement that he was cleared of any personality changes secondary to the "skull fracture" in the crash:

The patient [\*118] is a 27-year old, male, Caucasian, unmarried Army Captain, with 9 1/2 years service, who was referred to the Psychiatric Service by his Commanding Officer for hospitalization and observation. He was previously seen in the NP Outpatient Department on 16 January 1958 for psychiatric evaluation \* \* \*. The patient \* \* \* emphasized that he had no problems which merited psychiatric attention. The impression from the initial interview was that the patient seemed somewhat immature in the exercise of good judgment and restraint. No evidence of a neurosis or psychosis was found.

During the interval since the patient was first seen, it has been learned from ancillary sources that the patient had made certain allegations to the Department of the Army directly, circumventing ordinary channels in the chain of command. The allegations are supposed to deal with security violations and other infractions or inefficiencies in his organization. It was also revealed that the patient had instigated investigations of one sort or another at his two previous posts. There was also a report that the patient had shown an exaggerated degree of sensitiveness and withdrawal as a result of minor facial [\*119] disfigurement secondary to an aircraft accident approximately three years ago.

Upon admission to the hospital the patient stated that he had purposely withheld information during the initial interview regarding his recent request for an investigation of his organization by the Department of the Army. He withheld this allegedly because his action was unknown at the time to his own organization, and thus confidential. He had refrained from divulging his past involvement in administrative investigations, again allegedly because he felt that it might be inimical to his interests in the present investigation. During his

hospitalization he spontaneously brought out information regarding all the data known to have been evaded during the initial interview. In Korea in 1956 he contested an efficiency rating which he felt was unjustly low. As a result of his protest he was allegedly informed by the proper authorities that his own letter would be included with the efficiency rating. Later, when assigned to a post in Northern Japan, he allegedly found certain improprieties in the organization which had to do with 'security risks and other matters inimical to the Army and the Government [\*120] of the United States.' He could not give the specific details of the allegations because of their classified nature. According to the patient, he was advised by his immediate superior to just ignore these things. He claims that he received a very good efficiency rating from this officer. The patient subsequently succeeded this officer as Commanding Officer of this particular unit. He feels that he did a great deal toward improving many shortcomings within the unit. However, he allegedly was questioned by a superior from headquarters in regard to certain low efficiency-like ratings he had given to his inferiors. The patient states that he finally felt compelled to report this officer for his alleged efforts to coerce him into upgrading these reports. That incident is allegedly still being investigated. Since his transfer to Tokyo the patient claims that he has made efforts to bring attention to certain infractions and violations of regulations through the ordinary channels. He alleges that these attempts were fruitless, with the result that he finally felt compelled to contact the Department of the Army directly. Though he emphatically defends his position on the specific [\*121] issues, he admits that his methods were 'perhaps not proper.'

Regarding his injury three years ago, he states that he received a skull fracture and was hospitalized at Walter Reed Army Hospital. Upon recovery, he states that he was given a thorough psychiatric examination which cleared him of any personality changes secondary to the injury. He states that he was told that he had a 'passive-aggressive personality', but that this was an EPTS condition. He denies that he experienced any particular difficulty in adjusting to the slight disfigurement. He further contends that he is, if anything, more outgoing in his social relationships since the injury. For any further historical data, please refer to the initial evaluation.

Physical examination and laboratory studies were within normal limits.

(c) With regard to plaintiff's mental status, psychological



testing, and course in the hospital diagnosis and disposition, the Clinical Record contained the following entries:

**MENTAL STATUS:** There is essentially no change from previous evaluation. Verbal productions revealed normal intellectual functioning with considerable effort to exonerate his position on the various points under [\*122] question, but no disorders of thought content or disturbances of perception.

**PSYCHOLOGICAL TESTING:** The patient was administered the Wechsler-Bellevue, Bender Gestalt, MMPI, DAP and Rorshach tests. He possesses a full scale IQ of 115. He was quite guarded in his projective responses. However, there was no evidence of a thinking disorder of neurotic or psychotic proportions.

**COURSE IN THE HOSPITAL:** The patient was cooperative on the ward. He received no medication.

**DIAGNOSIS:** 7930: Observation psychiatric, no disease found.

**DISPOSITION:** Duty.

(d) Captain McGahee also prepared a report of his psychiatric examination clearing plaintiff of mental disease. The report repeated the material quoted above from the narrative summary of plaintiff's clinical record, and concluded with three findings:

The subject officer is so far free from mental defect, disease, and derangement as to be able to distinguish between right and wrong and to adhere to the right and refrain from the wrong.

The subject officer has no mental diseases or defects sufficient to warrant disposition under the provisions of AR 635-40B, or other medical channels.

Any administrative action including [\*123] disciplinary procedure or separation, if initiated by command, is not medically contraindicated.

32. An OER for the period from February 1, 1958 to March 2, 1958, contained a flat recommendation that plaintiff be discharged from the Army for "certain trends of character and conduct brought sharply into focus during recent months." The recommendation, largely based on his charges against his seniors, spoke of his misdirected aggressiveness:

Although Captain Nagell appears to be physically capable of performing those duties required of his grade

and branch during time of war and has shown the capability of discharging assigned duties under close supervision, certain trends of character and conduct, brought sharply into focus during recent months, lead the undersigned to recommend against Captain Nagell's retention on duty. Immediately prior to the current rating period, on 29 January 1958, Captain Nagell was given an administrative reprimand by the commanding officer of this organization. During the current rating period, specifically after 1 February 1958, Captain Nagell, using the pretext of consulting the Inspector General and Judge Advocate concerning the above situation, [\*124] visited senior officers of a higher headquarters in a vindictive and self admitted effort to bring embarrassment upon this organization and its commanding officer. In spite of Captain Nagell's official denial, it is firmly believed his actions were taken because of the reprimand and as an attempt to retaliate for what he believed to be an unfair action on the part of the commanding officer. It is the opinion of the undersigned that the reprimand was an extremely moderate one considering the offense of Captain Nagell and his rather questionable explanation of the event and that any reasonable, responsible officer would have accepted it as such and recognized the necessity of taking appropriate action to maintain good order and discipline.

Captain Nagell describes himself as the kind of person who, when he observes something wrong, must take aggressive action to correct it. His aggressiveness would be a fine quality if properly directed and if consistently applied under all circumstances and not merely to suit his own whims, convictions, and convenience. As it is, Captain Nagell is intelligent but immature, aggressive but motivated by selfish vindictiveness, very proud of his [\*125] rank and record but not always carrying out the personal responsibilities of his rank and position. He is not well versed in the military, he is not willing to accept the decision of senior officers, and has clearly established that he believes discipline, proper channels, and conduct conducive to good order are fine as long as they do not interfere with his own personal opinions, convictions, or convenience. In short, if every officer were to conduct himself in the same manner as Nagell, good order and discipline would be dissipated.

In fairness to Captain Nagell, in his relationship to the undersigned, he always presented himself in a neat, courteous manner and accomplished assigned duties efficiently and expeditiously; however, his activities and conduct discussed above have interfered with his

efficiency and performance of duty. In addition to his defensive actions, seeking out counsel, he has absentee himself from his duties from time to time, claiming such absences were in connection with some investigation being undertaken by him with reference to his conversations with senior officers of a higher headquarters. Consequently, duties assigned him were not accomplished.

**[\*126]** The indorsing officer wrote:

I concur with the remarks of the rating officer. Captain **Nagell** has presented himself in a neat manner and generally accomplished his duties efficiently. However, he is not well versed in the military and is not willing to accept the decisions of senior officers. Captain **Nagell** has indicated, through his actions, that he believes discipline and conduct conducive to good order are only applicable to other persons. Captain **Nagell** lacks maturity, judgment, and common sense; apparently he has been unable to adjust himself to the requirements expected of a Captain of the United States Army.

33. In March 1958, not long after the incident with his commanding officer, plaintiff was removed from actual intelligence work and assigned to personnel administrative duties for the remainder of his overseas tour.

34. An OER for the period April 11, 1958 to July 18, 1958, said this of him:

A slender officer about 6' tall, weighing about 185 pounds, physically capable of performing duties of his grade and branch in time of war. During his present temporary assignment, he has performed all tasks and details assigned him with dispatch, thoroughness, initiative **[\*127]** and meticulous attention to detail. He is a sound, mature officer, loyal, considerate and able to work well under pressure. His morals are above reproach. Recommend this officer attend Associate Advance Course as refresher in his basic branch after completing a tour in a security assignment.

35. In March 1958 plaintiff married a Japanese national at the American Embassy in Tokyo. The couple had two children. The marriage continued until 1963.

36. He returned to the United States in July 1958 and took command of an infantry basic training company at Fort Dix, New Jersey.

October 1958-The First Letter of Resignation

37. (a) By letter dated October 5, 1958, plaintiff

tendered an unqualified resignation from the Army seeking an honorable discharge, to be effective December 5, 1958.

(b) He wrote that he was resigning because his assignment precluded the efficient performance of his duties and adversely affected his wife's welfare, and because of the charges of prejudice and malfeasance he had made against his Commanding Officer in Japan, after critical OER's.

38. (a) Two weeks earlier, on September 22, 1958, he had had a resignation physical at Fort Dix, New Jersey.

**[\*128]** (b) The standard form Report of Medical History prepared at that time, certified by plaintiff to be true and complete to the best of his knowledge, contained a block entitled "17. STATEMENT OF EXAMINEE'S PRESENT HEALTH IN OWN WORDS." Typed in that block was the sentence "I am presently in excellent physical condition and my military profile is 111111."

(c) The form contained the question "34. HAVE YOU EVER HAD ANY ILLNESS OR INJURY OTHER THAN THOSE ALREADY NOTED? (if yes, give complete address of doctor, hospital, clinic, and details)." An "X" was typed in the adjacent box signifying a yes answer, and these details were typed in the space provided:

34. Pneumonia 6 Dec 49, Ft. Bragg, N.C.; WIA 25 Dec 51, Korea (grenade fragments right knee, right leg, right foot); WIA 6 Dec 52, Korea (mortar fragments face, left wrist); WIA 11 Jun 53, Korea (mortar fragments body concussion); Plane crash 28 Nov 54, Baltimore, Md. (lacerations & cuts of face, body, concussion, fracture of right & left lower jaw, atresia of left ear canal).

(d) He marked an X, indicating NO. to the question whether he had ever had nervous trouble of any sort.

(e) In an attached Consultation Report attached **[\*129]** to the Report of Medical History, Dr. Scavone of the Surgical Clinic wrote:

Patient states he has no disability at present; however, for sake of complete documentation, will obtain ENT and Eye clearance.

And, Dr. Buesing, Chief of the Surgical Service wrote:

Attention is invited to Form #513 from the Dental Clinic, Ear Clinic and Eye Clinic. There is no apparent physical limitation indicating the need of Medical Board action at this time.

39. By letter dated October 14, 1958, plaintiff requested that his tender of resignation of October 5, 1958, be withdrawn. He gave as his reasons:

(a) I have been informed that the conditions as described in paragraph 2a of my Tender of Unqualified Resignation [re revocation of plaintiff's specialty rating and assignment under conditions precluding his efficient performance and adversely affecting his wife's welfare], will not be permanent in nature.

(b) I have been informed that the matter referred to in paragraph 2b of my Tender of Unqualified Resignation [charges of bias by his rating officer overseas] will be thoroughly investigated.

#### 1958-1959--Plaintiff's Performance, Continued

40. The first OER on plaintiff as a battalion [\*130] staff officer in a training regiment in New Jersey, for the period October 30, 1958 to January 31, 1959, spoke well of him:

A perennially calm and level headed officer of superior intelligence who is mannerly, neat and dignified in bearing and has a growing reputation for dependability and upstanding moral integrity. He is always physically alert and energetic and is capable of performing war time duties required of his grade and branch. In performance, he has demonstrated considerable initiative, excellent judgment, and sound knowledge of military subjects. He is essentially a tactful team worker with a cooperative spirit and an instinct for organization, who leads with deceptively quiet enthusiasm, infinite patience, and understanding. He has thereby accomplished highly effective results.

The indorsing officer wrote:

I concur in the remarks of the rating officer; however, I consider the rating in section VII to be inconsistent with those awarded in Sections VI and VIII. Capt Nagell is a quiet, reserved officer who excels at duties requiring research, investigation and analytical planning. He is a quick and logical thinker. He has strong moral fiber and has the courage [\*131] to steadfastly defend his actions and convictions. This officer always presents a neat and military appearance.

41. In the next OER in his new post in New Jersey, for the period from April 9, 1959 to August 16, 1959, both rating officers spoke of his tactlessness, temper, obnoxious attitude and inability to get along with people:

Captain Nagell is a tall slender officer of medium build

and is capable of performing his duties in time of war. He is meticulous and slow but is capable of producing excellent results in administrative type duties. He is lacking in tact and on occasions is rude. He performs best when given one assignment and allowed to pursue it independently; if pushed, he is apt to lose his temper. Captain Nagell is conscientious and dependable and would make a very effective officer provided he can learn to control his temper and to employ tact in his daily performance of duty.

The indorsing officer wrote:

This officer is neat in appearance and has excellent military bearing. He is an intelligent officer but demonstrates very little initiative in the performance of his duties. Captain Nagell is tall in stature and appears to be physically capable of carrying [\*132] out his duties which are required of an officer of his grade and branch in the field in time of war. His behavior pattern has made it obvious that he does not know how to get along with people. If he controlled his temper and made a radical change in his most obnoxious attitude, he would undoubtedly be of great value to the service. Captain Nagell performs his duties in an excellent manner.

#### August 1959--Resignation

42. (a) By letter dated August 31, 1959, plaintiff again tendered an unqualified resignation from the Army.

(b) As his reason, plaintiff wrote:

I desire to tender my resignation because I wish to further my civilian education. It is not possible for me to pursue the curriculum of which I am desirous, while on active duty. Also, compassionate reasons of a personal nature exist for desiring to tender my resignation at this time.

(c) The letter ended with the request "that I be considered for disability compensation for applicable LOD service-connected injuries."

43. (a) In connection with this second letter of resignation, plaintiff underwent a resignation physical over four days in August 1959.

(b) Neither plaintiff's separation physical in September [\*133] 1958 nor his separation physical in August 1959 included examination by a psychiatrist or a neurologist.

(c) In the standard medical history questionnaires in

both separation physical examinations, plaintiff denied ever having suffered nervous trouble of any sort or having been a patient in a mental hospital.

(d) He was found physically qualified and was cleared for separation.

44. On October 29, 1959, plaintiff was honorably discharged from the Army.

#### Civilian Life

45. After his discharge in October 1959, plaintiff was on December 14, 1959, following a physical examination, found medically disqualified for employment as a policeman. The record does not contain direct evidence of the basis for the decision. In a medical examination at the VA in 1960, plaintiff said it was because of a tic in his left eye.

46. (a) From December 1959 to March 1961 plaintiff was employed as an investigator with the California Department of Employment. He got the job on a temporary basis, without a physical examination.

(b) When he was permanently employed in that capacity six months later, he was permitted to have his medical examination performed by a private physician.

(c) [\*134] He was discharged, he told a psychiatrist in 1964, because he "ma[de] an indiscreet statement to the press."

#### The VA Rating - March 1960

47. (a) On January 29, 1960, plaintiff applied to the Veterans Administration for a disability rating. In his application, he described his 1954 brain injury as a "concussion of the brain."

(b) On March 17, 1960, plaintiff had a Medical Examination for Disability Evaluation at the VA Outpatient Clinic at Los Angeles, California. Plaintiff was examined by several specialists.

(c) Plaintiff was examined by Dr. A. Trevisano, a neuropsychiatrist. In the History portion of Dr. Trevisano's report, he said that plaintiff had spoken of suffering a mild brain concussion in June 1953. The History does not refer to a brain concussion in detailing the injuries plaintiff incurred in the 1954 airplane crash.

(d) A report on an EEG on plaintiff stated that readings, taken from all areas of the cortex, were normal. The report mentioned brain concussions in 1953 and 1954.

(e) Dr. Trevisano's report contained these comments and diagnosis:

Examination reveals a tall, slender, and healthy looking man who is alert, attentive, intelligent and in [\*135] good contact. He is not confused, clouded or retarded. His memory is unimpaired. His mood is congenial, sincere and smiling. His affect is appropriate and his conversation is rational and relevant. The patient gives the above history and states that he feels 'okay, sir.' He denies any symptoms of headache, dizziness or convulsive attacks. However, if he drinks 6 bottles of beer and tries to concentrate his vision on one object or TV, he will see double. The diplopia disappears when he looks elsewhere or if he goes out in the fresh air. The patient expresses no delusional trends or abnormal ideas. The examination shows no deterioration nor psychotic or psychoneurotic manifestations. He states that he has not been aware of any personality change. He is competent.

(f) In the Rating Decision dated May 16, 1960, plaintiff was found to have nine service-connected conditions, several characterized as combat disabilities and compensable. Plaintiff was found to be competent. Among the nine service-connected conditions listed was a brain concussion. The brain concussion and the fractures to the jaw were listed as service-connected and less than 10 percent disabling. No compensation [\*136] was payable for them.

(g) On July 8, 1960, VA awarded plaintiff a 64 percent (60 percent compensable) combined wartime disability rating.

48. Following the VA's award of a disability rating, plaintiff continued to consult various VA medical facilities for treatment of his service-connected disabilities, including psychiatric symptoms that had not been adjudicated by the VA as service-connected. Until 1968 (finding 91), the VA continued to view plaintiff's 1954 head injury as a cured brain concussion.

#### Letter to a Senator

49. (a) Meanwhile, on May 30, 1960, plaintiff wrote to United States Senator Thomas H. Kuchel seeking assistance in obtaining "a complete and adequate physical examination and potential retirement from the Army."

(b) In his letter to the Senator he suggested that the cursory nature of the physical examination prior to his separation was the reason it failed to reveal disabling

neurological damage:

My Pre-Resignation Physical Examination was hurried and incomplete to say the least. As a prime example, even though I had received a neurological injury in combat, and another-very serious--neurological injury in the aforementioned airplane crash, I did [\*137] not receive examination by a Neurologist.

(c) On July 1, 1960, the Adjutant General responded to Senator Kuchel that the Surgeon General's careful review of plaintiff's physical examination at his resignation had considered and rejected his request for disability compensation, and that if plaintiff believed an injustice had been done he should submit substantial evidence thereof to the Army Board for the Correction of Military Records.

#### May 1962 - Suicidal Tendencies

50. (a) On May 18, 1962, plaintiff was admitted to the VA Hospital at Los Angeles because of exhibited homicidal and suicidal tendencies.

(b) Dr. Harvey Weintraub, M.D., a psychiatric resident, diagnosed "acute anxiety reaction with depressive features in a markedly passive aggressive character, passive dependent type."

(c) Plaintiff did not disclose to Dr. Weintraub his head injuries in the military. The patient's history, as set forth in the psychiatrist's consultation report, does not include plaintiff's head injuries.

(d) Plaintiff was not considered an active homicidal or suicide threat, and was allowed to discharge himself after three days. He was referred to an outpatient psychiatric clinic.

#### [\*138] July 1962 - Suicide Attempt

51. (a) In July or August of 1962, plaintiff shot himself in the chest. There is no direct evidence of the episode; the finding is based on plaintiff's subsequent medical histories and on statements in an opinion of the United States Court of Appeals for the Fifth Circuit discussed below.

(b) Once, plaintiff described this shooting as done by an unknown. At another time he said his wife shot him. No scars of the shooting are recorded, although other scars are noted. It is most likely that he shot himself.

#### 1962 - Reenlistment Effort

52. (a) In November 1962, plaintiff wrote to the Adjutant General inquiring about reenlistment. After detailing his previous service, he wrote:

I would like to know if it is again possible for me to obtain a commission as a captain in the USAR, and the chances of being ordered to EAD as a captain. \* \* \* All of my service was honorable, my resignation was unqualified (SPN520), and I was discharged with a physical profile of A-111111.

(b) An Army representative responded unofficially in December 1962 with the opinion, based upon a review of plaintiff's past efficiency reports, that the changes of favorable [\*139] action on his application were not good.

#### December 1962--The VA Hospital in Bay Pines, Florida

53. (a) On December 20, 1962, plaintiff entered the VA hospital at Bay Pines, Florida, where he was placed under psychiatric observation and on December 28, 1962, was examined by Dr. James Martin, Acting Chief of the Psychology Service. He seems to have disclosed his full medical history.

(b) Dr. Martin's Psychological Report dated December 28, 1962, reveals that plaintiff spoke with apparent frankness about the effects on him of the injuries in the airplane crash:

#### BACKGROUND DATA:

Patient relates that he was in an airplane accident in November of 1954. He reports being unconscious for some 20 days. After a considerable period of hospitalization, the patient was returned to full duty.

MENTAL STATUS: The patient has a rather interesting history. At the time of the clinical interview, he appeared to have a need to talk, and so considerable time was spent in interview and conversation. At one time, the patient became tearful. Patient describes good adjustment, both civilian and military, up until the time of his accident in 1954. He states he was the youngest captain in [\*140] the Army during the Korean Conflict. He was undergoing training in the Intelligence Service at the time of the accident. Following the accident, patient noted that his efficiency began slipping, and that he had tendencies to become suspicious and irritable.

He finally decided to resign his commission before he was retired for disability. Patient mentions several periods of evaluation and observation in Army hospitals.

After his plane wreck, he spent several days in a psychiatric unit for observation. Patient states that at that time he was given a diagnosis of 'passive-aggressive reaction.' Later, following some difficulties in interpersonal relationships in Korea while serving there, the patient was transferred to an Army hospital in Japan for further observation. Here, he states, he was diagnosed as a 'passive-aggressive personality.'

As mentioned above, patient insists that he had a good adjustment prior to the head injury. He states that his IQ on the Army general classification test was 145. Following the accident, however, it was difficult for him to learn, concentrate, or remember. He denies seizures, but alleges amnesic episodes. He states that sometimes his [\*141] 'mind goes blank' when talking with someone.

During the interviewing and testing, the patient appeared to be under some tension. There were times when it appeared as though he were in a sub-stuporous state. He would not reply to questions, or would apparently not hear the examiner. He seemed to have some difficulty in recall of items. At other times, the patient's thinking was quick and accurate.

The patient's test performance showed inefficiencies of thinking. Although the Bender-Gestalt designs were produced in a rather perfectionists manner, there was some hesitancy, and possibly confusion, in initiating the drawings. Patient would make several random movements, or would appear unsure as to how to actually go about the motor performance. Once started, however, his drawings were performed at a well-above average level. On the Porteus Maze Test, the patient also showed some inefficiencies of performance. Quick and accurate movements alternated with some impulsive and uncritical tendencies. IQ equivalent on the Porteus Maze Test was 93, low-average, which is considerably below what would be the patient's potential.

The Rorschach Test shows a conventional pattern [\*142] of thinking, with no bizarre or unusual ideation. Perceptual accuracy is good, and there were no indications of inability to comprehend this examination. Thinking, however, appeared slow, and there was the so-called 'staccato effect,' with quick and accurate perceptions alternating with slow, labored thinking and inefficiency. The patient had difficulty in integrating separate elements of a blot into a meaningful configuration, and his level of intellectual functioning, as estimated by this test, is no better than average.

(c) The Psychological Report in its sections on Personality Structure, Impressions and Conclusions stated as follows:

PERSONALITY STRUCTURE: The patient gave a total of 17 responses to the Rorschach. There are no signs of any major thinking disturbance. Ego control is adequate, and there is sufficient appreciation of social values and expectations. There are indications that the patient has many aggressive impulses and thoughts, and probably fears of releasing these impulses, and of being punished for them. Elements of passivity and dependency, alternate with signs of aggression and hostility. The patient is probably a basically impulsive individual, [\*143] a facet of his personality which he attempts to control consciously, with only partial success.

IMPRESSION: This appears to be a very interesting case for diagnosis. There are many psychological test signs of inefficiencies of thinking. Substuporous mental states are suspected, and there is a retardation of thought. Level of mental functioning is no better than low-average at the present time, although there are many indications of previously superior mental ability. The psychological testing does not, however, resemble that given by individuals who have impairment of brain tissue. To this examiner, the patient's history, behavior, and test performance strongly resembles that seen in epileptic individuals. The possibility remains that this is a beginning of a paranoid break with reality, possibly a paranoid schizophrenia, although the patient certainly shows no clinical signs of psychosis at the present time.

CONCLUSIONS: In addition to the reported history of headaches, amnesia, irritability, and confusion, the patient shows on psychological testing many signs indicative of inefficiencies of thought, delayed thinking, inability to integrate, and a waxing and waning of [\*144] alertness, which resembles that seen in epileptoid individuals. It is recommended that neuro-psychiatric studies be undertaken to rule out this condition.

(d) On December 28, 1962, plaintiff was given an electroencephalographic examination. The results were borderline abnormal.

(e) A referral of plaintiff from the Neuro-Surgical Service of the hospital to Dr. P. C. Clark, Chief of the Psychiatric Service, took place in early January. In the consultation request, dated January 14, 1963, Dr. S. M. Wilkes of the Neuro-Surgical Service described the reasons for the request as follows:

This patient, as is known, is a depressive reaction which probably originated following his injury in 1954, or subsequent injury to his head in 1955. As discussed with Dr. Clark this a.m., this man shows no neurosurgical problems and could be discharged insofar as this is concerned. However, he has shown various degrees of amnesia which was one of his major difficulties when he came in. While the Surgical Service is admittedly not in a position to state incompetency in any individual, having seen this individual since December 20, it would be my opinion that he is not competent to care for himself. [\*145] In the interest of the individual, I do not believe that this man should be sent out of the hospital with no one to care for him. Further opinion is requested. This man has indicated suicidal tendency most recent 1/12/63.

(f) Dr. Clark of the Psychiatric Service examined plaintiff, and his consultation report, also dated January 14, 1963, said of plaintiff:

He is emotionally unstable and continues to be aggressive, critical and paranoid. This type of behavior has been noted since being in the service in 1954 or earlier.

Dr. Clark made the following diagnosis:

Diagnosis: - Chronic brain syndrome associated with brain trauma, cerebral concussion in 1953 & 1954, with behavioral reaction-passive aggressive type with paranoid traits.

(g) Plaintiff was then seen by a staff psychiatrist, Dr. M. L. Schwartz.

For several days, plaintiff refused to discuss his symptoms, saying they were private business, and "was somewhat withdrawn on the ward and showed poor interpersonal relationship." He then changed and "a better rapport was established." Dr. Schwartz's report continues:

He seemed well oriented in all spheres. Speech was of normal flow and coherent. He showed no flight [\*146] of ideas. He denied delusions or hallucinations. No suicidal or homicidal tendencies were elicited. He states that his main trouble is 'headaches which I have had continuously recently.' He also complains of 'dizziness, and at times an unsteady gait.' These symptoms are sometimes associated with a transient loss of memory. During the interview his retention and recall were good. Sensorium was intact. When I asked him what he thought was wrong he said 'I think my

trouble is physiologic.' When I asked him what he meant by physiologic he stated 'My trouble is all due to my head injury.' He felt reassured when I told him that I thought some of his symptoms were due to that mishap. Although he smoked continuously during the interview he related quite a story about his Army activities and his domestic situation, but was somewhat evasive about the trouble he was in while in California, especially the trouble involving the F.B.I. and some shooting event. He was presented before the Psychiatric staff and at first was somewhat reluctant to answer questions and when asked a question that was not due to his liking he would relate 'this is my private life.' During the Staff Conference he [\*147] said 'you Psychiatrists are all stereotyped.' During the Staff Conference, however, his mood was one of friendliness and not one of depression, although he will occasionally get irritable when supposedly asked a personal question. After the interview at the Staff Meeting he approached me saying 'that he did not want any of the nurses aides to know about his business and that was the reason why he refused to give out any information.' He further related that he keeps everything in a little book that he has done or said because he has a poor memory, although some of these memory deficits were not brought out in the interview with him. He was advised to stay on the ward for another week or two for further observation but he felt that he did not have to since nothing more could be done for him. He also said the reason for him wishing to leave was that 'he had a job in mind and was going for an interview.' Since his insight and judgment were unpredictable at times and although no psychotic behavior was noted, it was felt that he could leave the hospital AMA. In view of the chronic nature of his illness the future prognosis must be guarded as to a possibility of a permanent future social [\*148] economic adjustment. Patient discharged A.M.A. on 1-22-63.

Plaintiff refused Dr. Schwartz's suggestion that he remain in the hospital for further observation. Dr. Schwartz's "Final Diagnosis and Present Status," approved by Dr. Clark, continues as follows:

## 5. FINAL DIAGNOSIS & PRESENT STATUS

1. Chronic brain syndrome associated with brain trauma (by history of) with behavioral reaction characterized by passive aggressive and paranoid features. Treated. Unchanged.

(a) Precipitating Stress: Unknown.

(b) Predisposition: Moderate, by history of, frequent hospitalizations and interviews for his present type of

behavior.

(c) Psychiatric Incapacity: Minimal. Patient is competent at this time.

(h) Plaintiff was discharged from the Bay Pines Hospital on January 22, 1963.

January 1963 - Letter to the President

54. (a) On January 2, 1963, plaintiff wrote to the President of the United States, complaining that the Army's reply to Senator Kuchel avoided the issue of the adequacy of the resignation physical examination, and that the evidence necessary to support his claim was a matter of record in the Army:

In their written answer to Senator Kuechel, the Army avoided [\*149] the main issue--that of a complete physical examination prior to my discharge. The 'physical examination' which was mentioned in their answer to Senator Kuechel as having been so carefully reviewed by the Surgeon General, was a pre-resignation physical examination and incomplete to say the least. I believe that my letter to Senator Kuechel was quite explicit in this respect.

The enclosed answer from the Army also indicates that if I believe there has been an error or injustice in my case, I should request a review by the Army Board for Correction of Military Records--and submit substantial evidence supporting my claim. How absurd can they be. I have no "evidence," substantial or otherwise. What I claim is a matter of record filed away among the maze of red tape within the Army establishment itself, not just in my so-called medical records. [Emphasis in original]

(b) Plaintiff wrote, also, that since the airplane crash he had never been the same and that his condition became worse as "years went by":

In 1954 I was the sole survivor of a B-25 bomber crash in which I sustained a serious head injury. Since then I have never been the same--mentally or physically--although [\*150] the Army returned me to a general duty status and assigned me to military intelligence. I was aware of my condition but pride made me try to 'hang on.' Eventually, many of my superiors and co-workers could see that there was something wrong. I know my subsequent military efficiency reports and other records, some of which are buried under the wraps of security classifications, substantiate this. My condition became worse as the years went by.

(c) This letter was forwarded to the Army, and the Adjutant General replied that plaintiff's final physical had been carefully reviewed before the Surgeon General found him physically qualified for separation. The Adjutant General again suggested that plaintiff apply to the Army Board for the Correction of Military Records.

February 1963--Application to the Correction Board

55. (a) On February 3, 1963, plaintiff submitted to the Army Board for the Correction of Military Records (ABCMR) an "Application for Correction of Military or Naval Record," requesting that he be given a complete and adequate physical examination by the Army, to include a neurological examination, and if applicable to receive a disability retirement from the Army.

[\*151] (b) In Item 11 of his application to the ABCMR, plaintiff explained that he considered his record to be in error or unjust, largely because he was not on his resignation given a neurological examination, despite his neurological injury in the airplane crash, which would, he intimated, have resulted in a medical disability discharge:

During the Korean Conflict I was wounded three times, one of such wounds resulting in severe concussion of the brain. Subsequently, in November 1954 I was the sole survivor of a B-25 bomber crash in which I sustained, among other injuries, a fractured skull and severe concussion of the brain.

After my hospitalization.... I could not physically perform my assigned Infantry duties in an efficient manner and repeated requests for reassignment to less arduous duties met with negative replies. I tendered an unqualified resignation on August 31, 1959.

In paragraph 8 of my letter of resignation I requested that I be considered for disability retirement. I was given a pre-resignation physical examination at Fort Dix, New Jersey. During this examination I was given five (5) different Consultation Sheets (Standard Form 513), one each to the Surgical [\*152] Clinic, Neurosurgical, EENT, Ophthalmology, and Dental Clinics.

Such pre-resignation physical examination was hurried and incomplete to say the least. As a prime example, even though I had received a serious neurological injury in combat, and another--very serious--neurological injury in the aforementioned airplane crash, I was neither examined by a Neurologist nor was I sent to the Neurology Clinic, even though I was referred to the Neurology Clinic on one of the aforesaid Consultation



Sheets. A medical doctor (Lt. Col. E. Scavone) who examined me at his clinic upon seeing my Consultation Sheet to the Neurology Clinic, literally threw it into a waste-paper basket and stated words to the effect that it was not necessary for me to see a Neurologist at the time as I would be required to undergo a final-type physical examination prior to my discharge from the Army. He added, at that time I would be given a complete examination by a neurologist, and appear before a Medical Board.

I did not receive the final-type physical examination to which he referred, or any other physical examination, nor did I appear before a Medical Board, prior to my discharge on October 29, 1959. I did [\*153] not receive any answer, verbal or otherwise, to my request for disability in my letter of resignation. I was told at the time of my discharge that I would receive my Army retirement by applying directly to the Veterans Administration after I was discharged. On May 25, 1960 Medical Authority at the Veterans Administration said that they were surprised that I was not medically retired from the Army, but advised me that I must apply directly to the Army for reexamination.

I believe that I have been quite explicit in this respect in such correspondence. For some reason, as indicated in the attached carbon copy of a letter received from Brig. General Wickham, my pre-resignation physical examination is continually referred to as a 'final-type' physical examination.

I cannot understand how General Wickham can state that my 'resignation was approved only after careful review of your final type physical examination, etc.,' when such examination was neither 'final type,' nor was it complete.

I have been turned down from many jobs because of my wartime wounds and injuries. The last time that I was employed was on June 8, 1962. I am asking the Army to examine me only for conditions [\*154] which were incurred in the Line of Duty while in the Army - conditions which I was promised would be examination [sic] prior to my discharge. [Emphasis in original.]

(c) In support of his application, plaintiff cited "Research and Medical records" held by Dr. Weinstein of the Walter Reed Army Institute of Research, medical records at Bolling Air Force Base Hospital, and "neurosurgical and psychiatric records" dated Jan 1-May 10, 1955 at Walter Reed Army Hospital, and the VA's medical records.

56. (a) On June 10, 1963, Mr. Raymond J. Williams, Executive Secretary of the ABCMR, requested from the Physical Standards Division of the Surgeon General's Office a review of plaintiff's application, military and medical records, and an opinion for the Board on the medical issues raised by plaintiff.

(b) On June 13, 1963, the Physical Standards Division replied negatively:

2. Review of the records including the VA examination of 3-17-56 reveals a history of concussion due to an explosion in 1953 and a concussion accidentally incurred in a plane crash in 1954. A medical board 5 May 55 found him fit for duty. Examination on May 58 and retirement examination 26-31 Aug 59 showed [\*155] no unfitting conditions warranting disability retirement. This is confirmed by the VA examination which included an NP survey. While the VA exam indicated several ratable conditions none were unfitting.

4. The opinion is expressed that the available records do not indicate a basis for additional neurosurgical or neurological examination or medical board action; that at the time of his resignation in 1959 the residuals of his injuries did not support a finding of unfitness and that he suffered no physical or mental impairment of such a nature or degree of severity which would have warranted his retirement of disability under the rules, laws, regulations and policies then in effect.

(c) Accordingly, the ABCMR denied his application on July 10, 1963. The Adjutant General wrote to plaintiff, on July 26, 1963:

A review of your records failed to reveal the necessity for further medical examination.

The Army Board for Correction of Military Records may deny an application if a sufficient basis for review has not been established.

After examining and considering your Army records and facts you presented, the Army Board for Correction of Military Records determined on 10 July [\*156] 1963 that insufficient evidence had been presented to indicate probable material error or injustice; accordingly, your application was denied.

In the absence of new and material evidence tending to show existence of error or injustice in the military records, further consideration by the Board is not contemplated.

(d) The Physical Standards Division report, upon which the Correction Board relied, gave no indication that any records of Dr. Weinstein were consulted. The report's reference to a VA examination of "3-17-56" is an erroneous reference to the VA examination of March 17, 1960. The report's reference to an examination of "22 May 58" is an erroneous reference to plaintiff's first resignation physical examination which took place September 22, 1958.

#### The Bank Shooting Affair--1963-68

57. On September 20, 1963, plaintiff entered the State National Bank in El Paso, Texas, and fired two shots from a .45 caliber pistol into a wall. He was arrested outside the bank immediately afterward and charged with entering a federally insured bank with intent to rob and with attempting to commit robbery.

58. The facts are best briefly stated in two opinions of the Fifth Circuit [\*157] discussed again below (reversing his conviction after two trials):

The record shows that late in the afternoon of September 20, 1963, appellant went into the State National Bank of El Paso, Texas. He asked where travelers' checks could be obtained, and upon reaching the proper cage asked the teller, a young woman, for one hundred dollars worth of checks in ten dollar denominations. The teller moved to get them, whereupon *Nagell* said, "Lady, this is a real gun." She immediately ran, and appellant took several steps away from the cage, fired two shots into the wall at a height of about seven feet, not aiming at the teller, and ran out of the bank. He was followed by a police officer who happened to be in the bank at the time. He was, without difficulty, arrested at a time when he was about to leave in an automobile which he had left parked near the bank.

[\*Nagell v. United States\*, 392 F.2d 934, 936 \(5th Cir. 1968\)](#) (quoting [\*Nagell v. United States\*, 354 F.2d 441, 442 \(5th Cir. 1966\)](#)).

59. His reason for the entry into the bank, and the shooting, plaintiff told a psychiatrist three years later (finding 77(g)) was that he had tried to get into a VA Hospital and they had refused [\*158] him and that he had entered the bank and attempted this holdup in order to force the VA to take him.

60. Evidently due to unusual behavior exhibited by plaintiff, the Government recognized the possibility of

insanity shortly after his arrest. On motion of the U.S. Attorney, stating that there was reasonable cause to believe that plaintiff was mentally incompetent, the court ordered a psychiatric examination. When plaintiff refused to cooperate with a court-appointed psychiatrist, the court ordered plaintiff confined, for a determination of competency, at the Medical Center for Federal Prisoners (MCFP) in Springfield, Missouri.

The Medical Center for Federal Prisoners (MCFP).

61. (a) Plaintiff was admitted to the Medical Center for Federal Prisoners on February 3, 1964 for psychiatric evaluation.

(b) He refused to cooperate in the examination, and the examining psychiatrist, Dr. H. Wayne Grotfelty, Chief of the Psychiatric Service, noted that plaintiff's lack of cooperation complicated diagnosis.

(c) The report on plaintiff, dated February 10, 1964, by Dr. Grotfelty, contained the following diagnosis:

IV Diagnosis: Mental Illness, undetermined, in a man utilizing [\*159] passive aggressive tactics.

(d) The report contains the following description of plaintiff's mental status:

III. MENTAL STATUS: It was impossible to perform a complete psychiatric examination as to his thinking processes but here he is cooperative with officials other than medical personnel. In discussing his *case* he understands that he has a charge against him and the various legal procedures that are relevant, and he states he can and will cooperate with counsel and assist in his defense for the plea that he will make and try to prove that he is not guilty of the charge. He recognizes the fact that there is a U.S. District Attorney and his role as well as the role of the judge and other officials of the court.

It is not known if this man has a mental illness but from his actions here and in this interview, it is believed he can factually understand the charges against him and assist in his defense as he has the capacity to do so at this time. Whether he will use it is not known. It is my opinion that he will cooperate with his attorney.

He states that he was worked as an Intelligence Officer in the past and he realizes how various Government agencies will use and [\*160] imply the use of psychiatric reports.

62. (a) Plaintiff was next examined on February 14,

1964, by three members of the neuropsychiatric staff of the MCFP, Drs. Glotfelty, Weiland and Parlato. The report of that examination by Dr. Gustave Weiland, staff psychiatrist, agreed with the diagnosis of mental illness, undetermined, by a man who is utilizing passive aggressive tactics; it concluded that the findings would support an adjudication of competence:

In giving another possible reason for his commitment for observation, he outlined his war injuries in Korea and previous treatment at Walter Reed General Hospital in Washington, D.C. There was a psychiatric evaluation there because of head injuries. He states that there was a good reason which he cannot reveal which caused him later to seek admission to another psychiatric hospital unnamed but he now states that the reasons given then were part of a necessary farce.

In describing this man's interview behavior, his approach to the examination was relaxed and collected. He was consistently rational and coherent. He related well to the examiner and showed himself to be oriented in the four spheres of time, place, person and [\*161] a clear understanding of his present situation.

The Staff agreed in the diagnosis of mental illness undetermined in a man who is utilizing passive aggressive tactics in handling the present court situation. From his behavior while under observation and from his interview, this man presently appears to possess the capacity of rationally understanding the proceedings against him and of assisting in his own defense. He is ready for competency hearing. The findings would support an adjudication of competence.

63. (a) On May 6, 1964, plaintiff was convicted of the charge.

(b) During the trial, several medical witnesses testified. One called plaintiff schizoid, one called him paranoid. All agreed that plaintiff could distinguish right from wrong when he entered the El Paso bank. No reference was made to any brain damage in the airplane accident of 1954; it was unknown to plaintiff's counsel. [354 F.2d at 445-46](#).

(c) Plaintiff vociferously denied that he had any mental disease or incapacity. He repeatedly said he would not accept insanity as a defense, and would not cooperate with his counsel in asserting such a defense. He denied that he had ever been treated by a psychiatrist. [\*162] [354 F.2d at 444-45](#). During the trial, "[he] would interrupt witnesses on the stand, calling them liars, and he would jump up and shout that he was not insane." [Id. at 445](#).

64. (a) A full evidentiary hearing was held on a motion for a new trial, after plaintiff finally told his counsel something of his history and it also had appeared that an FBI agent had interviewed the Dr. Weinstein who had examined plaintiff at Walter Reed in 1954 (finding 15).

(b) The first of the two Fifth Circuit opinions by Judge Coleman, described the discovery of the relevance of Dr. Weinstein's knowledge of plaintiff ([354 F.2d at 446](#)):

The second witness was an F.B.I. agent who had constantly been engaged in the case since the occurrence first took place on September 20, 1963. He testified that he first learned of Dr. Edwin A. Weinstein in an interview with the defendant. He then caused Dr. Weinstein to be interviewed by an Agent in Washington. This information, and the report received, had not been tendered to counsel for defendant prior to or during the trial on the merits, although the government, in good faith, had assured counsel that all documents material to Nagell's case would be made [\*163] available to them.

65. (a) Dr. Weinstein examined plaintiff in the El Paso jail.

(b) Judge Coleman's opinion describes Dr. Weinstein's qualifications ([354 F.2d at 446-47](#)):

[F]or the past ten years he had been a consultant in neurology and psychiatry for the Walter Reed Army Institute of Research, for the National Naval Medical Center, and the Veterans Administration. For the past five years he had been working on a research contract with the Surgeon General's Office on the investigation of behavior changes following brain injuries. He was the author of many articles on the effect of brain injury. He wrote the chapter on changes of behavior after brain injury in the Handbook of Psychiatry. He had written a monograph concerning the denial of illness in the behavior of subjects following brain injury.

Dr. Weinstein's further qualifications as of the time of his testimony on the trial of this case are described in finding 105.

(c) Continuing, the opinion describes Dr. Weinstein's testimony as follows:

He testified that in his research project with the Walter Reed Hospital he had been familiar with the case of Richard Nagell. He had given the Nagell case intensive [\*164] study. He had attempted to keep in

touch with Nagell, after his release from Walter Reed, but could obtain no reply to his inquiries. He said Nagell had apparently suffered a fracture through the base of his brain, which injured the underside of the brain, and not only damaged the brain but some of the cranial nerves coming off the brain. He described Nagell's 'rather long, stormy, and tragic course' in the hospital. He had a fracture through the orbit and a broken jaw. There was extensive laceration and scarring of the face. He attacked the corpsmen who had charge of him at the hospital. There was behavior interpreted as a suicidal gesture, resulting in his being locked in a psychiatric ward as a precaution against suicide. He was hospitalized from November, 1954, until May, 1955. The doctor did not see him from April 28, 1955 until he interviewed him on June 5, 1964. He got a letter from Nagell dated January 10, 1963, while he was at Bay Pines hospital. He received another letter about two weeks later. These were fully set forth in the evidence. Dr. Weinstein had examined the records from Bay Pines. He testified that unless a psychiatrist had an accurate history of [\*165] what had happened to Nagell in the past, including the brain damage history, he would be very much at sea and confused by the manifestations in his case. He said that one aspect of Nagell's illness, particularly complicating it, had been his denial of illness, and his attempt to conceal information. It was Dr. Weinstein's opinion that Nagell could not completely and accurately differentiate between right and wrong. In response to a hypothetical question, detailing what took place at the alleged robbery, and considering the entire history of Nagell's case, he said, 'I would say that this was a symptom or a manifestation of disturbed brain function and during the period his judgment and perception of reality was seriously disturbed so that he could not accurately differentiate right from wrong', that, in his opinion, Nagell was disassociated with reality at the time of the incident. He gave it as his opinion that the act at the bank on September 20, 1963, was directly related to Nagell's mental illness, that the act was an alternative to suicide. He said the brain damage sustained by Nagell did not affect the ordinary components of intelligence and that he did have sufficient intelligence [\*166] to know the nature of the charges against him, but that he would hesitate to say that he was reasonably able to factually confer with his attorneys or to raise a defense.

(d) Dr. Weinstein said that, recognizing plaintiff was suffering from a severe brain injury, he included plaintiff's case in an article and later a book he wrote on the behavioral effect of brain injury.

(e) Dr. Weinstein also criticized the diagnosis of cured concussion, made by the medical board in May 1955, which returned plaintiff to active duty 6 months after the plane crash (finding 16). He said this diagnosis was inaccurate and at least partly due to plaintiff's deception and repeated denials of any behavioral manifestations of his brain injury. He concluded that an accurate diagnosis of brain injury or traumatic encephalopathy would not have resulted in a return of plaintiff to active duty and that return of a soldier to active duty in the circumstances of plaintiff and his injuries would be "quite unusual."

66. Following Dr. Weinstein's testimony, psychiatrists who had testified for the Government on the trial, now reversed themselves. (354 F.2d 447-48):

Dr. Hernandez, who had testified at the [\*167] trial on the merits, took the stand. He said that Dr. Weinstein would be considered a foremost authority on brain injuries, that he did not know anyone better in this country. Dr. Hernandez stated that after consulting with Dr. Weinstein and further interviews with Nagell, he would change the testimony he gave on the original trial and would now be of the opinion that Nagell was not able to distinguish right from wrong on September 20, 1963.

Dr. Joseph J. Hornisher, a Board certified specialist in psychiatry, was the next witness. He was a retired Army doctor. He had been consulted about the case after the trial on the merits. He agreed with Dr. Weinstein that Nagell was suffering from Anton's disease, which would cause him to deny mental illness and to do anything he could to mislead others with reference to it. He agreed with Dr. Weinstein's diagnosis of organic brain disease. He did not believe that Nagell could distinguish between right and wrong on the day of September 20, 1963.

Dr. Martin L. Schwartz, who had testified for the government at the trial on the merits, was the next witness. He said that when he testified at the trial he did not have the entire Veterans [\*168] Administration file. He did not know of Nagell's brain injury. After hearing the testimony of Dr. Weinstein, and receiving additional facts, he was willing to concede that Nagell has a mental disorder, but declined to say how serious it was.

67. Despite the foregoing described testimony, the district court on May 9, 1964, denied the motion for a new trial and sentenced plaintiff to the maximum term of 10 years in prison.

## Suicide Attempt - June 1964

68. (a) On June 16, 1964, plaintiff attempted suicide by ingesting a variety of drugs.

(b) He was admitted to the prison hospital at Fort Worth on June 16, 1964, where he was first seen by Dr. Jo Anne Holzman.

(c) Dr. Holzman's Clinical Record of June 19, 1964, contains the following:

The patient himself explains all in great detail and in such a manner that he cannot be followed too well. He states he has periods of 'loss of memory, can't speak, loss of balance.' He states that he had battle fatigue twice. He had a psychiatric evaluation at Springfield in February and was found competent to stand trial. The patient apparently feels guilty about some of the events in the Korean War. On describing an incident of taking [\*169] a hill which was important to the truce negotiations, he breaks into tears and cannot continue. He states that he fell back five times, that he lost almost all of his men and that he became somewhat angry with the company commander for not ordering them back. The patient apparently left the Army as a captain. The patient states he really wanted to die in the recent suicide attempt but with his court appeal now pending, he now feels that things are more hopeful and does not consider suicide at this time. However, he goes on to state that he does get depressive episodes and fears that he might again consider suicide.

IMPRESSION: 1) Neurotic depressive reaction. Rule out (1) CBS manifested by emotional instability, (2) fugue state.

2) Left facial palsy.

(d) The prison hospital's Psychiatric Evaluation and Discharge Summary of July 16, 1964, by Dr. Herbert Rush, Surgeon, USPS, Acting Deputy Chief of Psychiatric Service No. 2, and Dr. Norman Wilson, Surgeon, USPS, Acting Chief of Psychiatric Service No. 2, contained the following:

He was admitted to the maximum security ward and placed on suicidal observation. He remained on close suicidal observation for 11 days. Since [\*170] his admission to this hospital Mr. Nagell has not appeared depressed nor has he appeared suicidal. He has denied any suicidal ideation or any suicidal intent and states that his taking of the overdose of pills, as mentioned above, was not because he wished to die. He,

however, did not wish to discuss his reasons for taking the pills.

HOSPITAL COURSE: Mr. Nagell has not appeared depressed during the course of his hospitalization. For the first eleven days of his hospitalization he was kept on suicidal observation. This was discontinued, and the patient has remained on the maximum security ward. He has been under continuous observation since his admittance to this hospital. The patient at no time during his hospitalization has appeared significantly depressed nor suicidal.

(e) The evaluation by Drs. Rush and Wilson contained the following diagnoses, which mentioned an "acute brain syndrome" and the patient's unwillingness to cooperate in further psychiatric evaluation.

FINAL PSYCHIATRIC DIAGNOSES: 1. Acute brain syndrome, secondary to drug intoxication, improved.

2. Sociopathic personality, dyssocial type, unimproved.

RECOMMENDATIONS: It is felt that Mr. Nagell [\*171] is not suicidal at this time nor has he appeared suicidal during the course of this hospitalization. The patient is unwilling to cooperate in order that we might be able to further evaluate him psychiatrically. It is felt that he may now be released to the U.S. Marshal for return to a penal institution.

## 1964-65--Prison Hospital

69. Within the year, plaintiff was back in a psychiatric ward, this time at the penitentiary hospital at Leavenworth. From November 11, 1964 to December 22, 1964, plaintiff was a patient on the psychiatric ward of the hospital at the federal penitentiary at Leavenworth, Kansas.

There are no documents in the record directly bearing on this period of hospitalization. A later psychiatric record in the same hospital, dated August 17, 1965, states:

Nagell was admitted to the psychiatric unit on November 11, 1964. During hospitalization he was diagnosed as character disorder, sociopathic personality, with emotional instability, malingering, refusal to talk or cooperate. He was discharged after 41 days of hospitalization on December 22, 1964.

70. Plaintiff was seen on February 2, 1965 at the hospital by H. R. Passaro, Psychologist. His Psychiatric [\*172] Progress Note speaks of a routine

psychiatric interview in which no symptoms were found.

71. Plaintiff was seen again by Mr. Passaro on August 17, 1965. His Psychiatric Progress Note contained the following comment:

Since his discharge from the psychiatric unit [on December 22, 1964] he has been making a satisfactory psychiatric and institutional adjustment.

He was seen on August 12, 1965 after referral by his parole officer. His attitude appears to have changed considerably. He was cooperative and quite free to express himself. He freely discussed his parole plan and indicated that he was in need of psychiatric counseling, particularly following his release. The way was left open for therapeutic interviews to begin immediately if he would cooperate in them. Present plans are to see him weekly for psychotherapeutic interviews and counseling.

January 1966 -- Reversal of the Conviction and Order for New Trial

72. On the appeal, the Fifth Circuit on January 4, 1966, took what it recognized was a most unusual action for an appellate court: it reversed the district court's refusal to grant a new trial.

To the Government's argument that the motion should be denied [\*173] for lack of diligence, since the accused knew all the time the crucial facts and concealed them from his counsel, the court responded:

But the proof is really without substantial dispute that appellant was suffering from a mental disorder which caused, if not compelled, him to follow this course. He is thus no more to be bound by it in a serious matter of this kind than in any other situation involving mental derangement.

73. Judge Coleman for the court described the case presented as follows ([354 F.2d at 449](#)):

Here we have a case in which the defendant exhibited no abnormal traits prior to 1954. On the contrary, by his own merit he became an officer in the Army after enlistment at eighteen. He was, to say the least, an outstanding soldier. After brain damage in 1954, a crucial fact which was unknown to the trial jury, he steadily declined to his present unhappy condition. The former valiant soldier who had sustained wounds on three occasions in defense of his Country had become so completely altered that he announced himself in

open court to be a Communist. He had made one serious effort to kill himself by a shot in the left chest.

Every doctor who testified at the [\*174] trial was of the opinion that Nagell could distinguish between right and wrong on September 20, 1963. As a result of the newly discovered evidence, which the defendant concealed as the result of a damaged brain and a diseased mind, three doctors, one of them an outstanding national authority on brain damage, are now prepared to testify that in their opinions he did not then know the difference between right and wrong. This puts an entirely different face on the matter. Of course, we do not decide the merits of the case, but we believe another jury should have an opportunity to decide the guilt or innocence of this man in the light of this new evidence.

74. On January 4, 1966, therefore, the court of appeals reversed the district court's order denying a new trial and remanded with instructions that a new trial be granted.

75. Following the remand to the trial court, on April 7, 1966, plaintiff was ordered recommitted to the Medical Center for Federal Prisoners for psychiatric observation and examination.

Medical Center for Federal Prisoners, 1966

76. (a) On May 31, 1966, plaintiff was preliminarily interviewed by Robert J. Murney, Ph.D., clinical psychologist at the [\*175] Medical Center at Springfield, who reported on June 8, 1966:

#### SUMMARY OF PSYCHOLOGICAL FINDINGS:

2. Mr. Nagell, in responding to the Projective Question 'Who are you?', stated that he was born in upstate New York, the son of a Norwegian emigrant who was an electrician by trade. He describes his mother as a native born American of German lineage. His father died when he was two years old and he became separated from his mother and siblings at the age of four. From that time on, he lived in various foster homes in rural areas until he was eleven and in an orphanage in the city until he graduated from high school in 1948. He remarks that he was raised in a very frugal environment under a strict moral code where 'economy and integrity was the byword'. Mr. Nagell states that he subscribed to the Quaker religion, was a member of 4-H clubs, and the Boy Scouts of America. Was an average student who excelled in languages and social studies. He also describes himself as a good athlete with multiple extra curricular interests. He

enlisted in the Army on his 18th birthday and served until he resigned from the Army in October 1959. His military history is a very impressive one in [\*176] that he was wounded on three occasions, won numerous awards and worked his way up through the ranks from an enlisted man to a Captain. All of these accomplishments particularly in view of a rather traumatic childhood, point to excellent intellectual potentials and reflect the personality of an individual who was making above average adjustments. After leaving the service he worked for the State of California from 1959--1962 when he was discharged for what he describes as an indiscretion wherein he describes he revealed information that he should not have revealed.

3. In our interview today (5-31-66), Mr. Nagell was most pleasant and cooperative. He was well oriented in all spheres and provided me with a very detailed account of the circumstances surrounding the event for which he was convicted and demonstrated a highly intelligent understanding of his own physical condition. His memory was excellent in terms of being able to supply me with the exact dates going back as far as the Korean conflict and at no time did he show any confusions or hesitation in his thinking. He is obviously a very bright highly verbal person who is capable of thinking in a logical and well ordered [\*177] manner. He himself made very little of the possibility that he had suffered serious brain damage but insisted rather that he had never intended to rob a bank in the first place, that he had only been seeking a desperate way of obtaining help. He went on to explain that several requests for admission to a V.A. Hospital had been turned down and that in desperation he involved himself in the act to call attention to his need. He is quite willing to admit that he must of [sic] been suffering from 'functional' problems at the time but feels that justice is not being served by having him convicted and serve time for an offense which he did not intend or actually commit. In my own opinion, Mr. Nagell is able to do a very convincing job of presenting his point of view and I found his story quite credible and convincing.

4. A very careful study of the patients performance on all of the psychological tests fail to uncover any evidence of an active psychotic process or any convincing evidence of impairment suggestive of cortical brain damage. The findings, do, however, point to significant functional emotional problems which appear to be of long standing and which definitely interfere, [\*178] particularly under conditions of stress, with this man's ability to function at a level commensurate with his intellectual capacities. In my opinion, this patient

has both neurotic and characterological problems which I would infer at times have reached psychotic proportions. Specifically, he shows an hysterical component in his personality which tends toward conversion symptoms and psychosomatic reactions but more basically his personality structure is characterized by emotional detachment and withdrawal, guardedness, suspiciousness, and distrust as well as tendencies toward projection. When we view these findings within the context of the patient's behavior over the last four years and particularly in view of his adamant refusal to cooperate on prior occasions, there is strong reason to believe that the underlying paranoid elements may reach delusional proportions under an intense and prolonged emotional stress. A review of the pertinent psychological findings is offered in support of these conclusions.

(4a.) Mr. Nagell is a very intelligent, verbally expressive man who shows no signs of a serious thought disorder and no indications of any significant impairment in intellectual [\*179] or visuo-motor functioning at this time. He was able to respond quickly and well to all of the psychological tests, he expressed his feelings and views about himself in a most logical orderly and coherent manner and was able to demonstrate a high level of abstract conceptual ability in response to Proverbs and other tasks requiring high level reasoning. Other than for his over-defensiveness and almost total denial of psychological problems he does not manifest any clearly pathological behavior. Visual-motor functioning is in tact [sic] and the patient's Bender-Gestalt and Graham-Kendall Memory for Designs Test performance is above average in quality. These results are in no way supportive of the hypothesis that Mr. Nagell has suffered any severe cortical brain damage. They do not, however, rule out the possibility of subcortical injury or of generalized traumatic effect.

5. In my opinion, little or nothing will be gained for society or for Mr. Nagell by continued incarceration in a penal institution. He is very bright and a capable person who showed an excellent adjustment for many years of his young adult life and if he is ever to be rehabilitated, he will require psychiatric [\*180] hospitalization and long term individual psychotherapy.

(b) Dr. Murney's report concludes with an "INITIAL PSYCHODIAGNOSTIC IMPRESSION: Paranoid Personality."

77. (a) About June 13, 1966, plaintiff was examined at the Medical Center by Dr. Joseph F. Alderete, Chief,

Psychiatric Services, at the Medical Center.

(b) Dr. Alderete was a physician licensed in New Jersey and Georgia. His specialties were psychiatry and electro-encephalography. He had been with the Public Health Service since his graduation from medical school. He had had three years of formal residency in psychiatry, and three years of duty as a staff psychiatrist at the Public Health Service hospital in Baltimore, Maryland. He had testified approximately 30 times on the issue of criminal responsibility.

(His further professional qualifications to the time of the trial of this case are stated in finding 107.)

(c) In making his evaluation of plaintiff, Dr. Alderete reviewed plaintiff's records from his military service and the various military and USPHS hospitals in his history. In addition, he contacted plaintiff's mother and sister, reviewed plaintiff's records concerning his previous MCFP commitment, [\*181] his incarceration at Leavenworth, and the transcripts of plaintiff's previous hearings.

(d) Dr. Alderete's report, dated June 17 1966, contains the following preliminary remark:

[Nagell at first refused to cooperate]. After thinking the matter over for a few days, Nagell [has] elected to cooperate to the fullest extent and has answered all questions put to him and undertaken all tests requested of him.

He showed no suicidal tendencies during the period of observation nor any tendency to act out. Therefore, he was subsequently moved to an open population ward where he is presently housed, \* \* \*.

(e) There follows a "Past History":

IV. PAST HISTORY: Nagell \* \* \* enlisted in the U.S. Army at Albany August, 1948 on his 18th birthday and remained in the military service until his resignation in October, 1959. Nagell states that this was not a forced resignation and that he resigned for personal reasons, namely that his wife insisted that he resign \* \* \*.

His father is allegedly deceased and no information is available about the father. His mother resides in Los Angeles, California and alleges that she has not seen her son since August of 1963 when he is said to [\*182] have stated that he did not wish to have anything more to do with his family because of its interference. She is reported to have remarked that her son had a brilliant career in the Army until severely injured in an accident

in November, 1954 and that after the accident he underwent a severe personality change and has been in continued difficulties since then.

Nagell married a native of Japan while stationed in Tokyo, Japan. They were married on March 24, 1958. His wife secured a divorce from him in Los Angeles, California in November, 1962 and is presently residing with his two children in Los Angeles. Nagell reports that his marital difficulties started sometime in 1959 and continued through the time of divorce.

While on active duty in the army, he was involved in an airplane crash November, 1954 and following the crash, it is alleged that he was in a coma for a period of time. Nagell himself confirms that he was in a coma. After recovering from the accident, he was returned to active duty. The record indicates that he has had some definite physical and mental problems, both stemming from severe injuries sustained in the airplane crash.

(f) The portion of the report [\*183] entitled "Physical Examination and Laboratory Test Results" reads in part as follows:

The psycho-diagnostic impression based on the psychological testing was that of a paranoid personality.

Psychological testing failed to show any evidence of an active psychotic process or show any evidence of an impairment suggestive of a cortical brain damage. The psychologist's report added that the findings do, however, point to significant functional, emotional problems which appear to be of long standing and which definitely interfere, particularly under conditions of stress, with this man's ability to function at a level commensurate with his intellectual capacity. In his opinion as a psychologist, the patient has been both neurotic and has had characterological problems which, he infers, have at times reached psychotic proportions.

I might conclude that the psychological report was essentially in agreement with my clinical evaluation of this patient.

(g) The portion of the report entitled "Psychiatric Examination" reads thus:

VI. PSYCHIATRIC EXAMINATION: The patient presented himself for the interview neatly groomed. His production of talk appeared to be logical, progressive [\*184] and without any indication of autism. He appeared to be somewhat tense and anxious throughout the interview but on subsequent interviews,



appeared to be more relaxed and comfortable. He was oriented with reference to time, person and place. He appeared to be of better than average intelligence. His judgment and insight appeared to be fair. There was no evidence of any hallucinatory phenomena or delusory thought trends.

The patient did show some compulsively and rigidity in his thinking. **Nagell** himself admitted that he had some psychiatric symptoms and stated that he has never denied that he had such psychiatric symptoms.

**Nagell** also displayed a very moralistic attitude and pattern. He kept emphasizing throughout the various interviews that his whole purpose in entering the bank in El Paso, Texas when he is alleged to have attempted to rob the bank was for the purpose and the sole purpose of getting psychiatric treatment.

**Nagell** states that he had tried for admission to the VA Hospitals just prior to the alleged bank robbery. He stated that after getting married, his wife insisted that he resign, which he did in 1959 and that his adjustment to civilian life was very [\*185] difficult and made more difficult by his marital problems and finally resulted in his marriage breaking up in the Spring of 1962 which had a very traumatic effect on him. He alleges that his wife left him twice and after she left him for the second and the last time, that he lost his job in June, 1962 and noticed that he was starting to get nervous and emotionally unstable, that he got and quit two jobs after that because he couldn't concentrate. He felt that he was slipping and finally, that he tried for admission to a VA Hospital just prior to the alleged bank robbery, and at the time of the alleged bank robbery that he was desperate for some type of psychiatric treatment for his psychiatric symptoms of nervousness and emotional instability and inability to concentrate.

(h) Dr. Alderete made the following diagnosis:

VII. DIAGNOSIS: 000-x44 paranoid personality associated with features of a paranoid state, presently in remission.

(i) To his diagnosis Dr. Alderete's added definitions of the terms "paranoid personality" and "paranoid state":

A paranoid personality is characterized by many traits of the schizoid personality, that is a tendency of avoidance of close relationships [\*186] with others, an inability to express direct hostility, coupled with an exquisite sensitivity in interpersonal relationships and with a conspicuous tendency to utilize a projection mechanism,

expressed by suspiciousness, envy, extreme jealousy, and stubbornness, all of which **Nagell** displays.

A paranoid state is a type of paranoid disorder under the classification of paranoid reactions which in turn fall under the general classification of psychotic disorders. The paranoid state is characterized by paranoid delusions. It lacks the logical nature of systemizations seen in paranoia; yet it does not manifest the bizarre fragmentation deterioration of schizophrenic reactions. It is likely to be of short duration, though it may be persistent and chronic.

78. Dr. Alderete's conclusions and recommendations were these:

#### VIII. CONCLUSIONS:

1. the patient is judged to be competent to stand trial. \*  
\* \*

2. With reference to the question of mental competency at the time of the alleged crime, the patient is judged to have been not mentally competent at the time of the alleged crime \* \* \*.

Whether or not there is any evidence of brain damage cannot be stated or disputed. I can [\*187] point out that on the basis of my examination and my laboratory findings including an EEG and psychological testing that I did not find any evidence or finding suggestible of brain damage.

It is evident from the record and from interviewing the patient that psychiatric symptomatology where etiological basis appears to be slowly building up stress, perhaps secondary to the plane crash in 1954 subsequently due to marital difficulty, slowly began to become evident perhaps as early as 1959 when he first was brought up for psychiatric evaluation in the U.S. Army hospital in Tokyo. This marriage finally broke up in the Spring of 1962. He had difficulty adjusting to civilian life after leaving the Army which he left apparently at the insistence of his wife. It is significant that in 1962, he entered Wadsworth Hospital for a chest wound which the record at one point states was self-inflicted and which **Nagell** implies that his wife shot him. It is further significant that the patient himself became aware that he was getting nervous and that he couldn't concentrate. Further evidence of his increasing instability was the signing out from the VA Big [sic] Pines Hospital and his attempting [\*188] to get psychiatric treatment at the hospitals but being unable to cooperate with them in getting it. It appears that he

wanted to qualify whatever treatment he got. It is fairly significant that he attempted to get psychiatric treatment in such unusual fashion, that is by allegedly entering a bank and firing two shots into the wall. His personality pattern at all of his past court hearings as well as in his past hospitalizations in which he displayed a hysterical nature and a stubbornness would lead one to believe that the patient was and has been mentally ill.

In resume, then, the psychiatric symptomatology began some time in 1959 with symptomatology suggestive of paranoid personality and proceeded under ever increasing stress to a paranoid state at the time of the alleged crime, and persisted until recently with a slow remission to his present paranoid personality. A paranoid personality is not a psychotic state; it falls under the general category of personality pattern disturbance. The depth of the psychopathology of a personality pattern disturbance allows these individuals little room to maneuver under conditions of stress except into actual psychosis. It is the opinion [\*189] of the psychiatric examiner, in closing, that this is exactly what took place, namely that Nagell, a lifelong paranoid personality under slowly building conditions of stress, went into an actual psychosis (paranoid state) and subsequently went into remission, and is now again a paranoid personality.

IX. RECOMMENDATIONS: As indicated above, Nagell displays some manifestations of a personality pattern disturbance which, if he is to be rehabilitated and achieve some degree of adjustment in life, would seem to indicate some type of out-patient psychiatric treatment such as long-term psychiatric therapy. I do not see any indication at the present time for any long-term in-patient hospitalizations. It is conceivable at the present time that Nagell could and would undergo out-patient treatment on a voluntary basis; however, under a period of undue stress in the future, it is conceivable that he could discontinue voluntary out-patient treatment. Some form of supervision that would insure his continued out-patient psychotherapy for at least a year would be highly desirable.

Retrial on the Criminal Charge - September 1966

79. Both Dr. Alderete (findings 77-78) and Dr. Weinstein [\*190] (findings 64-65) testified at plaintiff's second criminal trial in September 1966.

Dr. Weinstein's Testimony at the Retrial

80. (a) Dr. Weinstein had examined plaintiff at Walter Reed in 1954 (finding 15) and again in 1964 (finding

65).

(b) Dr. Weinstein's qualifications appear in findings 15, 64, 105.

81. (a) Dr. Weinstein testified to his diagnosis of plaintiff as suffering from traumatic encephalopathy, chronic, "a disease of the brain caused by trauma." He said that in the airplane crash, plaintiff had suffered an injury to the subcortical, or interior, portion of the brain, also called the base of the brain:

This is the brain [indicating on a diagram of the human skull] as you look at it from the side, and this is the covering of the brain that we call the cortex \* \* \*. I said his injuries were mainly in the interior part of the brain rather than on the surface of the cortex, the so-called base on the brain.

Well, from the circumstances of the onset which was obtained in an airplane accident, and from the behavior that he exhibited from 1956 to 1963, I'd say the most comprehensive diagnosis would be:

Traumatic Encephalopathy, Chronic, to indicate that it [\*191] occurred a long time ago, manifested by emotional instability, passive-aggressive behavior, and paranoid trends.

(b) This was the same diagnosis he made earlier, in 1964 and in 1966:

he had the same diagnosis ever since 1954 that he had then, that is of a brain injury.

(c) He agreed with the diagnosis of chronic brain syndrome at Bay Pines VA Hospital in December 1962 (finding 53(f)).

Chronic brain syndrome associated with brain trauma - that means injury - with behavioral reaction characterized by passive aggressive and paranoid features.

(d) He testified that a diagnosis of plaintiff as suffering from a life-long personality disorder would be incorrect.

(e) He testified that an EEG would probably be abnormal in the early stages of plaintiff's injury, but that was not important to do at Walter Reed when plaintiff was so sick, and that now it would be normal; that whether abnormal waves are shown depends on how close the electrodes are to the injury; that if the actual electrodes were placed within the brain that might well show something but that would require an operation,

while in the usual EEG the electrodes are taped to the skull; thus that such an injury as plaintiff [\*192] had would not be revealed by a routine EEG used to detect cortical brain damage.

The questions and answers on the subject of the EEG were these:

Q Now, Doctor, does brain injury necessarily show on an EEG test, what are your comments about that?

A Well, it depends on the part of the brain that is injured and it depends on how soon after the injury the EEG was taken. Now, in the early stages of Mr. Nagell's brain injury his electroencephalogram would have been abnormal, if you took one now it would in all probability be normal.

Q So the time from the accident to the time of the EEG test is the important thing?

A Yes, and also the location of the brain injury. If the injury is close to where the electrodes are in the head, the electroencephalogram would be more apt to show abnormal waves.

Q As I take it, then, the electroencephalogram does not go deep enough to where the injury of this defendant is, is that correct?

A No. If the actual electrodes were placed within the brain itself it might well show something.

Q But you don't do that, do you?

A That is rather a major procedure.

Q You would have to operate to put the electrodes in the brain?

A That is [\*193] correct, but in the usual electroencephalogram the electrodes are taped to the outside of the skull.

Q And those would indicate only injuries to the periphery of the brain, is that correct?

A Usually, yes.

Q Do the medical records from Walter Reed Hospital have anything concerning EEG tests shortly after the injury?

A No. When a person was as sick as Mr. Nagell was and there were so many other things to be done they couldn't do an EEG, it wasn't an important part of his

treatment.

(f) Further, plaintiff's condition would not have been easy for a psychiatrist without training in neurology, essentially a subspecialty of neurology and psychiatry to diagnoses unless the psychiatrist had been trained in brain function or had access to a good medical history, and that the lack of such training and good history explained the different previous diagnoses.

The questions and answers on this subject were these:

Q Now Doctor, is this mental illness resulting brain injury with its consequential bizarre behavior, is this easy to diagnose by a psychiatrist?

A Not unless the psychiatrist has had some training in brain function and neurology or has a good history.

Q In other [\*194] words, am I correct in saying, Doctor, that this is - we are in a technical field or neurology and psychiatry?

A That is correct.

Q And unless the doctor knows the full history, and, of course, his qualifications, he would not be able to properly diagnose this case, is that correct?

A That is correct, and I think that is one reason why he was given so many different diagnoses at different parts of his medical career because many doctors were just seeing him at just one period of time.

82. As to the consequences of plaintiff's illness, Dr. Weinstein testified that:

(a) the brain injury was the cause of plaintiff going downhill since the injury:

here is a man who was a highly successful person as a soldier up to the time of a brain injury. He has gone successively downhill ever since, and I think the brain injury is the major cause of his decline.

(b) the brain injury exaggerated plaintiff's pre-accident tendency to regard illness as imperfection and consulting a doctor as a confession of weakness. This trait, which was not abnormal, but only distinctive, became exaggerated to the point of psychosis after his injury:

Now, a person like Mr. Nagell feels ashamed [\*195] of imperfections, now, I am talking about the way he was before his accident because of course this is much exaggerated since his accident. Among the character

traits of people like this, they are often ashamed when they are ill, they have the idea that a person is responsible for his health or a person is responsible for his own efficiency, and if you get sick somehow it is your own fault and something you are ashamed of, so, people like this rarely like to go to doctors because that is a confession of weakness, and that is a cardinal point in his personality. Well, after a brain injury many previous traits which are not abnormal, which are just distinctive, become highly exaggerated, and I will point out this trait in Mr. Nagell was so - had become so exaggerated that it reached psychotic proportions.

The medical term "anosognosia," he explained, is synonymous with "denial of illness," and identified it as one of the behavioral changes likely to become evident after a brain injury. This denial of illness was detected when Weinstein first saw plaintiff in March 1955 in Walter Reed.

(c) Further, among the consequences of illness are impaired judgment on how to deal with one's [\*196] problems and "confabulations," or "fictitious stories" or "untrue delusional formations" with no awareness of falsity.

[O]ne effect of brain injury, it impairs your judgment on how to deal with your problems and to go about it in a rational way presumably that a normal person without a brain injury has, Mr. Nagell was going about what seemed to be now with rather irrational ways. Another thing, he was having something which we call confabulations. Now, confabulation means a fictitious story. If I would say that this morning I had breakfast with President Johnson, that would be a confabulation; and particularly in situations of stress, Nagell started to use these untrue delusional formations with no awareness at the time that these were false, and these came out particularly when he was admitted to the Veterans Hospital in Bay Pines, Florida, around Christmas in 1962, and I didn't --

Continuing, the witness related three stories plaintiff made up:

I got a letter from Nagell when he was in the hospital telling me about his problems and depression, and so on, but in that record I thought of three very interesting things, that there are three stories that Nagell made up that [\*197] wasn't [sic] true, and this so called confabulatory state, and it is particularly startling because the person may say it in a very matter of fact way; now, one of these confabulations or fabrications was that he received a telegram from California telling

him that his two children had been killed. Now, he never received this telegram, but my interpretation is that this was Nagell's was of saying how sorry he felt his wife had gotten a divorce and how much he missed his children, but due to altered brain function, you might say his brain was working in a way comparable to someone who might dream something, if you went to bed with a problem you might dream about the problem in a real dramatic way; so, he had this confabulation that his children were killed in a car accident, which wasn't true. Another story he made up was that he had been hit on the head with a blackjack in New York City and robbed of eight hundred dollars. Well, that confabulation may have come about because he was worried about his mind and worried about his brain, and this is the way, in his poor judgment, in his inability to control himself, it would be shown. Another one might be rather a minor thing but [\*198] in view of the other two confabulations I find it significant. He told a social worker, a psychologist in Bay Pines, that he had been born in Montana; now, actually he was born in New York; and this may be related to his unhappy childhood, I can't say, but when a person uses this method of trying to compensate for problems and dealings with it, it means to me that his brain function is pretty impaired.

#### Dr. Alderete's Testimony at the Retrial

83. (a) At plaintiff's retrial, Dr. Alderete substantially repeated the written report described in findings 77-78.

(b) He testified that while plaintiff was not in a psychotic state at the time he had examined him, he was at the time of the bank shooting episode in a psychotic state resulting from "a slow build-up of stress starting from the airplane crash in 1954 and slowly building up":

The nature of the illness \* \* \* was a paranoid state which is characterized by delusions of persecution, and grandiosity, usually without any evidence of hallucinations, the intelligence is usually well preserved, this falls under the general heading of paranoid reactions, which is a serious or a major mental illness commonly termed a psychotic state.

[\*199] (c) A person with a paranoid personality disturbance, he testified, "has little room to maneuver and under stress the only place they can maneuver is into a psychotic state, which, as I stated previously was a paranoid state," which meant "that he is not in full contact with reality."

(d) Noting that he was not a neurologist, he testified that he could neither confirm nor deny that plaintiff had

suffered brain injury. He did not adopt, but could not rule out, Dr. Weinstein's diagnosis of post-traumatic encephalopathy.

#### Reconviction and Resentence - September 1966

84. On the retrial, in addition to Dr. Weinstein's and Dr. Alderete's testimony, two psychiatrists-neurologists reversed their testimony at the first trial and now testified that plaintiff could not distinguish between right and wrong at the time of his entry into the bank and could not refrain from doing wrong.

85. The expert testimony did not change the former verdict. On September 26, 1966, plaintiff was again convicted and again sentenced to the maximum prison term of 10 years.

86. (a) On February 2, 1967, plaintiff was transferred from Leavenworth to the MCFP for psychiatric observation.

(b) He [\*200] was seen upon his arrival by Dr. Alderete, who could find no basis for plaintiff's transfer for psychiatric evaluation. Dr. Alderete's progress notes contain the observation:

This patient is rational, coherent, and about the only psychiatric symptomology that could be called that at present is some mild anxiety and bitterness which is justified [and] well within normal limits. This patient is not dangerous.... DX: Paranoid Personality in remission [with] mild schizoid features. [Emphasis in original].

(c) He recommended observation and evaluation for transfer back to Leavenworth. He noted that he had "failed to note any overt psychiatric symptomology that would warrant [plaintiff's] further retention at the U.S. Medical Center."

(d) Dr. Alderete reiterated his previous diagnosis, made in 1966:

On my examination of this patient under Section 4244 in the early part of 1966 I diagnosed him as a paranoid personality and that is still my current diagnosis. Psychiatric treatment for this personality disorder would be helpful in helping adjust in prison as well as when he returns to free society. However, it is not essential, and I would not recommend it at this time. [\*201] When this patient becomes sufficiently motivated he will ask for psychiatric assistance. It has been my experience that these type of patients do not become motivated until they have gone through a period of individual mourning

over their situation, and that is what this patient is going through at the present time. I feel he should be left to himself pretty much and not distressed at this time by efforts to approach him in a therapeutic manner. When he has reached his own internal level of emotional adjustment as I stated previously he will seek psychiatric assistance on his own at that time. At the present time and in the future he can get along at a regular penal institution and has no need to be at the Medical Center.

I would also like to comment that this patient is not dangerous, although because of the nature of the crime with which he is charged and is serving time for at the present time it would cause one to think that he would be dangerous in society. If paroled eventually this patient's need for psychiatric treatment could be obtained through outpatient facilities at the Veteran's Administration and would be for the sole purpose of helping him to better adjust [\*202] to free society and is not essential.

That is I think the patient could adjust to free society without the need of psychiatric treatment.

1967 - Application to the VA for a Mental Illness Disability

87. On April 21, 1967, while in custody, plaintiff wrote the VA for a psychiatric disability rating based upon his brain injury. This letter is not in the record.

88. In a letter to the VA adjudication officer dated May 9, 1967, Dr. Alderete supported plaintiff's claim with a summary of his June 1966 report on plaintiff (finding 77):

Now on a psychiatric examination that I completed on this patient dated June 7, 1966, I was of the opinion that his psychiatric difficulties stemmed from injuries he sustained in an airplane crash in November 1954. A careful pursuance of his Army record indicates that Mr. Nagell made a satisfactory adjustment in the Army until his involvement in the airplane crash in November 1954 and thereafter he began to show definite personality changes, and psychiatric symptomatology, and finally reached a climax in 1963 when he attempted to hold up a bank in El Paso, Texas, at which time it is my professional opinion that he was psychotic. My diagnosis [\*203] then and my current diagnosis is that of a Paranoid Personality associated features of a Paranoid State (a psychotic state), presently in remission. Although the Paranoid State is presently in remission, under minor stress the symptomatology

reappears. It is my current opinion that this patient is still psychiatrically disabled and chronically so. I am of the opinion that this psychiatric disability is at least 50%.

April 1968 - Court of Appeals Decision Directing Acquittal

89. (a) On April 3, 1968, the Fifth Circuit reversed the conviction and directed plaintiff's acquittal on the ground that the evidence did not sustain the conviction and that no good purpose would be served by a new trial. [Nagell v. United States, 392 F.2d 934 \(5th Cir. 1968\)](#).

(b) The court found that the expert testimony as to plaintiff's insanity was so overwhelming that reasonable doubt must have existed in the minds of reasonable jurors on that issue, and that the trial court, in light of the strong evidence of plaintiff's insanity, erred in not instructing the jury in terms of the specific intent required for attempted armed robbery.

(c) The court described the expert testimony as to plaintiff's [\*204] disease as follows ([392 F.2d at 937](#)):

Here the record is replete with expert testimony regarding Nagell's mental condition: "Mentally disturbed", the particular characterization being "chronic traumatic encephalopathy"--a disease of the brain caused by trauma. Its symptoms: paranoia suicidal preoccupations, "confabulations", tendency toward projection, impaired judgment, lack of contact with reality.

90. In early 1968, plaintiff apparently embarked on a trip to Europe. The text of a cable sent by the U.S. Consulate in Zurich, Switzerland, described plaintiff as appearing at the consulate and claiming he was on a CIA mission. It further described plaintiff as "quite incoherent. In fact, appears psychotic, possibly dangerous."

Stories told by plaintiff relating to this trip and earlier matters, involve work for, and persecution by the CIA, missions to Mexico, and other wholly unsubstantiated details. They are treated as likely confabulations, i.e., continuing symptoms and manifestations of his brain injury.

The 1967 VA Application, Continued

91. (a) On December 12, 1968, plaintiff, pursuant to his application to the VA of April 1967 (finding 87), was given a neuropsychiatric [\*205] examination by Dr. Benjamin H. Kagwa of the VA. The name of the VA

facility does not appear.

(b) The clinical record of the examination shows that plaintiff did not disclose his prior hospitalizations for mental illness, the criminal charges or the medical testimony, and diagnosis which were the basis of the two reversals of his convictions. He disclosed little more than a "severe head injury" in an airplane crash "while still in service."

(c) He was noted to be "somewhat raving literally," but using "coherent and relevant language;" to be "irritable, hostile, and almost combative;" to have no insight into his condition, and to have poor judgment. He indicated he was not working, and was rejected for all employment he sought because of his behavior and his facial disfigurement.

(d) The diagnosis was:

DIAGNOSIS:

Chronic Brain Syndrome, associated with brain trauma, with behavior reaction characterized by passive-aggressive and paranoid features. Incapacity marked. Competent.

(e) In a Rating Decision dated January 9, 1969, the VA found that plaintiff's chronic brain syndrome associated with brain trauma was service-connected, and rated him 100 percent disabled, effective [\*206] April 21, 1967, the date of filing of the claim. The Rating Decision form reflected that the Disabled American Veterans (DAV) had represented plaintiff before the VA.

January 1969 - VA Hospital in Brooklyn, N.Y.

92. (a) On January 23, 1969, plaintiff was admitted to the VA hospital in Brooklyn, N.Y., complaining of severe headaches.

(b) He was seen by Dr. Iris F. Norstrand, a staff neurologist whose report contained the following comments:

Course in Hospital: It appeared clear that headaches were due to emotional causes. It was also clear that this pt. had an obvious personality disorder, perhaps best described as a paranoid personality. One wondered, of course, about the possibility of an underlying paranoid schizophrenia. There was not, however, any disturbance of affect or through disorder to make a clinical diagnosis of a schizophrenic reaction. Pt. did not remain long enough for psychological studies to be performed. What part a traumatic

encephalopathy, which he must have suffered during the plane crash, played in aggravating a basic personality disorder was also unclear. There was no evidence of memory impairment, seizures or other gross evidences of an organic [\*207] brain syndrome.

(c) Dr. Norstrand made the following diagnoses:

1. Psychophysiologic central nervous system Disturbance, manifested by Headaches.

2. Paranoid Personality

3. Encephalopathy due to Remote Trauma

May 1969 - Reapplication to the Correction Board

93. (a) On May 1, 1969, the Disabled American Veterans on plaintiff's behalf, completed and submitted an application to the ABCMR to correct his military record to show a disability retirement.

(b) Dr. Weinstein's testimony at plaintiff's criminal retrial in 1966 (finding 81) was submitted as new evidence.

(c) In a letter dated September 18, 1969, the ABCMR decided that "no basis has been furnished which would justify a decision other than that made by the Board on 10 July 1963." The Board "contemplat[ed] no further action in the matter."

94. On November 26, 1969, Albert Cuervo, Associate Deputy National Service Director for the Disabled American Veterans, advised plaintiff that the ABCMR was the ultimate authority in the matter of plaintiff's claim for an Army disability retirement:

Needless to say, we are very sorry that you feel that neither Mr. Regan or myself exerted every effort possible to assist [\*208] you with your petition before the Army Correction Board. I want to assure you that Mr. Regan was very interested in your case as he strongly felt that your claim was a most meritorious and equitable one. I also felt that you had a very legitimate claim and I assure you that everything possible was done in your behalf at this office. Unfortunately, the Board is the ultimate authority in this matter and I regret very much that we could not persuade them to render a favorable decision in your case.

95. By letter dated April 7, 1970, plaintiff requested that the ABCMR reconsider his previous applications. On June 22, 1971, the Board advised plaintiff that his submission provided no basis for a formal hearing, that his request was denied, and that the prior decisions

were confirmed.

Family Problems

96. (a) On August 17, 1971, plaintiff was granted legal custody of his two children pursuant to a written application to a judge.

(b) Plaintiff testified that there was no court proceeding and no written application made by him. He intimated that the CIA can explain why the judge gave him custody under such circumstances.

(c) A magazine article in the record, dated June 1969, [\*209] reports plaintiff to have made a number of statements such as: that the FBI/CIA isolated him from his children and used the promise of a reunion to coerce him into a mission in East Germany; that plaintiff staged the bank incident to reach the safety of federal custody because he feared a CIA assassination; that he had dealings with Lee Harvey Oswald, as part of what he said was an undercover CIA assignment. Like the stories above, at finding 90, these too are treated as likely confabulations, i.e., continuing symptoms and manifestations of his brain injury.

March 1972 - The VA Hospital in Long Beach, California

97. In March 1972, plaintiff was examined at the VA Outpatient Clinic in Long Beach, California, by Dr. R. E. Cohenour, a staff psychiatrist. Dr. Cohenour reported as follows:

CHIEF COMPLAINTS: Headaches occasionally, just when he doesn't know. Worries about caring for his children since his wife left him, separated and told him to take care of them. He wants to know whether there are any electronic recordings made of him around the VA. Indicates he had a tic in his left eye up until February of this year. He has a rash over his face and forehead when he gets [\*210] uptight.

A 41-year-old separated male veteran of over 12 years Army commission service and ex-prisoner of East Germans while working for the CIA is living in Gardena, Calif. in a rent apartment with his two children, 11 and 12. He indicates that he gets along all right with them. He has done no gainful work since he was released as a prisoner of East Germans October, 1968 because of residuals of brain trauma. He indicates that he is unable to find any work and doesn't feel like it anyway. He believes his case was mismanaged by the government in the past and especially the FBI, CIA and some others. He does indicate that he was in an airplane accident

and was the only survivor, having a head injury and being unconscious for a period of time, and another time he was unconscious for about a month from, he thinks, some kind of blow to the head.

PSYCHIATRIC EXAMINATION: Reveals a well-dressed, neat and clean, oriented, attentive, alert, intelligent individual who is somewhat suspicious and wants to know if there is any electronic devices being turned on to record what he says. He is on guard, he says, because he had previous information used against him. He indicates that he [\*211] was trained as an investigator and hence he is not as paranoid as some others have made it out. He does have some hostility towards some of the agencies of the government, leading to many paranoid ideations and delusions. His affect is somewhat inappropriate, being much more hostile towards some of the agencies of the government and their questioning him, having all kinds of questions concerning how they did this and he has a recording of this from a VA letter. There is now much primary process thinking with defects in judgment and reasoning. He doesn't feel like the FBI has been off his back. He at all times pays his bills and wants to take care of his children.

DIAGNOSIS: Psychosis organic brain syndrome, brain trauma. Veteran is competent.

1973 - Suit in this Court and Reconsideration by the Correction Board

98. On January 2, 1973, plaintiff filed the instant action.

99.) On March 5, 1973, government counsel informed plaintiff that on plaintiff's request the Correction Board would reconsider his case, supported by Dr. Weinstein's opinion on any disability at the time of discharge and its causes:

Upon reading your petition before the Court, the Board staff informed [\*212] the Judge Advocate General's Office that should you so request, in all likelihood the Board would now reconsider your case. It cannot, however, do this on its own motion under its regulations but must have a written request from you to do this. The Judge Advocate General's Office was advised by the Board staff that should you request reconsideration, it would be important that you present an opinion by Dr. Weinstein, who seems familiar with your case, concerning whether or not you were disabled at the time of discharge and, if so, the cause or causes of any disability.

(b) When plaintiff requested such a letter from Dr. Weinstein, the latter responded as follows on March 20, 1973:

In response to your letters of March 7 and March 12, I can state that at the time I saw you at Walter Reed you had sustained a severe brain injury. As to your condition in October, 1959, I have no first hand information and could not state definitely whether or not you were disabled, in the sense of being unfit for military service at that time. However, in the light of subsequent events, I would be willing to write a letter to the Justice Department for you.

(c) Plaintiff thereupon, on March [\*213] 26, 1973, requested reconsideration by the ABCMR.

(d) In a letter to the ABCMR dated July 23, 1973, Dr. Weinstein stated that any medical evaluation of plaintiff made in 1959 should have considered his severe brain injury as a causal factor in his behavior; and that, after his injury plaintiff was, in Dr. Weinstein's opinion, unfit to be an Army officer:

Mr. Richard C. Nagell has asked me to send you a statement of my opinion of his medical condition in October, 1959. As I did not see Mr. Nagell between April 28, 1955 and June 7, 1964, I can only state my general impression of his medical condition in 1959.

My initial encounters with Mr. Nagell was in the course of a research study on the effects on behavior of head injuries. My later examination of him from 1964 was in response to a subpoena from the United States District Court in El Paso. Mr. Nagell is the sole survivor of a plane crash that killed a score or so of people on the night of November 28, 1954. He was brought to the hospital in shock and coma and a tracheotomy was performed. In addition to the putative brain injury, he had fractures of the facio-maxillary bone and numerous lacerations. He went through a [\*214] delirious stage in which he was restless and violent, evidently imagining he was in battle. He was admitted to Walter Reed on January 3, 1955 and was noted as disoriented for place. He continued to be restless, afraid to sleep and was transferred to a psychiatric ward after threatening to commit suicide. His behavior improved and he was transferred back to an officer's ward in mid-April. Following an operation for an anal fissure, he was confused, demanding, and uncooperative for a few days. Though he still had some memory impairment, the patient was insistent on returning to duty. He is said to have destroyed the record of his N.P. examination and he later denied to the CIC that he had ever had a



neuropsychiatric examination.

After Mr. Nagell's release from hospital, he was assigned to CIC school where he had problems with his memory. He then went to Japan where in contrast to his previous good efficiency ratings he received lower grades. In Japan he was sent to Tokyo Army Hospital in 1958 for psychiatric study because of antagonistic, disrespectful and impetuous behavior. He has also made several suicidal gestures, shooting himself in the chest in 1962 and trying to cut [\*215] his wrists after his arrest in El Paso in 1963. There also have been periods of confabulation and amnesia.

As I have testified in several court appearances, personality and behavioral changes are common sequelae of brain injuries such as were sustained by Mr. Nagell. These include lapses in memory, denial of illness, outbursts of temper and violence and anti-social behavior. Any medical evaluation of Mr. Nagell made in 1959 should have considered his severe brain injury as a causal factor in his behavior. After his injury he was in my opinion unfit to be an Army officer.

100. (a) On November 23, 1973, Mr. Raymond J. Williams, Executive Secretary to the ABCMR, informed plaintiff that a formal hearing on his case would be held in late January 1964, and inquired as to whether he and his counsel intended to appear before the Board.

(b) In response to an inquiry by the Executive Secretary dated November 23, 1973, of the ABCMR as to whether plaintiff and his counsel intended to appear at a formal hearing on his case scheduled for January 1964, plaintiff responded on December 23, 1973, that he did not intend to appear, in person or by counsel, because he had been informed by [\*216] an ABCMR Examiner that the ABCMR "lacks the authority to subpoena witnesses at its administrative hearings" but that he would attend any judicial hearings should this matter "revert to the U.S. Court of Claims."

ATTN: RAYMOND J WILLIAMS, EXECUTIVE SECRETARY, ABCMR REFERENCE YOUR LETTER DATED 28 NOVEMBER 1973. YOU ARE ADVISED THAT I DO NOT INTEND TO APPEAR BEFORE THE BOARD IN PERSON OR BY COUNSEL. MY REASON IS PREDICATED ON MR QUELCHOS ADVISEMENT THAT THE ABCMR LACKS THE AUTHORITY TO SUBPOENA WITNESSES AT ITS ADMINISTRATIVE HEARINGS, HOWEVER, SHOULD THIS MATTER REVERT TO THE US COURT OF CLAIMS, I INTEND TO APPEAR IN PERSON WITH COUNSEL AT ANY JUDICIAL HEARINGS. PLEASE FORWARD ANY

REPLY TO THIS COMMUNICATION TO ME IN CARE OF BERNARD FENSTERWALD, JR. ATTORNEY AT LAW 910 16 ST NORTHWEST, WASHINGTON DC 20006 Richard c nagell box 3673 hollywood station los angeles ca/ 90028

101. The ABCMR convened to consider plaintiff's case on April 3, 1974.

102. The Board's decision following a detailed summary of the earlier file, made these findings concerning the current proceedings before it:

s. that on 7 March 1973, the applicant asked Dr. Weinstein for his opinion regarding the applicant's [\*217] fitness for military service on 29 October 1959; that the doctor related on 20 March 1973 that the applicant had sustained a severe brain injury prior to his admission to WRAH; and that he had no first hand information as to the applicant's condition in October 1959 and could not state definitely whether or not he was disabled, in the sense of being unfit for service;

t. that based on correspondence with the U.S. Department of Justice, the applicant asked the Board on 26 March 1973 to reconsider his case;

u. that Dr. Weinstein informed the Board on 23 July 1973 that he could only state his general impression of the applicant's medical condition in 1959; that his initial encounter with the applicant was in the course of a research study on the effects on behavior of head injuries; that he examined the applicant in 1964 in response to a subpoena from the court; that in addition to the putative brain injury, he sustained fractures of facial bones and lacerations in the airplane crash; that after receiving treatment he insisted on returning to duty; that the applicant had made several suicidal gestures, shooting himself in the chest in 1962 and trying to cut his wrists after his [\*218] arrest in 1963; that there also had been periods of confabulation and amnesia; that personality and behavioral changes are common sequelae of brain injuries such as were sustained by the applicant; that these include 'lapses in memory, denial of illness, outbursts of temper and violence and anti-social behavior'; that any medical evaluation of the applicant in 1959 should have considered his brain injury as a causal factor in his behavior; and that after his injury he was unfit to be an Army officer; and

v. that the Board on 6 September 1973 asked the SGO to review the applicant's case and advise whether the

additional evidence warranted any change in the findings made by that office in 1963 and 1969; that the SGO informed the Board on 23 November 1973 that 'all of the voluminous correspondence in this case has been carefully reviewed,' and that in its opinion 'there are no new issues or significant new evidence presented in this case and that no action appears indicated.'

103. The Board concluded:

THE BOARD CONCLUDES:

1. That although the applicant was severely injured in November 1954, the medical treatment he received for these injuries made him fit to again perform general [\*219] military service commencing in May 1955.

2. That the above conclusion is supported by the applicant's military records prepared between May 1955 and October 1959, particularly medical records and efficiency reports, which provide no basis for a determination that he was medically unfit for further military service on 30 October 1959.

3. That the foregoing conclusions are further supported by the findings of the Surgeon General's Office on 13 June 1963 after a review of available evidence in the applicant's case.

4. That, furthermore, medical examination of the applicant by the Veterans Administration in March 1960, including neuropsychiatric evaluation, revealed no condition which could be considered to have rendered him medically unfit for military service.

5. That while there appears to be no doubt that the applicant's mental health deteriorated subsequent to his separation from the Army, as evidenced by the decisions made in his case by the Veterans Administration 1969, this affords insufficient basis for a determination that he was medically unfit on October 1959. That this conclusion is supported by subsequent findings made by the Surgeon General's Office in 1969 [\*220] and 1973 [see paras n and v above].

6. That in consideration of the foregoing findings and conclusions, the applicant's failure to be retired effective 30 October 1959 by reason of physical disability is neither erroneous nor unjust.

Trial in This Court

104. Dr. Weinstein testified on the trial in this court in

1979 on behalf of plaintiff, who also testified and appeared pro se. Dr. Alderete testified as a witness for the Government.

Dr. Weinstein's Testimony

105. (a) Dr. Weinstein whose qualifications to 1966 are stated in finding 65 was further qualified, by the time of trial.

(b) As of the time of trial of this case, Dr. Weinstein was a member of the American Neurological Association and the American Psychiatric Association. He is a Fellow of the William Alanson White Institution of Psychiatry. Until his retirement in 1977, he was Professor of Neurology at the Mount Sinai Medical School. He is a consultant to the National Medical Center, the Naval Medical Center, the Veterans Administration, and the Peace Corps.

106. (a) Dr. Weinstein explained his diagnosis of plaintiff as suffering from traumatic encephalopathy, chronic, as follows:

Post-Traumatic [\*221] Encephalopathy is very simple. It simply means that something is the matter with the brain caused by trauma and persisting for a long period after the initial injury, manifested chiefly by behavioral disturbances in certain areas, namely the area of social and emotional behavior, rather than the ability to use language, to calculate and carry on your ordinary thinking processes of everyday life.

(b) A diagnosis of post-traumatic encephalopathy would not have been valid in 1955 because too brief an interval had passed since plaintiff's injury, but Dr. Weinstein nevertheless thought at the time that plaintiff had a severe brain injury.

Q. Is it true, sir, that you found that the patient, the Plaintiff, had sustained a fracture through the base of his brain which injured the underside of the brain and not only damaged the brain but also damaged some of the cranial nerves coming off of the brain and that you had diagnosed the patient's condition as disturbed brain function, the particular characterization in 1955 being post-traumatic encephalopathy?

A. At that time the diagnosis of post-traumatic encephalopathy was not valid because the post period was so brief.

Yes, I was [\*222] under the impression, I will not say diagnosis because that means a form of record, that he had had a severe injury to the brain.

(c) Asked whether he was suggesting that Mr. Nagell can carry on the ordinary processes of a normal life:

A. After all the legal documents I have seen Mr. Nagell prepare, I would say his mental capacity for a layman is surprising[ly] good in that particular area.

(d) He testified that as of 1964, when he talked to plaintiff, it was his opinion that plaintiff could understand his legal rights; and that whenever he had talked to plaintiff he had found him coherent and logical.

(e) Dr. Weinstein was asked whether his letter to plaintiff of March 20, 1973 (finding 99(b)), where he said he "could not state definitely" whether or not plaintiff was disabled in 1959, was inconsistent with his letter to the Corrections Board of July 23, 1973 (finding 99(d)), in which he concluded that after plaintiff's injury, "he was in my opinion unfit to be an Army officer."

He responded:

This statement, "After his injury he was in my opinion unfit to be an Army officer", I think that that has to be qualified.

Q. How would you qualify it, Doctor?

A. For [\*223] one thing, it would be the time at which the judgment was being made.

As I remember Mr. Nagell in 1955, he denied -- one of the things in behavior I remembered, he denied absolutely that there was anything wrong with him even though he had had a severe head injury. He insisted he was completely capable for combat duty, I guess was what he was going to. I certainly did not think at that time that he was fit for duty.

I also did not think, when he began from reading the story how when he was getting the bad efficiency reports and he was sleeping badly and he was having nightmares about men being killed and showing a lot of agitated behavior, I certainly did not think he was fit to be a leader of infantry soldiers or whatever he was doing at the time.

Also, my answer has to be qualified on what the military service was. If they gave the job in the legal department, no aspersions on the profession, he might have functioned quite well. But in a combat situation, I did not think he could have functioned well.

That is what I mean when I say I have to qualify my opinion.

I will also say that the battle dreams -- not the battle dreams but the agitated behavior and the discontent [\*224] that he was having in Korea or Japan at the time is not pathmonic [sic] of brain injury. In other words, it is not necessarily caused by brain injury. It can be caused by other stresses at all.

I must admit it is a flater, more dramatic statement that it should have been. There are many factors.

I still think that the plaintiff, Mr. Nagell, was unfit for military duty in my estimation, but I do not know much about the requirements of combat military officers.

(f) He testified that plaintiff was better capable of handling his affairs than was demonstrated by the bank episode, and that plaintiff's conduct in the bank could be attributed to increased stress from "a lot of troubles"-- money troubles and something he was mixed up in Mexico:

Q. At that time that Mr. Nagell entered the bank in 1963, did he have the same -- was he exercising the same abilities of intelligence and ability to handle affairs and so on that you said a moment ago he is able to show on a day to day basis?

A. He was capable of much better behavior than that.

Q. Why is it, Doctor, that at that time he did not show better behavior?

A. Well, he had a lot of troubles evidently at that time. [\*225] He did not have any money. He was mixed up in something in Mexico that I did not know anything about or I knew something about but I did not actually know the nature of it. I think if you want to know you will have to ask Mr. Nagell.

Q. Are these troubles, as you call them, things that would come under the category of stresses?

A. Yes.

Q. Are you then saying this increased stress may have been responsible for his action in 1963?

A. That is quite feasible.

Dr. Alderete's Testimony

107. Dr. Alderete, whose earlier qualifications are stated in finding 77, was at the time of the trial in this court in 1979 an Assistant Regional Flight Surgeon for the Federal Aviation Administration, and had been appointed Clinical Instructor of Psychiatry at Emory

Medical School. He had in 1967 been appointed Clinical Fellow in Electroencephalography at Harvard Medical School, and completed one year of specialized training in brain wave testing (electroencephalography). Prior to the trial, also, he had been from 1968 to 1978, Medical Director of the U.S. Penitentiary at Atlanta, Georgia.

108. (a) He testified that at the time of the bank incident in 1963, plaintiff was in [\*226] borderline psychosis and "probably had a paranoid personality and probably some of the symptomatology of the paranoid state and was probably bordering a little on hysteria"; that he, the witness, arrived at this inference by examining the patient's actions, described in various documents, and his various mental illnesses:

Q. Can you describe the difference in Mr. Nagell's mental condition between the time when you examined him in 1966 and that occasion when he entered the bank in 1963?

A. Here I am actually examining him in 1966 and back in 1963 when he entered the bank, I am not present there, so I have to go by inference. The way you usually do that is by examining his actions that are described to you by different documents and also by any mental illness and the history of the mental illness and you run that backwards.

I would say in answer to your question, that at the time of the bank robbery that he was probably a fairly severe paranoid personality and probably some of the symptomatology of a paranoid state and was probably bordering a little bit on hysteria.

Q. Was it your opinion that Mr. Nagell was in a borderline psychosis at the time he entered the bank?

[\*227] A. Yes.

(b) He testified further that at the time of the bank incident, plaintiff had some of his faculties and not others--was a "little crazy but not \* \* \* all the way":

Q. Does that mean he was -- how do you relate that, Dr. Alderete, to his ability to think logically at the time he entered the bank?

A. Let me put it this way, mental illness, as contrasted with pregnancy, can be partial. You are pregnant or you are not pregnant. Mental illness, you can be a little mentally ill or a whole lot mentally ill.

If you are a little mentally ill you have some of your faculties about you. You know what you are doing. You know some of the things that are going on, but you may not know the consequence of what you are doing or you may not be able to refrain from what you are doing.

A person can be a little crazy but not be all the way. That is how I would characterize Mr. Nagell at the time of the bank robbery, that he had some of his faculties with him and a few he did not.

(c) Further, that when he examined plaintiff in 1966, plaintiff was in remission, competent to stand trial, free of a mental condition that would keep him from understanding the charges against [\*228] him and from assisting in his own defense.

Q. Did you, Dr. Alderete, find that Mr. Nagell was competent to stand trial in 1966?

A. Yes, sir, I did.

Q. What criteria did you use to make that determination?

A. I generally used, for that purpose, I used some guidelines. Does the man have a mental condition or not that would keep him from understanding what the charges are and understanding the proceedings in a court trial and to be able to assist an attorney in defending himself. That is one criteria.

Did he know what he was charged with. Did he know that the crime that he was charged with was against the law. Was he aware of the courtroom proceedings, that is what the function of the judge would be, what the function of a prosecutor would be, what the function of the jury and the defense attorney would be. Those are generally recognized guidelines that you use for that.

Q. Did you find that Mr. Nagell met all those criteria for competency?

A. Yes.

(d) Further, that plaintiff was capable of understanding his rights and that there was nothing in his mental condition, other than being in prison, which would have prevented him from bringing suit in the [\*229] Court of Claims.

(e) Further, that remission is a "fancy word" meaning that he did not have the symptomatology that he had had in the recent past:

Q. Now, you state in your Report of Psychiatric Examination, Dr. Alderete, that at the time you examined the Plaintiff he was in remission, is that correct?

A. Yes, sir.

Q. Now, when Mr. Nagell was in remission as opposed to being psychotic, in your opinion was he capable of understanding his legal rights?

A. Yes, sir.

Q. Can you give an opinion, Doctor, as to whether there was anything in his mental condition in 1966 when you saw him that would have prevented him from bringing a lawsuit in this court of the nature that we are engaged in at this time?

A. I do not know of anything mentally that would have prevented him from it other than being in prison.

Q. I am limiting the question to his mental condition as you diagnosed it.

A. Mental condition, no, there would be nothing.

(f) Further, that plaintiff's exposure to stress determines the severity of his mental illness:

Q. In your diagnosis of Mr. Nagell's condition, does stress have any affect upon the degree to which he is affected by his mental condition?

**[\*230]** A. It certainly does. It still has, although he is currently in pretty good shape, but stress still plays an important part. Under stress he starts to fall apart. The more severe the stress the more he falls apart. Under real severe stress he can go all the way in to a borderline psychosis.

109. In response to Dr. Weinstein's assumption that plaintiff was personally responsible for all the legal documents prepared in his case, plaintiff testified:

I am not an attorney. I do not profess to be one. I have never made that claim. Many of the things that I have done have been on the advice of other attorneys, people who are actually attorneys, an individual who is with the Central Intelligence Agency even requested that I not mention his name.

It sort of burns me up when this is used against me and I think it is being used against me. In other words, Dr. Weinstein indicated that he had no doubts about such and such because after looking at my petitions and all of

this court paperwork, so I want to emphasize that all of this court paperwork which I have submitted does not stem from me personally.

#### Intermediate Findings of Mixed Fact and Law

110. (a) While in military **[\*231]** service, plaintiff suffered a mental disorder, traumatic encephalopathy, in 1954 in a crash of a military airplane.

(b) The disorder disabled him from performing military duties.

(c) The disability is service-connected.

(d) The disability is total, that is, 100 percent.

111. In 1958 and in 1959, when plaintiff attempted to and did resign and was given separation physical examinations, he was suffering from an exacerbation of his mental disorders, including Anton's disease, which compelled him to pursue the course he did in tendering his resignation and denying illness and concealing information regarding his symptoms and ailments.

112. On his resignation from the Army in 1959, he was entitled to a medical disability rating and the accompanying disability and other payments provided by law.

113. The Correction Board decisions to the contrary are unsupported by substantial evidence and are reversed. No issues remain to be resolved for which a remand to the Board would be appropriate.

114. Plaintiff's mental illness, and its continuity since it was incurred, are responsible for his failure to file a timely suit in this court. Periods in which plaintiff's symptoms **[\*232]** are less debilitating or less observable are not of sufficient comprehensiveness to rid him of the impairment of judgment and good sense, Anton's disease or denial of illness, delusions as to factual matters, and return to psychotic states on stress, all of which effectively impaired his access to this court.

115. Limitations have been tolled under [28 U.S.C. § 2501](#) on his claim for appropriate disability payments by his mental disability and its continuity since it was incurred.

116. The opinions to the contrary have been rendered by medical witnesses lacking the requisite experience in brain injuries, professional qualifications in neurology, or sufficient knowledge of the history of plaintiff's disease and its symptoms.

117. Accordingly the claim that plaintiff is entitled to a judgment of a 100 percent disability since 1959, and the appropriate payments, as provided by law is upheld.

118. In the event the parties are unable to agree on damages under Rule 131(c), the case will be set down for proceedings to determine damages or for remand to the military authorities for that purpose.

#### CONCLUSION OF LAW

On the basis of the findings of fact and opinion herein, **[\*233]** it is concluded that plaintiff is entitled to, and the defendant is liable for, payment of a military disability pension appropriate to plaintiff's rank as of the time of his resignation for total mental disability, from the time of his resignation from the Army in 1959, and any other sums provided in such case by law, and that the case is set down under Rule 131 for proceedings for the determination of damages.

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