A Rough Form of Justice: Constitutional Boundaries on Capital Punishment Under the UCMJ

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I. Introduction

A society's laws may be meant to "insure domestic Tranquility," or to "promote the general Welfare."[1] American military law, meanwhile, is meant "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[2] If the former emphasizes peacefulness and security, the latter prioritizes martial potency. One facilitates a society's functioning, while the other safeguards its existence. But when constitutional rights conflict with national security mandates, how is the tension resolved?

In America, both civilian and military authorities have long dispensed capital punishment through their respective justice systems. But while the Supreme Court has consistently developed constitutional principles governing capital punishment in civilian courts, its military jurisprudence is sparse. The Court extends extraordinary deference to military law and acknowledges an abbreviated array of rights for service members. As the Eighth Amendment is read increasingly broadly, however, the extent of that deference must be studied and questioned.

This Note will proceed in three parts. First, an overview of the history and procedural structure of the military justice system will provide the context for its modern operation. Next, civilian capital punishment jurisprudence will be compared and contrasted with the relevant military law. Finally, the capital articles of the Uniform Code of Military Justice (UCMJ) will be surveyed to determine whether they survive the Eighth Amendment jurisprudence of the Supreme Court.

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1. U.S. CONST. pmbl.
2. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, § 3 (2019) [hereinafter MCM].

II. The American Military Justice System

A. Origins and Evolution

The Constitution distinguishes military governance from the civilian realm. Authority for military courts does not flow from the creation of the federal judiciary in Article III, but from an Article I enumerated power that allows Congress to "make Rules for the Government and Regulation of the land and naval Forces."[3] Likewise, the Bill of Rights does not extend its full protections to American service members. The Fifth Amendment, for example, explicitly omits military cases from the Grand Jury Indictment clause,[4] and courts have likewise read a military exception into the Sixth Amendment's right to a jury trial.[5] Supreme Court opinions have repeatedly acknowledged the unique considerations owed to the military justice system.[6] In 1974, then-Justice Rehnquist stated that "the different character of the military community and of the military mission requires a different application of [First Amendment] protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[7] But precisely where military necessity overtakes constitutional protections is an open question.

Whether the Constitution tolerates different Eighth Amendment standards for civilian and military justice regimes turns on an answer to this question. Courts-martial were conceived not merely as a justice-rationing device but as a method of enforcing discipline and obedience among troops.[8] The Articles of War in force during the American Revolution were later enacted into legislation by Congress in 1789.[9] These Articles deferred heavily to the jurisdiction of civil courts and did not authorize courts-martial except

3. U.S. CONST. art. I, § 8, cl. 14.

4. U.S. CONST. amend. V, cl. 1.

5. *See* United States v. Kemp, 46 C.M.R. 152, 154 (1973) ("Courts-martial are not a part of the judiciary of the United States within the meaning of Article III of the Constitution . . . . They derive their authority from the enactments of Congress under Article I of the Constitution, pursuant to congressional power to make rules for the government of the land and naval forces. Consequently, the Sixth Amendment right to trial by jury . . . has no application to the appointment of members of courts-martial.").

6. *See infra* notes 72–88.

7. Parker v. Levy, 417 U.S. 733, 758 (1974).

8. A court-martial is a military court that tries and punishes crimes listed in the UCMJ. *See* Nicole E. Jaeger, *Maybe Soldiers Have Rights After All!*, 87 J. CRIM. L. & CRIMINOLOGY 895, 899 (1997) (stating that the historical function of the military justice system was "to ensure disciplined troops, and the court-martial was a tool that could be used at the commander's complete discretion to instill fear and obedience in his soldiers").

9. Loving v. United States, 517 U.S. 748, 752 (1996) (citing Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96).

for specific military-related offenses.[10] Congress, worried that civil courts would be unable to function during the Civil War, expanded this jurisdiction in 1863 to cover common law capital crimes.[11] Jurisdiction expanded again in 1916, as military courts were authorized to hear common law felonies committed by military personnel.[12] Following World War II, which saw military courts convene over two million courts-martial, Congress overhauled the military justice system with the enactment of the UCMJ in 1950.[13] Military courts now have jurisdiction over all American service members, regardless of their offense.[14] Since the nation's founding, public sentiment towards permanent military bodies has swung from mistrust to reverence. The jurisdiction granted to the military has expanded in tandem with the public faith in the service branches and tolerance for their authority.

B. Capital Punishment in Military Courts

While originally available in more limited circumstances, American courts-martial have long been afforded the authority to dispense capital punishment and have historically exercised this authority.[15] But despite a prolific history, the United States military has not carried out an execution since 1961 and has not executed a service member for a military-related offense since 1945.[16] To understand why requires an examination of the procedural structure of capital courts-martial and their appellate treatment.

The UCMJ lists fourteen death-eligible offenses.[17] Of these, only murder has no explicit national security or military association. Nine of the

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10. *Id.* (citing 1776 Articles, § 10, art. 1).

11. *Id.* at 753 (citing Act of Mar. 3, 1863, § 30, 12 Stat. 736, Rev. Stat. § 1342, art. 58 (1875)).

12. Except for murder and rape committed within the country during peacetime, which could only be tried by civilian courts. *Id.* (citing Articles of War of 1916, ch. 418, § 3, arts. 92–93, 39 Stat. 664).

13. Jaeger, *supra* note 8, at 900.

14. Solorio v. United States, 483 U.S. 435, 436 (1987). *Solorio* overturned *O'Callahan v. Parker*, 395 U.S. 258 (1969), which had held that crimes committed by members of the Armed Forces must have some "service connection" in order to be tried by court-martial. *O'Callahan*, 395 U.S. at 272. Whether the service connection rule was abolished for capital crimes in the military was not definitively answered by the Court in *Solorio*, but this Note will assume it was. *See* United States v. Hennis, 75 M.J. 796, 810 (A. Ct. Crim. App. 2016) (holding that "nothing in the *Solorio* majority opinion . . . limits its holding to non-capital cases"). *But see Loving*, 517 U.S. at 774 (Stevens, J., concurring) ("*Solorio*'s review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try noncapital ones.").

15. *See infra* notes 120–25 and accompanying text. *Cf. Loving*, 517 U.S. at 752–53 (recalling that Congress in 1806 debated and rejected a proposal to remove the death penalty from court-martial jurisdiction).

16. Clark Smith, *Fair and Impartial? Military Jurisdiction and the Decision to Seek the Death Penalty*, 5 U. MIAMI NAT'L SECURITY & ARMED CONFLICT L. REV. 1, 11 (2015).

17. Thirteen of the offenses are considered unique to the military: desertion in a time of war,

offenses are punishable by death only if committed in the presence of the enemy or in a time of war.[18] Once a service member is accused under one of these articles, the Convening Authority—a commanding officer who levies the charges against the defendant—will decide whether the military will seek the death sentence.[19] At least one defense counsel in capital cases must be, "to the extent practicable, . . . learned in the law [of] such cases."[20] Capital cases must be tried before a panel of twelve military members.[21] The panel must vote unanimously to convict, at which point the court-martial will enter the sentencing phase.[22] A death sentence may not be imposed unless each panel member finds that the offense includes a specified aggravating factor, such as causing substantial damage to the national security of the United States.[23] If the members unanimously agree that the aggravating factors substantially outweigh the mitigating evidence, they then must conclude that death is the appropriate sentence.[24] Next, the Court of Criminal Appeals (CCA) of the appropriate service branch reviews the record.[25] If the CCA affirms the sentence, it rises to the second level of appellate review before the Court of Appeals for the Armed Forces (CAAF).[26] Only if the CAAF

UCMJ, art. 85, 10 U.S.C. § 885 (2019); assault of a superior commissioned officer in a time of war, UCMJ, art. 89, 10 U.S.C. § 889 (2019); willfully disobeying a superior commissioned officer in a time of war, UCMJ, art. 90, 10 U.S.C. § 890 (2019); mutiny or sedition, UCMJ, art. 94, 10 U.S.C. § 894 (2019); offenses by sentinel or lookout in a time of war, UCMJ, art. 95, 10 U.S.C. § 895 (2019); misbehavior before the enemy, UCMJ, art. 99, 10 U.S.C. § 899 (2019); subordinate compelling surrender, UCMJ, art. 100, 10 U.S.C. § 900 (2019); improper use of a countersign in a time of war, UCMJ, art. 101, 10 U.S.C. § 901 (2019); forcing a safeguard, UCMJ, art. 102, 10 U.S.C. § 902 (2019); spying during a time of war, UCMJ, art. 103, 10 U.S.C. § 903 (2019); espionage, UCMJ, art. 103a, 10 U.S.C. § 903a (2019); aiding the enemy, UCMJ, art. 103b, 10 U.S.C. § 903b (2019); and willfully and wrongfully hazarding a vessel or aircraft, UCMJ, art. 110, 10 U.S.C. § 910 (2019). The fourteenth capital offense is murder, UCMJ, art. 118, 10 U.S.C. § 918 (2019).

18. Desertion in a time of war, UCMJ, art. 85, 10 U.S.C. § 885 (2019); assault of a superior commissioned officer in a time of war, UCMJ, art. 89, 10 U.S.C. § 889 (2019); willfully disobeying a superior commissioned officer in a time of war, UCMJ, art. 90, 10 U.S.C. § 890 (2019); offenses by sentinel or lookout in a time of war, UCMJ, art. 95, 10 U.S.C. § 895 (2019); misbehavior before the enemy, UCMJ, art. 99, 10 U.S.C. § 899 (2019); subordinate compelling surrender, UCMJ, art. 100, 10 U.S.C. § 900 (2019); improper use of a countersign in a time of war, UCMJ, art. 101, 10 U.S.C. § 901 (2019); spying during a time of war, UCMJ, art. 103, 10 U.S.C. § 903 (2019); and aiding the enemy, UCMJ, art. 103b, 10 U.S.C. § 903b (2019).

19. RULES FOR COURTS-MARTIAL 1004(b)(1)(A) (2019) [hereinafter RCM].

20. UCMJ, art. 27(d), 10 U.S.C. § 827(d) (2019); UCMJ, art. 70(f), 10 U.S.C. § 870(f) (2019).

21. UCMJ, art. 25a(a), 10 U.S.C. § 825a(a) (2019).

22. RCM, *supra* note 19, 1004(a)(2)(A), 1006(d)(4)(A). Before a 1984 executive order, unanimity was not required. Smith, *supra* note 16, at 7.

23. RCM, *supra* note 19, 1004(c)(3).

24. *Id.* 1006(d)(1).

25. *Id.* 1203(b).

26. *Id.* 1204(a)(1).

affirms the sentence does the case qualify for Supreme Court review.[27] Whether the sentence is affirmed by the Supreme Court or certiorari is denied, the defendant may not be executed unless the President approves the punishment,[28] at which point the defendant may seek habeas relief in an Article III court.[29] Barring relief here, the condemned service member will be executed by lethal injection.[30]

These sentencing and appellate protections are in many ways more substantial than those enjoyed by civilian defendants. For example, the military is one of only two American jurisdictions that provides two levels of mandatory appellate review for capital cases.[31] As in civilian jurisdictions, the appellate courts review the legal sufficiency of a death sentence. Unlike most civilian jurisdictions, however, these intermediate courts also review capital cases for their factual sufficiency.[32] Military defendants are also granted "unlimited opportunity to present mitigating and extenuating evidence" on sentencing.[33] A host of failings have contributed to this phenomenon, including ineffective counsel, improper instruction by judges, and mishandled evidence.[34] Of the seventeen death sentences imposed under the current (post-1984) system, thirteen have been overturned, while four are still pending.[35] This dry spell may soon be broken, as the final appeal of convicted murderer and Army Pvt. Ronald Gray, whose death sentence was affirmed by President Bush in 2008, failed in November of 2017.[36]

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27. *Id.* 1205(a)(1).

28. UCMJ, art. 57(a)(3), 10 U.S.C. § 857(a)(3) (2019).

29. The United States Disciplinary Barracks at Fort Leavenworth is located in Kansas, meaning that federal habeas cases arising there will be litigated under the Tenth Circuit's precedent. Because the Tenth Circuit denies habeas relief for claims that were "fully and fairly considered" by a military court—a standard that will be satisfied even if the military court denied a claim without further explanation—and because claims not presented before the courts are considered waived, military habeas claims may fall into a "Catch–22" that precludes habeas relief for military petitioners. Dwight Sullivan, *A Matter of Life and Death: Examining the Military Death Penalty's Fairness*, 45 FED. LAW. 38, 43 (1998).

30. The last military execution was conducted by hanging. As such, the military has not yet executed a service member by lethal injection. Dwight Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1, 1–2 (1994).

31. Smith, *supra* note 16, at 9. The other is Tennessee. *Id.* at n.48.

32. *Id.* at 9–10.

33. United States v. Matthews, 16 M.J. 354, 378 (C.M.A. 1983).

34. Rich Federico, *The Unusual Punishment: A Call for Congress to Abolish the Death Penalty under the Uniform Code of Military Justice for Unique Military, Non-Homicide Offenses*, 18 BERKELEY J. CRIM. L. 1, 25–26 (2013).

35. *Description of Cases for Those Sentenced to Death in U.S. Military*, DEATH PENALTY INFO. CTR., https://www.deathpenaltyinfo.org/description-cases-those-sentenced-death-us-military [https://perma.cc/SZ66-NCTX].

36. United States v. Gray, 77 M.J. 5, 6 (C.A.A.F. 2017) (stating that "[d]irect review of this capital case is done. The Army court has completed its review under Article 66, UCMJ, 10 U.S.C.

III. Capital Courts-Martial and the Supreme Court

A. The Historical Context of Modern Capital Punishment Jurisprudence

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments"[37] and has been the primary basis for limiting the death penalty in civilian courts. Forgoing a static touchstone, the Supreme Court has held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[38] The difficulty of applying such an elastic standard contributed to the nine opinions and 50,000-plus words of the Court's 1972 opinion in *Furman v. Georgia*.[39] In *Furman*, the Court held that death penalty schemes in the United States were so inconsistently and arbitrarily applied as to be unconstitutional.[40] Consequently, every prisoner then on death row had his sentence commuted to life imprisonment. Following a four-year moratorium on the death penalty, the Court, in a slew of cases led by *Gregg v. Georgia*,[41] affirmed the constitutionality of death sentences that incorporated protections such as bifurcation between a determination of guilt and the sentencing procedure, judicial guidance on how a jury may consider aggravating factors, and mandatory appellate review.[42] On the same day, the Court struck down statutes that imposed a *mandatory* death sentence for first-degree murder.[43] Then, in 1977, the Court decided that non-lethal rape of an adult may not be punishable by death,[44] and it extended that holding to include non-lethal rape of children in 2008.[45]

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§ 866, and this Court has completed its review under Article 67, UCMJ, 10 U.S.C. § 867. Under Article 67a, UCMJ, the U.S. Supreme Court has denied certiorari. The President has approved the sentence and an execution date was set. Therefore, there is a final judgment as to the legality of the proceedings under Article 71(c)(1), UCMJ, and the case is final under Article 76, UCMJ, 10 U.S.C. § 876. Appellant has exhausted all of his remedies in the military justice system."). The Supreme Court subsequently denied Gray's petition without explanation. Gray v. United States, 138 S. Ct. 2709, 2709 (2018) (mem.), *reh'g denied*, 139 S. Ct. 47, 47 (2018) (mem.).

37. U.S. CONST. amend. VIII.

38. Trop v. Dulles, 356 U.S. 86, 101 (1958).

39. 408 U.S. 238 (1972). Evidencing the challenge of applying the vague *Trop* standard, *Furman* is among the longest opinions in the history of the Court. Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 Hous. L. Rev. 621, 632 n.44 (2008).

40. *Furman*, 408 U.S. at 239–40.

41. 428 U.S. 153 (1976).

42. *Id.* at 163–66.

43. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

44. Coker v. Georgia, 433 U.S. 584, 600 (1977).

45. Kennedy v. Louisiana, 554 U.S. 407, 413 (2008).

While dissenting Justices in *Furman* feared the holding would apply to the UCMJ,[46] the military justice system did not initially react to the 1970s holdings. On the contrary, it sentenced seven service members to death between 1979 and 1983 under a system that did not consider itself bound by Supreme Court precedent.[47] In 1976, the CAAF[48] weighed in on a still-ongoing debate as to how the Bill of Rights applies to the military justice system, announcing as a general rule that courts-martial should abide by civilian constitutional norms unless military necessity justified a departure.[49] Left unanswered was what "military necessity" entails or how great a departure may be tolerated. Taking up the issue of *Furman* in 1983, the Navy–Marine Corps intermediate appellate court defended the constitutionality of capital courts-martial, relying on the argument that military defendants were afforded more procedural protections than civilian defendants.[50] Later that year, however, the CAAF invalidated the military death penalty in *United States v. Matthews*.[51] Assuming that *Furman* applied to courts-martial, the CAAF held that most of the procedural safeguards mandated by the Supreme Court were already satisfied under the UCMJ but struck down the military death penalty on the grounds that it did not sufficiently require the identification of an offense's aggravating factors.[52] And so prisoners on military death row had their *Furman* moment: *Matthews* resulted in the reversal of every military death sentence.[53]

What might have turned into a high-court showdown between military law and civilian precedent was preempted by the Executive Branch. Rather than contest the applicability of *Furman* or *Gregg*, President Reagan issued an Executive Order amending court-martial procedure in capital cases. Executive Order 12,460, enacted as Rule for Courts-Martial (RCM) 1004, enhanced procedural protections for military defendants facing the death penalty, detailed above, by requiring the presence of an aggravating factor[54]

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46. Furman v. Georgia, 408 U.S. 238, 412 (1972) (Blackmun, J., dissenting); *id.* at 417–18 (Powell, J., dissenting).

47. United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986); United States v. Artis, 22 M.J. 15 (C.M.A. 1986); United States v. Redmond, 21 M.J. 319 (C.M.A. 1986); United States v. Matthews, 16 M.J. 354 (C.M.A. 1983); United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983); United States v. Gay, 16 M.J. 586 (A.F.C.M.R. 1982); United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1981).

48. Until 1994, the Court of Appeals for the Armed Forced was classified as the Court of Military Appeals. This Note will use the court's current designation for consistency.

49. Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976).

50. *Rojas*, 15 M.J. at 930.

51. 16 M.J. 354, 382 (C.M.A. 1983).

52. *Id.* at 377–79.

53. Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 7 (2006).

54. RCM, *supra* note 19, 1004(b)(4)(A).

and imposing unanimity requirements in sentencing.[55] Subsequent changes to the military death penalty have both expanded its availability and broadened protections afforded to the accused, but none has been as extensive as RCM 1004.[56]

B. UCMJ Article 55

The extent to which military courts are bound by the Supreme Court's Eighth Amendment jurisprudence is not a settled issue, but courts-martial must at least abide by a similar provision in the UCMJ. Article 55 prohibits punishment by "flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment" and regulates the use of shackles.[57] Facially, Article 55 actually grants more protections than the Eighth Amendment, outlawing specific punishments and banning cruel *or* unusual punishments (rather than using the narrower constitutional conjunctive).

Congress likely did not expect the Eighth Amendment (or at least civilian courts' interpretation of it) to apply to courts-martial, or else Article 55 is superfluous.[58] In *Matthews*, the CAAF suggested that military members are entitled to Eighth Amendment protection but left the door open in the next sentence, acknowledging that "there may be circumstances under which the rules governing capital punishment of service members will differ from those applicable to civilians."[59] The Supreme Court in *Loving v. United States*[60] likewise assumed the Amendment's applicability to the military.[61] Criticizing in concurrence,[62] Justice Thomas leaned in part on *Schick v. Reed*,[63] which expressly declined to reach the question of the Eighth Amendment's applicability to military defendants.[64] Dissenting in *Schick*,

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55. *Id.* 1004(b)(4)(B).

56. Sullivan, *supra* note 53, at 10.

57. UCMJ, art. 55, 10 U.S.C. § 855 (2019).

58. *See* Christine Daniels, *Capital Punishment and the Courts-Martial: Questions Surface Following* Loving v. United States, 55 WASH. & LEE L. REV. 577, 603 (1998) ("After all, if Congress expected the same Eighth Amendment capital punishment rules to control both the courts-martial and civilian courts, then Article 55 is redundant.").

59. United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983).

60. 517 U.S. 748 (1996).

61. *Id.* at 755–56. This remains the operating assumption of the CAAF. United States v. Pena, 64 M.J. 259, 265 (C.A.A.F. 2007).

62. "It is not clear to me that the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military . . . . In light of Congress' express constitutional authority to regulate the Armed Forces, and the unique nature of the military's mission, we have afforded an unparalleled degree of deference to congressional action governing the military." *Id.* at 777–78 (Thomas, J., concurring in the judgment) (citations omitted).

63. 419 U.S. 256 (1974).

64. *Id.* at 260 ("[D]oes that case apply to death sentences imposed by military courts where the

meanwhile, Justice Marshall had argued that "[n]othing in *Furman* suggests that it is inapplicable to the military. The *per curiam* carves out no exceptions to the prohibition against discretionary death sentences. The opinions of the five-member majority recognize no basis for excluding the members of the Armed Forces from protection against this form of punishment."[65]

C. The Supreme Court's Treatment of the Military Justice System

The Supreme Court's 2008 decision in *Kennedy v. Louisiana*[66] based its holding on an apparent "national consensus" that the Eighth Amendment did not tolerate capital punishment for non-lethal rape of a child.[67] Of the thirty-seven jurisdictions that utilized the death penalty, the Court reasoned, "only six . . . authorize[d] the death penalty for rape of a child."[68] Absent from the Court's consideration, however, was the thirty-eighth United States jurisdiction with the death penalty: the military under the UCMJ, which did authorize capital punishment for that crime.[69] Upon the omission's discovery, the Court nonetheless denied rehearing, reasoning that *Kennedy* involved "the application of the Eighth Amendment to *civilian* law," barring the need to "decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases."[70] Commenting on the denial of rehearing, Justice Scalia distilled the issue:

> [The majority] speculates that the Eighth Amendment may permit subjecting a member of the military to a means of punishment that would be cruel and unusual if inflicted upon a civilian for the same crime . . . . One can imagine, for example, a social judgment that treason by a military officer who has sworn to defend his country deserves the death penalty even though treason by a civilian does not.[71]

Distinguishing the military justice system from its civilian counterpart, the Court has left open the question of how courts-martial should apply the Eighth Amendment.

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asserted vagaries of juries are not present as in other criminal cases? Our disposition of the case will make it unnecessary to reach the third question.").

65. *Id.* at 271 n.5 (Marshall, J., dissenting).

66. 554 U.S. 407 (2008).

67. *Id.* at 426.

68. *Id.*

69. Kennedy v. Louisiana, 554 U.S. 945, 947 (2008) (denying petition for rehearing). Military law has since been amended to remove death as an available punishment for rape. MCM, *supra* note 2, pt. IV, ¶60(d)(1).

70. *Id.* at 947–48 (emphasis added).

71. *Id.* at 949.

Hesitation to bind military courts to civilian precedent has a long tradition in American jurisprudence. The Supreme Court has consistently held that the Constitution applies differently to the military.[72] In 1922, the Court wrote that "the experience of our Government for now more than a century and a quarter, and of the English Government for a century more, proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs."[73] Military law, according to the Court's 1953 decision in *Burns v. Wilson*,[74] "is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[75] The Court (at that point) had "played no role in its development" and had "exerted no supervisory power" over it—"the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment."[76] What was true in 1953 is not true today,[77] but the *Burns* Court articulated a still-pervasive view that military society is owed deference due to the uniquely high stakes of its mandate and the lack of expertise among the civilian judiciary.[78] In *Parker v. Levy*,[79] the Court described the military as "a specialized society separate from civilian society," treated differently in the eyes of the law due to "the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'"[80] Military law, according to *Parker*, is "that of obedience."[81] In 1983, Chief Justice Burger noted that affording the military justice system special considerations of deference was a necessity "too obvious to require extensive discussion; no

72. *See* United States v. Stanley, 483 U.S. 669, 683 (1987) (stating that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate"); Reid v. Covert, 354 U.S. 1, 36 (1957) (plurality opinion) ("Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts."); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (stating that the "military constitutes a specialized community governed by a separate discipline from that of the civilian").

73. United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 343 (1922).

74. 346 U.S. 137 (1953).

75. *Id.* at 140.

76. *Id.*

77. The Court has since, in cases like *Solorio v. United States*, 483 U.S. 435 (1987) and *Loving v. United States*, 517 U.S. 748 (1996), played a role in the development of military law.

78. *See* Cynthia S. Conners, *The Death Penalty in Military Courts: Constitutionally Imposed?*, 30 UCLA L. REV. 366, 372 (1982) (noting that Congress is "better equipped than the judiciary to evaluate the impact on military discipline that might result from a change in disciplinary rules and procedures").

79. 417 U.S. 733 (1974).

80. *Id.* at 743.

81. *Id.* at 744.

military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."[82]

Justice Stevens, concurring in *Loving*, rebutted this notion, preferring instead to extend the full rights of civilians to service members.[83] "[T]here are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians."[84] This logic is not compelling. The military oath of enlistment recognizes the opposite,[85] as do the Constitution[86] and Supreme Court opinions.[87] Only a small fraction of service men and women risk their lives in combat, but the sacrifice of all persons serving lies in their (usually) voluntary surrender of certain rights in service of a much greater cause—namely, military readiness and effectiveness in the form of "good order and discipline." Other high-stakes security organizations such as police forces or intelligence agencies may not subject their members to death for compromising their missions, but defense of the territorial sovereign from foreign threats exists as a cause apart from all others. In justifying why the military offense of sleeping while on post as a sentry is punishable by death,[88] former Judge Advocate General of the Army General Enoch H. Crowder offered that "cities and fortifications and armies have been lost through the drowsiness of sentinels."[89] Limiting the constitutional rights enjoyed by soldiers, sailors, airmen, and Marines is not punishment for the good deed of service but rather is what makes that service such a good deed in the first place.

82. Chappell v. Wallace, 462 U.S. 296, 300 (1983).

83. Loving v. United States, 517 U.S. 748, 774 (1996) (Stevens, J., concurring); *see also* Smith, *supra* note 16, at 4 (advocating "for the removal from the military's jurisdiction of capital offenses not directly connected to the role of the military").

84. *Loving*, 517 U.S. at 774 (Stevens, J., concurring).

85. "I, [name of enlistee], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that *I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice*. So help me God." 10 U.S.C. § 502(a) (2019) (emphasis added).

86. *See supra* notes 3–5 and accompanying text.

87. *See supra* notes 72–82 and accompanying text; *see also* Middendorf v. Henry, 425 U.S. 25, 50 (1976) (Powell, J., concurring) (recognizing that "one's constitutional rights are not surrendered upon entering the Armed Services. But the rights are applied, as this Court often has held, in light of the 'unique military exigencies' that necessarily govern many aspects of the military service").

88. UCMJ, art. 95, 10 U.S.C. § 895 (2019).

89. Federico, *supra* note 34, at 20.

IV. Military-Specific Offenses

A. Military-Specific Capital Articles and Competing Civilian Precedent

In *Weems v. United States*,[90] the Supreme Court called for proportionality between an offense and its punishment.[91] In a capital context, the Court's definition of "proportional" has narrowed over the past several decades.[92] Existing Supreme Court case law strongly suggests that capital punishment may not be invoked except in cases involving homicide. *Coker v. Georgia*[93] barred the penalty for non-lethal rape of an adult,[94] *Kennedy* extended the bar to non-lethal rape of a child,[95] and *Enmund v. Florida*[96] struck down the death penalty in felony-murder cases where the defendant neither kills nor intends to do so.[97] This precedent directly clashes with nearly all of the capital offenses under the UCMJ. Of the fourteen eligible offenses, only one—murder—has loss of life as an essential element.[98] Every capital sentence passed under the current structure, however, has included a charge of murder, thus precluding meaningful review of the articles that do not include homicide.[99]

The Supreme Court has held unconstitutional state statutes with mandatory death sentences. *Woodson v. North Carolina*[100] and *Roberts v. Louisiana*,[101] decided on the same day as the cluster of cases testing the post-*Furman* waters, involved state statutes that mandated the death penalty for all criminal defendants convicted of first-degree murder.[102] Both were struck down as unconstitutional.[103] The Court reaffirmed these holdings in a 1987 decision, *Sumner v. Shuman*,[104] that prohibited mandatory death penalties

90. 217 U.S. 349 (1910).

91. *Id.* at 367.

92. *See supra* notes 40–45 and accompanying text.

93. 433 U.S. 584 (1977).

94. *Id.* at 598.

95. Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008).

96. 458 U.S. 782 (1982).

97. *Id.* at 801. *But see* Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding that a non-triggerman in a felony murder may be sentenced to death because he acted with "reckless indifference to human life" and was a "major participa[nt] in the felony").

98. *See supra* note 17 (listing the UCMJ's fourteen death-eligible offenses).

99. *See Description of Cases for Those Sentenced to Death in U.S. Military*, *supra* note 35 (describing military cases in which defendants have been sentenced to death).

100. 428 U.S. 280 (1976).

101. 428 U.S. 325 (1976).

102. *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336.

103. *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336.

104. 483 U.S. 66 (1987).

even for prisoners who commit first-degree murder while serving life sentences without parole.[105]

Woodson involved the murder of a cashier during an armed robbery.[106] Petitioner James Tyrone Woodson was not the triggerman, but he was found guilty under a felony-murder theory of liability.[107] A three-justice plurality rejected mandatory death statutes as "unduly harsh and unworkably rigid."[108] Two other Justices, believing the death penalty to be unconstitutional in all applications, accounted for the remainder of the majority and concurred in the judgment.[109] The plurality founded its holding on the history of similar statutes. Many juries faced with only two options—sentencing the defendant to death or returning a verdict of not guilty—had apparently opted to let murderers go free rather than impose the extreme alternative.[110] While jury discretion was the chief evil identified by the Court in *Furman*, the *Woodson* plurality decided that a complete absence of discretion was an evil all its own.[111] Society's standards of decency now required mitigating circumstances to be considered by juries in capital cases.[112] Applying the flexible *Trop v. Dulles*[113] test, the plurality noted that the "belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[114] The weight of past jury determinations and legislative enactments offered the Court a clear enough picture of society's distaste for mandatory death sentences.[115] According to the plurality, such statutes treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass," thus failing to exercise a "fundamental respect for humanity" required by the Eighth Amendment.[116]

In *Roberts*, the Supreme Court distinguished the Louisiana statute as more narrowly defined than the one reviewed in *Woodson* but still struck it

105. *Id.* at 85.
106. *Woodson*, 428 U.S. at 282–83.
107. *Id.* at 283, 286.
108. *Id.* at 293.
109. *Id.* at 281.
110. *Id.* at 293.
111. *Id.* at 302.
112. *Id.* at 304.
113. 356 U.S. 86 (1958).
114. *Woodson*, 428 U.S. at 296–97 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).
115. *Id.* at 301.
116. *Id.* at 304.

down.[117] The same three-justice plurality followed largely the same reasoning as it had in *Woodson*.[118]

Standards of decency in the military do not mirror those of civilian society. On the contrary, military courts dispense what the Supreme Court has called a "rough form of justice."[119] During the American Revolution, General George Washington convened a firing squad and publicly executed soldiers charged with desertion.[120] His contemporary, Thomas Jefferson, meanwhile advocated expanding the number of military offenses punishable by death.[121] From 1861–1866, the Union Army conducted over 267 executions.[122] During World War II, eighteen German soldiers caught spying behind enemy lines were all tried by military commission, convicted, and executed.[123] One hundred thirty-five people have been executed by the Army since 1916.[124] In the military, where soldiers are trained to fight and kill, standards of decency are subordinated to standards of discipline.

Every military-specific death provision in the UCMJ accompanies a crime that directly compromises the military mission.[125] Nine of the articles allow capital punishment only if committed during a time of war or in the presence of the enemy.[126] The remaining four—mutiny or sedition, violating a safeguard order for persons or property, espionage, and willfully and wrongfully hazarding an American vessel or aircraft—jeopardize martial imperatives. These articles are more than rough justice—they guard against existential risks. If kingdoms can be lost for the want of a horseshoe nail,[127] even minor military breakdowns may snowball into an avalanche of chaos.

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117. Roberts v. Louisiana, 428 U.S. 325, 332 (1976).

118. *Id.* at 336.

119. Reid v. Covert, 354 U.S. 1, 35 (1957) (plurality opinion). This description was echoed by Chief Justice Roberts's opinion concurring in part and dissenting in part in *United States v. Denedo*, 556 U.S. 904, 918 (2009).

120. Jaeger, *supra* note 8, at 899 n.41.

121. Smith, *supra* note 16, at 4.

122. Federico, *supra* note 34, at 17.

123. David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of its Mandatory Death Penalty*, 127 MIL. L. REV. 1, 12 (1990) ("The object of the death penalty is to deter by fear." (internal quotation omitted)).

124. *The U.S. Military Death Penalty, Facts and Figures*, DEATH PENALTY INFO. CTR., https://www.deathpenaltyinfo.org/us-military-death-penalty#facts [https://perma.cc/3XZY-ZT2A].

125. *See supra* note 17.

126. *Supra* note 18.

127. The famous proverb in full:

> For want of a nail the shoe was lost.
> For want of a shoe the horse was lost.
> For want of a horse the rider was lost.
> For want of a rider the message was lost.
> For want of a message the battle was lost.
> For want of a battle the kingdom was lost.

The weight of American legislative and judicial history confirm that Congress has wide latitude in crafting punishments within the military and that death is an appropriate sentence for certain military offenses. Supreme Court standards that virtually bar the imposition of death for non-murderous civilian offenders find little purchase in a military context that is bolstered by centuries of precedent and a compellingly unique context. Nor are the procedural protections afforded to military defendants objectionable.[128] The capital articles under the UCMJ—consisting of military offenses as well as murder—are unlikely to be struck down.

C. The Constitutionality of a Mandatory Death Sentence in a Military Setting

Until recent revisions to the UCMJ took effect in 2019, military justice *required* a death sentence for those convicted of spying during a time of war.[129] At common law, the execution of spies was all but certain.[130] The Continental Congress in 1776 enacted America's first spying statute, which allowed, but did not mandate, the execution of spies:

> That all persons, not members of, nor owing any allegiance to, any of the United States of America, . . . who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or of any of them, shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct.[131]

In 1806, this provision was replaced by one that did require the execution of those convicted of spying.[132] During the Civil War, the law was amended to apply to all persons rather than just aliens.[133] Notably, however, the corresponding offense of spying in the Navy carried a discretionary rather than mandatory death sentence.[134] The mandatory penalty was codified into the UCMJ in 1950 and was removed in 2019.[135]

And all for the want of a horseshoe nail.

128. *See supra* notes 19–30 and accompanying text.

129. *Compare* UCMJ, art. 106, 10 U.S.C. § 906 (2012), *with* UCMJ, art. 103, 10 U.S.C. § 903 (2019).

130. *See* Anderson, *supra* note 124, at 3 (noting that "[o]nce confirmed as a spy, a man's death warrant was virtually sealed").

131. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 765 (2d ed. 1920). Unlike Article 103, this provision applied only to foreign aliens. *Id.*

132. Anderson, *supra* note 124, at 4–5.

133. *Id.* at 5.

134. *Id.* at 7. The military law distinction between service branches was done away with by the passage of the UCMJ in 1950. *Id.* at 8.

135. *Id.* at 8–9; UCMJ, art. 103, 10 U.S.C. § 903 (2019).

The same UCMJ revisions that removed the mandatory death provision, however, also nodded to its constitutionality as a military punishment. Until 2019, Article 45 prohibited a defendant from pleading guilty to a capital offense.[136] But the article was amended to ban guilty pleas only when "the death penalty is *mandatory*."[137] Despite Supreme Court precedent firmly striking down mandatory death sentences in a civilian setting,[138] Congress alludes to their viability in the UCMJ. This section will explore whether such a provision would indeed survive the civilian constitutional precedent.

Several considerations detailed above weigh in favor of the provision's constitutionality. The mandatory penalty is bolstered by legislative precedent, having first been implemented for wartime spying in 1806.[139] But the provision was not consistent within the service branches until 1950, as the corresponding Navy statute mimicked the Army statute's language except that it did not mandate death for convicted offenders.[140] The lack of a stable consensus weakens the historical or originalist argument in favor of mandatory death.

Does the Supreme Court's longstanding deference to military justice suggest that it may uphold even a mandatory death provision? While a wealth of precedent recognizes the distinct role of the military and separates its justice system from the civilian sphere, the context of these opinions requires further examination. The strongest language in favor of the independence of military courts pre-dates *Furman*, *Gregg*, *Woodson*, *Roberts*, *Coker*, *Kennedy*, and *Sumner*. Even the Court's relative solidarity in favor of deference does not imply a historical consensus among the Justices. Justices Marshall and Stevens, for example, have authored strongly worded objections to the practice of distinguishing civilian constitutional rights from those extended to members of the military.[141] Most notably, the general consensus of the above holdings has been that the Constitution applies differently to the military, not that it does not apply at all. Eighth Amendment jurisprudence has marched towards a broader reading of "cruel and unusual," and the CAAF has made a practice of applying those readings.[142] Consequently, the extent to which military courts will be allowed to depart

136. UCMJ, art. 45, 10 U.S.C. § 845 (2012).

137. UCMJ, art. 45, 10 U.S.C. § 845 (2019) (emphasis added).

138. *See supra* notes 101–19 and accompanying text.

139. Anderson, *supra* note 124, at 4–5.

140. Anderson, *supra* note 124, at 7.

141. Schick v. Reed, 419 U.S. 256, 271 n.5 (1974) (Marshall, J., dissenting); Loving v. United States, 517 U.S. 748, 774 (1996) (Stevens, J., concurring).

142. *See Loving*, 517 U.S. at 755–56 (recognizing that the imposition of the death penalty requires the existence of aggravating factors in addition to conduct sufficient to charge an individual with murder).

from Article III courts may be expected to narrow. Said otherwise, deference only extends so far.

Taken together, *Woodson*, *Roberts*, and *Sumner* are an insurmountable obstacle for the future of mandatory death in the military. Qualifying language in the 1976 holdings stops short of issuing a total ban on mandatory death statutes. "This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence . . . . We thus express no opinion regarding the constitutionality of such a statute."[143] But eleven years later, *Sumner* struck down the very exception noted by the Court in *Woodson*.[144] *Sumner* held that "in capital cases, 'it is *constitutionally* required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence.'"[145] The sentencing authority, according to *Sumner*, "must be permitted to consider '*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense.'"[146] No mandatory death scheme could survive that test.

Already inconsistent with civilian precedent, a mandatory death rule would conflict with the existing capital sentencing structure in the military. Under Article 52, the UCMJ requires panels to unanimously sentence a defendant to death.[147] Even sentences that carry a mandatory sentence of life imprisonment must receive a unanimous vote post-conviction.[148] Yet the CAAF has in dicta determined that "for a mandatory death sentence, no vote by the members on sentence is necessary and that the military judge should simply announce the death sentence."[149] The unanimous sentencing requirement opens the door to jury nullification, a threat specifically guarded against by the civilian cases.[150] A head-on review of a mandatory death provision may not dismiss Article 52's requirement so casually.

Allowing a death sentence is far different from requiring one. Even in the broader context of deference to military courts, the practical and ethical concerns that guided the Supreme Court in *Woodson*, *Roberts*, and *Sumner*

143. Woodson v. North Carolina, 428 U.S. 280, 287 n.7 (1976).

144. Sumner v. Shuman, 483 U.S. 66, 77–78 (1987).

145. *Id.* at 72 (emphasis in original) (citing Gregg v. Georgia, 428 U.S. 153, 189–90 n.38 (1976)).

146. *Id.* at 76 (emphasis in original) (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

147. UCMJ, art. 52(b)(2), 10 U.S.C. § 852(b)(2) (2019).

148. RCM, *supra* note 19, 1006(d)(5).

149. United States v. Shroeder, 27 M.J. 87, 89 (C.M.A. 1988).

150. *See* Woodson v. North Carolina, 428 U.S. 280, 291 (1976) (recognizing that distinguishing between legislative criteria has led states to grant sentencing discretion in capital cases); *Sumner*, 483 U.S. at 85 n.13 ("Elimination of the mandatory-sentencing procedure also eliminates the problem of the possibility of jury nullification . . . .").

apply in a military setting as well. Considerations of good order and discipline are well-founded, but are not a blank check for military courts.

V. Conclusion

The military enjoys substantial leeway in implementing its own system of justice, and rightly so. American platitudes like "freedom isn't free" acknowledge the sacrifices of service, including the relinquishment of certain constitutional protections. Military law is different from civilian law in that it prioritizes order over liberty and discipline over welfare. Abiding by that mandate enables the military to eschew non-military case law decided through a civilian lens. But this latitude has limits. Generally able to distinguish Supreme Court precedent, military courts are not similarly free to operate outside of the Constitution. When the Court has firmly established a constitutional principle, supported by reasoning that applies in a military setting, then conflicting UCMJ provisions should be abandoned by courts-martial in favor of the precedent. Congress wisely removed the mandatory death sentence from the UCMJ capital articles, but simultaneously accounted for its potential return. Military-specific death sentences survive the Court's strict precedent, but mandatory death sentences would not.