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KILLING TIME: TWO DECADES OF MILITARY CAPITAL LITIGATION

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I. Introduction

The military's death row is a pod in the U.S. Disciplinary Barracks' "Special Housing Unit." For the six men confined in that pod's cells, 24 January 2007 was just another Wednesday.[2] They probably neither knew nor cared that the day marked the twenty-third anniversary of the current U.S. military death penalty system. But this milestone suggests that the military death penalty system has operated long enough to allow a meaningful analysis of its performance.

This article offers such an analysis. This examination is positivist rather than normative, describing the military death penalty system as it

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[2] The six servicemembers on military death row on 24 January 2007 were Army Sergeant (SGT) Hasan Akbar, Army Specialist (SPC) Ronald A. Gray, Army Private (PVT) Dwight J. Loving, Marine Corps Lance Corporal (LCpl) Kenneth G. Parker, Marine LCpl Wade L. Walker, and Air Force Senior Airman (SrA) Andrew Witt. *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW U.S.A. 63 (Winter 2007), *available at* http://www.naacpldf.org/content/pdf/pubsx/drusa/DRUSA_Winter_2007.pdf [hereinafter DEATH ROW U.S.A.].

actually works rather than suggesting how the system should operate. The article's focus is a survey of courts-martial that were tried capitally, the cases' outcomes, and the appeals of those cases that resulted in death sentences. A 2000 study of state death penalty systems[3] provides the methodology for this survey and allows a comparison of the military system with its civilian counterparts. The resulting data present some quantifiable measures of how the current military death penalty system has performed over its first two decades.

The article's survey of the military death penalty system yields this overview of capital punishment in the military:

- Military death sentences have rarely been sought and even more rarely been adjudged. Less than one-third (15/47) of known capital courts-martial have resulted in death sentences.

- In the few instances where servicemembers have been sentenced to death and appellate review is complete, the death sentence has been overturned on appeal 3.5 times more often than it has been affirmed (7 to 2).

- Overturned death sentences tend to be replaced with non-capital sentences. So far, no military death sentence that has been overturned on appeal has been reinstated.

- The military's capital reversal rate is far higher than the civilian average. In the military justice system, the direct appeal functions like a combined state direct appeal and post-conviction proceeding. The current direct appeal reversal rate of military death sentences is 77.78%,

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[3] The study produced two unpublished reports, both maintained online by the Columbia Law School: (1) James S. Liebman et al., A Broken System: Error Rates in Capital Cases, 1973-1995 (June 12, 2000), http://www2.law.columbia.edu/instructionalservices/liebman/ [hereinafter Liebman, *Broken System I*]; and (2) James S. Liebman et al., A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It (Feb. 11, 2002), http://www2.law. columbia.edu/brokensystem2/ [hereinafter Liebman, *Broken System II*]. An abridged version of the first report was published in the *Texas Law Review*. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1840 (2000) [hereinafter Liebman, *Capital Attrition*]; *see also* Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004); James S. Liebman, *Rates of Reversible Error and the Risk of Wrongful Execution*, 86 JUDICATURE 78 (2002); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000).

while the aggregate state direct appeal plus post-conviction reversal rate (albeit for a somewhat different time span[4]) is 47%. But due to the extremely small number of military capital cases, the difference between the military system and the civilian system is not statistically significant. Thus, the difference between the military and civilian systems—though real—has limited predictive and explanatory value.

- No execution has occurred under the current military death penalty system and none is imminent.

- Military death penalty cases average more than eight years between sentencing and resolution of the direct appeal. The average capital appellate delay is longer in the military system than in the state systems.

To quote the familiar mutual fund disclaimer, "Past performance is no guarantee of future results."[5] But policymakers considering military justice revisions and convening authorities considering referral of potentially capital charges should be aware of the military death penalty system's track record as they make their decisions.

II. The Current Military Death Penalty System's Origins

The U.S. Supreme Court's 1972 *Furman v. Georgia*[6] decision effectively invalidated every state death penalty system that existed at the time. *Furman* featured a scant 206-word per curiam opinion briefly identifying the three death sentences at issue and holding "that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[7] Voting 5-4, each of the nine justices wrote a separate opinion concurring in or dissenting from this outcome.[8] Synthesizing the

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[4] This article examines the military death penalty system from 24 January 1984 through 31 December 2006. Professor Liebman and his colleagues examined state death penalty systems from 1973-1995. *See* Liebman, *Broken System I*, *supra* note 3, at 3.

[5] Lauren Young, *The Past As Forecast*, BUSINESS WEEK, Oct. 27, 2003, at 138.

[6] 408 U.S. 238 (1972) (per curiam).

[7] *Id.* at 239.

[8] *Id.* Justices Douglas, Brennan, Stewart, White, and Marshall were in the majority. Chief Justice Burger and Justices Blackman, Powell, and Rehnquist dissented.

justices' disparate opinions is difficult.[9] But *Furman* generally has been interpreted as holding that the Eighth Amendment requires that death penalty procedures "channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a 'wanton' and 'freakish' manner."[10]

In the four years that followed *Furman*, thirty-five states and the federal government revised their capital punishment systems.[11] In 1976, the Supreme Court held that the new Georgia, Florida, and Texas death penalty systems were constitutionally permissible.[12] The "modern era of capital punishment" in the United States had begun.[13] But neither Congress nor the President reformed the military death penalty system.[14] Instead, just as before *Furman*, in any case that resulted in a finding of guilty under Article 118(1) (premeditated murder) or 118(4) (felony murder), the members exercised unfettered discretion to choose between the only two congressionally authorized sentences: confinement for life and death.[15]

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[9] *See* Major John J. Pavlick, Jr., *The Constitutionality of the UCMJ Death Penalty Provisions*, 97 MIL. L. REV. 81, 85 (1982) ("The *per curiam* decision in *Furman* is a judicial nightmare of nine separate opinions, and the specifics of the opinions are of limited practical and precedential value.").

[10] Johnson v. Texas, 509 U.S. 350, 359 (1993) (quoting *Furman*, 408 U.S. at 310 (Stewart, J., concurring)).

[11] Gregg v. Georgia, 428 U.S. 153, 179-80 (1976).

[12] *Id.*; Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). On the other hand, the Court struck down death penalty systems that made the death penalty mandatory for specified offenses. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

[13] WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 7 (1991) (observing that the *Gregg* decision marked the beginning of the era).

[14] *See* Captain Michael E. Pfau & Captain Eugene R. Milhizer, *The Military Death Penalty and the Constitution: Is there Life After* Furman?, 97 MIL. L REV. 35, 35-36 (1982) ("Congress has not amended the pertinent provisions of the Uniform Code of Military Justice . . . in the more than ten years which have passed since *Furman*.").

[15] *See* United States v. Gay, 16 M.J. 586, 596 (A.F.C.M.R. 1983) (en banc) (noting that under Article 118(1), UCMJ, "absolute discretion is permitted the sentencing authority, unchecked by articulated standards."), *aff'd*, 18 M.J. 104 (C.M.A. 1984). Since the modern era of capital punishment began in 1976, premeditated murder and felony murder are the only offenses that have resulted in military death sentences. The UCMJ establishes fifteen capital offenses, though some carry the death penalty only in times of war. *See* Captain Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 MIL. L. REV. 66, 115, 122 (2005) (noting that of the military's death penalty offenses, three are common law capital felonies and the other twelve are uniquely military offenses). *See generally* Dwight H. Sullivan, Jerry L. Brittain, Michael N. Knowlan & Cheryl Pettry,

Between 1979 and 1983, courts-martial sentenced seven servicemembers to death.[16] Each had been convicted of premeditated

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Raising the Bar: Mitigation Specialists in Military Capital Litigation, 12 GEO. MASON U. CIV. RTS. L.J. 199, 202 n.14 (2002) [hereinafter Sullivan et al., *Raising the Bar*] (discussing death eligible offenses under the UCMJ). The UCMJ also authorizes general courts-martial to "try any person who by the law of war is subject to trial by a military tribunal" and to "adjudge any punishment permitted by the law of war." UCMJ art. 18 (2005). The United States' longstanding view is that "[t]he death penalty may be imposed for grave breaches of the law" of war. U.S. DEP'T OF ARMY, FIELD MANUAL, THE LAW OF LAND WARFARE 182 (1956). *Ex parte* Quirin, 317 U.S. 1 (1942), is an example of a case where the United States executed individuals for, among other offenses, violating the law of war. *See generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL 78-79 (2003) (discussing execution of six of the convicted German saboteurs). In *Ex parte* Quirin, the Supreme Court noted that paragraph 357 of the 1940 "Rules of Land Warfare promulgated by the War Department for the guidance of the Army . . . provides that 'All war crimes are subject to the death penalty, although a lesser penalty may be imposed.'" *Quirin*, 317 U.S. at 34. Another example of the United States carrying out an execution for a law of war violation arose from the case of General Tomoyuki Yamashita. *See In re* Yamashita, 327 U.S. 1 (1946). *See generally* Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 22-37 (1973) (discussing the trial of General Yamashita and its aftermath).

For an interesting discussion of the applicability of capital punishment to war crimes today, see William A. Schabas, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Police on War Crimes and Crimes Against Humanity: War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV. 733 (1997). Currently, Rule for Courts-Martial (RCM) 1004 provides that death may be adjudged for "a violation of the law of war" if "death is authorized under the law of war for the offense." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004(c)(10) (2005) [hereinafter MCM]. A proposed change to the *MCM* would instead authorize a death sentence if "the violation constitutes a grave breach of the law of war." Amendments to the Manual for Courts-Martial, United States (2002 ed.), 68 Fed. Reg. 48,886, 48,887 (proposed Aug. 11, 2003); *see also* 69 Fed. Reg. 13,816 (Mar. 24, 2004) (summary of public comments regarding proposed amendments). The proposed discussion accompanying the modification refers to the four Geneva Conventions to define grave breaches. 68 Fed. Reg. at 48,887. The drafters' analysis explains that the amendment is designed "to clarify which law of war violations may subject the accused to capital punishment." *Id.* But because Article 18 provides that a general court-martial trying an accused for a violation of the law of war "may adjudge any punishment permitted by the law of war," without further defining that phrase, the issue of whether, and to what extent, the law of war continues to authorize the death penalty would likely be the subject of litigation.

[16] Pfau & Milhizer, *supra* note 14, at 79 n.325. The seven cases, arranged by date of sentencing, were: United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) (Army, sentence adjudged 3 July 1979); United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983), *rev'd*, 17 M.J. 154 (C.M.A. 1984) (Marine Corps, sentence adjudged 30 Jan. 1981); United States v. Redmond, 21 M.J. 319 (C.M.A. 1986) (Army, sentence adjudged 5 Mar. 1981); United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1981), *rev'd*, 18 M.J. 281 (C.M.A.) (summary disposition), *cert. denied*, 469 U.S. 981 (1984) (Marine Corps,

murder or both premeditated murder and felony murder.[17] In June of 1983, the Air Force Court of Military Review reversed the death sentence of Airman Robert M. Gay—the only member of the Air Force then on military death row.[18] The Air Force Court based this result on its

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sentence adjudged 22 June 1981); *Gay*, 16 M.J. at 586 (Air Force, sentence adjudged 15 Dec. 1981); United States v. Mustafa a/k/a Joseph N. Brown (Mustafa), 22 M.J. 165 (C.M.A.), *cert. denied*, 479 U.S. 953 (1986) (Army, sentence adjudged 1 July 1982); and United States v. Artis, 22 M.J. 15 (C.M.A.) (summary disposition), *cert. denied*, 479 U.S. 813 (1986) (Army, sentence adjudged 22 Feb. 1983).

[17] *Matthews*, 16 M.J. at 359 (premeditated murder); *Rojas*, 15 M.J. at 905 (premeditated murder); *Redmond*, 21 M.J. at 319-20 (premeditated murder); *Hutchinson*, 15 M.J. at 1059 (premeditated and felony murder); *Gay*, 16 M.J. at 587 (premeditated murder); *Mustafa*, 22 M.J. at 166 (premeditated and felony murder); United States v. Artis, No. 444056 (A.C.M.R. June 17, 1985) (premeditated murder). During the UCMJ era, one servicemember has been executed for rape. *See* United States v. Bennett, 21 C.M.R. 223 (C.M.A. 1956). *See generally* Captain Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1, 1-3 (1994) [hereinafter, Sullivan, *Last Line of Defense*] (discussing litigation in Bennett's case and his ultimate execution). In *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion), the plurality noted that *Gregg* reserved judgment on "the constitutionality of the death penalty when imposed for [crimes other than] deliberate murder." *Id*. at 592 (citing *Gregg*, 428 U.S. at 187 n.35). The plurality observed, "That question, with respect to rape of an adult woman, is now before us." *Id*. The plurality then held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* Whether *Coker* prohibits imposition of the death sentence for all rapes, for only the rape of an adult woman, or for only the rape of an adult woman that does not involve maiming or attempted murder has been the subject of continued uncertainty. *See* United States v. Gonzales, 46 M.J. 667 (N-M. Ct. Crim. App. 1997) (declining to resolve whether military death penalty for rape is constitutional under *Coker*, 433 U.S. at 584); United States v. McReynolds, 9 M.J. 881 (A.F.C.M.R. 1980) (per curiam) (following *Coker* to hold that rape is not a capital offense); United States v. Clark, 18 M.J. 775, 776 (N.M.C.M.R.) ("[T]he capital aspect of punishment purportedly authorized under Article 120 has been effectively invalidated."), *petition denied*, 19 M.J. 23 (C.M.A. 1984); *Matthews*, 16 M.J. at 377 (noting that the death penalty "[p]robably . . . cannot be constitutionally effectuated in a case where the rape of an adult female is involved, *Coker v. Georgia*, 433 U.S. 584 (1977)—at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense."). *But cf*. State v. Wilson, 685 So. 2d 1063, 1070 (La. 1996) (holding that "the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old"), *cert. denied*, 520 U.S. 1259 (1997). *See generally* Simon, *supra* note 15, at 115-16 (questioning Article 120's constitutionality); Lieutenant Colonel Robert T. Jackson, Jr., *Death—An Excessive Penalty for Rape of a Child?*, ARMY LAW., Sept. 1986, at 37 (analyzing Article 120's constitutionality); Corey Rayburn, *Better Dead than Raped? The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1135-40 (2004) (discussing, *inter alia*, Article 120).

[18] *Gay*, 16 M.J. at 586. The Army and Navy-Marine Corps Courts of Military Review, on the other hand, ruled that the military death penalty was constitutional despite *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); *Matthews*, 13 M.J. at 501; *Rojas*, 15 M.J.

conclusion that *Furman* invalidated the military capital punishment system. Four months later, the Court of Military Appeals (COMA) reached a similar conclusion in the landmark case of *United States v. Matthews*.[19] *Matthews* was a bold opinion. It invalidated the existing military death penalty system, ultimately leading to the reversal of the death sentences of every inmate on military death row at the time.[20] It also proclaimed the COMA's power to hold congressional statutes unconstitutional, despite its status as an Article I court.[21] And in what was destined to become the most contentious portion of the decision, the majority opinion's decretal paragraph suggested that either "the President or Congress" could establish "constitutionally valid procedures" for the military death penalty system.[22]

On 24 January 1984, President Ronald Reagan signed Executive Order 12,460.[23] That Executive Order amended the 1969 (Revised) *Manual for Courts-Martial* (*MCM*) by establishing a new military death penalty system. With only minor modifications in wording, this new

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at 902; *Hutchinson*, 15 M.J. at 1056.

[19] 16 M.J. at 354.

[20] *See supra* note 16.

[21] *Matthews,* 16 M.J. at 364-68. Judge Fletcher declined to join this portion of the majority opinion, writing that "I do not find it necessary to reach the question of the authority of this Court to declare an act of Congress unconstitutional." *Id.* at 392 (Fletcher, J., concurring).

[22] *Id*. at 382. The decretal paragraph allowed for "a rehearing on sentence if constitutionally valid procedures are provided by the President or Congress within 90 days of the date on which the mandate in this case is issued." *Id.* Judge Fletcher declined to join this portion of the majority opinion as well, writing, "The question of whether the executive or the legislative branch may act to modify the present code so that it comports with Article 55 is not before the Court in this case." *Id.* at 392 (Fletcher, J., concurring). The President's decision to adopt aggravating factors for the military justice system ultimately led to the Supreme Court's opinion in *Loving v. United States*, 517 U.S. 748 (1996), rejecting a separation of powers challenge to the President's prescription of the military death penalty system. In the *Matthews* case, the COMA issued its mandate on 27 October 1983. United States v. Matthews, 17 M.J. 48 (C.M.A. 1983). The President revised the military death penalty system eighty-nine days later. *See* Exec. Order 12,460, 49 Fed. Reg. 3169 (Jan. 26, 1984) (note that 26 January 1984 is the date of the *Federal Register* in which Executive Order 12,460 appears; the order itself is dated 24 January 1984). Under the *Matthews* opinion, this allowed the government to seek a death sentence under the new procedures. But the Judge Advocate General of the Army referred the case to the ACMR, which substituted a sentence of confinement for life in place of the original death sentence. *See* United States v. Matthews, 17 M.J. 978 (A.C.M.R. 1984).

[23] 49 Fed. Reg. 3169 (Jan. 26, 1984).

system would become Rule for Courts-Martial (RCM) 1004 when the 1984 *MCM* went into effect on 1 August 1984.[24]

The system that Executive Order 12,460 established, as codified by the 1984 *MCM*, allowed the members[25] to adjudge a death sentence if three conditions were satisfied: (1) the accused was found guilty of an offense for which death was an authorized punishment;[26] (2) the

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[24] While the President issued Executive Order 12,460 after *Matthews*, the 1984 *MCM*'s drafters emphasized that the revised system was designed before the COMA's *Matthews* decision, as well as the Air Force Court of Military Review's *Gay* decision. The 1984 drafters' analysis explained:

> [RCM 1004] and the analysis were drafted before the COMA issued its decision in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) on 11 October 1983. There the court reversed the sentence of death because of the absence of a requirement for the members to specifically find aggravating circumstances on which the sentence was based. When this rule was drafted, the procedures for capital cases were the subject of litigation in *Matthews* and other cases. *See, e.g.*, *United States v. Matthews*, 13 M.J. 501 (A.C.M.R. 1982), *rev'd*, *United States v. Matthews*, *supra*; *United States v. Rojas*, 15 M.J. 902 (N.M.C.M.R. 1983). *See also United States v. Gay*, 16 M.J. 586 (A.F.C.M.R. 1982 [sic]), *a'ffd* [sic] 18 M.J. 104 (1984) (decided after draft MCM was circulated for comment).
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> While the draft *MCM* was under review, following public comment on it (*see* 48 Fed. Reg. 23688 (1983)), the *Matthews* decision was issued. The holding in *Matthews* generated a necessity to revise procedures in capital cases. However, *Matthews* did not require substantive revision of the proposed R.C.M. 1004. The several modifications made in the rule since it was circulated for comment were based on suggestions from other sources. They are unrelated to any of the issues involved in *Matthews*.

MCM, *supra* note 15, app. 21, at A21-73.

[25] Pursuant to Article 18, UCMJ, and RCM 201(f)(1)(C), all capital courts-martial must be tried before members. Unlike the accused in a non-capital case, the accused in a death penalty case cannot elect to be tried by military judge alone. By contrast, in the federal civilian system, a judge can preside over a capital case if both the defendant and the United States consent and the judge approves the parties' request. *See* FED. R. CRIM. P. 23a. Military appellate courts have rejected constitutional challenges to the prohibition against judge-alone trials in capital cases. *See, e.g.*, United States v. Gray, 51 M.J. 1, 49 (1999); United States v. Curtis, 44 M.J. 106, 130 (1996), *rev'd on other grounds*, 46 M.J. 129 (1997); United States v. Loving, 41 M.J. 213, 291 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996); *Matthews*, 16 M.J. at 363.

[26] MCM, *supra* note 15, R.C.M. 1004(a)(1). All capital courts-martial are contested. In a case that has been referred capitally, Article 45(b) and RCM 910(a)(1) prohibit a plea of guilty to a death-eligible offense. Military appellate courts have rejected constitutional challenges to this prohibition. *See, e.g.*, *Matthews*, 16 M.J. at 362. One law review

members unanimously found beyond a reasonable doubt that one of the "aggravating circumstances" (later renamed "aggravating factors"[27]) set out in RCM 1004(c) existed;[28] and (3) the members unanimously found that any extenuating and mitigating circumstances were "substantially outweighed by any aggravating circumstances," including the "aggravating circumstances" (later renamed "aggravating factors") listed in RCM 1004(c).[29]

Since RCM 1004 was promulgated in 1984, the military death penalty system has been altered twice by statute[30] and six times by

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article states that only three jurisdictions—Arkansas, Louisiana, and New York—prohibit capital defendants from pleading guilty. Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 ALB. L. REV. 181, 181 (2001). According to the article,

> There are apparently no statutes or case law from other states, or the federal government, nor any existing rules or provisions against a competent criminal defendant from [sic] entering a knowing, voluntary, and unconditional guilty plea to a capital charge, in a murder case, or any other similar category of prosecutions.

Id. at 191. Article 45(b) of the UCMJ, however, is just such a statute.

[27] The 1986 *MCM* amendments adopted the phrase "aggravating factors" to describe the matters set out in RCM 1004(c), at least one of which must be proved to make a case death-eligible. *See* MCM, *supra* note 15, app. A21-74. The new phrase was adopted to "more clearly distinguish such factors from the aggravating circumstances applicable to any sentencing proceeding under R.C.M. 1001(b)(4), which may be considered in the balancing process in capital cases under R.C.M. 1004(b)(4)(B)." *Id.*

[28] *Id.* R.C.M. 1004 (b)(4)(A).

[29] *Id.* R.C.M. 1004(b)(4)(B).

[30] The first statutory change created the new military capital offense of espionage. Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534, 99 Stat. 583, 634-35 (1985) (codified at UCMJ art. 106a (2005), 10 U.S.C. § 906a (2000)). *See generally* Major Carol A. DiBattiste, *Air Force Espionage: Two Recurring Issues*, 32 A.F. L. REV. 377 (1990). The second statutory change provided that, absent military exigencies, capital courts-martial must have at least twelve members. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 582, 115 Stat. 1012 (2001) (codified at UCMJ art. 25a, 10 U.S.C.A. § 825a (West Supp. 2006)) [hereinafter FY 2002 DOD Authorization Act]; *see generally* Jonathan Choa, Note, *Civilians, Service-Members and the Death Penalty: The Failure of Article 25a to Require Twelve-Member Panels in Capital Trials for Non-Military Crimes*, 70 FORDHAM L. REV. 2065 (2002). Two capital courts-martial have been tried since this statute took effect. The first, *United States v. Akbar*, had a fifteen-member panel. United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006); *see* Richard A. Serrano, *GI Sentenced to Death for Fatal Attack; Army Sgt. Hasan Akbar Apologizes for Killing Two American Officers and Wounding 14 Other Soldiers in Kuwait on the Eve of War*, L.A. TIMES, Apr. 29, 2005, at A11. The second, *United States v. Witt*, had a twelve-member

executive orders amending the *MCM*.[31] The resulting changes fall into three groups: (1) those broadening the death penalty's availability by creating a new capital offense or new aggravating factor;[32] (2) those providing additional procedural protections to the accused;[33] and (3) one resolving an ambiguity in the original RCM 1004.[34]

III. The Military Death Penalty at the Trial Level

Capital prosecutions under RCM 1004 have been rare, though no one knows precisely how many military capital cases have been tried since the current system took effect in 1984. The various services' recordkeeping on this issue is neither uniform nor complete. Further uncertainty arises because convening authorities have, on occasion, inadvertently authorized capital courts-martial for death-eligible charges

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panel. United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006); *see* Gene Rector, *Photos Debated in Double-Murder Trial*, MACON TELEGRAPH, Sept. 19, 2005, at F.

[31] *See* Exec. Order No. 12,550, 51 Fed. Reg. 6,497 (Feb. 25, 1986); Exec. Order No. 12,767, 56 Fed Reg. 30,284 (July 1, 1991); Exec. Order No. 12,936, 59 Fed. Reg. 59,075 (Nov. 15, 1994); Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (October 12, 1999); Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 17, 2002); Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (Oct. 18, 2005).

[32] *See, e.g.*, Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534, 99 Stat. 583, 634-35 (1985) (codified at UCMJ art. 106a (2005), 10 U.S.C. § 906a (2000); Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999) (adding the RCM 1004(c)(7)(K) aggravating factor for premeditated murder that the victim was under the age of fifteen); Exec. Order No. 12,936, 59 Fed. Reg. 59,075 (Nov. 15, 1994) (adding the RCM 1004(c)(7)(B) aggravating factor for premeditated murder that the murder was drug-related); Exec. Order No. 12,767, 56 Fed Reg. 30,284 (July 1, 1991) (adding the RCM 1004(c)(8) aggravating factor in Article 118(4) cases); Exec. Order No. 12,550, 51 Fed. Reg. 6,497 (Feb. 25, 1986) (expanding the class of public officials whose premeditated murder constitutes an aggravating factor under RCM 1004(c)(7)(F) and adding RCM 1004(c)(11) to implement the statutory aggravating factors found in Article 106a).

[33] *See*, *e.g.*, Pub. L. No. 107-107, § 582, 115 Stat. 1012 (2001) (generally requiring that panels in capital courts-martial include at least twelve members); Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (Oct. 18, 2005) (implementing twelve-member requirement); Exec. Order No. 12,550, 51 Fed. Reg. 6,497 (Feb. 25, 1986) (promulgating RCM 1004(a)(2), requiring a unanimous vote on findings for a case to remain death eligible).

[34] *See* Exec. Order 12,936, 59 Fed. Reg. 59,075 (Nov. 15, 1994) (clarifying that the RCM 1004(c)(4) recklessly endangering aggravating factor applies even if only one person other than the victim is endangered and clarifying the types of injuries that qualify as "substantial physical harm" for purposes of the RCM 1004(c)(7)(I) aggravating factor).

such as rape.[35] Until recently, a death-eligible offense at a general court-martial was referred capitally unless the referral included express instructions precluding a death sentence.[36] So, for example, every premeditated murder, felony murder, rape, and willfully hazarding a vessel charge referred to a general court-martial was death-eligible unless the referral block contained an instruction indicating that the case was non-capital. Under a 2005 *MCM* amendment, a case is now referred non-capitally unless the referral block specifically indicates the convening authority's intent to make the case death-eligible.[37] This change better reflects the actual practice in which non-capital referrals are the norm and capital referrals are the exception.

Requests to the military services, LEXIS and WESTLAW searches, and interviews with academicians and military justice practitioners over a three-year period have identified forty-seven court-martial cases that were tried capitally from the inception of the current military death penalty system in 1984 to the end of this article's study period, 31 December 2006. For purposes of this analysis, a capital court-martial is defined as a case that remained death-eligible at the conclusion of the presentation of evidence on the merits. Many other cases that were initially referred capitally but, for various reasons including pretrial agreements, did not result in a death-eligible trial are not included in this survey, nor are known cases of inadvertent capital referrals. [38]

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[35] *See, e.g.*, United States v. Underwood, 50 M.J. 271, 273 (1999); United States v. Mason, No. 96-01793, 1998 CCA LEXIS 112 (N-M. Ct. Crim. App. Feb. 5, 1998), *aff'd*, 50 M.J. 229 (1998) (summary disposition).

[36] *See* MCM, *supra* note 15, R.C.M. 103(2) ("'Capital case' means a general court-martial to which a capital offense has been referred without an instruction that the case be treated as noncapital . . . ."); United States v. Clark, 35 M.J. 432, 433 n.1 (C.M.A. 1992) ("There must be a specific statement in the instructions that the case is referred as noncapital for the death penalty to be removed as the maximum punishment."), *cert. denied*, 507 U.S. 1052 (1993).

[37] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (Oct. 18, 2005) (amending RCM 103(2) and RCM 201(f)(1)(A)(iii)(b)).

[38] *See supra* note 35 and accompanying text.

Of the forty-seven known capital cases, ten were tried by the Air Force.[39] Eighteen were Army cases,[40] including both a capital trial in *United States v. Dock*[41] and a capital retrial[42] after the results of the original court-martial were set aside on appeal.[43] Thirteen of the forty-seven known capital cases were tried by the Marine Corps.[44] The

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[39] United States v. Anderson, 36 M.J. 963 (A.F.C.M.R. 1993), *aff'd*, 39 M.J. 431 (C.M.A.), *cert. denied*, 513 U.S. 819 (1994); United States v. Burks, No. 28760, 1991 CMR LEXIS 1155 (A.F.C.M.R. Aug. 26, 1991), *aff'd*, 36 M.J. 447 (C.M.A.), *cert. denied*, 510 U.S. 866 (1993); United States v. Hamilton, No. 31768, 1996 CCA LEXIS 243 (A.F. Ct. Crim. App. Aug. 9, 1996), *aff'd*, 47 M.J. 32 (1997), *cert. denied*, 522 U.S. 1052 (1998); United States v. Mobley, 28 M.J. 1024 (A.F.C.M.R. 1989), *rev'd*, 31 M.J. 273 (C.M.A. 1990); United States v. Neeley, 21 M.J. 606 (A.F.C.M.R. 1985), *aff'd,* 25 M.J. 105 (C.M.A. 1987); United States v. Poertner, No. 26640, 1988 CMR LEXIS 853 (A.F.C.M.R. Oct. 4, 1988), *petition denied*, 28 M.J. 287 (C.M.A. 1989); United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996), *rev'd*, 50 M.J. 1 (1998); United States v. Taylor, 41 M.J. 701 (A.F. Ct. Crim. App. 1995), *aff'd*, 44 M.J. 475 (1996); United States v. Willis, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 258 (1997); United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006).

[40] United States v. Roukis, 60 M.J. 925 (Army Ct. Crim. App.) (per curiam), *aff'd*, 62 M.J. 212 (2005) (summary disposition); United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293, *reconsideration denied*, 62 M.J. 210 (2005); United States v. Graves, 47 M.J. 632 (Army Ct. Crim. App. 1997), *aff'd*, 52 M.J. 375 (1999), *cert. denied*, 529 U.S. 1093 (2000); United States v. Kaspers, 47 M.J. 176 (1997); United States v. Loving, 41 M.J. 213 (1994), *aff'd*, 517 U.S. 748 (1996); United States v. Murphy, 36 M.J. 1137 (A.C.M.R. 1993) (en banc), *rev'd*, 50 M.J. 4 (1998); United States v. Gray, 37 M.J. 730 (A.C.M.R. 1992) (affirming death sentence and denying petition for new trial), 37 M.J. 751 (A.C.M.R. 1993) (rejecting supplemental issues), *aff'd*, 51 M.J. 1 (1999), *cert. denied*, 532 U.S. 919, *reh'g denied*, 532 U.S. 1035 (2001); United States v. Dock, 35 M.J. 627 (A.C.M.R. 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994); United States v. Franklin, 35 M.J. 311 (C.M.A. 1992); United States v. Meeks, 35 M.J. 64 (C.M.A. 1992); United States v. Curry, 31 M.J. 359 (C.M.A. 1990); United States v. Tarver, 29 M.J. 605 (A.C.M.R. 1989), *petition denied*, 32 M.J. 316 (C.M.A. 1991); United States v. Miller, 28 M.J. 998 (A.C.M.R. 1989), *aff'd*, 31 M.J. 247 (C.M.A. 1990); United States v. Strom, 28 M.J. 336 (C.M.A. 1989) (order denying petition for review); United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989); United States v. Whitehead, 26 M.J. 613 (A.C.M.R. 1988). Two cases are unreported: United States v. Chrisco, No. 8800382 (V Corps, tried 4 Feb. 1988, resulting in total acquittal) (record on file at Washington National Records Center, Suitland, Maryland); United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006). The author is grateful to the office of the Clerk of Court, U.S. Army Judiciary, Arlington, Virginia, for providing information on Army capitally-referred courts-martial.

[41] 35 M.J. at 625 (setting aside the findings and death sentence). Dock was subsequently retried and sentenced to confinement for life. *Id.* at 629.

[42] *Dock*, 35 M.J. at 640 (affirming sentence of confinement for life).

[43] *Id.* at 629 n.1.

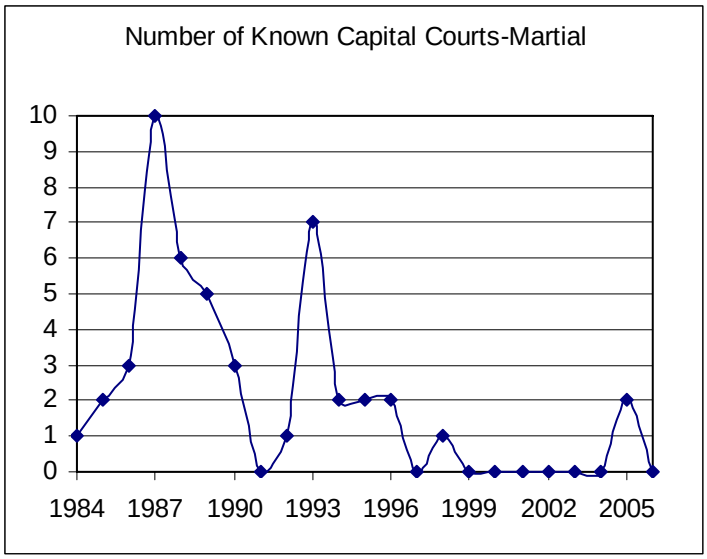
[44] United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006); United States v. Curtis, 52 M.J. 166 (1999) (per curiam) (affirming unreported NMCCA ruling setting aside death sentence); United States v. Schlamer, 47 M.J. 670 (N-M. Ct. Crim. App. 1997), *aff'd*, 52

remaining six were tried by the Navy.[45] No Coast Guard case has been referred for capital prosecution under the current military death penalty system, if ever.[46] The following chart depicts the annual number of known capital courts-martial, determined by the year in which the trial ended:

M.J. 80, *cert. denied*, 529 U.S. 1005 (2000); United States v. Holt, 46 M.J. 853 (N-M. Ct. Crim. App. 1997), *aff'd*, 52 M.J. 173 (1999); United States v. Levell, 43 M.J. 847 (N-M. Ct. Crim. App.), *aff'd*, 46 M.J. 160 (1996); United States v. Thomas, 43 M.J. 550 (N-M. Ct. Crim. App. 1995) (en banc), *rev'd*, 46 M.J. 311 (1997); United States v. Gibbs, 39 M.J. 378 (C.M.A. 1994) (summary disposition); United States v. Reliford, 27 M.J. 176 (C.M.A. 1988), *cert. denied*, 488 U.S. 1009 (1989); United States v. Parker, *appeal redocketed*, No. 9501500 (N-M. Ct. Crim. App. Dec. 23, 1997); United States v. Adams, No. 95 00397, 1996 CCA LEXIS 478 (N.M. Ct. Crim. App. May 14, 1996), *aff'd*, 46 M.J. 447 (1997); United States v. Walker, *appeal redocketed*, No. 9501607 (N.-M. Ct. Crim. App. Aug. 10, 1995); United States v. Clark, No. 86-4407, 1987 CMR LEXIS 610 (N.M.C.M.R. Sept. 4, 1987), *petition denied*, 27 M.J. 18 (C.M.A. 1988); United States v. Turner, No. 85 4044, 1986 CMR LEXIS 2275 (N.M.C.M.R. Aug. 8, 1986), *rev'd*, 25 M.J. 324 (C.M.A. 1987).

[45] United States v. Straight, 42 M.J. 244 (1995) (rape case tried capitally) (*see supra* note 17 concerning the constitutionality of applying capital punishment to the offense of rape); United States v. Gonzalez, No. 88 4472, 1992 CMR LEXIS 763 (N.M.C.M.R. Oct. 26, 1992), *aff'd*, 39 M.J. 459 (C.M.A.), *cert. denied*, 513 U.S. 965 (1994); United States v. Colon, No. 88 4988, 1990 CMR LEXIS 1203 (N.M.C.M.R. Oct. 31, 1990), *aff'd*, 32 M.J. 473 (C.M.A.) (summary disposition), *cert. denied*, 502 U.S. 821 (1991); United States v. Ameen, No. 872655, 1989 CMR LEXIS 422 (N.M.C.M.R. May 22, 1989), *petition denied*, 29 M.J. 302 (C.M.A. 1989); United States v. Jordan, No. 861006, 1987 CMR LEXIS 453 (N.M.C.M.R. June 30, 1987), *aff'd*, 29 M.J. 177 (C.M.A. 1989), *vacated*, 498 U.S. 1004 (1990); United States v. Garraway, No. 86 2199, 1987 CMR LEXIS 126 (N.M.C.M.R. Mar. 4, 1987), *petition denied*, 25 M.J. 484 (C.M.A. 1987).

[46] E-mail from Commander Jeffrey C. Good, USCG, Chief of the Office of Military Justice, to Col Dwight H. Sullivan, USMCR, Office of Military Commissions (Apr. 9, 2007, 12:21) (on file with author); *see also* GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 8 (1989) (noting that throughout its history, the Coast Guard has never carried out an execution resulting from a court-martial conviction). One federal execution has occurred at a Coast Guard base. On 17 August 1929, federal marshals carried out an execution at Coast Guard Base No. 6, near Fort Lauderdale, Florida. *See* Alderman v. United States, 31 F.2d 499 (5th Cir. 1929). James Horace Alderman had been convicted in U.S. District Court for the Southern District of Florida of two counts of murdering Coast Guard personnel after a U.S. Coast Guard patrol boat stopped him on the high seas while he was attempting to smuggle whisky into the United States. *Id.*; *see also* Charlie Reeves, Inside the National Archives Southeast Region, Premeditated Crime, http://www.archives.gov/southeast/exhibit/9.php (last visited Apr. 2, 2007) (displaying copies of original documents of the indictment and death warrant for James Horace Alderman); Sean Rowe, *The Gallows and the Deep; The Story of the Bloody, High-Seas Crimes and Execution of Smuggler Horace Alderman Is a Yarn Worthy of Joseph Conrad or Quentin Tarantino*, BROWARD-PALM BEACH NEW TIMES, Dec. 4, 1997. The author is grateful to LCDR (Ret.) Eugene R. Fidell, USCGR, for alerting him to this case and to the sources cited above.



The roster of capital trials reveals one particularly interesting trend. In 1996, the military tried two capital cases, both of which resulted in death sentences.[47] But from 1997 through the end of 2006, the military tried only three capital cases. The first was *United States v. Roukis*, an Army case that ended in a sentence of confinement for life in April 1998.[48] Then, following a seven-year period in which no capital case was tried, the military returned to the historic mean with two capital prosecutions in 2005[49] and exceeded the historic mean when both cases produced adjudged death sentences.

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[47] *Quintanilla*, 60 M.J. at 852; United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005).

[48] 60 M.J. 925 (Army Ct. Crim. App.) (per curiam), *aff'd*, 62 M.J. 212 (2005) (summary disposition). Roukis was found guilty of the premeditated murder of his wife. *Id*. at 929.

[49] United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006); United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006).

Several factors may have contributed to the seven-year hiatus in military capital prosecutions and the eight-and-a-half year gap in actual death sentences. One factor is our European allies' increasing opposition to the trial of capital courts-martial on their soil.[50] The United States

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[50] *See, e.g.*, United States v. Youngberg, 38 M.J. 635, 636 (A.C.M.R. 1993), *aff'd*, 43 M.J. 379 (1995) (finding in the 1993 proceeding that the "German authorities asserted immediate investigatory and prosecutorial control in this case and refused to release jurisdiction until they were assured in writing that the death penalty would not be an option at appellant's trial"); *see also* John E. Parkerson & Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments*, 129 MIL. L. REV. 41 (1990); Alyssa K. Dragnich, *Developments: Jurisdictional Wrangling: US Military Troops Overseas and the Death Penalty*, 4 CHI. J. INT'L L. 571 (2003); John E. Parkerson, Jr. & Steven J. Lepper, Case Report: Short v. Kingdom of the Netherlands, 85 AM. J. INT'L L. 698 (1991).

Tension between the United States and Germany over the military death penalty was particularly pronounced in *United States v. Murphy*. 56 M.J. 642 (Army Ct. Crim. App. 2001); *see also* Major Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals*, ARMY LAW., May 2000, at 107-09. United States Army SGT James T. Murphy was sentenced to death in a court-martial tried in the Federal Republic of Germany arising from his 1987 premeditated murder of his estranged wife, their twenty-one-month-old son, and her five-year-old son from a previous marriage. *Murphy*, 56 M.J. at 643. He bludgeoned his wife with a hammer, and then drowned her and the two boys in the bathtub of her apartment in Germany. *Id.* "The German Government, which opposes the use of the death penalty at the national level, sought assurances [from the United States] that Murphy would not be subjected to the death penalty and [was] told that the chances that an execution would be carried forward [were] remote . . . ." Richard J. Wilson, *Using International Human Rights Law and Machinery in Defending Borderless Crime Cases*, 20 FORDHAM INT'L L.J. 1606, 1617 (1997). Despite these concerns of West Germany's federal government, "German law permits a local prosecutor to surrender jurisdiction to the United States, which the local prosecutor did in [Murphy's] case." *Id*. The result was that Murphy was tried at a capital general court-martial in Germany. *See* United States v. Murphy, 30 M.J. 1040, 1048 (A.C.M.R. 1990) (en banc).

At his court-martial in 1987, Murphy was found guilty of, among other offenses, three specifications of premeditated murder. *Murphy*, 56 M.J. at 642. The members sentenced him to death. *Id.* That outcome caused diplomatic tensions. Parkerson & Stoehr, *supra*, at 50. "German Foreign Minister Hans-Dietrich Genscher wrote a personal plea to then-Secretary of State George Shultz in July 1988 expressing concern" about the *Murphy* case. *Id.* (citing Letter from Hans-Dietrich Genscher, Foreign Minister, Federal Republic of Germany**,** to George Shultz, Secretary of State (July 25, 1988), *quoted in* Telecommunications Message from Secretary of State to American Embassy, Bonn (unclassified) (Sept. 17, 1988)). The Court of Appeals for the Armed Forces (CAAF) set aside Murphy's death sentence in 1998. United States v. Murphy, 50 M.J. 4 (1998); *see also Murphy*, 56 M.J. at 642 (ordering *DuBay* hearing to determine whether ineffective assistance of counsel affected sentence only or findings and sentence).

European reluctance to facilitating capital courts-martial is consistent with similar European resistance to extraditing prisoners to face non-military capital trials in the United States. *See, e.g.*, Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989)

tried at least nine capital courts-martial in European countries from the current military death penalty system's creation in 1984 until 1989.[51] But since the 1989 capital retrial in *United States v. Dock* ended with a non-capital sentence, the United States has tried no known capital case in Europe. A second factor that helps explain the absence of capital courts-martial for the seven-year period appears to be rising litigation costs,[52] which may have deterred some capital prosecutions. A third factor is increased preparation time for capital trials. Had the length of preparation time remained stable, the two capital cases tried in 2005 would have been tried in earlier years.[53] Another important explanatory

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(holding that extradition of the applicant to the United States to stand trial for capital murder in Virginia would violate the European Convention on Human Rights' prohibition against "inhuman or degrading treatment or punishment."); *see also* William A. Schabas, *Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice*, 25 LOY. L.A. INT'L & COMP. L. REV. 581 (2003).

[51] *Murphy*, 36 M.J. at 1137; United States v. Dock, 35 M.J. 627 (A.C.M.R. 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994) (retrial); United States v. Franklin, 35 M.J. 311 (C.M.A. 1992); United States v. Curry, 31 M.J. 359 (C.M.A. 1990); United States v. Miller, 28 M.J. 998 (A.C.M.R. 1989), *aff'd*, 31 M.J. 247 (C.M.A. 1990); United States v. Strom, 28 M.J. 336 (C.M.A. 1989) (order denying petition for review); United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989); United States v. Whitehead, 26 M.J. 613 (A.C.M.R. 1988); United States v. Poertner, No. 26640, 1988 CMR LEXIS 853 (A.F.C.M.R. Oct. 4, 1988), *petition denied*, 28 M.J. 287 (C.M.A. 1989).

[52] *See* Sullivan et al., *Raising the Bar*, *supra* note 15 (discussing use of civilian mitigation specialists in courts-martial); Major David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1 (2001). For example, the increasingly prevalent use of civilian experts, including mitigation specialists, in military capital cases raises the costs of litigating such cases.

[53] For example, in *United States v. Akbar*, two years passed between the date of the offenses (after which the accused was immediately apprehended) and the trial. *See* Serrano, *supra* note 30, at A11. In *Witt*, more than fourteen months passed between the accused's apprehension and opening statements at his court-martial. *See* Becky Purser, *Witt's Defender: Robins Killings Not Premeditated*, MACON TELEGRAPH, Sept. 20, 2005, at A; Becky Purser, *Witt's Oral Confession Recounted*, MACON TELEGRAPH, Sept. 22, 2005, at C (detailing that the murders were committed on 4 July 2004, Witt was apprehended on 5 July 2004, and opening statements commenced on 20 Sept. 2005). Earlier capital cases were tried far more quickly. For example, the offenses at issue in *United States v. Curtis* occurred on 13 April 1987 and the death sentence was imposed less than four months later, on 6 August 1987. United States v. Curtis, 44 M.J. 106, 117 (1996); *see also* United States v. Curtis, 38 M.J. 530, 530 (N.M.C.M.R. 1993). Similarly, in *Loving*, the offenses occurred on 11-12 December 1988, and the death sentence was adjudged less than four months later, on 3 April 1989. United States v. Loving, 41 M.J. 213, 229, 284 (1994). Even as late as 1996, military death penalty cases went to trial far more quickly than today. In the *Kreutzer* case, the date the offenses occurred was 27 October 1995. United States v. Kreutzer, 59 M.J. 773, 774 (Army Ct. Crim. App. 2004),

factor appears to be the availability of confinement for life without eligibility for parole for offenses committed after 18 November 1997.[54] The availability of this sentence may have led some convening authorities to refer cases non-capitally that, had the maximum non-capital sentence remained confinement for life *with* eligibility for parole, they would have referred capitally.[55]

While capital prosecutions are rare, death sentences are rarer still. Of the forty-seven capital prosecutions detailed above, the members adjudged a death sentence in only fifteen cases (31.91%).[56]

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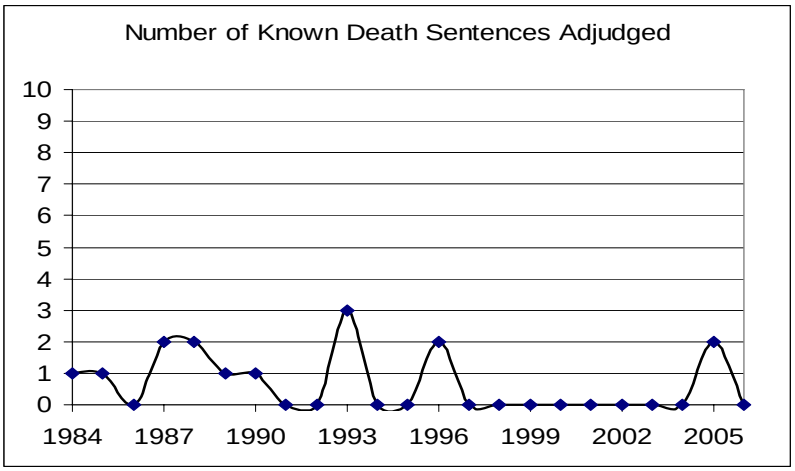
aff'd, 61 M.J. 293 (2005). Kreutzer was sentenced to death less than eight months later, on 12 June 2006. *See Fort Bragg Sniper Gets Death Penalty*, WASH. POST, June 13, 1996, at A17. The date of the offenses in *Quintanilla* was 5 March 1996. United States v. Quintanilla, 60 M.J. 852, 854-55 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006). Quintanilla was sentenced to death nine months later, on 5 December 1996. *Id.* at 852.

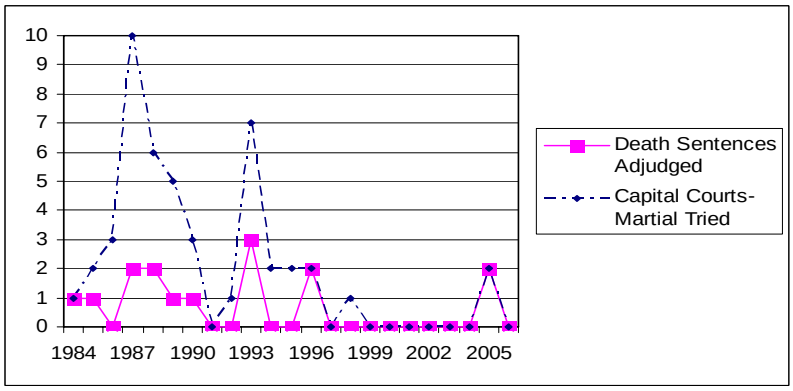
[54] *See* National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 581, 111 Stat. 1629, 1759 (1997) (codified at 10 U.S.C. § 856a (2000)). *See generally* United States v. Ronghi, 60 M.J. 83, *cert. denied*, 543 U.S. 1013 (2004) (holding that life without eligibility for parole is an authorized sentence for premeditated murders occurring after 18 November 1997, the effective date of the National Defense Authorization Act for Fiscal Year 1998).

[55] *Cf.* Liebman, *Broken System II*, *supra* note 3, at 404-05 (discussing analyses suggesting that the availability of confinement for life without parole reduces the number of death sentences imposed by civilian juries).

[56] Those fifteen cases, arranged by date of sentencing, are: United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989) (2 Apr. 1985); United States v. Curtis, 28 M.J. 1074 (N-M.C.M.R. 1989) (en banc), *rev'd in part*, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 502 U.S. 1097 (1992) (6 Aug. 1987); United States v. Murphy, 36 M.J. 1137 (A.C.M.R. 1993) (en banc), *rev'd*, 50 M.J. 4 (1998) (17 Dec. 1987); United States v. Thomas, 43 M.J. 550 (N-M. Ct. Crim. App. 1995) (en banc), *rev'd*, 46 M.J. 311 (1997) (8 Nov. 1988); United States v. Gray, 37 M.J. 730 (A.C.M.R. 1992) (affirming death sentence and denying petition for new trial), 37 M.J. 751 (A.C.M.R. 1993) (rejecting supplemental issues), *aff'd*, 51 M.J. 1 (1999), *cert. denied*, 532 U.S. 919, *reh'g denied*, 532 U.S. 1035 (2001) (4 Dec. 1988); United States v. Loving, 41 M.J. 213 (1994), *aff'd*, 517 U.S. 748 (1996) (3 Apr. 1989); United States v. Gibbs, 39 M.J. 378 (C.M.A. 1994) (summary disposition) (11 Jan. 1990); United States v. Walker, *appeal redocketed*, No. 9501607 (N.-M. Ct. Crim. App. Aug. 10, 1995) (2 July 1993); United States v. Parker, *appeal redocketed*, No. 9501500 (N-M. Ct. Crim. App. Dec. 23, 1997) (20 July 1993); United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996), *rev'd*, 50 M.J. 1 (1998) (22 July 1993); United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293, *reconsideration denied*, 62 M.J. 210 (2005) (12 June 1996); United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006) (6 Dec. 1996); United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006) (28 Apr. 2005); and United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006) (13 Oct. 2005). This list may not include



The graph above depicts the number of known military death sentences adjudged per year since 1984. The graph below superimposes the corresponding number of known capital courts-martial over the same period.



every death sentence adjudged under RCM 1004. In *United States v. Gibbs*, 39 M.J. 378 (C.M.A. 1994) (summary disposition), no court decision available on LEXIS or WESTLAW reveals that Gibbs was sentenced to death. That information can be obtained only by looking at the original record of trial. It is possible that in some post-*Matthews* military case other than *Gibbs* and *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)—another Marine Corps case in which a convening authority commuted an adjudged death sentence—a court-martial sentenced an accused to death but the convening authority commuted the sentence. However, almost certainly the list above includes every case in which an approved death sentence has gone on appeal under the current military death penalty system.

In two of the fifteen (13.33%) adjudged capital cases, the convening authority commuted the death sentence.[57] So among the population of known capital courts-martial, members adjudged a death sentence in just under one-third of the case (31.91%; 15/47), and the court-martial resulted in an approved death sentence in slightly more than one-fourth of the cases (27.66%; 13/47).

The roster of military capital cases also reveals enormous differences among the various military branches' capital practice. The Marine Corps—which includes less than 13% of all Defense of Department (DOD) active duty forces[58]—accounts for almost half (46.67%; 7/15) of the adjudged military death sentences. The Marine Corps is also unique in that a majority of capital cases it tried during the study period resulted in adjudged death sentences (7/13 or approximately 54%).[59] In the Army, one-third (6/18) of capital cases resulted in death sentences. The figure for the Air Force is just 20.00% (2/10), while no Navy capital case (0/6) resulted in a death sentence. These disparities among the branches are an interesting and unexplained phenomenon warranting further research.

IV. The Military Death Penalty at the Appellate Stage

During the study period (24 January 1984 through 31 December 2006), only thirteen cases with approved death sentences entered the military appellate system. That appellate system is unique. One unusual aspect is that the military justice system is one of only two jurisdictions in the United States that provides two levels of mandatory appeals for

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[57] *See Turner*, 25 M.J. at 324 (noting that the Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region "commuted the death sentence to life imprisonment plus a dishonorable discharge"); United States v. Gibbs, No. 910249 (2d Marine Division, Dec. 13, 1990) (record of trial on file at Washington National Records Center, Suitland, Maryland) (Commanding General, 2d Marine Division ordering that "so much of the sentence extending to death is changed to confinement for natural life.").

[58] The authorized active duty end strengths for 30 September 2006 were: Air Force, 357,400; Army, 512,400; Marine Corps, 179,000; and Navy, 352,700. National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, § 401(a), 119 Stat. 3136 (2005).

[59] But because of the two Marine Corps cases in which convening authorities disapproved death sentences, *see supra* note 57 and accompanying text, only 38.46% (5/13) of Marine Corps capital cases resulted in approved death sentences.

capital cases.[60] Defendants sentenced to death in United States district courts receive one appeal as a matter of right to one of the twelve geographic circuit courts of appeals.[61] Further review by the Supreme Court is discretionary.[62] Six of the thirty-eight[63] death penalty states have no intermediate courts of appeals.[64] In each of those states, death penalty cases fall within the state supreme court's mandatory jurisdiction.[65] In Oklahoma, the Court of Criminal Appeals exercises exclusive jurisdiction over all criminal appeals,[66] including capital cases.[67] In twenty-nine death penalty states, capital appeals bypass the

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[60] The other is Tennessee. TENN. CODE ANN. § 39-13-206(a)(1) (2003) (requiring its intermediate criminal appellate and supreme courts to hear death penalty appeals). *See infra* note 70 and accompanying text.

[61] *See* 28 U.S.C. § 1291 (2000).

[62] *See id.* § 1254.

[63] *See* DEATH ROW U.S.A., *supra* note 2, at 1. This publication lists thirty-eight states "with capital punishment statutes": Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id*. New York's continued status as a death penalty jurisdiction is questionable. In 2004, the New York Court of Appeals invalidated a portion of the New York death penalty statute and ruled that "under the present statute, the death penalty may not be imposed." *See* People v. LaValle, 817 N.E.2d 341, 367 (N.Y. 2004). In 2005, the New York legislature declined to revise the death penalty statute to cure the defects that the Court of Appeals identified in *LaValle*. *See* Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment; Accidental Execution of the Innocent Cited*, WASH. POST, Apr. 13, 2005, at A3. The Supreme Court observed that under the New York *LaValle* case (and another Kansas capital case), the death penalty "remains on the books, but as a practical matter it might not be imposed on anyone until there is a change of course in these decisions, or until the respective state legislatures remedy the problems the courts have identified." Roper v. Simmons, 543 U.S. 551, 580 (2005). This article will nevertheless treat New York as a death penalty jurisdiction in accordance with *Death Row U.S.A.*

[64] Those states are Delaware, Montana, Nevada, New Hampshire, South Dakota, and Wyoming. *See* Peter L. Murray, *Maine's Overburdened Law Court: Has the Time Come for a Maine Appeals Court?*, 52 ME. L. REV. 43, 67 (2000).

[65] *See* DEL. CODE ANN. tit. 11, § 4209(g) (Michie Supp. 2004); MONT. CODE ANN. § 46-18-307 (2005); NEV. REV. STAT. ANN. § 177.055 (Michie 2003); N.H. REV. STAT. ANN. § 630:5.X (1996); S.D. CODIFIED LAWS § 23A-27A-9 (Michie 1998); WY. STAT. ANN. § 6-2-103(a) (LEXIS 2005).

[66] The Oklahoma Court of Criminal Appeals is a court of last resort. "In Oklahoma's bifurcated appellate system, the Oklahoma Supreme Court has final jurisdiction over civil appeals, and [the Court of Criminal Appeals] has final jurisdiction over criminal appeals." Hughes v. State, 868 P.2d 730, 734 (Okla. Ct. Crim. App. 1994). "[N]either Oklahoma court is obligated to adopt the reasoning of the other . . . ." *Id.*

[67] OKLA. STAT. ANN. tit. 21, § 701.13 (West 2002).

intermediate appellate court and are docketed directly with the state court of last resort for criminal cases.[68] Alabama treats capital appeals like all other criminal cases: the intermediate appellate court exercises mandatory jurisdiction and the Alabama Supreme Court exercises discretionary certiorari jurisdiction over those cases.[69] Tennessee, the

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[68] The twenty-nine bypass states are: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, and Washington. *See* ARIZ. REV. STAT. ANN. § 12-120.21 (West 2003); ARIZ. REV. STAT. ANN. § 13-703.04 (West 2005); ARK. CODE ANN. § 16-91-101 (LEXIS 2005); Ark. S. Ct. R. 1-2(a); CAL. CONST. art. 6, § 11(a); COL. REV. STAT. ANN. § 18-1.3-12.01(6)(a) (West 2004); CONN. GEN. STAT. ANN. § 53a-46b (West 2005); FLA. CONST. art. 5, § 3(h); GA. CONST. art. VI, § VI, ¶ III; GA. CODE ANN. § 15-3-3 (2005); IDAHO CODE § 19-2827 (Michie 2004); ILL. CONST. art. 6, § 4(b); IND. CODE ANN. § 35-50-2-9(j) (LEXIS 2004); KAN. STAT. ANN. § 21-627(a) (1995); KY. REV. STAT. ANN. § 532.075(1) (LEXIS 2003); LA. CONST. art. 5, § 5(D); MD. CODE ANN., CTS. & JUD. PROC. § 12-307 (LEXIS 2002); MISS. CODE ANN. § 9-4-3(1) (2002); MO. ANN. STAT. § 565.035.1 (West 1999); NEB. CONST. art. V, § 2; N.J. CONST. art. 6, § 5, ¶ 1; N.M. CONST. art. VI, § 2; N.Y. CRIM. PROC. LAW § 470.30.2 (McKinney 2004); N.C. GEN. STAT. § 7A-27(a) (2003); OHIO CONST. art. IV, § 2; OR. REV. STAT. § 138.012 (2003); 42 PA. CONS. STAT. ANN. § 9711(h)(1) (West 2005); S.C. CODE ANN. § 14-8-200(b) (West 2004); TEX. CONST. art. 5, § 5; UTAH CODE ANN. § 78-2-2(3) (2002); VA. CODE ANN. § 17.1-313-A (LEXIS 2003); WASH. REV. CODE ANN. § 10.95.100 (West 2002). Before 1995, death penalty appeals in Ohio were heard by the Ohio Court of Appeals, from which an appeal as of right could be taken to the Ohio Supreme Court. However, a 1994 amendment to Article IV, § 2(c) of the Ohio Constitution provided that for offenses that occurred after 1 January 1995, a death penalty appeal would go directly to the Ohio Supreme Court. *See* State v. Yarbrough, 767 N.E.2d 216, 224 n.1 (Ohio), *cert. denied*, 537 U.S. 1023 (2002). In Texas, the state criminal court of last resort is the Texas Court of Criminal Appeals. Like Oklahoma, Texas has a separate Supreme Court and Court of Criminal Appeals. In Texas, however, intermediate appellate courts have jurisdiction over most criminal appeals, and the Texas Court of Criminal Appeals exercises discretionary jurisdiction over those decisions. *See* TEX. CONST. art. V, § 5. Capital appeals bypass the intermediate courts of appeals and are heard directly by the Court of Criminal Appeals. *Id.* For a fascinating discussion of the development of Texas appellate courts' jurisdiction, see Joe R. Greenhill, *The Constitutional Amendment Giving Criminal Jurisdiction to the Texas Courts of Civil Appeals and Recognizing the Inherent Power of the Texas Supreme Court*, 33 TEX. TECH. L. REV. 377 (2002).

[69] Until 19 May 2000, certiorari was automatic in Alabama death penalty cases. *See Ex parte* Jackson, 836 So.2d 979, 981 & n.1 (Ala. 2002). However, effective on that date, the Alabama Supreme Court amended Rule 39 of the Alabama Rules of Appellate Procedure to provide that the review of death penalty cases would be discretionary. *Id.* The Alabama Court of Criminal Appeals has noted that the "primary responsibility for reviewing all death-penalty convictions and sentences is with this Court." Jenkins v. State, No. CR-97-0864, 2005 Ala. Crim. App. LEXIS 236, at *22 (Ala. Crim. App. Nov. 23, 2005).

sole remaining capital jurisdiction, is the only state that provides two levels of mandatory appellate review for capital cases.[70]

In the military, like in Tennessee, the intermediate appellate courts have mandatory jurisdiction over capital cases.[71] But unlike other cases, where the Court of Appeals for the Armed Forces (CAAF) exercises discretionary jurisdiction absent a certificate of review filed by a Judge Advocate General,[72] Congress requires the CAAF to review every case in which a court of criminal appeals has affirmed a death sentence.[73]

The courts of criminal appeals apply a broad scope of review that requires them to independently assess both the appropriateness of the sentence and the factual sufficiency of the evidence.[74] While the intermediate military appellate courts' factual sufficiency review is probably unique,[75] their sentence appropriateness review is not unusual among capital appellate systems. In more than half of the death penalty states, courts evaluate adjudged death sentences under some form of comparative proportionality review.[76] While "[t]here is no single model

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[70] Since 1992, Tennessee has required its Court of Criminal Appeals to hear death penalty cases and has required its Supreme Court to hear an appeal of any case in which the Court of Criminal Appeals affirms a death sentence. TENN. CODE ANN. § 39-13-206(a)(1) (2003). Before 1992, Tennessee death penalty cases bypassed the Tennessee Court of Criminal Appeals and were automatically heard by the Tennessee Supreme Court. *See* TENN. CODE ANN. § 39-13-206(a)(1) (1991). *See generally* Lee Davis & Bryan Hoss, *Tennessee's Death Penalty: An Overview of Procedural Safeguards*, 31 U. MEM. L. REV. 779 (2001).

[71] UCMJ art. 66(b) (2005) ("The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—(1) in which the sentence, as approved, extends to death . . . .").

[72] *Id.* art. 67(a).

[73] *Id*. art. 67(a)(1).

[74] *Id.* art. 66(c); *see also* Colonel Francis A. Gilligan, *The Bill of Rights and Service Members*, ARMY LAW., Dec. 1987, at 3, 10 (noting that the intermediate military appellate courts' "scope of review is much broader than their civilian counterparts'. Unlike a civilian appellate court, the courts of military review have plenary authority to correct errors. They can review de novo factual findings and legal holdings.").

[75] *See* United States v. McAllister, 55 M.J. 270, 277 (2001) ("The Courts of Criminal Appeals are unique in that they are charged with 'the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency.' *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).").

[76] According to Professor Timothy V. Kaufman-Osborn, twenty-two death penalty states apply some form of comparative proportionality review in capital cases. Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 792 (2004). Such proportionality review has produced mixed results. Professors David C. Baldus and George Woodworth point to Florida and New Jersey as two examples of appellate

of comparative proportionality review to which all state appellate courts adhere," proportionality review involves three fundamental steps: (1) "a court must select the universe of cases to be considered when such reviews are conducted"; (2) "a court must choose the pool of cases deemed 'similar' to a specific case on appeal"; and (3) "a court must decide whether a specific case is proportionate when measured against the pool of similar cases."[77]

Interestingly, despite the intermediate military appellate courts' broad powers to grant relief on grounds of factual insufficiency and inappropriateness of the sentence, the CAAF has proven far more likely than the courts of criminal appeals to set aside death sentences. The intermediate military appellate courts have affirmed the death sentence in six of the nine capital cases they have considered.[78] In four of those six cases, the CAAF reversed the intermediate appellate court and set aside the death sentence.[79] In only one case has the CAAF reversed a portion of a court of criminal appeals' ruling favoring an accused in a capital case, and even in that case the CAAF still affirmed the portion of the lower court's decision setting aside the death sentence.[80] In the remaining two capital cases, the CAAF affirmed the relief granted by the intermediate appellate court.[81]

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proportionality review systems that have focused death sentences on the most highly aggravated cases. David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections of the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1460-64 (2004). They also point to Nebraska as another successful proportionality review system, *id*., though Nebraska is the only state where proportionality review occurs at the trial level. *Id*. at 1459 n.184.

[77] Kaufman-Osborn, *supra* note 76, at 792 (footnotes omitted).

[78] Those six cases were: United States v. Simoy, 46 M.J. 592 (A.F. Ct. Crim. App. 1996) (en banc); United States v. Thomas, 43 M.J. 550 (N-M. Ct. Crim. App. 1995) (en banc); United States v. Gray, 37 M.J. 730 (A.C.M.R. 1992); United States v. Loving, 34 M.J. 956 (A.C.M.R.), *reconsideration denied*, 34 M.J. 1065 (A.C.M.R. 1992); United States v. Murphy, 30 M.J. 1040 (A.C.M.R. 1990) (en banc); United States v. Curtis, 28 M.J. 1074 (N.M.C.M.R. 1989) (en banc). *See also* United States v. Gray, 37 M.J. 751 (A.C.M.R. 1993) (rejecting supplemental issues).

[79] United States v. Curtis, 46 M.J. 129 (1997); United States v. Thomas, 46 M.J. 311 (1997); United States v. Simoy, 50 M.J. 1 (1998); United States v. Murphy, 50 M.J. 4 (1998).

[80] United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part*, 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006).

[81] *See* United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989); United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005).

In some ways, the military capital review system provides less protection for those sentenced to death than do civilian systems. The most significant departure from the civilian norm concerns the vehicle for collaterally attacking the court-martial's results. "All States provide some form of post-conviction review, which may be denominated 'habeas corpus,' '*coram nobis*,' 'postconviction relief,' 'relief from restraint,' or the like."[82] Similarly, Congress has authorized post-conviction hearings for defendants convicted in federal district courts.[83] "The scope of postconviction review, and the procedures by which it may be sought, vary widely from State to State."[84] But these collateral proceedings typically allow convicted defendants to present facts from outside the record to attack their convictions or sentences.[85] Extra-record facts are often necessary to advance claims such as ineffective assistance of counsel[86] or the prosecutor's violation of discovery duties that may not be apparent on the face of the trial transcript. In state systems, these collateral attacks usually begin only after the direct appeal is complete. They generally begin in a trial court, followed by an appeal within the state system and an opportunity to seek discretionary review from the United States Supreme Court.[87] For ineffective assistance of counsel claims in the civilian federal system, the Supreme Court has expressed a

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[82] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 190 (4th ed. 2001). For additional background information, see generally *id.* §§ 1-5 & 3-2. *See also* DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF 16 (2001) ("In every American state there is at least one principal postconviction remedy and usually one or more secondary, alternative remedies that supplement the primary remedy and may be used when, for one reason or another, the principal remedy is unavailable or inappropriate or inapplicable.").

[83] 28 U.S.C. § 2255 (2000).

[84] HERTZ & LIEBMAN, *supra* note 82, at 190.

[85] *See* Andrew Hammell, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Habeas Corpus*, 39 AM. CRIM. L. REV. 1, 73 (2002) (noting that state post-conviction review usually involves "an initial fact-finding proceeding in the trial court followed by review in the state supreme court.").

[86] *See* Massaro v. United States, 538 U.S. 500, 505 (2003) (calling the district court "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial").

[87] *See* Ronald F. Wright & Marc Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659, 662-63 (1986); Geraldine Szott Moohr, Note, Murray v. Giarratano: *A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 770 n.32 (1990); Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 520 (1988); *see also* HERTZ & LIEBMAN, *supra* note 82, at 191.

preference for resolving the issue through a post-conviction proceeding initiated in a district court rather than on direct appeal.[88]

Several states have adopted "unitary review" systems in which a post-conviction proceeding at the trial level follows the capital trial almost immediately and the appeal from that post-conviction proceeding is combined with the direct appeal of the initial trial.[89] Federal law formerly defined "unitary review" as "a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of

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[88] *Massaro*, 538 U.S. at 504 ("[I]n most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance.").

[89] While courts and commentators disagree over precisely which states have unitary review systems, collectively they have identified five such states: California, Colorado, Idaho, Ohio, and Texas. *See generally* Hoffman v. Arave, 236 F.3d 523, 534 n.18 (9th Cir. 2001) ("Currently, only three [states other than Idaho]—California, Colorado, and Texas—employ a unitary scheme consolidating the post-conviction and appellate procedures into a single petition for review by the state's highest court."); Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 393 (2003) ("So-called unitary review systems . . . are currently in force in Colorado, Texas, Ohio, and Idaho . . . ."). *See also* Calderon v. Ashmus, 523 U.S. 740, 743 n.1 (1998) ("It is undisputed here that California is a unitary review State, which is a State that allows prisoners to raise collateral challenges in the course of direct review of the judgment, such that all claims may be raised in a single state appeal."); Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 469, 496-502 (2000) (discussing California's and Idaho's unitary review systems); Alexander Rundlet, *Opting for Death: State Responses to AEDPA's Opt-in Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 669-72 (1999) (discussing California's unitary review system); COL. REV. STAT. ANN. § 16-12-201 to -206 (West 1998 & West Supp. 2005); COLO. R. CRIM. P. 32.2(c)(1); Kappler, *supra*, at 527-28 (discussing Colorado's unitary review system); IDAHO CODE ANN. § 19-2719 (LEXIS 2004); Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho's Flawed Process*, 2 J. APP. PRAC. & PROCESS 85 (2000); OHIO REV. CODE ANN. § 2953.21(A)(2) (LEXIS 2003); TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon 2005); Julie B. Richardson-Stewart, Note, *One Full Bite at the Apple: Defining Competent Counsel in Texas Capital Post-Conviction Review*, 9 TEX. WESLEYAN L. REV. 221 (2003) (discussing Texas's unitary review system). At least three other jurisdictions adopted unitary systems at some point. In 1996, after Missouri had operated under a unitary system for eight years, the Missouri Supreme Court adopted a rule of criminal procedure reverting to a system of post-conviction review following completion of the direct appeal. *See* Fisher, *supra*, at 111-14. The supreme courts of Florida and Pennsylvania invalidated legislation adopting unitary systems of review in those states. Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000); *In re* Suspension of Capital Unitary Review Act, 722 A.2d 676 (Pa. 1999); *see also* Fisher, *supra*, at 114-16; Hammel, *supra*, at 394.

the judgment, such claims as could be raised on collateral attack."[90] For example, in Idaho, a capital defendant generally must file any request for post-conviction relief within forty-two days of being sentenced to death.[91] The district court must resolve the post-conviction claim within ninety days.[92] The appeal of the post-conviction proceeding is then consolidated with the direct appeal.[93]

In practice, the military appellate system functions as a unitary review jurisdiction. Ineffective assistance of counsel, *Brady* violations, and other claims relying on evidence from outside the record are routinely raised on direct appeal.[94] The extra-record evidence to support these claims is usually introduced into the appellate system through the simple mechanism of a motion to attach an affidavit.[95]

Another, more formal procedure also exists to raise issues relying on extra-record evidence. As an alternative to a writ of error *coram nobis*,[96] Congress authorized a military accused to file a petition for a new trial within two years of the convening authority's action.[97] These petitions can be based on either newly discovered evidence or fraud on the court. In practice, such petitions have been rare[98] and have been largely

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[90] 28 U.S.C. § 2265 (2000), *repealed by* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, tit. v, § 507, 120 Stat. 192, 250 (2006).

[91] IDAHO CODE ANN. § 19-2719(3) (LEXIS 2004).

[92] *Id.* § 19-2719(7).

[93] *Id.* § 19-2719(6).

[94] *See* Captain Scott A. Hancock, *The Advocate for Military Defense Counsel: Ineffective Assistance of Counsel: An Overview*, ARMY LAW., Apr. 1986, at 41, 42 (discussing the procedures for raising ineffective assistance of counsel claims on appeal); Major LeEllen Coacher, *Discovery in Courts-Martial*, 39 A.F. L. REV. 103 (1996) (discussing numerous cases in which military appellate courts ruled on discovery issues on direct appeal).

[95] *See* Lieutenant Colonel James Kevin Lovejoy, *The CAAF at a Crossroads: New Developments in Post-Trial Processing*, ARMY LAW., May 1998, at 25, 35 n.112.

[96] *See Hearings Before a Subcomm. of the Comm. on Armed Services on H.R. 2498, A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice*, 81st Cong., 1st Sess. 211 (1949) [hereinafter *Hearings on H.R. 2498*] (statement of Felix Larkin) (explaining that the UCMJ's drafters designed the Article 73 petition for new trial "to combine what amounts to a writ of error coram nobis with the motion for a new trial on newly discovered evidence.").

[97] UCMJ art. 73 (2005).

[98] *See* EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 189 (11th ed. 2003) ("new

displaced by an alternative judicially created framework for resolving appellate issues relying on extra-record facts.[99] But among the many differences between the military petition for new trial and the civilian post-conviction process, one is paramount: while the state post-conviction proceeding and its federal counterpart[100] are typically initiated at the trial court level, a petition for new trial is not. Military death row inmates do not have access to the same procedural mechanisms available to civilian defendants who litigate their post-conviction reviews at the trial level.

Military petitions for a new trial are filed with the Judge Advocate General, who will refer the petition to any court in which a direct appeal is pending.[101] Because the statute of limitations for such petitions is two years from the date of the convening authority's action,[102] in practice a petition for new trial in a capital case will always be referred to one of the military justice system's appellate courts. There, the standard course has been to combine consideration of the petition for new trial with consideration of the direct appeal.[103]

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trial petitions are rarely filed . . . and even more rarely granted."), *available at* http://www.nimj.org/documents/MILAPP.pdf.

[99] *See* United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967) (remanding case for an evidentiary hearing); *see also* United States v. Ginn, 47 M.J. 236 (1997) (circumscribing the courts of criminal appeals' authority to resolve factual conflicts created by competing affidavits and generally requiring remand for a *DuBay* hearing where the competing affidavits concern a material fact); Captain David D. Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c), UCMJ*, 38 A.F. L. REV. 63 (1994).

[100] *See* 28 U.S.C. § 2255 (2000).

[101] UCMJ art. 73 (2005); *see also* MCM, *supra* note 15, R.C.M. 1210(e), (g)(2).

[102] UCMJ art. 73; *see also* MCM, *supra* note 15, R.C.M. 1210(a). The CAAF has held that this two-year period can be equitably tolled. United States v. Van Tassel, 38 M.J. 91, 93 (C.M.A. 1993) (suspending deadline for filing petition for new trial due to appellant's mental incompetence).

[103] *See* FIDELL, *supra* note 98, at 188 ("Ordinarily the Court will consider a new trial petition and the merits of a case before it under Article 67(a)(3) at the same time."). Similarly, the Courts of Criminal Appeals generally resolve petitions for new trial together with the Article 66 appeal. *See*, *e.g.*, United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006); United States v. Hildebrandt, 60 M.J. 642 (N-M. Ct. Crim. App. 2004); United States v. Cuento, 58 M.J. 584 (N-M. Ct. Crim. App. 2003), *aff'd in part, rev'd in part*, 60 M.J. 106 (2004); United States v. Diaz, 56 M.J. 795 (Army Ct. Crim. App. 2002), *rev'd*, 59 M.J. 79 (2003); United States v. Guest, 46 M.J. 778 (Army Ct. Crim. App. 1997), *petition denied*, 49 M.J. 132 (1998); United States v. Hill, 46 M.J. 567 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 242 (1998); United States v. Denier, 43 M.J. 693 (A.F. Ct. Crim. App. 1995), *aff'd*, 47 M.J. 253 (1997).

After the direct appeal is complete, the President of the United States must decide whether to approve the death sentence.[104] The President's role is somewhat analogous to that of governors in some death penalty states that require the chief executive to issue death warrants,[105] though presidential review is not merely a ministerial act but rather is "conducted as a matter of clemency."[106] If the President fails to act, then the death sentence remains unapproved and no execution can be carried out.[107] The presidential approval requirement adds an additional layer of protection for an accused in the military death penalty system.[108] No President has acted on a military capital case since 1962, when President John F. Kennedy commuted a Sailor's death sentence.[109] Since then, only two military death sentences have been finally affirmed on appeal. The first was that of Army Private First Class Dwight Loving, whose death sentence became ripe for presidential action in 1996, when the Supreme Court affirmed his death sentence.[110] The second was that of Army Specialist Ronald Gray, whose death sentence became ripe for

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[104] UCMJ art. 71(a) ("If a sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President."). *See also* Dwight H. Sullivan, *Executive Branch Consideration of Military Death Sentences*, *in* EVOLVING MILITARY JUSTICE 137 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002) [hereinafter Sullivan, *Executive Branch Consideration*].

[105] *See, e.g.*, FLA. STAT. ANN. § 922.052 (LEXIS 2001) ("The sentence shall not be executed until the Governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing the warden to execute the sentence at a time designated in the warrant."); 61 PENN. STAT. ANN. § 3002(a) (West 1999) ("After the receipt of the record pursuant to 42 PA. CONST. STAT. § 9711(i) (relating to sentencing procedure for murder of the first degree), unless a pardon or commutation has been issued, the governor shall, within ninety days, issue a warrant specifying a day for execution which shall be no later than sixty days after the date the warrant is signed.").

[106] S. REP. No. 98-53, 98th Cong., 1st Sess. 24 (1983); *see generally* Loving v. United States, 62 M.J. 235, 247 (2005).

[107] The UCMJ drafters intended the system to operate in just this way. During the House hearings, Felix Larkin, the Assistant General Counsel of the Office of the Secretary of Defense and chairman of the UCMJ drafters' "working group," explained that a military death sentence "is in effect suspended from the very beginning until [the President] in his own good time does approve it." *See Hearings on H.R. 2498*, *supra* note 96, at 199. Army Colonel John P. Dinsmore, who was also a member of the working group, noted that if the President wants additional time to review a death sentence, "all the President has to do is to defer action until he makes up his mind what he wants to do. The execution date can't be fixed until after the President has acted." *Id.*

[108] *See* Sullivan, *Executive Branch Consideration*, *supra* note 104, at 137 ("This requirement is an important protection for condemned servicemembers. Since the UCMJ took effect in 1951, the military has carried out twelve executions while in fourteen cases a condemned servicemember's death sentence was commuted by the president.").

[109] *See id*. at 138.

[110] Loving v. United States, 517 U.S. 748 (1996).

presidential action in 2001, when the Supreme Court denied his certiorari petition seeking review of the CAAF decision affirming his findings and sentence.[111] Both cases remained pending presidential action at the end of the study period.[112]

If a President were to approve a military death sentence, the case would be eligible for habeas corpus review by an Article III court. Specific congressional statutes govern federal habeas review of state death sentences and post-conviction review of federal death sentences.[113] Those statutes, however, omit any reference to the statute under which Article III courts hear military habeas petitions, including in capital cases.[114] No military death row inmate has filed a habeas petition with

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[111] United States v. Gray, 51 M.J. 1 (1999), *reconsideration denied*, 53 M.J. 242, *second reconsideration denied*, 54 M.J. 223 (2000), *cert. denied*, 532 U.S. 919, *reh'g denied*, 532 U.S. 1035 (2001).

[112] A May 2005 newspaper article reported that the Secretary of the Army had forwarded both the *Loving* and *Gray* cases to the DOD. Andrew Tilghman, *U.S. Military Executions Draw Closer*, HOUSTON CHRON., May 1, 2005, at A1. On 1 September 2005, the *Gray* case was forwarded from the DOD to the White House. Memorandum, Colonel Flora D. Darpino, Judge Advocate, Chief, Criminal Law Division, Office of The Judge Advocate General of the Army, to the Office of the Secretary of the Army, subject: Forwarding of Death Penalty Case to the President of the United States (Sept. 1, 2005). Rule for Courts-Martial 1204(c)(2) provides that in cases where the Court of Appeals for the Armed Forces has affirmed a sentence requiring the President's approval, the Judge Advocate General will provide the record, military appellate court decisions, and a recommendation "to the Secretary concerned for the action of the President." During the Eisenhower Administration, service secretaries began to forward the case to the Secretary of Defense before submission to the President. *See* Sullivan, *Executive Branch Consideration*, *supra* note 104, at 138. Since 1953, the Justice Department has also given a recommendation to the President in military death penalty cases. *Id.* Executive Branch consideration of the *Loving* case may have been delayed to some extent by a series of petitions for extraordinary relief filed on his behalf. *See generally* Loving v. United States, 62 M.J. 235 (2005) (dismissing petitions for writs of error coram nobis and describing procedural history of case). On 29 September 2006, the Court of Appeals for the Armed Forces ordered a *DuBay* hearing to address allegations of ineffective assistance of counsel that Loving raised in a post-direct appeal habeas petition. Loving v. United States, 64 M.J. 132 (2006).

[113] *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 192, 230 (codifed at 18 U.S.C.A. § 3599 (West Supp. 2006)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101, 110 Stat. 1214 (Apr. 24, 1996).

[114] *See* Sullivan, *Last Line of Defense*, *supra* note 17, at 49 (discussing omission of 28 U.S.C. § 2241—the statutory provision under which military sentenced prisoners seek habeas relief from Article III courts—from the habeas counsel right provisions of the Anti-Drug Abuse Act of 1988, which are now codified at 18 U.S.C. § 3599). Similarly, the Antiterrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. § 2255, the provision under which federal prisoners seek post-conviction review, and § 2254, the

an Article III court since 1961,[115] long before Congress adopted the statutes that now govern habeas review of civilian death sentences. So great uncertainty surrounds the scope of review that Article III courts will apply when conducting habeas review of military death penalty cases, and, consequently, the extent to which such habeas review will be meaningful.[116]

The military capital review system varies so much from its civilian counterparts that it seems useless to analyze whether it is more or less procedurally protective than the typical state system. But one conclusion is clear. As the next section demonstrates, the rate at which the military

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provision under which state prisoners seek federal habeas review. But the statute makes no mention of § 2241, the analogous statute for military prisoners challenging sentences imposed by court-martial. *See also* 28 U.S.C. § 2261(a) (2000) ("This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence."). In 2006, the USA PATRIOT Improvement and Reauthorization Act of 2005 moved the Anti-Drug Abuse Act of 1988's habeas counsel provisions from Title 21 to Title 18 of the U.S. Code. *See* Pub. L. No. 109-177, § 222, 120 Stat. 192, 230. This statute, like its predecessor, also referred to habeas cases arising under 28 U.S.C. §§ 2254 and 2255 with no mention of habeas cases brought under 28 U.S.C. § 2241. Congress appears to have consistently overlooked that there is a class of death-sentenced prisoners—those who were tried in the court-martial system—who seek Article III habeas review under 28 U.S.C. § 2241. *See also* John K. Chapman, Note, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 VAND. L. REV. 1387 (2004).

[115] *See* Bennett v. Cox, 287 F.2d 883 (10th Cir. 1961); *see also* Sullivan, *Last Line of Defense*, *supra* note 17, at 3.

[116] *See generally* Sullivan, *Last Line of Defense*, *supra* note 17, at 11-25 (discussing scope of review for Article III habeas review of court-martial cases). The Tenth Circuit, whose case law governs the United States Disciplinary Barracks and thus military death row, articulated the scope of review in habeas cases arising from court-martial convictions in *Roberts v. Callahan*, 321 F.3d 994 (10th Cir.), *cert. denied*, 540 U.S. 973 (2003). The Tenth Circuit held:

> If the grounds for relief that Petitioner raised in the district court were fully and fairly reviewed in the military courts, then the district court was proper in not considering those issues. Likewise, if a ground for relief was not raised in the military courts, then the district court must deem that ground waived. The only exception to the waiver rule is that a petitioner may obtain relief by showing cause and actual prejudice.

Id. at 997 (internal citations omitted). *See generally* United States *ex rel.* New v. Rumsfeld, 448 F.3d 403 (D.C. Cir. 2006) (discussing applicable standards for collateral review of courts-martial), *cert. denied*, 75 U.S.L.W. 3286 (U.S. Apr. 23, 2007) (No. 06-691).

capital review system invalidates death sentences is higher than the comparable figure for the state death penalty systems.

V. A Comparison with Civilian State Death Penalty Systems

In June 2000 and February 2002, Columbia Law School Professor James S. Liebman and a group of his colleagues issued a pair[117] of influential[118]—and controversial[119]—reports on state capital punishment

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[117] *See* Liebman, *Broken System I*, *supra* note 3; Liebman, *Broken System II*, *supra* note 3.

[118] The *Broken System II* report is cited in a Supreme Court concurring opinion and two federal circuit court opinions. Ring v. Arizona, 536 U.S. 584, 616, 618 (2002) (Breyer, J., concurring); House v. Bell, 311 F.3d 767, 778 (6th Cir. 2002) (en banc); Depew v. Anderson, 311 F.3d 742, 750 n.1 (6th Cir. 2002), *cert. denied*, 540 U.S. 888, 938 (2003). The *Broken System I* report is cited in three federal circuit court decisions. Comer v. Schriro, 463 F.3d 934, 949 (9th Cir. 2006); Rompilla v. Horn, 359 F.3d 310, 311 (3d Cir.), *cert. denied*, 125 S. Ct. 27 (2004); Summerlin v. Stewart, 341 F.3d 1082, 1110 n.11, 1123 (9th Cir. 2003), *rev'd*, 542 U.S. 348 (2004). Both reports were discussed in a prominent, though quickly reversed, federal district court opinion holding the Federal Death Penalty Act unconstitutional. United States v. Quinones, 205 F. Supp. 2d 256, 268 (S.D.N.Y.), *rev'd*, 313 F.3d 49 (2d Cir. 2002), *cert. denied*, 540 U.S. 1051 (2003). The reports were also discussed in a subsequent federal district court opinion concluding that the Federal Death Penalty Act "will inevitably result in the execution of innocent people," but nevertheless upholding its constitutionality. United States v. Sampson, 275 F. Supp. 2d 49, 57-58 (D. Mass. 2003); *see also id*. at 77, 81 (discussing *Broken System* reports). The *Broken System I* report was also cited in a recent federal district court opinion noting "the anguish of death penalty lawyers who believe the death penalty system as broken." Barbour v. Haley, 410 F. Supp. 2d 1120, 1136 & 1136 n.29 (M.D. Ala. 2006).

[119] The authors of the *Broken System* reports have engaged in a remarkable series of exchanges with their critics. *See* Joseph L. Hoffmann, *Violence and the Truth*, 76 IND. L.J. 939 (2001); Valerie West, Jeffrey Fagan & James S. Liebman, *Look Who's Extrapolating: A Reply to Hoffmann*, 76 IND. L.J. 951 (2001); Adam L. VanGrack, Note: *Serious Error with "Serious Error": Repairing a Broken System of Capital Punishment*, 79 WASH. U. L. Q. 973 (2001); *Editor's Note*, 80 WASH. U. L.Q. 415 (2002); Jeffrey Fagan, James S. Liebman & Valerie West, *Misstatements of Fact in Adam VanGrack's Student Note: A Letter to the Editors of the Washington University Law Quarterly*, 80 WASH. U. L.Q. 417 (2002); Adam L. VanGrack, *Elevating Form Over Substance: A Reply to Professors James Liebman, Jeffrey Fagan and Valerie West*, 80 WASH. U. L.Q. 427 (2002); Jeffrey Fagan, James S. Liebman & Valerie West, *VanGrack's Explanations: Treating the Truth as a Mere Matter of "Form"*, 80 WASH. U. L.Q. 439 (2002); Barry Latzer & James N.G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64 (2000); James S. Liebman, Jeffrey Fagan & Valerie West, *Death Matters: A Reply to Latzer and Cauthen*, 84 JUDICATURE 72 (2000); Barry Latzer & James N.G. Cauthen, *The Meaning of Capital Appeals: A Rejoinder to Liebman, Fagan, and West*, 84 JUDICATURE 142 (2000); Jeffrey Fagan, James S. Liebman & Valerie West, *Death Is the Whole Ball Game*, 84 JUDICATURE 144 (2000); Barry Latzer & James N.G. Cauthen**,** *Another Recount:*

systems. The first of these reports, *A Broken System: Error Rates in Capital Cases, 1973-1995*, analyzed "all 4,578 capital sentences that were finally reviewed by state direct appeal courts and all 599 capital sentences that were finally reviewed by federal habeas corpus courts between 1973 and 1995."[120] The report also provided national aggregates. The result is a remarkable long-term statistical depiction of state death penalty systems' performance. The report, however, examined neither the federal civilian nor military death penalty systems.[121]

A. Findings Concerning State Death Penalty Systems

The *Broken System* reports' major findings include the following:

● *Overall execution rate*: "Between 1973 and 1995, approximately 5,760 death sentences were imposed in the United States. Only 313 (5.4%; one in [nineteen] of those resulted in execution during the period."[122]

● *Direct appeal reversal rate*: "Of the 5,760 death sentences imposed in the study period, 4,578 (79%) were finally reviewed on

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Appeals in Capital Cases, PROSECUTOR**,** Jan./Feb. 2001, at 25 (arguing that the *Broken System* study overstates the death penalty reversal rate and that the *Broken System* study indicates that the actual relief rate is 20% for capital convictions, plus another 32% of capital cases in which the relief is limited to setting aside the death sentence). A collection of criticism of and rebuttals to the *Broken System* reports is available at http://www.prodeathpenalty.com/Liebman/Liebman.htm.

[120] Liebman, *Capital Attrition, supra* note 3, at 1844.

[121] The *Broken System* study "considers only state, not federal, death sentences." Liebman, *Broken System I*, *supra* note 3, at 128 n.30.

[122] Liebman, *Capital Attrition*, *supra* note 3, at 1846. By 2 April 2007, the number of post-*Furman* executions had risen to 1,069. *See* Death Penalty Information Center, Executions By Year, *available at* http://www.deathpenaltyinfo.org/article.php?scid=8&did=146. Through the end of 2005, a total of 7,320 individuals had been sentenced to death since *Furman*. *See* TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2005, at 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf (printed by the Bureau of Justice Statistics and labeled: NCJ 215083). Also through the end of 2005, a total of 1,004 post-*Furman* executions had occurred in the United States. So between the end of the Broken System reports' study period in 1995 and 2005, the overall execution rate more than doubled, from 5.4% to 13.7%.

'direct appeal' by a state high court."[123] In 1,885 (41%) of those cases, the death sentence was reversed.[124]

● *State post-conviction reversal rate*: In the twenty-eight states in the *Broken System* reports' post-conviction study group, approximately 6% (248/4,364) of adjudged death sentences that completed final review were reversed at the state post-conviction level.[125]

● *Federal habeas review reversal rate*: In the twenty-eight-state group, approximately 21% of adjudged death sentences that completed final review were reversed during federal habeas corpus proceedings.[126]

● *Overall reversal rate*: Including death sentences reversed at any point in the review process, "[n]ationally, over the entire 1973-1995 period, the overall error-rate in our capital punishment system was 68%."[127] The *Broken System* reports' authors caution, however, that because they consistently used methodologies that would avoid overstating the amount of reversible error in the system, the overall reversal rate may actually be (and probably is) higher.[128]

● *Disposition following reversal*: For those individuals in the twenty-eight-state group whose death sentences were reversed and whose post-reversal outcome is known, "82% (247 out of 301) of the capital judgments that were reversed were replaced on retrial with a sentence *less* than death, or *no* sentence at all."[129] This includes 7% (22/301) of

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[123] Liebman, *Capital Attrition*, *supra* note 3, at 1847; *see also* Liebman, *Broken System II*, *supra* note 3, at 8.

[124] Liebman, *Capital Attrition*, *supra* note 3, at 1847.

[125] *Id*. at 1851, 1852. The *Broken System* reports calculate the state post-conviction reversal rate not on the basis of all death sentences adjudged during the study period, but only those adjudged in the twenty-eight death penalty systems in which a case had progressed through the entire review system, including federal habeas review, by 1995. *See* Liebman, *Broken System I*, *supra* note 3, at 29. This twenty-eight-state group consists of Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

[126] Liebman, *Capital Attrition*, *supra* note 3, at 1851, 1852; *see also* Liebman, *Broken System II*, *supra* note 3, at 8.

[127] Liebman, *Capital Attrition*, *supra* note 3, at 1850; *see also* Liebman, *Broken System II*, *supra* note 3, at 8, 11.

[128] Liebman, *Broken System II*, *supra* note 3, at 14.

[129] Liebman, *Broken System I*, *supra* note 3, at 7.

reversed cases that "resulted in a determination on retrial that the defendant was *not guilty* of the capital offense."[130]

● *Comparison with non-capital reversal rate*: "Reversals occurred far more often in the capital cases studied than . . . in non-capital cases."[131] While information concerning the non-capital reversal rate is "sparse," the *Broken System II* report estimates that "the reversal rate in non-capital cases is less than 10% and probably less than 5%. Capital verdicts are 7 to 14 times more likely to be reversed than non-capital ones**.**"[132]

● *Delay in the capital review process*: "[A]bout five years elapse between sentence and [completion of] the *first* direct appeal."[133] For cases that resulted in reversal during federal habeas corpus review, "[i]t took an average of 7.6 years after the defendant was sentenced to [death] to complete federal habeas corpus consideration . . . ."[134] These findings are generally consistent with a Bureau of Justice Statistics report's conclusion that for all of the state and federal "prisoners executed between 1977 and 2005, the average time between the imposition of the most recent sentence received and execution was more than 10 years."[135] While the amount of delay has ebbed and flowed over the years, the general trend is toward greater delay.[136] In 2005, the most recent year for which statistics are available, the average delay reached a record length of twelve years, three months.[137]

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[130] *Id.* In the more recent *Persistent Patterns of Reversals* article, Professor Liebman and his colleagues state that "death-row inmates were found not guilty on retrial" in 9% of the studied cases reversed during state post-conviction review. Gelman et al., *supra* note 3, at 221.

[131] Liebman, *Broken System II*, *supra* note 3, at 11.

[132] *Id*. at 11-12. When referring to "capital verdicts," the study's authors appear to mean death sentences. In other words, these appear to be the rates at which sentences are reversed, not necessarily their underlying verdicts—though reversal of an underlying verdict is a sufficient, but not necessary, basis for reversal of a sentence.

[133] Liebman, *Capital Attrition*, *supra* note 3, at 1862 n.68.

[134] *Id.* at 1856.

[135] SNELL, *supra* note 122, at 10.

[136] *See id.* at 11, tbl. 11.

[137] *Id.*

B. Comparable Findings for the Military Death Penalty System

1. Defining the Population of Military Cases to be Surveyed

This subsection provides military data corresponding to the *Broken System* reports' data for the eight categories listed in the previous subsection. This survey, however, uses a somewhat different study period than did the *Broken System* reports. Those reports analyzed capital sentences that were finally reviewed between 1973 and 1995. This survey of military death sentences, on the other hand, begins its analysis in 1984, when the current military death penalty system came into effect. Excluding the seven military death sentences imposed between 1973 and 1983—all of which were reversed as a result of *United States v. Matthews*[138]—is consistent with the *Broken System* reports' approach. The *Broken System* reports' analysis for each state began only after it had adopted a *Furman*-compliant death penalty system.[139] The military death penalty was not reformed in light of *Furman* until President Reagan issued Executive Order 12,460 on 24 January 1984.[140] Also, this article's goal is to analyze the current military death penalty system. The seven death sentences that were set aside by *Matthews* and its progeny[141]—all of which were adjudged before the current military death penalty procedures took effect in 1984—tell us nothing about the current system's operation. Accordingly, the relevant starting date for an empirical analysis of the military death penalty system is 1984, not 1973.

The *Broken System* reports' end date of 1995 is also ill-suited to an analysis of the military death penalty. Only one military death penalty case—*United States v. Dock*[142]—completed direct review from 1984 to 1995. Ending the study period in 1995 would produce a misleading—

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[138] 16 M.J. 354 (C.M.A. 1983); *see supra* notes 16, 20, and accompanying text.

[139] *See* Liebman, *Broken System II*, *supra* note 3, at 18; Gelman et al., *Persistent Patterns of Reversals*, *supra* note 3, at 214.

[140] *See supra* note 23 and accompanying text.

[141] *See supra* notes 16-22 and accompanying text.

[142] 26 M.J. 620 (A.C.M.R. 1988) (en banc), *aff'd*, 28 M.J. 117 (C.M.A. 1989). While the Court of Appeals for the Armed Forces affirmed *Loving*'s death sentence in 1994, *see* 41 M.J. 213 (1994), that case remained pending at the Supreme Court in 1995. Because the Supreme Court had granted certiorari in 1995, *see* Loving v. United States, 515 U.S. 1191 (1995), but did not rule in the case until 1996, the *Broken System* reports' rules for determining the population of cases studied would have excluded *Loving*. *See* Liebman, *Capital Attrition*, *supra* note 3, at 1844 ("If the Supreme Court instead granted certiorari in a case but did not decide the case before or during 1995, the case is omitted from the study because the Supreme Court's action withdrew the finality of the decision.").

and virtually meaningless—100% reversal rate (1/1). Since 1995, eight more capital cases have completed direct review, including two—*Loving* and *Gray*—in which the death sentences were affirmed. Thus, to present a more meaningful analysis of the military capital punishment system's actual performance, this survey evaluates data from January 1984 through 31 December 2006.

2. Cases in This Survey's Population

Nine of the thirteen military death penalty cases that have been appealed under the current system completed direct appellate review during the study period. In two of those cases (*Gray* and *Loving*), the death sentences were affirmed. In the remaining seven (*Dock*, *Curtis*, *Murphy*, *Thomas*, *Simoy*, *Kreutzer*, and *Quintanilla*), the death sentences were reversed. Four cases (*Walker*,[143] *Parker*,[144] *Witt*,[145] and *Akbar*[146]) remained on direct appeal at the end of the study period. Those four cases are excluded from this analysis. Excluding them is consistent with the *Broken System* study's exclusion of cases that were not yet final at the time the data were collected.[147]

3. A Comparison of the Military Cases and the Broken System Study

The nine cases included in this survey, in order of sentencing, are *Dock*, *Curtis*, *Murphy*, *Gray*, *Thomas*, *Loving*, *Simoy*, *Kreutzer*, and *Quintanilla*.

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[143] *See generally* Walker v. United States, 60 M.J. 354 (2004) (granting in part petition for extraordinary relief concerning the appointment and composition of the NMCCA panel hearing Walker's appeal).

[144] *See generally* Parker v. United States, 61 M.J. 63 (2005) (ordering that "the matter is remanded to the United States Navy-Marine Corps Court of Criminal Appeals to consider the continued availability of the sentence of death in light of" evidence concerning Parker's possible mental retardation). *See also* Parker v. United States, 60 M.J. 446 (2005) (order).

[145] United States v. Witt, *appeal docketed*, No. ACM 36785 (A.F. Ct. Crim. App. July 24, 2006).

[146] United States v. Akbar, *appeal docketed*, No. 20050513 (Army Ct. Crim. App. Dec. 1, 2006)

[147] *See* Liebman, *Broken System I*, *supra* note 3, at 25.

● *Overall execution rate*: The military has not carried out an execution since 1961.[148] So the military's execution rate for the study period was 0% compared to 5.4% (313/5,760) for the state death penalty systems.[149] The military is one of six American death penalty jurisdictions that have not carried out a post-*Furman* execution.[150]

● *Direct appeal reversal rate*: The military's direct appeal death sentence reversal rate was 77.78% (7/9)[151] for capital cases tried since 1984 and finally resolved by 31 December 2006, compared to 41% (1,885/4,578) for civilian cases that completed direct appeal between 1973 and 1995.[152] But three of the military death sentence direct appeal reversals—*Curtis*, *Murphy*, and *Kreutzer*—were based at least in part on ineffective assistance of counsel, an issue that is typically raised during state post-conviction challenges in the civilian system. Therefore, a more meaningful comparison is the military direct appeal reversal rate versus the civilian direct appeal *plus* state post-conviction reversal rate.

● *Post-conviction reversal rate*: The state post-conviction proceeding has no direct military justice counterpart. The military justice system instead operates as a unitary system in which claims based

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[148] Turney, *supra* note 50, at 104 n.13.

[149] *See supra* note 122. By 2005, however, the civilian systems' execution rate had risen substantially. *See id.*

[150] The other five are Kansas, New Hampshire, New Jersey, New York, and South Dakota. *See* DEATH ROW U.S.A., *supra* note 2, at 8-9.

[151] In two military capital cases decided during the study period, *Dock* and *Kreutzer*, the appeal resulted in reversal of the contested findings as well as the sentence. In *Murphy*, proceedings are ongoing to determine whether the ineffective assistance of counsel that led to the reversal of the death sentence also tainted the findings. The military judge who conducted the *DuBay* hearing concluded that the ineffective assistance affected the sentence only. Memorandum of Decision, United States v. Murphy, United States Army Trial Judiciary, Fourth Judicial Circuit (17 Oct. 2005) (on file with author), in Record, United States v. Murphy, *appeal redocketed*, No. 8702873 (Army Ct. Crim. App. Nov. 8, 2005). The ACCA is now reviewing that ruling. In the remaining six capital cases, the findings and sentence were affirmed in two (*Loving* and *Gray*), the findings were affirmed but the death sentence reversed in three (*Curtis*, *Thomas*, and *Simoy*), and the death sentence was reversed without a final ruling on the findings in one (*Quintanilla*). *See* United States v. Loving, 41 M.J. 213 (1994), *aff'd*, 517 U.S. 748 (1996); United States v. Gray, 51 M.J. 1 (1999), *cert. denied*, 532 U.S. 919, *reh'g denied*, 532 U.S. 1035 (2001); United States v. Curtis, 46 M.J. 129 (1997); United States v. Thomas, 46 M.J. 311 (1997); United States v. Simoy, 50 M.J. 1 (1998); United States v. Quintanilla, 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006). Accordingly, excluding *Murphy* and *Quintanilla* from the analysis, the findings reversal rate was 22% (2/7).

[152] *See supra* notes 123-24.

on new evidence are raised as part of the direct appeal.[153] The military death sentence direct appeal reversal rate, including post-conviction-type claims, is 77.78% (7/9). In the twenty-eight states included in the Broken System reports' post-conviction study group, the civilian death sentence reversal rate for direct appeals plus post-conviction proceedings is approximately 47% (2,030/4,364).[154] The military reversal rate is far higher than the comparable average for the death penalty states. But because of the extremely small number of military death penalty cases, the difference is not statistically significant.[155] One state, Wyoming, actually has a direct appeal plus post-conviction reversal rate equal to the military's reversal rate.[156]

● *Federal habeas review reversal rate*: No military death penalty case has entered Article III habeas review since the present military death penalty system was adopted in 1984.

● *Overall reversal rate*: The overall civilian death sentence reversal rate, including direct review, state post-conviction review, and federal habeas review, is 68%.[157] The overall death sentence reversal rate for the military is unknown, since no military death penalty case has even begun

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[153] *See supra* note 94 and accompanying text.

[154] Liebman, *Broken System I*, *supra* note 3, at 31, 37, 144 n.156.

[155] "Social scientists use tests of statistical significance to test the probability that some random process . . . could have generated an observed result. The significance or '*p*-value' for a result indicates the likelihood that the observed result could have happened by chance." Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 782 n.59 (1998). *See generally* Liebman, *Broken System II*, *supra* note 3, at 85, 109-10 (defining and explaining statistical significance). "Most social scientists accept results with a *p*-value of .05 or less as 'significant' or meaningful." Merritt, *supra*, at 782 n.59. A comparison of the military reversal rate with the direct appeal plus state post-conviction reversal rate for the Broken System reports' twenty-eight-state post-conviction study group yields a *p*-value of approximately .06. Because one of the values used in the chi square analysis is less than five and the chi-square analysis was performed using a two-by-two matrix, some statistical analysis experts would recommend employing Yates' correction for continuity. *See generally* Kristopher J. Preacher, *Calculation for the Chi-Square Test* (Apr. 2001), *available at* http://www.psych.ku.edu/preacher/chisq/chisq.htm. The reader should note that the chi-square analyses presented in this footnote were calculated using, among other sources, this website's chi-square calculator. The Yates' *p*-value is approximately .12. Under either analysis, the difference between the results of the military system and the twenty-eight states is not statistically significant.

[156] Liebman, *Broken System I*, *supra* note 3, at 58, A-121. Wyoming's direct appeal plus state post-conviction reversal rate is 77.78% (7/9). The next highest reversal rate is Maryland's (77.19%; 44/57). *See id*. at A-61.

[157] *See supra* note 127 and accompanying text.

Article III habeas review. But for the group of military capital cases that has completed direct review, any ultimate Article III habeas review (or post-direct appeal military habeas review, such as in *Loving v. United States*[158]) can only add to the reversal rate. Accordingly, we know that the ultimate death sentence reversal rate for that group will be at least 77.78%. The reversal rate would climb even higher if either Loving or Gray were to obtain habeas relief.

- *Disposition following reversal*: In the military justice system, three of the seven accused whose death sentences have been set aside (Murphy, Kreutzer, and Quintanilla) have yet to be retried.[159] In the remaining four cases (*Dock*, *Curtis*, *Simoy*, and *Thomas*), the original death sentence was replaced with a sentence of confinement for life.[160] So 100% (4/4) of those who were resentenced (or, in the case of Curtis, whose sentence was reassessed) avoided the death penalty. The comparable figure for the civilian system is 82% (247/301).[161]

- *Comparison with non-capital reversal rate*: The military appellate reversal rate for non-capital sentences is unknown, but it is certainly far less than 77.78%. A recent analysis concluded that the Air Force, Army, and Navy-Marine Corps Courts of Criminal Appeals "took action affecting the findings or sentence" in "less than three percent (3%)" (<350/>12,000) of BCD special court-martial appeals decided

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[158] Loving v. United States, 64 M.J. 132 (2006).

[159] *See* United States v. Murphy, 56 M.J. 642 (Army Ct. Crim. App. 2001) (ordering *DuBay* hearing); United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005); United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006).

[160] Dock was retried in a capitally-referred case that resulted in a sentence of confinement for life. United States v. Dock, 35 M.J. 627 (A.C.M.R. 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994). After the CAAF reversed Curtis' sentence due to ineffective assistance of counsel, the NMCCA substituted a sentence of confinement for life. United States v. Curtis, 52 M.J. 166 (1999) (per curiam) (affirming unpublished Navy-Marine Corps Court ruling setting aside death sentence). After Thomas' and Simoy's death sentences were reversed due to similar instructional errors, military judges resentenced both to confinement for life. United States v. Thomas, 60 M.J. 521 (N-M. Ct. Crim. App. 2004); United States v. Simoy, 2000 CCA LEXIS 183 (A.F. Ct. Crim. App. July 7, 2000), *aff'd*, 54 M.J. 407 (2001). Thomas entered into a unique agreement that, for all practical purposes, resulted in a sentence of confinement for life without parole. *See Thomas*, 60 M.J. at 523-24. A subsequent CAAF opinion suggests that this agreement violated RCM 705(c)(1)(B)'s prohibition against pretrial agreement terms that "deprive[] the accused of . . . the complete and effective exercise of post-trial and appellate rights." United States v. Tate, 64 M.J. 269 (2007).

[161] *See supra* note 129 and accompanying text.

during fiscal years 1998-2002.[162] An earlier analysis found that "the Army Court of Military Review (ACMR) affirmed 92.6% of all Army court-martial sentences eligible for appellate review during calendar year 1990."[163] In that same calendar year, the COMA granted relief in less than 1% of all Army cases in which a petition was filed.[164] So, as in the civilian system,[165] the military justice system's reversal rate for death sentences greatly exceeds that for non-capital sentences.

- *Delay in the capital review process*: In the civilian system, "about five years elapse between sentence and [completion of] the *first* direct appeal."[166] For cases that resulted in reversal during federal habeas corpus review, "[i]t took an average of 7.6 years after the defendant was sentenced to die to complete federal habeas corpus consideration . . . ."[167] The military death penalty review system's progress is even slower.

During the 1949 House hearings on the UCMJ, a colloquy between Representative Overton Brooks, the subcommittee's chairman, and Army Colonel John P. Dinsmore indicated their expectation that appellate review of military death penalty cases would be completed "within 3 or 4 months."[168] During the UCMJ's early years, military capital appeals were resolved with remarkable speed, though never as quickly as the House hearings predicted. Consider, for example, the cases of two Soldiers who were hanged on the same day at the United States Disciplinary Barracks. On 1 April 1953, Private Thomas J. Edwards was sentenced to death for the premeditated murder of a woman in West Germany. On 15 July 1953—just 105 days after sentencing—an Army

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[162] Major Jeffrey D. Lippert, *Automatic Appeal Under UCMJ Article 66: Time for a Change*, 182 MIL. L. REV. 1, 17 (2004). Interestingly, "In two-thirds of the BCD special cases in which the service court took action affecting the findings or sentence, the accused had pled guilty." *Id.* at 17 n.101. Of course, in military death penalty cases, the accused may not plead guilty. *See supra* note 26 and accompanying text.

[163] Army Defense Appellate Division, DAD Notes, ARMY LAW., Oct. 1991, at 32, 34.

[164] *Id.* at 35.

[165] *See supra* notes 131-32.

[166] Liebman, *Capital Attrition*, *supra* note 3, at 1862 n.68.

[167] *Id.* at 1856.

[168] During the House hearings, Felix Larkin, the Assistant General Counsel of the Office of the Secretary of Defense, asked Colonel Dinsmore, "[D]o you have a guess as to how long it takes to complete the review of a death sentence now?" *Hearings on H.R. 2498*, *supra* note 96, at 1213. Colonel Dinsmore replied, "It varies, depending on the difficulty of the questions involved, but I would say a matter of only a few months." *Id*. Chairman Brooks suggested that such cases would be "completed, say within 3 or 4 months." *Id.* Colonel Dinsmore agreed and added, "[I]t would be an extremely unusual case, Mr. Chairman, that would take a year." *Id*.

Board of Review affirmed the findings and sentence.[169] Ten months later, the COMA affirmed the Army Board of Review's ruling.[170] The case of Private Winfred D. Moore went through the system even more quickly. Moore was sentenced to death on 19 August 1953, for the murder and robbery of a taxicab driver in Fayetteville, North Carolina.[171] On 16 November 1953—a mere 89 days later—an Army Board of Review affirmed his findings and sentence.[172] On 2 July 1954—less than eleven months after Moore was sentenced—the COMA affirmed as well.[173] But it would not be until February 1957 that the Army carried out the two Soldiers' executions.[174]

Such speed is a thing of the past. For the nine military capital cases that completed direct appeal during the study period, an average of 3,116 days—more than eight-and-a-half years—elapsed between sentencing and the completion of direct appellate review. The military justice system's direct appeal of capital cases, on average, has taken more time than the 1973-1995 civilian average for direct appeal, state post-conviction review, and federal habeas review combined. Like the civilian system,[175] the military justice system's review of capital cases is becoming even slower over time. The two Marines whose cases were

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[169] United States v. Edwards, 11 C.M.R. 350 (A.B.R. 1953), *aff'd*, 15 C.M.R. 299 (C.M.A. 1954).

[170] *See* United States v. Edwards, 15 C.M.R. 299 (C.M.A. 1954). At the time, the Supreme Court did not have certiorari jurisdiction over the COMA's decisions. *See* Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, *in* EVOLVING MILITARY JUSTICE 149-60 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

[171] *See* United States v. Moore, 13 C.M.R. 311 (A.B.R. 1953), *aff'd*, 16 C.M.R. 56 (C.M.A. 1954).

[172] *Moore*, 13 C.M.R. at 319.

[173] United States v. Moore, 16 C.M.R. 56 (C.M.A. 1954).

[174] *See Two Go to Gallows at Military Prison*, LEAVENWORTH TIMES, Feb. 14, 1957, at 1. The delay between COMA's affirming the death sentences and the ultimate executions resulted from the Executive Branch's consideration of the cases. President Eisenhower did not approve the two death sentences until 20 November 1956. *See* Information Relating to Death Cases Considered by the President (undated), John F. Kennedy Library, White House Central Files, Subject File, Box 606, Folder: ND 9-6-1/A-C.

[175] *See* Liebman, *Broken System II*, *supra* note 3, at 91 ("All verdicts finally reviewed on federal habeas during the study period spent much more time under review in state and federal court in later years than in earlier years—rising from about *5½ years* on average from sentence to final habeas review for verdicts finally reviewed in 1981, to *12 years* for verdicts finally reviewed in 1995.").

still pending their first level of direct appeal at the end of the study period (Parker and Walker) were sentenced in July 1993.[176]

One recent military capital decision discussed appellate delay. The case of *United States v. Quintanilla* was decided by the Navy-Marine Corps Court of Criminal Appeals (NMCCA) more than eight years after the sentence was adjudged and more than six years after the case was docketed with the court.[177] The NMCCA concluded that "the delay in appellate review has been excessive."[178] The court blamed this excessive delay principally on appellate defense counsel's "'revolving-door' mentality."[179] The court explained that "appellate defense counsel consciously or subconsciously deferred writing a brief in this case until they transferred or left active duty, when the case would be turned over to a successor appellate defense counsel."[180] The court noted that these appellate defense counsel "faced the daunting task of reading and digesting thousands of pages of transcript and exhibits, then preparing a brief in this capital case"—a task made even more difficult "when those counsel had many other assigned cases that required their attention."[181] Nevertheless, the court emphasized, "upon entering an appearance, each of these attorneys had an obligation to read the record and file a brief in a timely manner."[182] But finding no prejudice resulting from the excessive delay, the court declined to provide relief.[183]

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[176] Some of the appellate delay in each of those cases arose because the Navy-Marine Corps Court remanded both cases for new convening authority actions by a different command than that which took the original action. *See* Walker v. United States, 60 M.J. 354, 355 (2004) (discussing Navy-Marine Corps Court's earlier remand); Parker v. United States, 60 M.J. 446, 447 (2005) (Crawford, J., dissenting). Petitions for extraordinary relief filed in each of these cases further delayed the completion of their first level of review. *See generally Walker*, 60 M.J. 354; Parker v. United States, 61 M.J. 63 (2005) (ordering that "the matter is remanded to the United States Navy-Marine Corps Court of Criminal Appeals to consider the continued availability of the sentence of death in light of" evidence concerning Parker's possible mental retardation).

[177] United States v. Quintanilla, 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part*, 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006).

[178] *Id.* at 867.

[179] *Id*. at 868.

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

With appellate delay persisting in the military justice system in general,[184] and in capital cases in particular,[185] similar issues will continue to arise in military death penalty cases.

4. Analysis

a. Overview

The seven military capital cases in which the death sentence was finally reversed on appeal during the study period fall into four categories. The first category is limited to *Dock*, where the ACMR set aside the death sentence because it concluded that Dock's pleas of guilty to both unpremeditated murder and robbery were the functional equivalent of a plea of guilty to the capital offense of felony murder.[186] This violated the UCMJ's prohibition of a guilty plea to a death-eligible offense.[187] The COMA later affirmed the Army court's decision.[188]

The second category of cases in which the death sentence was reversed on direct appeal consists of two cases of instructional error concerning the procedures for voting on the sentence in a capital case. In *United States v. Thomas*,[189] the military judge's sentencing instructions were confusing and internally inconsistent.[190] One portion of the instructions directed the members to "vote on the aggravating circumstances, then you vote on the sentence of death. If it is not by unanimous vote, then you turn to the consideration of the other applicable portions of the sentence worksheet."[191] The CAAF unanimously held that this portion of the instruction, which erroneously conflicted with the proper procedure of voting on the lightest proposed

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[184] *See*, *e.g.*, United States v. Moreno, 63 M.J. 129 (2006); United States v. Oestmann, 61 M.J. 103 (2005); Toohey v. United States, 60 M.J. 100 (2004); Diaz v. Judge Advocate General of the Navy, 59 M.J. 34 (2003).

[185] *See supra* note 176 and accompanying text.

[186] United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988), *aff'd*, 28 M.J. 117 (C.M.A. 1989).

[187] UCMJ art. 45(b) (2005); *see also supra* note 26.

[188] United States v. Dock, 28 M.J. 117 (C.M.A. 1989).

[189] 46 M.J. 311 (1997).

[190] *See* United States v. Thomas, 43 M.J. 550, 582 (N-M. Ct. Crim. App. 1995) (en banc) (quoting military judge's sentencing instructions), *rev'd*, 46 M.J. 311 (1997).

[191] *Id.* Another portion of the sentencing instructions properly told the members to vote on the lightest proposed sentence first. *Id.*

sentence first, rose to the level of plain error.[192] The year after it decided *Thomas*, the CAAF unanimously reversed the death sentence in *Simoy* due to a similar instructional error.[193]

A third category of military death penalty cases reversed on direct appeal consists of cases featuring an inadequate defense. In *Curtis*, the CAAF reversed the death sentence due to ineffective assistance of counsel at the sentencing stage.[194] In *Murphy*, a three to two decision, the CAAF set aside the sentence on ineffective assistance of counsel grounds due in part to the trial defense counsel's failure to develop evidence that Murphy had suffered from severe mental disease and organic brain damage.[195] In *Kreutzer*, the Army Court of Criminal Appeals (ACCA) reversed both the death sentence and the contested findings.[196] A two-judge majority of the panel set aside the contested findings because the military judge had denied a defense request for a mitigation specialist to investigate Kreutzer's background.[197] All three judges agreed that ineffective assistance of counsel required the reversal

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[192] *Thomas*, 46 M.J. at 312-16. *See generally* Lieutenant Colonel Donna M. Wright, *Annual Review of Developments in Instructions—1997*, ARMY LAW., July 1998, at 39, 50.

[193] United States v. Simoy, 50 M.J. 1, 2-3 (1998). While the *Thomas* instruction was internally inconsistent, in *Simoy* the military judge repeatedly instructed the members to vote on a death sentence first, rather than voting on the least severe proposed sentence first, as the law required. *Id*. at 2.

[194] United States v. Curtis, 46 M.J. 129 (1997) (per curiam). *See also* United States v. Curtis, 48 M.J. 331, 331 (1997) (Cox, J., concurring in denial of reconsideration). *See generally* Major Mary M. Foreman, *Military Capital Litigation: Meeting the Heightened Standards of* United States v. Curtis, 174 MIL. L. REV. 1 (2002).

[195] United States v. Murphy, 50 M.J. 4, 15-16 (1998). The Court of Appeals for the Armed Forces remanded the case to the Army court to consider whether the ineffective assistance prejudiced Murphy for sentencing purposes only or for both findings and sentencing purposes. *Id*. at 16. The Army court then ordered a hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to determine "[w]hether a different verdict as to findings might reasonably result" in light of the mental disease evidence that was discovered after the trial. United States v. Murphy, 56 M.J. 642, 648 (Army Ct. Crim. App. 2001) (quoting *Murphy*, 50 M.J. at 16). The military judge presiding over the *DuBay* hearing determined that the ineffective assistance of counsel did not affect the findings. Memorandum of Decision, United States v. Murphy, United States Army Trial Judiciary, Fourth Judicial Circuit (17 Oct. 2005) (on file with author), in Record, United States v. Murphy, *appeal redocketed*, No. 8702873 (Army Ct. Crim. App. 2005) (concluding, "A different verdict as to findings would not reasonably result in light of the post-trial evidence."). At the end of the study period, that issue remained pending before the ACCA.

[196] United States v. Kreutzer, 59 M.J. 773, 784 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005).

[197] *Id.* at 775-80.

of Kreutzer's sentence.[198] One judge thought the ineffective assistance of counsel also required reversal of the findings.[199] The CAAF later affirmed the majority's decision.[200]

United States v. Quintanilla[201] represents a final category in which the death sentence was reversed because of the military judge's erroneous application of case law limiting the removal of members from capital cases based on moral or religious qualms about the death penalty.[202]

Aggregating these outcomes reveals that ineffective assistance of counsel was found in 33% (3/9) and instructional error was found in 22% (2/9) of all military death penalty cases that have completed direct appeal. These two types of error are also common in civilian death penalty systems, though it is impossible to determine exactly how common. The *Broken System* reports identify 351 death sentences that were reversed during state post-conviction review in 26 states[203] from 1973 to April 2000.[204] Approximately 33% of those reversals (116/351) were based on ineffective assistance of counsel.[205] Instructional error was the basis for relief in almost another 17% (58/351) of cases reversed at this stage.[206]

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[198] *Id.* at 780-84, 785 (Currie, J., concurring), 801 (Chapman, S.J., concurring in part, dissenting in part). *See generally* Major Robert Wm. Best, *2003 Developments in the Sixth Amendment: Black Cats on Strolls*, ARMY LAW., July 2004, at 55, 74-77.

[199] *Kreutzer*, 59 M.J. at 793-98 (Currie, J., concurring).

[200] United States v. Kreutzer, 61 M.J. 293 (2005).

[201] 60 M.J. 852 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part,* 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006).

[202] *See* Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 469 U.S. 412, 423 (1985).

[203] Those states are the same as the twenty-eight-state post-conviction study group with the exception of Delaware and Washington, for which the reports' authors could not obtain data concerning causes for post-conviction relief. *See* Liebman, *Broken System II*, *supra* note 3, at C-1. The twenty-eight states in the post-conviction study group are listed at *supra* note 125.

[204] Liebman, *Broken System II*, *supra* note 3, at C-4.

[205] *Id*. The *Broken System* reports' authors were able to identify the basis for state post-conviction relief for 299 of the 351 death sentences that were reversed at this stage. *Id.* Ineffective assistance of counsel was the basis for relief in 39% (116/299) of the cases with a known basis for relief. *Id*.

[206] *Id*. Instructional error was the basis for relief in 19% (58/299) of the cases with a known basis for relief. *Id.*

But the *Broken System* reports do not identify the raw number of civilian cases that became final in those twenty-six states during that time period. Therefore, it is not possible to determine the percentage of all civilian capital cases that resulted in relief on those bases. The *Broken System* data do reveal that the number of cases reversed for ineffective assistance of counsel during state post-conviction review is a mere 4% (116/2,606) of the death penalty cases that became final in those twenty-six states from 1973 through 1995.[207] The same statistic for instructional errors is approximately 2% (58/2,606). But even these numbers do not provide a direct apples-to-apples comparison between the military and civilian systems. Ineffective assistance of counsel claims are typically litigated during post-conviction review in state systems.[208] Some death penalty cases reversed on other bases during direct appeal might have produced viable ineffective assistance claims that never became the subject of post-conviction review.[209] Additionally, some cases were almost certainly reversed on direct appeal due to erroneous instructions. Thus, the true frequency of these two types of error in the civilian death penalty system is not only unknown, but probably unknowable.

What is certain is that the reversible error rate is far higher in capital than non-capital court-martial appeals. Numerous factors no doubt contribute to this phenomenon. Possible explanations include the fact that all capital cases are contested, thus providing more opportunities for reversal than would occur in a guilty plea case. Capital courts-martial also produce disproportionately large records of trial,[210] again reflecting

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[207] This fraction's numerator appears at *Broken System I*, *supra* note 3, at C-4. The denominator was calculated by adding the number of cases in the twenty-six-state group that were reversed on direct appeal, reversed on post-conviction, reversed on federal habeas review, or upheld on federal habeas review. *See Broken System I*, *supra* note 3, at A-13 to A-122. The *Broken System* reports do not identify the number of cases upheld on state post-conviction review, so the only death sentences that the reports definitively indicate were finally upheld are those that remained following federal habeas review.

[208] John F. Fatino, *Ineffective Assistance of Counsel: Identifying the Standards and Litigating the Issues*, 49 S.D. L. REV. 31, 35 (2003) ("[M]ost ineffective assistance of counsel claims are . . . usually resolved in a post-conviction relief action . . . .").

[209] Cases reversed on direct appeal comprise two-thirds (1,764/2,606) of the known final death penalty cases from the twenty-six jurisdictions. *See* Broken System II, *supra* note 3, at C-4. The numerator and denominator for this fraction were calculated by adding the relevant numbers from the *Broken System I* report's "State Report Cards" for each of the twenty-six-state group. *See Broken System I*, *supra* note 3, at A-13 to A-122.

[210] *See, e.g.*, United States v. Quintanilla, 60 M.J. 852, 865 (N-M. Ct. Crim. App. 2005), *aff'd in part, rev'd in part*, 63 M.J. 29, *cert. denied*, 127 S. Ct. 261 (2006) ("The record

greater opportunities for error. And both trial and appellate defense counsel litigating capital cases no doubt raise more issues and pursue relief with greater zeal than in non-capital cases.[211] But military death penalty appeals point to two factors that seem particularly salient in explaining the far higher reversal rate in capital than non-capital case. First, trial-level litigators and military judges in capital cases make errors due to their unfamiliarity with death penalty practice. Second, military appellate courts subject capital cases to more exacting scrutiny than non-capital cases, leading judges to find reversible error in some instances where they would affirm if the same issue were to arise in a non-capital context.

b. Trial-Level Counsel's and Military Judges' Unfamiliarity with Death Penalty Procedures

A common thread runs through the seven military cases in which the death sentence was reversed during the study period: the reversal occurred due to the military judge's and/or counsel's apparent unfamiliarity with death penalty practice. For example, apparently neither the military judge nor the counsel in *Thomas* or *Simoy* fully understood the correct instructions for voting on the sentence in a capital case. The hypothesis that unfamiliarity with death penalty practice has contributed to the relatively high reversal rate in military capital cases is consistent with an observation made by a group of military justice experts. The privately-sponsored Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice,[212] chaired by Senior Judge Walter T. Cox III of the CAAF, concluded, "Inadequate counsel is a serious threat to the fairness and legitimacy of capital courts-martial, made worse at court-martial by the fact that so few military lawyers have experience in defending capital cases."[213] The Commission explained, "The paucity of military death penalty referrals, combined

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of trial in this capital case includes 3091 pages and hundreds of prosecution, defense, and appellate exhibits.").

[211] *See id.* (noting that "appellant's brief and assignments of error alone numbers 408 pages").

[212] *See* Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. MICH. ST. U.-DETROIT.C.L. 57, 84-86 (discussing commission background and composition). The Commission, commonly referred to as the "Cox Commission," was sponsored by the National Institute of Military Justice.

[213] *Id.* at 110 (reprinting with commentary the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice § IIIC (May 2001)).

with the diversity of experience that is required of a successful military attorney, leaves the military's legal corps unable to develop the skills and experience necessary to represent both sides properly."[214] Given that judge advocates typically stay in a position for no more than three years,[215] it is unlikely that any participant in a capital court-martial will have experience performing his or her duties in a death penalty case.

c. The Military's "Death Is Different" Jurisprudence

A second factor also appears to contribute to the relatively high reversal rate in military capital cases. Some types of trial error are more likely to result in reversal in capital cases than in non-capital cases.

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[214] *Id.* In an article generally critical of the Cox Commission's report, two Air Force attorneys attempted to rebut this point. They argued:

> [W]hile the courts should be ever vigilant to ensure a fair trial, particularly in a death penalty case, the court has never reversed a military death penalty conviction based on inadequate military counsel. It is vital that counsel be qualified in every criminal case, and we believe that the court is best qualified to examine whether the counsel that are practicing before it are competent. While additional training may be a good idea, neither training nor experience guarantee a counsel will be competent.

Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): "The Cox Commission"*, 52 A.F. L. REV. 233, 258-59 (2002). The article failed to note that when it was published, two military death sentences had been set aside due to ineffective assistance of counsel. United States v. Curtis, 46 M.J. 129 (1997); United States v. Murphy, 50 M.J. 4 (1998). In the latter case, the Court of Appeals for the Armed Forces had directed further proceedings to determine whether the ineffectiveness also tainted the findings, *id.* at 16, and the Army court had remanded the case for a *DuBay* hearing to determine the ineffective assistance of counsel's effect on the findings. United States v. Murphy, 56 M.J. 642 (Army Ct. Crim. App. 2001). The *DuBay* hearing ultimately concluded that the ineffective assistance of counsel had not affected the sentence and that ruling remains on appeal. *See supra* note 195. Since that article was published, another military death sentence has been set aside, in part, on ineffective assistance of counsel grounds. United States v. Kreutzer, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (2005).

[215] *See* Major Gretchen A. Jackson, *The Lawyer's Myth: Reviving Ideals in the Legal Profession*, 179 MIL. L. REV. 228, 234 (2004) (book review) ("Military lawyers rotate duty positions every one to three years.").

In its 2005 *Loving v. United States*[216] opinion, the CAAF emphasized that "'Death is different' is a fundamental principle of Eighth Amendment law."[217] The CAAF explained, "This legal maxim reflects the unique severity and irrevocable nature of capital punishment, infuses the legal process with special protections to insure a fair and reliable verdict and capital sentence, and mandates a plenary and meaningful judicial review before the execution of a citizen."[218]

Thomas[219] and *Simoy*[220] demonstrate how this "death is different" principle yields a higher reversal rate in capital than non-capital cases. In both *Thomas* and *Simoy*, despite the absence of defense objection at trial, the CAAF reversed the death sentence because the sentencing instructions did not make clear that the members should vote on the lightest proposed sentence first.[221] But in *United States v. Fisher*[222]—a non-capital case—the COMA concluded that the military judge's failure to instruct the members to vote on the lightest proposed sentence first was erroneous, but did not constitute "plain error justifying reversal in spite of the lack of timely objection."[223] In both *Thomas* and *Simoy*, the Court of Criminal Appeals found error, but relied on *Fisher* in concluding that the instructions did not rise to the level of plain error.[224] But in *Thomas*, the CAAF reversed, concluding that *Fisher* was inapplicable because it was not "a death penalty case."[225] The court also cited the Supreme Court's *Mills v. Maryland*[226] decision for the proposition that heightened procedural reliability is necessary in capital cases.[227] In *Simoy*, the CAAF followed *Thomas* in holding that "[t]he

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[216] 62 M.J. 235 (2005).

[217] *Id.* at 236 (quoting, *inter alia*, Ring v. Arizona, 536 U.S. 584, 605-06 (2002), "[T]here is no doubt that 'death is different.'").

[218] *Id.*

[219] United States v. Thomas, 46 M.J. 311 (1997).

[220] United States v. Simoy, 50 M.J. 1 (1998).

[221] *Thomas*, 46 M.J. at 315; *Simoy*, 50 M.J. at 2-3.

[222] 21 M.J. 327 (C.M.A. 1986).

[223] *Id.* at 329. The COMA nevertheless reversed Fisher's sentence because it gave him the benefit of the case law as it existed at the time of his trial, which treated a military judge's failure to instruct the members to vote on the lightest sentence first as per se reversible. *Id.* (applying, *inter alia*, United States v. Johnson, 40 C.M.R. 148 (C.M.A. 1969)).

[224] United States v. Thomas, 43 M.J. 550, 582-83 (N-M. Ct. Crim. App. 1995) (en banc), *rev'd*, 46 M.J. 311 (1997); United States v. Simoy, 46 M.J. 592, 614 (A.F. Ct. Crim. App. 1996) (en banc), *rev'd*, 50 M.J. 1 (1998).

[225] United States v. Thomas, 46 M.J. 311, 315 (1997).

[226] 486 U.S. 367, 383-84 (1988).

[227] *Thomas*, 46 M.J. at 315.

failure to give the instruction requiring voting on the lightest proposed sentence first is a plain, clear, obvious error that affected the substantial rights of appellant."[228] So, comparable errors produced differing results depending on whether the case was capital or non-capital.

VI. Conclusion

The military justice system retains the death penalty and Congress and the President have periodically expanded its reach. Yet cases in which a convening authority seeks a death sentence are rare. The members actually adjudged a death sentence in less than one-third of that already-small group of cases. Over the last two decades, most of the select few cases that resulted in approved death sentences have been reversed on appeal. The military has not carried out an execution since 1961. And with the inevitability of Article III habeas challenges following any presidential approval of a military death sentence,[229] no military execution is likely to occur for years.

Writing in 1989, Professor Gary D. Solis summed up the military death penalty system with the observation: "The Death Penalty in the Armed Forces: Yes But No."[230] More than two decades after the current death penalty system came into force, this remains a compelling description of capital punishment in the military.

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[228] *Simoy*, 50 M.J. at 2.
[229] *See* Sullivan, *Last Line of Defense*, *supra* note 17, at 7-13.
[230] SOLIS, *supra* note 46, at 7.