



# MILITARY LAW REVIEW

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OF MILITARY DEATH SENTENCES TO RESTORE FINALITY OF LEGAL REVIEW

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# MILITARY LAW REVIEW

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# MILITARY LAW REVIEW

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## TIME TO KILL: EUTHANIZING THE REQUIREMENT FOR PRESIDENTIAL APPROVAL OF MILITARY DEATH SENTENCES TO RESTORE FINALITY OF LEGAL REVIEW

MAJOR JOSHUA M. TOMAN\*

*As the civil judiciary is free from the control of the executive, so the military [judiciary] must be untrammelled and uncontrolled in the exercise of its functions by the power of military commanders. The decision of questions of law and legal rights is not an attribute of military command.<sup>1</sup>*

*The [P]resident has the discretion on when and if he wants to sign the documents. There's no timeline that the [P]resident has to follow. It can be carried out in this administration or it can be transferred to the next.<sup>2</sup>*

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<sup>1</sup> Edmund M. Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 53, 73 (1919) (describing World War I military justice problems, roughly twenty-five years before chairing Uniform Code of Military Justice (UCMJ) committee).

<sup>2</sup> Dawn Bormann, *Army Seeks Bush's OK to Execute Two Prisoners at Fort Leavenworth*, KAN. CITY STAR, Feb. 9, 2006 (quoting Lieutenant Colonel (LTC) Pamela

## I. Introduction

The death penalty has effectively been abolished in the military justice system. This silent abolishment undermines the authority necessary to enforce good order and discipline in the armed forces, especially in times of war. More importantly, in a democracy, a practice established in law by the people's representatives and by common usage should not be ended without a vote, an executive decision, or a court order. The military death penalty was silently abolished by the layering of more judicial review atop the presidential review of capital sentences which creates a logjam and a bureaucratic excuse for inefficiency. Removing direct presidential approval and redefining it as traditional executive clemency revives the will of people in establishing a military death penalty.

Civilian oversight by political appointees after the completion of military judicial review of a death sentence creates deliberate or inadvertent delays in forwarding a capital sentence to the President for approval. These delays provide defense attorneys a window of opportunity to file numerous additional petitions to the same military courts that previously completed review of the case. When the military courts entertain these petitions, it creates needless delays<sup>3</sup> that stop the political appointees from forwarding the death sentence cases to the President and results in an indefinite loop of delay. This delay forestalls Presidential review or approval and subsequently precludes federal district courts from conducting habeas review of the proceedings, ultimately precluding any executions. Nevertheless, the military justice system only needs a simple upgrade to reboot the system and prevent it from locking up when processing a capital sentence in order to achieve an essential public interest—verdict finality.<sup>4</sup>

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Hart, Pentagon spokeswoman, on the delivery of the court-martial records of Private (PVT) Dwight J. Loving and PVT Ronald A. Gray to the President for approval).

<sup>3</sup> *Lawrence v. Florida*, 421 F.3d 1221, 1225 n.1 (11th Cir. 2005), *aff'd*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1079 (2007) (“We say needless delay because we conclude that the district court abused its discretion in entering a stay order pending a certiorari ruling in *Caruso v. Abela*, 541 U.S. 1070 (2004).”).

<sup>4</sup> *Id.* (noting that stays of execution “injured the State because the State has a substantial interest in the finality of state criminal proceedings. See *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (“Each delay, for its span, is a commutation of a death sentence to one of imprisonment.” *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983).”).

The discretion of an individual's whim is a menace to any legal system, but discretion embedded into a legal system by legislative action is anathema. The first quote by Edmund Morgan, a Harvard Law professor and former Army Judge Advocate, captures the peril a commander's caprice poses to military justice. Eliminating this danger was the basis for significant changes to the military legal system over fifty years ago. Yet it is an unqualified danger, and as reflected in the second quote, such deleterious effects can even be caused by the highest military commander. Specifically, as Commander in Chief, the President must personally approve a Soldier's court-martial death sentence before it may be imposed under Article 71(a), Uniform Code of Military Justice (UCMJ).<sup>5</sup> However, there are no deadlines for this approval, and the involvement of political appointees bogs down the approval process because their review is also not guided by timelines, functions, or criteria.

This executive approval requirement is a unique hybrid of affirmative approval of the sentence and a discretionary grant of clemency. This dangerous combination is further intensified because of both the procedural location and political implications of such approval. Procedurally, after a capital case completes legal review under the UCMJ, it is submitted for presidential approval before the case may be subject to federal habeas review. Prior to the addition of federal habeas review of courts-martial, presidential approval was the last affirmative step in capital courts-martial prior to carrying out the sentence. However, patchwork changes in the military legal system added federal judicial review after executive approval. Politically, capital punishment is a much more sensitive issue today when compared to the social environment in existence when Article 71(a) was enacted. Therefore, by requiring presidential approval in this manner, as a discretionary choice rather than as a perfunctory duty, it is virtually certain that approval of a death sentence will occur only amidst vociferous public support. Finally,

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<sup>5</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES A2-22 (2008) [hereinafter MCM]; UCMJ art. 71(a) (2008).

If the 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*. In such a case, *the President may commute, remit or suspend any part thereof, as he sees fit*. That part of the sentence providing for death may not be suspended.

UCMJ art. 71(a) (emphasis added).

this open-ended arrangement irrefutably breeds inaction that consumes precious military justice resources.

Private (PVT) Dwight J. Loving's case substantiates that these dangers posed by command—or rather, civilian appointee—discretion presently exist. His death sentence, stemming from the 1988 murder of two taxi drivers, is still awaiting presidential approval.<sup>6</sup> Private Loving is in a unique legal position compared to civilians on death row because his sentence was unanimously affirmed in 1996 by the Supreme Court.<sup>7</sup> Yet, his case was remanded in 2006 by the U.S. Court of Appeals for the Armed Forces (CAAF) and the CAAF declared it has continuing jurisdiction.<sup>8</sup> The court's action coupled with the President's inaction creates an unintended defect in the system. Other capital courts-martial<sup>9</sup> will soon enter a similar wasteful cycle of continual appeals.

This problem spills over into two other areas. First, even if the \$50 million congressional bounty for Osama bin Laden leads to his capture and eventual sentence to death by a military commission, his sentence may never be carried out because the Code for Military Commissions adopted the UCMJ's executive approval requirement.<sup>10</sup> Consequently,

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<sup>6</sup> Loving v. United States, 64 M.J.132, 135 (2006) (providing appellate history).

<sup>7</sup> 517 U.S. 748 (1996).

<sup>8</sup> Loving, 64 M.J. at 135 (reasserting its holding in *Loving v. United States*, 62 M.J. 235, 246 (2005)). This article will not address the legal implications of any post-finality collateral review of capital courts-martial raised by *Denedo v. United States*, 66 M.J. 114 (2008) (granting writ of error *coram nobis* where former Sailor alleged ineffective assistance of counsel and asserted civilian defense counsel advised him that pleading guilty at a special court-martial for larceny, fraud, and conspiracy would not result in deportation).

<sup>9</sup> See *infra* Pt. III. The other capital courts-martial listed in Part III are at various stages of prosecution and review. The evidentiary hearing which resulted from the CAAF's remand of PVT Loving's case was recently completed. See Interview with Lieutenant Colonel Steven P. Haight, Gov't Appellate Div., Chief, Trial Counsel Assistance Program, U.S. Army (May 1, 2008). After the military judge issues the findings of fact, the case will be returned to the CAAF for further proceedings. *Id.* Thus, with even the slightest amount of foot-dragging, PVT Loving's counsel can delay completion of this latest round of post-appellate review, making it highly unlikely that his sentence will be resolved prior to the swearing-in of the next President of the United States. See, e.g., Josh White, *Justice System for Detainees Is Moving at a Crawl; No Sept. 11 Trials Likely Before Bush Leaves Office, Officials Say*, WASH. POST, May 6, 2008, at A-1.

<sup>10</sup> See Justice for Osama Bin Laden and Other Leaders of Al Qaeda, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1255(a), 122 Stat. 3 (2007) (amending Section 36(e)(1) of the State Department Basic Authorities Act of 1956 (22 U.S.C. § 2708(e)(1)) by adding "The Secretary shall authorize a reward of \$50,000,000 for the capture or death or information leading to the capture or death of

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Osama bin Laden.”). The infinite delay defect of capital sentences under the UCMJ was transplanted into the military commissions’ procedures inclusion of the presidential approval requirement, preceded by political appointee review following judicial review. See MANUAL FOR MILITARY COMMISSIONS, UNITED STATES [hereinafter MMC] (implementing the Military Commissions Act of 2006, 10 U.S.C.S. §§ 948a–950w (LexisNexis 2008)). Under 10 U.S.C. § 950i(b), “[i]f the sentence of a military commission . . . extends to death, that part of the sentence providing for death may not be executed until approved by the President.” Cf. UCMJ, art. 71(a). Also, Rules for Military Commissions (RMC) 1207(a) states that “[n]o part of a military commission sentence extending to death may be executed until approved by the President.” MMC, *supra*, R.M.C. 1207(a). Cf. MCM, *supra* note 5, R.C.M. 1207. Nevertheless, it appears that adopting a presidential approval requirement, and the attendant potential for inevitable delay, was a deliberate choice. See The White House, *White House Fact Sheet: The Administration’s Legislation to Create Military Commissions*, Sept. 6, 2006, available at <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-6.html> [hereinafter *Fact Sheet*] (noting “[t]he Administration has carefully reviewed the procedures of the UCMJ and adopted or adapted certain UCMJ articles that would be appropriate for these military commissions” in order to try alien unlawful enemy combatants). Although the commissions did not initially provide for federal habeas or Supreme Court review, subsequent judicial decisions determined that some judicial avenues exist. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Acknowledging the *Hamdan* ruling, the subsequent Code for Military Commissions legislation made it clear that an accused would have the right to at least two appeals from any military commission conviction, including appeal to a

Court of Military Commission Review within the Department of Defense to hear appeals on questions of law. All convicted detainees would also be entitled to an appeal to the U.S. Court of Appeals for the D.C. Circuit, regardless of the length of their sentence. The Supreme Court could review decisions of the D.C. Circuit.

*See Fact Sheet, supra; see also* 10 U.S.C.S. § 950f(d) (Review by Court of Military Commission Review), § 950g(c) (Review by Appeals Court and Supreme Court). The jurisdictional scope of review for the Court of Appeals is limited to “the consideration of (1) whether the final decision was consistent with the standards and procedures specified in [10 U.S.C.S. §§ 948a–950w]; and (2) to the extent applicable, the Constitution and the laws of the United States.” *Id.* § 950g(c). Analogous to the preclusion of federal habeas jurisdiction under the UCMJ until the President acts on the death sentence, the CMC also contains language that could cause the Court of Military Commission Review to entertain numerous appeals because 10 U.S.C. § 950j(b) states that:

Except as otherwise provided in this chapter [10 U.S.C.S. §§ 948a–950w] and notwithstanding any other provision of law (including section 2241 of title 28 [28 U.S.C.S. § 2241] or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006 [enacted Oct. 17, 2006], relating to the prosecution, trial, or judgment of a military commission under this chapter [10 U.S.C.S. §§ 948a–950w] . . . .

military commission judicial resources may be consumed by extensive post-appellate reviews in the same manner as seen in PVT Loving's case. Second, no matter how abhorrent the conduct of a civilian contractor in Iraq or Afghanistan, the same UCMJ delays would arise in the case of a civilian sentenced to death at a court-martial.<sup>11</sup>

This article advocates a reform to military capital litigation. Military offenders face a constitutionally<sup>12</sup> sound, but rarely approved death

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*Id.* Therefore, until the President acts on the sentence, the Court of Military Commission Review may determine that it retains jurisdiction as seen in *Loving*. See *Loving*, 64 M.J. at 135. Any delay in executive approval following judicial review would likely be caused by the Secretary of Defense's overall responsibility for carrying out the commission sentences. 10 U.S.C. § 950(i). Consequently, all three parts of the same problem for capital sentences under the UCMJ are found under the CMC: presidential approval, political appointee review, and a judicial charter that attempts to preclude jurisdiction until sentence approval.

<sup>11</sup> See, e.g., JENNIFER K. ELSEA & NINA M. SERAFINO, CONG. RESEARCH SERV., PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES, RL32419, at 10–11 (July 11, 2007). The Military Extraterritorial Jurisdiction Act, 18 U.S.C.S. §§ 3621–3267 (LexisNexis 2008), was amended to close the legal gaps that allowed some civilians to avoid punishment for crimes committed while operating in a combat zone and now applies to civilian employees, contractors, subcontractors, and contract employees of any federal agency or provisional authority. Congress took the additional measure of expanding jurisdiction under UCMJ Article 2 to make persons serving with or accompanying an armed force in time of declared war or a contingency operation subject to punishment at court-martial, to include a death sentence. See John Warner National Defense Authorization Act for Fiscal Year 2007 § 552, Pub. L. No. 109-364, 120 Stat. 2083.

<sup>12</sup> As the renowned military justice scholar and former Chief Judge of the Court of Appeals for the Armed Forces, Robison O. Everett, stated:

I was asked "How do you feel about the civilianization of military justice?" I sometimes responded that I was unsure what the questioner meant by the term "civilianize." Next I usually pointed out that, if to "civilianize" meant ignoring the uniqueness of the military society and its needs, then I was opposed; but if the term referred to the acknowledgement that certain basic ethical norms apply to the military, as well, as to the civilian, society, then I was in favor.

[S]ometimes to replace a recognized rule of military law with a rule derived from civilian jurisprudence would lead to more conviction[s], rather than fewer [acquittals].

Those who ask about the civilianization of military law should also be reminded that in many instances, civilian criminal law



penalty.<sup>13</sup> Not acting on a Soldier's court-martial death sentence for murder while denying clemency on a civilian federal death sentence for murder is de facto clemency.<sup>14</sup> As President, George W. Bush denied clemency in less than thirty days in a federal capital case; however, nearly three years have passed with no action on two capital courts-martial.<sup>15</sup> Even if the President approves PVT Loving's sentence, a change is needed to stop perpetual delay of capital courts-martial for Soldiers and civilians subject to the UCMJ.<sup>16</sup>

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administration has moved towards a military model which provided greater safeguards.

Robinson O. Everett, *Some Comments on the Civilianization of Military Justice*, ARMY LAW. Sept. 1980, at 4 (referencing Chief Justice Warren's opinion in *Miranda v. Arizona*, 384 U.S. 436, 489 (1966) wherein he cited Article 31, UCMJ in imposing the warning requirement for custodial interrogation). See generally MAJOR DAVID COOMBS, CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, 30TH NEW DEVELOPMENTS COURSE, CAPITAL LITIGATION F-2 (2006) [hereinafter 30TH NEW DEVELOPMENTS COURSE] (outlining series of cases applying Supreme Court precedent to military capital cases).

<sup>13</sup> Since the approval of the UCMJ in 1950, ten service members have been tried and executed. The last Soldier was executed in 1961. See Captain Cody Weston, *United States v. Loving: The Resurrection of Military Capital Punishment*, 77 OR. L. REV. 365, 369-70 (1998) (citing Cynthia Swarthout Connors, *The Death Penalty in Military Courts: Constitutionally Imposed?*, 30 UCLA L. REV. 366, 369 n.18 (1982)). But see DWIGHT H. SULLIVAN, EXECUTIVE BRANCH CONSIDERATIONS OF MILITARY DEATH SENTENCES 137 (2002) (stating the number as twelve executions and fourteen commutations based on a memorandum from Attorney General Robert F. Kennedy in 1961); EUGENE FIDELL, *EVOLVING MILITARY JUSTICE* (2002).

<sup>14</sup> See *infra* pt. III (detailing presidential denial of clemency in the case of Louis Jones, Jr.); see also Colonel Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1 (2006) ("survey of courts-martial that were tried capitally, the cases' outcomes, and the appeals of those cases that resulted in death sentences.").

<sup>15</sup> President Bush denied clemency in all 150 executions when Governor of Texas. See Thomas DeFrank, *Servicemen on Death Row; 6 Killers Await as Military Justice Crawls*, N.Y. DAILY NEWS, June 24, 2001, available at <http://www.deathpenaltyinfo.org/article.php?scid=17&did=300>.

<sup>16</sup> This article does not advocate that capital courts-martial should be limited to common law murder. See, e.g., Johnathan Choa, *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, 2104 n.29 (2002) (noting that in strictly military cases, good order and discipline interests may supersede defendant's rights). Furthermore, this article does not address the ancillary legal issues raised by a potential capital court-martial of a civilian under Article 2(a)(10), UCMJ. See *supra* note 11.

It is time for a mercy killing of Article 71(a) because it has fallen into desuetude as a result of its disjointed location in the judicial process.<sup>17</sup> Congress should amend Article 71(a) by eliminating presidential approval of death sentences because it is an illogical requirement prior to federal habeas review. It is also unnecessary because it does not preclude clemency following habeas review. Furthermore, it is inefficient because it is discretionary and lacks a timeline for completion, thereby making approval extremely remote and excessively wasting government resources.<sup>18</sup> Consequently, cases affirmed on appeal have fallen into a “legal vacuum”; other capital courts-martial and military commissions are sure to follow.<sup>19</sup>

Part II of this article compares military capital litigation with other legal systems that pass constitutional muster and are considered fair and just, but do not have this approval impediment. Part III details the historical basis for executive clemency leading to the approval requirement in Article 71(a), UCMJ, and its interrelation with finality of legal review under Article 76, UCMJ. Part IV explores the procedural history of PVT Loving’s case to show the laborious impasse between final legal review and executive approval, and underscores the impending crisis. Part V recommends a reform because executive approval unwisely makes the military justice system separate without justification.

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<sup>17</sup> BLACK’S LAW DICTIONARY 449 (6th ed. 1990) (disuse, as applied to obsolete practices and statutes). Desuetude is a legal doctrine wherein a legislative enactment is judicially abrogated after a long period of non-enforcement. Note, *Desuetude*, 119 HARV. L. REV. 2209 (2006).

<sup>18</sup> Court-martial expenses are funded by the operations and maintenance (O&M) budget which funds the day-to-day operations of the Army; such funds exceeded \$72 billion in Fiscal Year 2007. See DEPARTMENT OF THE ARMY FISCAL YEAR 2009 BUDGET ESTIMATES: OPERATIONS AND MAINTENANCE JUSTIFICATION BOOK vol. I, at 1 (Feb. 2008), available at <http://www.asafm.army.mil/budget/fybm/FY09/oma-v1.pdf>. Cf. Jennifer McMenamin, *Death Penalty Costs [Maryland] More Than Life Term*, BALTIMORE SUN, Mar. 6, 2008, available at <http://www.baltimoresun.com/news/local/balmd.death06mar06,0,5961444.story> (citing study which determined that “[t]he death penalty has cost Maryland taxpayers at least \$186 million more in prosecuting and defending capital murder cases over two decades than would have been spent without the threat of execution . . . [because] the cost of reaching a single death sentence costs the state an average of \$3 million, which is \$1.9 million more than a non-death penalty case costs, even after factoring in the long-term costs of incarcerating convicted killers not sentenced to death.”); see also Death Penalty Info. Ctr., *Facts About the Death Penalty*, Feb. 18, 2008, available at <http://www.deathpenaltyinfo.org/FactSheet.pdf> (estimating costs associated with death penalty cases for California, Florida, Kansas, Indiana, North Carolina, and Texas).

<sup>19</sup> *Loving v. United States*, 62 M.J. 235, 250 (2005) (describing inability to contest sentence in alternate forum until presidential action).

## II. Capital Litigation Procedures

Examination of the trial and post-trial processes up to the point of execution demonstrates that capital courts-martial are comparable to civilian systems<sup>20</sup> even though some criticisms of the military justice system exist.<sup>21</sup> The procedural similarities between the military, federal, and state death penalty systems support purging direct executive approval in favor of traditional discretionary executive clemency. “The discipline and reputation of the Army are deeply involved in the manner in which military courts are conducted and justice administered.”<sup>22</sup> The UCMJ applies to all members of the armed forces; no matter where they commit an offense, they may be sentenced to death under the prescribed procedures at a general court-martial.<sup>23</sup> Legally, these capital courts-

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<sup>20</sup> See Major Jack L. Rives et al., *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213 (2002) (explaining military criminal law and Virginia criminal justice process by contrasting resolution of a hypothetical offense under each system); *id.* at 233.

<sup>21</sup> See generally WALTER T. COX, III ET AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE § IIIC (May 2001), reprinted with commentary in 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, 109–12 (2002); see also Lindsay Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in the Military Justice Systems*, 16 DUKE J. COMP. & INT’L L. 169 (2006) (discussing criticisms of commander’s authority under the UCMJ as described by the Cox commission); Meredith L. Robinson, *Volunteers for the Death Penalty? The Application of Solorio v. United States to Military Capital Litigation*, 6 GEO. MASON L. REV. 1049 (1998) (arguing military courts are inappropriate forums to try service members for capital crimes that have no service connection); Eugene R. Fidell, *Accountability, Transparency & Public Confidence in the Administration of Military Justice*, 9 GREEN BAG 2D 361, 362 (2006) (recommending centralized docket, military prosecutors determine referral decisions, and commenting that result disparity leads to perception that “military criminal justice process seems to have been employed only to prosecute enlisted personnel.”).

<sup>22</sup> Army Regulations, 1835, Article XXXV, para. 1, reprinted in MAJOR LOUIS F. ALYEA, *MILITARY JUSTICE UNDER THE 1948 AMENDED ARTICLES OF WAR* (1949). “Military discipline is that mental attitude and state of training which render obedience and proper conduct instinctive under all conditions.” U.S. DEP’T OF ARMY, REG. 600–10, *MILITARY DISCIPLINE* 1 (8 July 1944), reprinted in ALYEA, *supra*.

<sup>23</sup> 10 U.S.C.S. ch. 47, §§ 801–941 (LexisNexis 2008); UCMJ art. 3 (2008) (defining members of the armed forces); *id.* art. 5 (stating the UCMJ “applies in all places”); *id.* art. 56 (sentence limitations); *id.* art. 36 (procedures prescribed by President); *id.* art. 18 (general court-martial may direct any punishment prescribed by the President for the specific offenses).

martial are subject to the same constitutional procedural scrutiny as civilian capital trials.<sup>24</sup>

#### A. Federal Military Death Penalty<sup>25</sup>

Courts-martial are courts of law and justice, “bound, like any court, by the fundamental principles of law . . . [and required to adjudicate according] not only to the laws . . . but to [their] sense of substantial right and justice.”<sup>26</sup> Thus, the military endeavors to “preserve the personal rights and liberties of citizens living under the Constitution; and . . . [corresponding civilian provisions] should be observed, even though not binding, whenever not inconsistent with the preservation of discipline and the organization of the Army.”<sup>27</sup>

The UCMJ establishes a separate system that fully meets legal requirements, especially in capital courts-martial.<sup>28</sup> The existence of military capital offenses reflects Congress’s intent “to ensure the military possesses the means to effectively punish service members who, by their conduct, harm the safety and integrity of the unit or the interests of national security.”<sup>29</sup> The Supreme Court recognized that the military’s pursuit of capital punishment is rooted in the belief that it “remains a necessary sanction in courts-martial and . . . is an appropriate punishment

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<sup>24</sup> *Loving v. United States*, 517 U.S. 748 (1996).

<sup>25</sup> For a detailed explanation of the administration of a military death sentence, see *infra* Appendix C. This article will not address the constitutionality of the execution procedures to be used in any future executions. See *Baze v. Rees*, \_\_U.S. \_\_, 128 S. Ct. 1520 (2008) (upholding lethal injection procedures used in executions by Kentucky because it met constitutional standards where same protocol was used by other states and the federal government).

<sup>26</sup> ROBERT D. PECKHAM & EDWARD F. SHERMAN, *THE MILITARY IN AMERICAN SOCIETY* 1–3 (1978) (citation omitted).

<sup>27</sup> COLONEL EDGAR S. DUDLEY, *MILITARY LAW AND THE PROCEDURES OF COURTS-MARTIAL* 171 (1908).

<sup>28</sup> Rives, *supra* note 20, at 233.

<sup>29</sup> See generally 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 (2005) (proposing an Eighth Amendment framework to “harmonize the military’s interest in assuring it can effectively punish Soldiers who commit the vilest crimes, with the civilian court’s interest in ensuring that the protections of Cruel and Unusual Punishment Clause are available to all.”). Generally, a capital offense “means an offense for which death is an authorized punishment under the [UCMJ] . . . or under the law of war.” MCM, *supra* note 5, R.C.M. 103(3).

under a broader range of circumstances than may be the case in civilian jurisdictions.”<sup>30</sup>

In times of peace, “seven unique military offenses . . . permit the death penalty [and] like the war time capital offenses, [are] rooted in the Articles of War.”<sup>31</sup> The military capital offenses<sup>32</sup> are mutiny or sedition, misbehavior before the enemy, subordinate compelling surrender, forcing a safeguard, aiding the enemy, espionage, and improperly hazarding a vessel.<sup>33</sup> The non-military capital offenses are premeditated murder, felony murder, and rape, all of which have civilian counterparts.<sup>34</sup> Therefore, military offenders are tried for their actions not just because their actions are prejudicial to the military, but because the offenders have violated the supreme laws of the land.<sup>35</sup>

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<sup>30</sup> MCM, *supra* note 5, R.C.M. 1004(b) analysis, at A21-74 (noting “unique purpose and organization of the military” by reference to *Parker v. Levy*, 417 U.S. 733 (1974)).

<sup>31</sup> Simon, *supra* note 29, at 125. It is important to note that the “constitutionality of non-homicidal crimes has not been fully litigated.” See 30TH NEW DEVELOPMENTS COURSE, *supra* note 12, at F-15 (referencing *Coker v. Georgia*, 433 U.S. 584 (1977), which held that the death penalty for rape of an adult woman is unconstitutionally disproportionate).

<sup>32</sup> “Courts-Martial have exclusive jurisdiction of purely military offenses.” MCM, *supra* note 5, R.C.M. 201(d)(1). “Military offenses are those, such as unauthorized absence, disrespect, and disobedience, which have no analog in civilian criminal law.” *Id.* R.C.M. 201(d)(1) analysis, at A21-8.

<sup>33</sup> UCMJ art. 94 (2008) (mutiny), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106a (espionage) (only offense with a mandatory death sentence).

<sup>34</sup> *Id.* art. 118(1) (premeditated murder), art. 118(4) (felony murder), art. 120 (rape). “The constitutionality of non-homicidal crimes has not been fully litigated.” 30TH NEW DEVELOPMENTS COURSE, *supra* note 12, at F-15. “Rape may be ‘punished by death’ only if constitutionally permissible. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that the death penalty is ‘grossly disproportionate and excessive punishment for the rape of an adult woman,’ and is ‘therefore forbidden by the Eight Amendment as cruel and unusual punishment.’ [*Coker*] at 592.” *Id.*; see also MCM, *supra* note 5, at A23-14, ¶ 45(e) (1995 Amendment).

<sup>35</sup> PECKHAM & SHERMAN, *supra* note 26, at 3-8 (citing comments by General Samuel T. Ansell, Acting Judge Advocate General, on S. 5320 Before the Senate Committee on Military Affairs, 65th Cong., 3d Sess. 40, 49 (1919)).

Throughout the pretrial process an accused can challenge the evidence and the proposed level of punishment with the help of military counsel appointed by the Trial Defense Service (TDS).<sup>36</sup> First, a commissioned officer conducts a mandatory pretrial investigation, known as an Article 32 investigation,<sup>37</sup> to inquire into the truth of the matters asserted in the charges, the form of those charges, and determine what disposition should be made of the case.<sup>38</sup> Next, the general court-martial convening authority (GCMCA)<sup>39</sup> determines if a case should be referred as capital<sup>40</sup> after obtaining the legal advice of his staff judge advocate (SJA).<sup>41</sup> Adopting a page from the federal civilian system, it is

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[T]he court-martial tries a man not only for the military aspect involved in his act, it tries him for the violation of the law of the land resulting from that act. For instance, if a soldier commits homicide . . . [t]he court-martial passes upon that unlawful homicide and every issue involved in it just exactly as, and concurrently, with, a district court of the United States or as any other trial court. Now, when we . . . give him a punishment that is in every respect the same kind of punishment in quantity, in finality, and in the regard which the law entertains for it . . . those functions are necessarily, inherently, and primarily judicial . . . .

*Id.*

<sup>36</sup> UCMJ art. 27 (concerning appointment of defense counsel); *see also* Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 1. An accused enjoys a constitutional right to effective assistance of counsel against a capital offense. *See generally* United States v. Curtis, 48 M.J. 331 (1998); United States v. Murphy, 50 M.J. 4, 10 (1999); United States v. Kreutzer, 61 M.J. 293 (2005); *see also* Foreman, *infra* note 171, at 35–38 (proposing RCM amendments and other actions to improve capital representation in courts-martial). The President supports effective representation, “because people on trial for their lives must have competent lawyers by their side.” President George W. Bush, State of the Union Address (Feb. 2, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>) (proposing to fund special training for capital defense counsel).

<sup>37</sup> UCMJ art. 32; *see also* U.S. DEP’T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICER (16 Sept. 1990).

<sup>38</sup> MCM, *supra* note 5, R.C.M. 405. Charges in the military are preferred by a commander. *Id.* R.C.M. 307.

<sup>39</sup> *Id.* R.C.M. 504(b)(1); UCMJ arts. 22(a)(3), (5)–(9). This is usually a commissioned officer in the rank of general.

<sup>40</sup> The convening authority must specifically refer the case as a capital court-martial. *Id.* R.C.M. 201(F)(1)(A)(iii)(b); *see* Fidell, *supra* note 21, at 364. There are numerous convening authorities within the military and “[w]hat makes the needle bounce for one may be a yawn for another, even in quite comparable cases.” *Id.*

<sup>41</sup> MCM, *supra* note 5, R.C.M. 407(a)(6) (action by commander exercising general court-martial jurisdiction); *id.* R.C.M. 601(d)(2)(B) (referral). The SJA is the legal advisor to

common practice—but not required policy—for the GCMCA to permit the accused’s TDS counsel,<sup>42</sup> with the assistance of a capital mitigation expert,<sup>43</sup> to present materials and evidence in support of a non-capital referral.<sup>44</sup> If referred as a capital court-martial, a military judge will oversee the remaining pre-trial procedures and administer the trial.<sup>45</sup>

Prior to arraignment, the military prosecutors, known as trial counsel, must give the defense written notice of which aggravating

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the GCMCA whereas the Judge Advocate General (TJAG) is the senior legal advisor in the U.S. Army. Referral is the process of sending the charges to trial at court-martial.

<sup>42</sup> The military does not have a professional death penalty defense bar or specific capital counsel qualifications. The American Bar Association’s *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* have not been adopted as official DOD policy. Resolution of the House of Delegates, Feb. 1989, revised and separately compiled in pamphlet of same name (2d. ed.) (Feb. 10, 2003) [hereinafter *Guidelines*]. The ABA had a specific policy regarding appropriate representation in military capital litigation which was adopted in August, 1996, but was consolidated into the main guidelines. *Id.* These guidelines were determinative for the Supreme Court in reversing for ineffective assistance of counsel in a civilian case. *See Rompilla v. Beard*, 545 U.S. 374, 376 (2005). These guidelines no longer carry an exception for the military and aspire to apply to military commissions as well. *See Guidelines, supra*, at 919, para. 1.1. The guidelines “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence in any jurisdiction.” *Id.* The definitional notes explicitly state that the term “jurisdiction” is intended to apply to the military. *Id.* at 921. “In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of court-martial, military commission, or tribunal, or otherwise.” *Id.*

<sup>43</sup> Military defense counsel can seek the assistance, at government expense, of a mitigation expert. These specialists are indispensable because they “possess clinical and information-gathering skills and training that most lawyers simply do not have.” *See Guidelines, supra* note 42, at 959 (referencing Colonel Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON U. CIV. RTS. L.J. 199, 206–11 (2002)); *see also* Major David D. Vellony, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 MIL. L. REV. 1 (2001).

<sup>44</sup> Telephone Interview with Captain Robert McGovern, Gov’t Appellate Div., Trial Counsel Assistance Program, U.S. Army (Feb. 1, 2007). This practice was employed in the capital referral of Sergeant (SGT) Hasan Akbar, and has been recommended for all potential capital cases since. *Id.*

<sup>45</sup> *See generally* UCMJ art. 26 (2008). Article 26 lists qualifications and duties of a military judge. A military judge is a commissioned officer who is a member of the bar of a federal court or a member of the bar of the highest court of a state and is also qualified for duty as a military judge by the TJAG. *Id.* art. 26(b) (2008). In the military, there is no civilian equivalent of a standing or permanent courts-martial. The GCMCA will direct specific members of the command to serve as a pool of potential jurors for a specific case. *See id.* art. 25. Article 25 specifies selection criteria the CA must consider.

factors they intend to prove.<sup>46</sup> Most of these factors are military in nature,<sup>47</sup> but none of the Soldiers currently on death row were convicted solely for military aggravating factors.<sup>48</sup> The non-military aggravating factors were formulated after “the examination of aggravating circumstances for murder in various states”<sup>49</sup> and are worded similarly. Specific capital extenuating or mitigating factors are not listed but the panel can consider the circumstances applicable to all courts-martial because “no list of extenuating or mitigating circumstances can safely be considered exhaustive.”<sup>50</sup>

At trial, following the conclusion of all evidence, “four gates must be passed” to impose the death penalty.<sup>51</sup> First, the panel must find unanimously that the accused is guilty of a death eligible offense.<sup>52</sup> Second, the panel must unanimously find that the prosecution has proven the existence of at least one of the specified aggravating factors beyond a reasonable doubt.<sup>53</sup> Third, “[a]ll members [must] concur that any

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<sup>46</sup> MCM, *supra* note 5, R.C.M. 1004(b)(1).

<sup>47</sup> See generally *id.* R.C.M. 1004(c)(1) (offense committed in the presence of the enemy) (noting this factor does not apply to violations of UCMJ Articles 118 or 120); *id.* R.C.M. 1004(c)(5) (with intent to avoid hazardous duty); *id.* R.C.M. 1004(c)(2)(A) (knowingly creating a grave risk of damage to the national security of the United States) (creating military justice counterpart to federal aggravating factor listed at 18 U.S.C.S. § 3592(b)(2) (LexisNexis 2008)); *id.* R.C.M. 1004(c)(3) (causing substantial damage to the national security of the United States); *id.* R.C.M. 1004(c)(6) (offense committed in time of war).

<sup>48</sup> See, e.g., E-mail from Captain Robert McGovern, Gov’t Appellate Div., Trial Counsel Assistance Program (TCAP), U.S. Army (15 Mar. 2007, 11:37 EST) (on file with author). In the capital court-martial of SGT Akbar, the Government proved the existence of a non-military aggravating factor under RCM 1004 (c)(7)(J), “to wit: that having been found guilty of premeditated murder, a violation of U.C.M.J. Article 118(1), the accused has been found guilty in the same case of another violation of U.C.M.J. Article 118.” *Id.*

<sup>49</sup> MCM, *supra* note 5, R.C.M. 1004(c)(7)–(8) analysis, at A21-77. Amendment of the factors also corresponds to changes in the corresponding federal capital statutes discussed *infra*.

<sup>50</sup> *Id.* R.C.M. 1004 (4)(B) analysis, at A21–A75 (referencing *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Lockett v. Ohio*, 438 U.S. 586 (1978)); *id.* R.C.M. 1001(c)(1), pt. II, 122; R.C.M. 1001(f)(1); R.C.M. 1001(f)(2)(B), pt. II, 123. Cf. 18 U.S.C.S. §§ 3592(a)(1)–(8) (LexisNexis 2008) (listing eight mitigating factors including impaired capacity, duress, minor participation, equally culpable defendants, no prior criminal record, mental or emotional disturbance, victim’s consent to the criminal conduct, and other factors from defendant’s background, record or character).

<sup>51</sup> *United States v. Simoy*, 50 M.J. 1, 2 (1998); see also *Loving v. Hart*, 47 M.J. 438, 442 (1998) (noting “R.C.M. 1004 and 1006 establishes four ‘gates’ to narrow the class of death-eligible offenders”).

<sup>52</sup> *Id.* R.C.M. 1004(a)(2).

<sup>53</sup> *Id.* R.C.M. 1004(b)(7).



extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances” including the aggravating factors required above.<sup>54</sup> Fourth, a unanimous vote is required to impose death.<sup>55</sup> If convicted and sentenced to death, an accused with a capital sentence is entitled to the automatic military appellate procedures discussed in part III.<sup>56</sup>

### B. Federal Civilian Death Penalty

Congress makes the laws governing federal courts just as it does for courts-martial.<sup>57</sup> Federal capital offenses fall mainly within the Anti-Drug Abuse Act of 1988<sup>58</sup> and the Federal Death Penalty Act of 1994.<sup>59</sup> The aggravating factors<sup>60</sup> vary by type of offense but the mitigating factors are universal under their respective Acts.<sup>61</sup> The Department of Justice oversees capital cases via its “Death Penalty Protocol,”<sup>62</sup> with the goal of ensuring “that the death penalty is sought in a fair and consistent

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<sup>54</sup> *Id.* R.C.M. 1004(b)(4)(C).

<sup>55</sup> *Id.* R.C.M. 1006(d)(4)(A) (“A sentence which includes death may be adjudged only if all members present vote for that sentence.”). Where death is authorized under the UCMJ, all other punishments authorized in the MCM are also authorized. *Id.* R.C.M. 1004(e) (“Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense . . .”).

<sup>56</sup> UCMJ art. 66 (2008) (Review by Court of Criminal Appeals); *id.* art. 67 (review by the CAAF).

<sup>57</sup> U.S. CONST art. III, § 1.

<sup>58</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended at 21 U.S.C. § 848(e)).

<sup>59</sup> Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (codified at 18 U.S.C. § 3591); *see also* ELIZABETH BAZAN, CONG. RESEARCH SERV. REPORT, CAPITAL PUNISHMENT: AN OVERVIEW OF FEDERAL DEATH PENALTY STATUTES, RL30962, at 3–15 (Jan. 5, 2005) (providing specific code provisions and language of entirety of capital offenses under Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2241–2255)); Terrorist Bombings Convention Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 724 (codified as amended at 18 U.S.C. §§ 2331–2339D); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

<sup>60</sup> *See, e.g.*, 18 U.S.C. § 3592(b) (2000) (aggravating factors for espionage and treason); *id.* § 3592(c) (homicide); *id.* § 3592(d) (drug offense penalty); 21 U.S.C. § 848(n) (aggravating factors for homicide).

<sup>61</sup> 18 U.S.C. § 3592; 21 U.S.C. § 848(m).

<sup>62</sup> David J. Novak, *Trial Advocacy: Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 S.C. L. REV. 645, 651 (Spring 1999) (referencing U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-10.010 (1997)) [hereinafter U.S. ATTORNEYS’ MANUAL].

manner, free from ethnic, racial, or other invidious discrimination.”<sup>63</sup> United States Attorneys must submit cases through the Capital Case Unit (CCU) to the Attorney General’s Review Committee on Capital Cases (AGRCCC).<sup>64</sup> The AGRCCC reviews the “Death Penalty Evaluation”<sup>65</sup> form, a prosecution memorandum with all available evidence, the aggravating or mitigating factors, and the suspect’s criminal record and background.<sup>66</sup> The AGRCCC meets with the CCU and the prosecuting attorneys; then the defense counsel are permitted to present any arguments against seeking the death penalty.<sup>67</sup> The Attorney General makes the final decision after receiving the AGRCCC’s recommendation and must provide written authorization to seek the death penalty.<sup>68</sup> The Government must then file a “Notice of Intent to Seek a Sentence of Death” along with the aggravating factors to be presented at trial.<sup>69</sup>

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<sup>63</sup> *Id.* at 651. This policy originated in 1988 following enactment of the Anti-Drug Abuse Act for cases where the U.S. Attorney wanted to seek the death penalty, but was further expanded to a full review process of all potential capital cases after the 1994 enactment. *See* U.S. DEP’T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW pt. I (June 6, 2001).

<sup>64</sup> U.S. Dep’t of Justice, Criminal Division, <http://www.usdoj.gov/criminal/ccu.html> (last visited May 1, 2008).

<sup>65</sup> Novak, *supra* note 62, at 652.

The prosecutor must remember the central axiom of a death penalty prosecution: while the defendant’s culpability in the offense will be at issue in the guilty phase, his entire life will be at issue in the penalty phase. . . . [The Government should gather] all information about the defendant’s life, school records, medical records, mental health records, offense reports for previous arrests, jail records from previous confinements, probation and parole files, and employment records.

*Id.*

<sup>66</sup> *Id.* at 651. Of note, “[t]his form and other internal memoranda concerning the decision to seek the death penalty are not subject to discovery to the defendant or his attorney.” U.S. ATTORNEYS’ MANUAL, *supra* note 62, § 9–10.040.

<sup>67</sup> Novak, *supra* note 62, at 651.

<sup>68</sup> U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL (2008) [hereinafter 2008 U.S. ATTORNEYS’ MANUAL] (Authorization and Consultation in Capital Cases). “The death penalty shall not be sought without the prior written authorization of the Attorney General . . . [and] the United States Attorney shall not file or amend the notice until the Capital Case Unit of the Criminal Division has approved the notice or the proposed amendment.” *Id.* § 9–10.020.

<sup>69</sup> 18 U.S.C.S. § 3593(a) (LexisNexis 2008); 21 U.S.C.S. § 848(h) (LexisNexis 2008).

When seeking the death penalty,<sup>70</sup> the jury must find “one of the ‘gateway’ *mens rea* aggravating factors.”<sup>71</sup> The jury will then have to determine if the prosecution has proven beyond a reasonable doubt one other statutory aggravating factor,<sup>72</sup> thereby making the defendant “eligible for the death penalty.”<sup>73</sup> The court imposes the death sentence<sup>74</sup> upon a recommendation<sup>75</sup> from the jury that the defendant should be sentenced to death. Federal appellate review is mandatory for a capital sentence to determine “whether the sentence of death was imposed under the influence of passion, prejudice, or any arbitrary factor.”<sup>76</sup> If the sentence is upheld, a “Petition for Executive Clemency” can be filed with the Pardon Attorney at the Department of Justice.<sup>77</sup>

“No petition for reprieve or commutation of a death sentence should be filed before proceedings on the petitioner’s direct appeal . . . and first [habeas petition]<sup>78</sup> have terminated [and] no later than 30 days after [notice] of the scheduled date of execution.”<sup>79</sup> The Pardon Attorney investigates the reports or services of the appropriate government

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<sup>70</sup> Since 1988, the federal government tried 125 federal death penalty cases, involving 192 defendants, out of the larger pool of 382 against whom the Attorney General had authorized the Government to seek the death penalty. One was granted clemency and three were executed. *See* Dick Burr et al., Capital Defense Network, An Overview of the Federal Death Penalty Process (Jan. 8, 2008), [http://www.capdefnet.org/fdprc/contents/shared\\_files/docs/1\\_overview\\_of\\_fed\\_death\\_process.asp](http://www.capdefnet.org/fdprc/contents/shared_files/docs/1_overview_of_fed_death_process.asp).

<sup>71</sup> Novak, *supra* note 62, at 656 (citing 21 U.S.C. § 848(n)(1)). A civilian defendant is protected for the lingering post-trial delay seen in capital courts-martial by this pre-trial requirement for approval of death penalty cases. The decision must be made promptly or the Government risks dismissal for violating the Speedy Trial Act provisions. *See* Pub. L. No. 93-619, 88 Stat. 2076, *as amended* August 2, 1979, Pub. L. No. 96-43, § 3, 93 Stat. 327 (codified at 18 U.S.C. §§ 3161–3174). The Speedy Trial Act requires filing an information or indictment within thirty days from the date of arrest. *Id.* § 3161(b). Trial must commence within seventy days after the later of filing the information or indictment, or first appearance of defendant before an officer of the court. *Id.* § 3161(c)(1).

<sup>72</sup> 18 U.S.C. §§ 3592(b)–(d); 21 U.S.C. §§ 848n(2)–(12). The jury may then find other non-statutory aggravating factors under 18 U.S.C. § 3593(a) such as future dangerousness under 21 U.S.C. § 848(h)(1)(B).

<sup>73</sup> Novak, *supra* note 62, at 657.

<sup>74</sup> 18 U.S.C. § 3594.

<sup>75</sup> *Id.* § 3593(e).

<sup>76</sup> *Id.* § 3595.

<sup>77</sup> *See* 28 C.F.R. §§ 1.1–1.10; *see also* 28 U.S.C. §§ 509–510; 28 C.F.R. §§ 0.35, 0.36.

<sup>78</sup> 23 C.F.R. § 1.10(b) (referencing 28 U.S.C. § 2255).

<sup>79</sup> *Id.* Any supporting papers for the petition must be submitted within fifteen days of filing the petition.

officials or agencies.<sup>80</sup> The Attorney General “shall determine whether the request for clemency is of sufficient merit to warrant favorable action” and provide the President with a written recommendation to grant or deny the petition.<sup>81</sup> The Attorney General will advise petitioners if the President specifically denies the request for clemency because there is no presumptive denial of clemency in death cases.<sup>82</sup> Commutation is “an extraordinary relief that is rarely granted”<sup>83</sup> and the power to commute is vested in the President alone.<sup>84</sup> “Only one request for commutation of a death sentence will be processed to completion” unless the defendant can make a clear showing of exceptional circumstances.<sup>85</sup> After the appeals conclude and clemency is denied, the U.S. marshal will “supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed.”<sup>86</sup>

The federal civilian death penalty system requires no presidential approval for imposition.<sup>87</sup> Instead, the President’s role is limited to clemency decisions *after* the completion of legal review instead of

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<sup>80</sup> *Id.* § 1.6; U.S. DEP’T OF JUSTICE, RULES GOVERNING PETITIONS FOR EXECUTIVE CLEMENCY (2000) [hereinafter RULES GOVERNING PETITIONS].

<sup>81</sup> *See* 28 C.F.R. § 1.6(c). Counsel for the petitioner can request an oral presentation to the Office of the Pardon Attorney, and the families of any victims may also request to make a similar presentation. *Id.* § 1.10(c).

<sup>82</sup> *Id.* § 1.8 (Notification of denial of clemency). Except in death penalty cases, whenever the Attorney General recommends denial and “the President does not disapprove or take other action with respect to that adverse recommendation within thirty days after the date of its submission to him” it shall be presumed the President concurs in the adverse recommendation. *Id.* § 1.8(b).

<sup>83</sup> *Id.* § 1–2.113 (Standards for Considering Commutation Petitions). “It is not an implication of forgiveness but can be granted for similar conditions as parole but is typically based upon grounds of sentence disparity or for cooperating with the government.” *Id.*

<sup>84</sup> *Id.* § 1.10. “As a matter of well established policy, the specific reasons for the President’s decision to grant or deny a petition are generally not disclosed by either the White House or the Department of Justice.” *Id.*

<sup>85</sup> *Id.* § 1.10(e).

<sup>86</sup> 18 U.S.C. § 3596(a) (2000).

If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State . . . .

*Id.*

<sup>87</sup> *See id.* The statutes simply state that following the exhaustion of appeals, “an execution is to be conducted according to the laws of the state in which the sentence is imposed.” *Id.*

midway between those courts directly reviewing the case and the courts reviewing a habeas petition. The similarities between the military and federal criminal system are intentional, and they continue to grow on formal and informal levels, as seen by the military's use of pre-capital referral procedures. These systems, each with distinct advantages<sup>88</sup> and disadvantages, must continue to be separate because they serve different functions.<sup>89</sup> Yet, the federal civilian clemency proceedings, as well as different state systems, create a finality that the military system is blatantly lacking.

### C. State Death Penalty Procedures Not Requiring Executive Action

Capital punishment in Texas mirrors that of the federal civilian system because executive approval is not required.<sup>90</sup> Furthermore, clemency, although limited by a board, occurs only after the completion of direct review and habeas review. If a person is convicted of a capital offense in Texas,<sup>91</sup> the court must sentence the defendant to death if the jury determines that the defendant is a "continuing threat to society."<sup>92</sup> The defendant's case is automatically reviewed on appeal at the Texas

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<sup>88</sup> 2008 U.S. ATTORNEYS' MANUAL, *supra* note 68, sec. 669 (Criminal Resource Manual) (noting strength of expansive jurisdiction under UCMJ, "the ability of the military to apprehend, confine and conduct trials abroad and without venue restrictions should be kept in mind when considering by whom a prosecution should be undertaken.").

<sup>89</sup> *See generally* U.S. DEP'T OF DEFENSE, DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES encl. 1, para. B (22 Jan. 1985), *reprinted in* MCM, *supra* note 5, at A3-1. "The Department of Justice has primary responsibility for enforcement of federal laws in the United States District Courts. The DOD has responsibility for the integrity of programs, operations and installations and for the discipline of the Armed Forces." MCM, *supra* note 5, at A3-2.

<sup>90</sup> *See generally* Steve Woods, *A System under Siege: Clemency and the Texas Death Penalty after the Execution of Gary Graham*, 32 TEX. TECH L. REV. 1145 (2001) (outlining Texas's death penalty process).

<sup>91</sup> TEX. PENAL CODE ANN. §§ 19.02–03 (Vernon 1994) (Capital murder occurs when a person "intentionally or knowingly" causes the death of another, intends to cause serious bodily harm that causes the death of another, commits or attempts a felony and in furtherance thereof causes the death of another.).

<sup>92</sup> *Id.* § 2(g) (stating court must issue death sentence); *id.* § 2(b)(1) (stating jury determines whether "there is a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society"); *id.* § 2 (e)(1) (stating jury must consider all the evidence, the circumstances of the offense, the defendant's personal moral culpability, character and background when determining if sufficient mitigating circumstances warrant life imprisonment rather than death sentence).

Court of Criminal Appeals,<sup>93</sup> followed by federal habeas access.<sup>94</sup> After the sentence is affirmed,<sup>95</sup> the convicting trial court will formally pronounce the death sentence and the clerk of the court sets an execution date as part of his ministerial duties.<sup>96</sup> The governor is advised of any death sentence, but does not have to approve the sentence.<sup>97</sup> After pronouncement of the death sentence, the governor has authority to grant a temporary thirty day reprieve, but must have “the written, signed recommendation and advice of the Board of Pardons and Paroles [in order] to grant reprieves and commutations.”<sup>98</sup>

#### D. State Death Penalty Procedures Requiring Executive Action

Executive officers in some states actively participate in the capital system by issuing the death warrant. Still, this mandatory duty is reinforced by alternative means to reach finality if the governor does not act. Although the states are not uniform in the timelines for the executive to complete their duties, no state is comparable to the military in terms of requiring the executive to approve the sentence.

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<sup>93</sup> TEX. CONST. art. V, § 5; TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(h). This review is combined with any habeas corpus review under TEX. R. APP. P. 71.1 and TEX. CODE CRIM. PROC. ANN. art. 11.071. Texas is a “unitary review” system because it “authorizes a person under a sentence of death to raise in the course of direct review . . . such claims as could be raised on collateral attack.” See 28 U.S.C.S. § 2265 (LexisNexis 2008).

<sup>94</sup> 28 U.S.C.S. § 2254. If unsuccessful at the state level, the defendant may seek relief through a writ of habeas corpus in federal district court or appeal the habeas petition to the U.S. Supreme Court. *Id.* § 2266.

<sup>95</sup> TEX. CODE CRIM. PROC. ANN. art. 43.141(b).

<sup>96</sup> *Id.* art. 43.15.

<sup>97</sup> TEX. CONST. art. IV, § 1 (1876). The governor’s general counsel’s duties include “tracking inmates on death row as their cases move through the judicial process including all appeals to the governor for commutations or stays of execution; [and] handling pardon requests sent to the governor.” See Texas State Library & Archive Comm’n, *An Inventory of the General Counsel’s Execution Files at the Texas State Archives*, available at <http://www.lib.utesas.edu/taro/tslac/20098/ts1-20098.html> (last visited May 1, 2008).

<sup>98</sup> TEX. CONST. art. IV, § 11(a)–(b); see also TEX. CODE CRIM. PROC. ANN. art. 48.01. The Board of Pardons and Paroles consists of eighteen members appointed by the governor and approved by the Texas Senate. The Board was vested with the powers stated in 1936 in response to governors using their previously unfettered “clemency powers in such a frivolous manner.” Woods, *supra* note 90, at 1171 nn.255, 259.

*1. Florida*

Florida's capital system clearly requires executive action by a mandatory duty to issue the death warrants or face the political consequences of the court issuing it instead.<sup>99</sup> If the jury finds the defendant guilty of a capital offense,<sup>100</sup> "the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death."<sup>101</sup> A death sentence is automatically reviewed on appeal by the Supreme Court of the State of Florida.<sup>102</sup> If the sentence is affirmed, the clerk of the court prepares a certified copy of the record of the conviction and sentence which is sent to the governor.<sup>103</sup> Once the governor issues the warrant, only a federal appeal or the governor can stay the execution.<sup>104</sup> Upon certification that the stay is lifted or dissolved, the governor must set a new date for execution within ten days.<sup>105</sup> If there is an "unjustified failure of the governor to issue a warrant, or for any other unjustifiable reason,"<sup>106</sup> the Supreme Court shall issue the warrant.<sup>107</sup> Florida's governor "has unfettered discretion to deny clemency at any time, for any reason."<sup>108</sup> He can grant a reprieve up to sixty days,<sup>109</sup> but he must have the approval of two

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[T]he Governor's warrant is . . . the equivalent of a declaration that he declines to interfere with the execution of the death sentence, that the law shall take its course, the judgment and conviction be executed so far as any power vested in him shall be exercised to the contrary.

Jarvis v. Chapman, 159 So. 282, 285 (Fla. 1934).

<sup>100</sup> FLA. STAT. § 782.04(1)(a) (1) (2006) (premeditated killing); § 782.04(1)(a)(2)(a)–(q) (unlawful killing while engaged in or attempting to perpetrate a felony); § 782.04(1)(a)(3) (unlawful distribution of controlled substance as proximate cause of death); § 794.011(2)(a) (sexual battery or attempted battery which injures the sexual organs of a person less than twelve years of age); § 893.135 (capital drug trafficking).

<sup>101</sup> *Id.* § 921.141(3).

<sup>102</sup> FLA. CONST. art. V, § 3(b)(1); FLA. STAT. § 921.141(4) (2006). If affirmed, the condemned can petition the U.S. Supreme Court. 28 U.S.C.S. § 1257 (LexisNexis 2008).

<sup>103</sup> FLA. STAT. § 922.052(1).

<sup>104</sup> *Id.* § 922.095(1).

<sup>105</sup> *Id.* § 922.095(2)(a)–(b).

<sup>106</sup> *Id.* § 922.14.

<sup>107</sup> The Florida Supreme Court has issued no warrants of execution under this provision. Telephone Interview with Charmaine Millsaps, Attorney, Fla. Attorney Gen.'s Office (Sept. 23, 2006).

<sup>108</sup> FLA. R. EXEC. CLEMENCY 4 (Dec. 12, 2004).

<sup>109</sup> FLA. CONST. art. IV, § 8; FLA. STAT. § 940.01(1) (2006). Reprieve granted by issuing executive order. *Id.*

members of the Florida cabinet<sup>110</sup> to grant pardons or commute punishments.<sup>111</sup>

Of note for the military justice system is the criticism<sup>112</sup> of Florida's clemency process, because moratorium advocates propose a sweeping series of changes.<sup>113</sup> The General Counsel for the governor stated that the recommendations would turn the "clemency review into yet another layer of additional appellate review . . . unnecessarily constrict the broad discretion of the executive" and unnecessarily impede finality.<sup>114</sup> For the military, because of the many officials who make recommendations to the President, it is only a matter of time before such recommendations are aimed at the UCMJ. Such actions would "impinge on the judicial process [because the] clemency process should not be designed to re-litigate the question of guilt after guilt has been lawfully established in the court system."<sup>115</sup>

## 2. *Pennsylvania*

Pennsylvania's capital system requires executive action to issue death warrants following appellate review and within a structured time frame. Following a death sentence at trial,<sup>116</sup> the Pennsylvania Supreme

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<sup>110</sup> FLA. CONST. art. IV, § 4. The cabinet is "composed of an attorney general, a chief financial officer, and a commissioner of agriculture . . . [i]n the event of a tie vote of the governor and cabinet, the side on which the governor voted shall be deemed to prevail." *Id.*

<sup>111</sup> *Id.* art. IV, § 8; FLA. STAT. § 940.01(1).

<sup>112</sup> See AM. BAR ASS'N DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE FLORIDA DEATH PENALTY ASSESSMENT REPORT vii (2006) [hereinafter MORATORIUM ASSESSMENT], available at <http://www.abanet.org/moratorium/assessmentproject/florida/Report.pdf>.

<sup>113</sup> See *infra* app. B (chart summarizing the ABA assessment of Florida clemency).

<sup>114</sup> MORATORIUM ASSESSMENT, *supra* note 112, app. 1 (reprinting letter from general counsel).

<sup>115</sup> *Id.*

<sup>116</sup> The Commonwealth of Pennsylvania has only one capital offense: an intentional killing. 18 PA. CONS. STAT. § 2502(a) (2006). "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." *Id.*; 18 PA. CONST. STAT. § 1102(a)(1) (2005) ("A person who has been convicted of a murder of the first degree shall be sentenced to death or to a term of life imprisonment in accordance with 42 Pa. C.S. § 9711.").



Court automatically reviews the case<sup>117</sup> and if affirms the case, forwards it to the governor within thirty days.<sup>118</sup> Upon review, the governor shall sign the warrant of execution within ninety days.<sup>119</sup> If the governor fails to sign it, the Secretary of Corrections will carry out the execution anyway.<sup>120</sup> The condemned may continue to file for a stay of execution under the Post Conviction Relief Act,<sup>121</sup> or seek federal court habeas review.<sup>122</sup> The governor must conduct a public hearing and obtain the written recommendation of the Board of Pardons, stating the specific reasons, in order to commute or pardon a death sentence.<sup>123</sup> Because the applicant has already been found guilty by the courts, the Board only exists to make a recommendation to the governor, thereby requiring only a determination “whether there are sufficient reasons to recommend mercy . . . the Board’s only consideration is whether the applicant should be granted a pardon or have their sentence reduced.”<sup>124</sup>

The unique provision that the governor’s inaction will not stop the implementation of the death sentence may be a solution for military capital litigation. Pennsylvania instituted this law in response to systemic state executive inaction. In 1994, the Pennsylvania Supreme Court issued a judgment in *mandamus* to the governor to act upon affirmed death sentences as he was required to by law.<sup>125</sup> A district

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<sup>117</sup> 42 PA. CONS. STAT. § 9711(h)(3) (affirming the sentence unless: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor; or (ii) the evidence fails to support the finding of at least one aggravating circumstance).

<sup>118</sup> *Id.* § 9711(i). Prothonotary of the Supreme Court shall transmit full and complete record to the governor within thirty days of expiration of certiorari filing period, denial of certiorari, or disposition by U.S. Supreme Court.

<sup>119</sup> 61 PA. CONS. STAT. § 3002(a) (2006).

<sup>120</sup> *Id.* § 3002(c) (stating that if governor fails to timely comply and a pardon or commutation has not been issued, the secretary shall schedule, within thirty days of the governor’s failure to comply, carryout the execution no later than sixty days from the date the governor was required to sign the warrant under subsection (a)).

<sup>121</sup> 42 PA. CONS. STAT. § 9545(c); Post Conviction Relief Act, 42 PA. CONS. STAT. §§ 9541–9546.

<sup>122</sup> *See* 28 U.S.C.S. § 2254 (LexisNexis 2008).

<sup>123</sup> PA CONST. art. I, § 9(a) (2006). The Board of Pardons consists of the lieutenant governor as chairman, the attorney general with three members appointed by the governor; one shall be a crime victim, one a corrections expert, and the third a doctor of medicine, psychiatrist or psychologist. *Id.* art. I, § 9(b). Appointed members “shall be residents of Pennsylvania” and must receive the consent of a majority of the Senate. *Id.*

<sup>124</sup> Commonwealth of Pennsylvania-Board of Pardons, Function of the Board, *available at* [http://sites.state.pa.us/PA\\_Exec/BOP](http://sites.state.pa.us/PA_Exec/BOP) (follow “Who are the Board members?” Hyperlink; then follow “Function” hyperlink) (last visited May 1, 2008). The board shall keep records of its actions, which shall at all times be open for public inspection. *Id.*

<sup>125</sup> *See* *Morganelli v. Casey*, 641 A.2d 675 (Pa. Commw. Ct. 1994).

attorney filed the petition because the Governor had not acted upon the affirmed sentences since the cases were transmitted by the courts three years before in one case and five years before in the other.<sup>126</sup> The issue was whether the governor, after the cases have been reviewed and transferred to him, “in accordance with his constitutional responsibility to take care that the laws be faithfully executed, then [has] the legal duty to . . . [issue] the death warrant so that there may follow clemency proceedings, together with any reprieve,” and the actual implementation of the sentence if not commuted or pardoned.<sup>127</sup>

The court interpreted the issue as the governor’s mandatory duty to act because “the issuance of the death warrant is indispensable to carrying out the death penalty.”<sup>128</sup> Likewise, because the rules provided a timeline for the judicial branch to transfer the case after review to the executive branch within a specific time period, “the conclusion must be that the Governor is obligated to establish a reasonably prompt time frame for performance of the executive responsibilities.”<sup>129</sup> In buttressing this duty, the court noted “[p]recisely because the Governor has the power to grant pardons and commutations . . . the Governor’s duty to embark upon [the clemency] phase by death warrant issuance is mandatory.”<sup>130</sup> Pointedly, the court noted the statute did not establish a timeline for executive action because “such a specification . . . would be no more feasible than an attempt to establish a time frame for the completion of all judicial appeals and review.”<sup>131</sup> The state legislature quickly resolved the void, and determined a specification of ninety days was feasible.<sup>132</sup>

### III. Presidential Approval and Continuing Jurisdiction for Legal Review

This section outlines the legacy of military capital post-trial processes. Presidential control of military death sentences changed to balance governance of the military against national security and political

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<sup>126</sup> *Id.* at 677.

<sup>127</sup> *Id.* at 676.

<sup>128</sup> *Id.* at 678.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (referencing state constitution’s grant of pardon power to executive under Article IV, § 9(a)).

<sup>131</sup> *Id.*

<sup>132</sup> Act of June 18, 1998, Pub. L. No. 622, No. 80 (codified at 61 PA. CONS. STAT. § 3002(a) (2007)).

expedience. In contrast to the earlier restrictive civilian authority over a small force in a small nation at peace, Congress eventually transitioned to decentralized civilian authority over a larger population, territory, and military.<sup>133</sup> When that same nation faced threats to its very existence, delegation of approval was essential. As the military expanded, military legal review became ineffective and anemic. Unchecked delegation invited problems, necessitating greater scrutiny of capital sentences.<sup>134</sup>

#### A. Presidential Authority to Approve Military Capital Sentences

The development of military justice must be examined with the requisite perspective that “in the late 1780’s [there was] considerable diversity of opinion regarding military policy.”<sup>135</sup> President George Washington understood the sentiment of the post-Revolutionary leaders who were convinced that the oceans were a first line of defense and the militia was the most effective force for a democracy.<sup>136</sup> Not naïve to the possibility of attack, he declared that “[t]o be prepared for war is one of the most effectual means of preserving peace. A free people ought not only to be armed, but disciplined; to which end a uniform and well-digested plan is requisite.”<sup>137</sup> A decade later, President Thomas

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<sup>133</sup> See generally Colonel Frederick Bernays Wiener, *1 Courts-Martial and The Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 11 (1958) (noting the post-colonial forces numbered from several hundred to a few thousand compared to the twelve million military personnel in World War II).

<sup>134</sup> *Hearings on H.R. 2498 Before a Subcomm. of the H. Armed Servs. Comm.*, 81st Cong., 1st Sess., at 606 (1949) (statement of Professor Edmund G. Morgan). “We were convinced that a Code of Military Justice cannot ignore the military circumstances in which it must operate but we were equally determined that it must be designated to administer justice.” *Id.*

<sup>135</sup> Wiener, *supra* note 133, at 5.

<sup>136</sup> See THE PAPERS OF GEORGE WASHINGTON, REVOLUTIONARY WAR SERIES DOCUMENTS, G.W. TO JOHN BANISTER (21 Apr. 1778) (providing a letter to John Banister).

Standing Armies are dangerous to a state . . . the prejudice in Other Countries has only gone to 'em in time of peace—and then from their not having in general cases, any of the ties—the concerns or interests of Citizens or any other dependence, than what flowed from their military employ—in short from their being mercenaries—hirelings.

*Id.* (explaining the dangers of a standing mercenary army as opposed to the standing army of consisting of citizens).

<sup>137</sup> President George Washington, *First Annual Address*, Jan. 8, 1790, in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 65 (1896) [hereinafter PRESIDENTIAL PAPERS].

Jefferson's first annual message repeated this collective thought; because it was not "conceived as needful or safe that a standing army should be kept up in time of peace [to protect against invasion] . . . the only force which can be ready at every point and competent to oppose them is the body of neighboring citizens as formed into a militia."<sup>138</sup> Thus, Jefferson urged Congress "that we should at every session continue to amend the defects . . . in the laws regulating the militia."<sup>139</sup> A large federal force was never intended, even as potential problems with controlling militias were apparent.<sup>140</sup>

The armed services were therefore a "mere handful of individuals . . . [who] were soldiers by choice."<sup>141</sup> Nevertheless, "[t]he American military's authority to decree capital punishment is as old as the military itself."<sup>142</sup> In exercising this authority, commanders must support the purpose of military law, "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment and to thereby strengthen the national security of the United States."<sup>143</sup> The Commander in Chief supports military law by establishing rules and regulations for the administration of the military services<sup>144</sup> and acting "as he should think fit for the good and welfare of the services [and] to cause strict discipline and order to be observed."<sup>145</sup>

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<sup>138</sup> *Id.* at 329; President Thomas Jefferson, *First Annual Message*, Dec. 8, 1801, in PRESIDENTIAL PAPERS.

<sup>139</sup> *Id.*

<sup>140</sup> See President Thomas Jefferson, *Sixth Annual Message*, Dec. 2, 1806, in PRESIDENTIAL PAPERS, *supra* note 137, at 406 (expressing concern in congressional address about the potential of war with Spain and the threat posed by armed American groups seeking to conduct military actions against Spain on the frontier). Congress revised and reissued the American Articles of War in 1806 shortly after this address. See *infra* app. A; see also PECKHAM & SHERMAN, *supra* note 26, at 1–3 (citing to the RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed., 1911) (noting drafters feared state militias that were not subjected to uniform discipline would be an ineffective fighting force as evidenced by episodes in the American Revolution)).

<sup>141</sup> Wiener, *supra* note 133, at 8.

<sup>142</sup> Simon, *supra* note 29, at 103.

<sup>143</sup> MCM, *supra* note 5, Pt. I, ¶ 3.

<sup>144</sup> U.S. CONST. art. III, § 2.

<sup>145</sup> COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 59 (2d. ed. 1920) ("[t]he words 'as he sees fit' are intended to give the President absolute discretion in determining the amount of the sentence to be approved").

The Commander in Chief must also support his purpose as the Chief Executive to be “an important moderating force . . . whose constituency is a national majority coalition.”<sup>146</sup> Clearly, presidential leadership sometimes demands intrusion into military affairs to “ensure that the nation’s political objectives remain paramount.”<sup>147</sup> Equally significant is the trait that “wartime leadership [sometimes demands] consistency and determination in the face of inevitable and sometimes popular opposition.”<sup>148</sup> Capital punishment obviously ignites strong feelings<sup>149</sup> but it still exists, even if it is based on retribution or on “the belief that certain crimes can be adequately punished only by a sentence of death.”<sup>150</sup> Accepting its existence, “[w]hat value does the death penalty serve without executions, and what mechanisms prevent executions [but] leave death penalty statutes [and] sentencing practices undisturbed?”<sup>151</sup>

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<sup>146</sup> Steven G. Calabresi, *The President, Federalist No.10, and the Constitution*, in *PRESIDENTIAL LEADERSHIP* 5–7 (James Taranto & Leonard Leo eds., 2004) (noting president is effective in his role when acting as chief law enforcement officer and tending to the needs of a broad coalition).

<sup>147</sup> Victor Davis Hanson, *Presidential Leadership during Wartime*, in *PRESIDENTIAL LEADERSHIP*, *supra* note 146, at 227.

<sup>148</sup> *Id.* at 231.

<sup>149</sup> See generally James J. Megivern, *Our National Shame: The Death Penalty and the Disuse of Clemency*, 28 *CAP. U. L. REV.* 595 (2000); see also U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 105 (31st ed. 2003), available at <http://www.albany.edu/sourcebook/pdf/section2.pdf> (reporting opinion polls reveal various perceptions and rationales about favoring or opposing death penalty).

<sup>150</sup> The political power of the death penalty is widely recognized, and regardless of position, it is also an emotional issue. Scott E. Sundby, *The Death Penalty’s Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 *TEX. L. REV.* 1930, 1962 (1992) (describing the “McVeigh” factor of some violent offenses, regardless of defendant’s notoriety, where individuals believe “that the taking of the victim’s life can only be morally redressed through the taking of the defendant’s life.”). In the 1988 presidential candidate debates Massachusetts Governor Michael Dukakis was asked: “Governor, if [your wife] Kitty Dukakis were raped and murdered, would you favor an irrevocable death penalty for the killer?” Governor Dukakis responded, “No, I don’t, Bernard. And I think you know that I’ve opposed the death penalty during all of my life.” The dispassionate reply detracted from his political support. See CNN.com, 1988 Presidential Debates History, <http://www.cnn.com/ELECTIONS/2000/debates/history.story/1988.html> (last visited May 1, 2008).

<sup>151</sup> Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 *TEX. L. REV.* 1869, 1871 (June 2006) (comparing the political culture of “executing states” that actively execute against “symbolic” states that have death penalty laws but few or no executions).

1. *Presidential Approval—Historical Foundations of Article 71(a)*

Beginning with the American Revolution, the first pronouncement of national military law<sup>152</sup> did not address approval of capital sentences.<sup>153</sup> It was limited in scope to offenses not usually punishable by the common law<sup>154</sup> with a further requirement that those common law offenses be handled by the civil system.<sup>155</sup> Following several disastrous defeats, General George Washington implored the Continental Congress to recognize that freedom would require a disciplined regular force,<sup>156</sup> which could only be achieved by strong enforcement of military discipline mechanisms.<sup>157</sup> Rather than another selective compilation, almost the entire British Articles of War of 1765 were adopted<sup>158</sup> because they had “carried two empires to the head of mankind.”<sup>159</sup> Thereafter, the number of capital offenses grew,<sup>160</sup> and the authority to approve such sentences was likewise expanded to the generals<sup>161</sup> because as the military grew in size, Congress was too slow to respond.<sup>162</sup>

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<sup>152</sup> DUDLEY, *supra* note 27, at 5 n.1 (explaining that Rules and Articles of War as adopted by the Continental Congress on 30 June 1775 derived from English army rules in force just prior to American Revolution). American colonists, including George Washington, served with the British Army during the French and Indian Wars, and were acquainted with the rules which were derived from articles of war prescribed by the sovereign and Parliamentary enactments. *Id.*

<sup>153</sup> See generally American Articles of War of 1775, reprinted in WINTHROP, *supra* note 145. The only mention of sentencing or pardon power is in Article LXVII, which states that “the general or commander in chief for the time being, shall have full power of pardoning, or mitigating any of the punishments ordered to be inflicted . . . .” *Id.* at 958–59.

<sup>154</sup> Simon, *supra* note 29, at 103.

<sup>155</sup> Weiner, *supra* note 133, at 10 (referencing WINTHROP, *supra* note 146, at 964 (Articles of 1776, § 10, art. I)).

<sup>156</sup> DAVID MCCULLOUGH, JOHN ADAMS 158–59 (2001). Washington’s regulars faced a more disciplined British and Hessian force in New York in September 1776 and during the battle, “the militia began deserting in droves . . . [and] those who remained abandoned their entrenchments and fled, never firing a shot.” *Id.* at 159.

<sup>157</sup> Major Gerald F. Crump, *Part I: A History of the Structure of Military Justice in the United States, 1775–1920*, 16 A.F. L. REV. 41, 43 (1974); see also MCCULLOUGH, *supra* note 156, at 158–61 (noting that many of the troops had a “lust for plunder [and alcohol],” which compounded the problems of rampant desertion).

<sup>158</sup> MCCULLOUGH, *supra* note 156, at 160 (accepting John Adams’s proposal).

<sup>159</sup> *Id.* at 141. The British system was modeled on the Roman system of military rules.

<sup>160</sup> See Captain John F. O’Connor, *Don’t Know Much about History: The Constitution, Historical Practice and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIAMI L. REV. 177, 185–86 (1997) (describing the capital offenses and the circumstances of their unique military character).

<sup>161</sup> See *infra* app. A (Act of 14 April 1777). Numerous amendments to the approving or remitting authority occurred between 1776 and 1786. See also Captain Annamary

The rules and procedures under the resulting Articles of War did not provide for legal counsel nor review in a federal or state court.<sup>163</sup> If a death sentence were affirmed, “great ceremony is to be made of special observance . . . the troops to witness the execution are formed on three sides of a square.”<sup>164</sup> For a non-military offense, the Soldier was to be hung, “but for a purely military offense like a sentinel sleeping on his post [the Soldier was] ‘to be shot to death with musketry.’ For the sake of the example and to deter others . . . these sentences are executed in the presence of the troops of the command, assembled to witness them.”<sup>165</sup> The offenses charged, the sentence imposed, and the orders of execution were read aloud; after the execution, the troops were marched past the corpse.<sup>166</sup>

Commanders had authority to approve capital sentences until after the war, when approval authority reverted to the Congress.<sup>167</sup> However, the commanding generals in the field continued to approve court-martial

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Sullivan, *The President’s Power to Promulgate Death Penalty Standards*, 125 MIL. L. REV. 143, 177–78 (1989) (describing General Washington’s functions as Commander in Chief as envisioned by the Framers, to lead the army in battle, but also in maintenance of its discipline).

<sup>162</sup> See generally Crump, *supra* note 157, at 45 (noting General Washington wanted the generals of state forces to have the authority to appoint, approve and remit courts-martial); see also THE PAPERS OF GEORGE WASHINGTON, REVOLUTIONARY WAR SERIES DOCUMENTS, G.W. TO JOHN BANISTER (21 Apr. 1778).

“[T]he indecision of Congress and the delay used in coming to determinations in matters referred to [them] is productive of a variety of inconveniences, and an early decision in many cases, though it should be against the measure submitted, would be attended with less pernicious effects. Some new plan might then be tried; but while the matter is held in [suspense], nothing can be attempted.

*Id.*

<sup>163</sup> See generally JONATHAN LURIE, *ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS 1775–1950*, at 10–12 (1992).

<sup>164</sup> CAPTAIN WILLIAM C. DEHART, *OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL* 247 (1862). The condemned Soldier led a procession containing the provost marshal, the regimental band playing the dead march, the firing party, the coffin bearers, and the chaplain. *Id.* at 247–48.

<sup>165</sup> DUDLEY, *supra* note 27, at 157 (citations omitted).

<sup>166</sup> DEHART, *supra* note 164, at 248–49.

<sup>167</sup> WINTHROP, *supra* note 145, at 972; see also *id.* at 943 (providing an analogous British article). By retaining authority of capital sentences in peacetime, the Congress effectively controlled all capital sentences.

death sentences<sup>168</sup> until 1796 when approval was reserved to the President,<sup>169</sup> to include in time of war in 1802.<sup>170</sup>

Exclusive presidential approval continued until political and practical issues arose during the Civil War, resulting in the return of the commander's authority to impose the death sentence.<sup>171</sup> This is not to say that commanders always used this authority wisely,<sup>172</sup> and President Lincoln retained most of the approval authority over execution of Soldiers<sup>173</sup> and civilians subject to courts-martial, martial law, and federal law.<sup>174</sup> Historically, however, commanders of armies enjoyed

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<sup>168</sup> See Wiener, *supra* note 133, at 15–16, 16 n.113 (noting death sentence approval actions listed in the commanding general's order books, prior to presidential approval requirement in 1796, "are too numerous to be listed separately.").

<sup>169</sup> Act of May 30, 1796, ch. 39, § 18, 1 Stat. 485; see also Sullivan, *supra* note 161, at 181–84 (outlining principles behind executive powers as Commander in Chief as they apply to courts-martial).

<sup>170</sup> Act of Mar. 16, 1802, ch. 9, § 10, 2 Stat. 134. "Time of war" is defined as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists for purposes of RCM 1004(c)(6) and Parts IV and V of [the] Manual." MCM, *supra* note 5, R.C.M. 103(19).

<sup>171</sup> Major Mary M. Foreman, *Military Capital Litigation: Meeting the Heightened Standards of United States v. Curtis*, 174 MIL. L. REV. 1, 4 (2002) (noting that Congress did not delegate this authority until it was apparent that civil courts may not be able to convene during hostilities).

<sup>172</sup> See 1 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 342 (1939). On 30 August 1861, Union General John C. Fremont, a staunch abolitionist, declared martial law in Missouri, a hotly contested border state along the Western frontier. To combat the pro-slavery guerillas, he proclaimed that all persons found guilty at court-martial of carrying arms in Missouri would be shot. *Id.* When President Lincoln learned of Fremont's declaration, he immediately educated the general that

[s]hould you shoot a man, according to the proclamation, the Confederates would very certainly shoot our best man in their hands in retaliation; and so, man for man, indefinitely . . . [i]t is therefore, my order that you allow no man to be shot . . . without first having my approbation or consent.

*Id.*

<sup>173</sup> Lincoln "agonized over the hundreds of court-martial cases that ended up on his desk," and in 1864, he commuted all capital sentences for desertion to imprisonment for the duration of the war. RICHARD CARWARDINE, LINCOLN: A LIFE OF PURPOSE AND POWER 285 (2003).

<sup>174</sup> See, e.g., SANDBURG, *supra* note 172, at 385. President Lincoln received a petition for pardon of a civilian sentenced to death in federal court for slave-trading on the high seas. Although many respectable citizens had signed the petition, Lincoln denied clemency, stating, "I have felt it to be my duty to refuse [and] it becomes my painful duty to admonish the prisoner that, relinquishing all expectation of pardon by human authority,



unfettered discretion in granting pardons or executing death sentences from a court-martial.<sup>175</sup> Thus, the congressional delegation of executive

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he refers himself alone to the mercy of the common God and Father of all men.” *Id.* Relating the “extraordinary pressure on Lincoln to [grant the] pardon,” the prosecuting attorney E. Delafield Smith states the President listened patiently as he argued the “imperative necessity of making an example of this man.” *Id.* President Lincoln then held a pen aloft and asked, “Mr. Smith, you do not know how hard it is to have a human being die when you know that a stroke of your pen may save him.” *Id.*

<sup>175</sup> WINTHROP, *supra* note 145, at 903–29 (noting that various sources of Anglo-American military law, from Articles of War of Richard II in 1385 through British Mutiny Act of 1689, contained no requirement for field commander—in peace or war—to seek approval or confirmation when imposing court-martial death sentence). Kings could raise armies for war, to include pardoning prisoners if they would join his force, and create such rules as needed to direct the forces. *See generally* WAR OFFICE, *MANUAL OF MILITARY LAW* 1914, at 147–55 (His Majesty’s Stationery Office 1914) [hereinafter *BRITISH MANUAL*] (sketching the history of military forces in England prior to the Norman Conquest in 1066 through the Restoration of Charles the Second in 1660). Compulsory service was abolished in 1640, but the practice of pardoning prisoners to serve in the military continued, and even impressing them into service was retained. *See id.* at 157 n.(f). Standing armies in peacetime became vital. *Id.* at 156–57. Charles II, with the consent of Parliament, maintained a standing army “on the occurrence or in anticipation of foreign war,” and when colonial settlements were abandoned, the troops were simply brought back to England intact.). *Id.* at 156. *See also* PECKHAM & SHERMAN, *supra* note 26 (citing *THE FEDERALIST* NO. 29 (Alexander Hamilton) (“A standing force therefore, is a dangerous, at the same time that it may be a necessary, provision.”)). Consequently, the continual existence of military forces required that the military law be enforced during peacetime, but exclusively on the troops. *BRITISH MANUAL, supra*, at 6–7. Previously, Charles I tried to enforce military law against soldiers in peacetime but the citizenry objected. Parliament made a *Petition of Rights* in 1627, denouncing the practice of soldiers being tried under military law for murder, praying the “practice be halted lest your majesty’s subjects be put to death contrary to the laws of the land.” *See also* Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 *VAND. L. REV.* 435, 443 (1960). Military law in time of peace did not exist until the Mutiny Acts of 1689 under Charles II. These courts-martial were very limited and could not enforce a death penalty and they were subordinate to the civil law. *See* WINTHROP, *supra* note 145, app. VI (Mutiny Act of 1689) (“[N]o man shall suffer loss of life at martial law . . . than by judgement [sic.] of peers and to laws of the realm.”). The Mutiny Act was the first occurrence of military law against all persons in peace time and it allowed trial by court-martial of three capital offenses: mutiny, sedition and desertion. Duke & Vogel, *supra* at 443 (noting that the Act’s primary purpose was to enforce the contractual obligation to serve in the armed forces of the kingdom). Separate and apart from courts-martial, the Articles of War regulated the conduct of the troops. *See* Articles of War under James II, *reprinted in* WINTHROP, *supra* note 145, app. V, at 1434–37 (noting the ability to conduct a capital court-martial within England was withheld to the sovereign). While the Articles under James II did not allow for the death penalty in times of peace (art. LXIV) Soldiers could still be punished at court-martial for committing civil crimes (art. XVIII). *Id.* at 1434–45. Parliament took a great care to ensure that the death penalty was not overused. *BRITISH MANUAL, supra*, at 160–61. Since 1660, standing armies were dependent on Parliament

authority was merely a partial return of previous command authority. Concurrent jurisdiction<sup>176</sup> for capital common-law offenses in time of war was expressly added to military jurisdiction in 1863 when the armed forces were in constant movement.<sup>177</sup> Military jurisdiction eventually included crimes committed by the civilian populace because of the uncertain existence of courts on the frontiers or near the battlefield during the Civil War.<sup>178</sup> Given this significant expansion of military capital authority, President Lincoln's use of executive approval substantiates that "[c]onveying larger values and ideals . . . or apprising generals as to the political stakes involved" is as important as supervising the military operations.<sup>179</sup>

This lesson was forgotten until entry into World War I and the accompanying expansion of military jurisdiction<sup>180</sup> revealed the military justice system's fatal flaw: supremacy of military command.<sup>181</sup>

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for maintenance. Parliament then delegated the power to govern the military to the Crown. *Id.* at 160. Members of these forces were generally volunteers. *Id.* at 157–60. Prior to 1660, desertion was handled in the civil courts but the obligation to serve in the military was transferred to the court-martial in 1660. *Id.* at 160. In order to maintain the large numbers of troops, governments needed disciplined but willing volunteers, or in the event of conscription, political support for military service without domestic unrest over the forced service. *Id.*

<sup>176</sup> Concurrent jurisdiction allows prosecution by federal, military, or state authorities. *See generally* Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 116 (1997) (describing background, analysis and provisions of federal exclusive jurisdiction).

<sup>177</sup> O'Connor, *supra* note 161, at 190 (referencing Article 58, as amended by the Act of March, 3, 1863).

<sup>178</sup> *See generally* SANDBURG, *supra* note 172, at 336–42 (presenting experiences of Union generals in frontier and border states reveals turmoil driving changes in military justice). Control over secessionist areas by martial law was intended to stop marauding guerrilla forces but countering the actions of anti-Union politicians in those areas became just as vital a security issue, requiring military success to be tempered with diplomatic savvy. *Id.*

<sup>179</sup> Hanson, *supra* note 147, at 230.

<sup>180</sup> Capital common-law offenses became punishable at all times with the exception of murder and rape committed in the United States. *See* Articles of War of 1916, ch. 418, sec. 3, arts. 92, 93, 39 Stat. 664.

<sup>181</sup> Morgan, *supra* note 1, at 67.

To maintain this principle, military command dominate[d] and control[ed] the proceedings from its initiation to the final execution of the sentence. While the actual trial [had] the semblance of a judicial proceeding and [was] required to be conducted pursuant to the forms of law, in its essence it is a mere administrative investigation; for the final determination whether the trial [had] been

Command authority over military capital sentences remained intact until 1 February 1949.<sup>182</sup> As such, as long as the military stayed within its jurisdictional limits, “the civil courts [were] without power to interfere with its proceedings, findings or sentence.”<sup>183</sup> Professor Morgan, two decades before leading the congressional overhaul of military justice, recognized the philosophical hurdles to fixing it: “[T]he military theory prevails and will continue to prevail until changed by legislation.”<sup>184</sup> It was not corrected and was even further exacerbated during World War II. Under the Articles of War, approval of death sentences was delegated,<sup>185</sup> resulting in thirty-five executions during World War I<sup>186</sup> and another 141 executions during World War II.<sup>187</sup>

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legally and properly conducted [lay] not with a judicial body or officer but with the military.

*Id.* at 66.

<sup>182</sup> ALYEA, *supra* note 22, at 32–33 (noting that “[t]he former provisions authorizing wartime commanding generals in the field to confirm . . . sentences of death for murder, rape, mutiny, desertion and spying [are repealed].”).

<sup>183</sup> Morgan, *supra* note 1, at 67 (citations omitted). Civilian authorities retained primary jurisdiction over Soldiers accused of civilian offenses of murder and rape in time of peace, but capital military offenses were the exclusive province of the commander. Articles of War 1916, art. 74, 39 Stat. 662.

<sup>184</sup> Morgan, *supra* note 1, at 67. Legislation was proposed after World War I that Professor Morgan stated, if passed *in toto*, would “revolutionize the court-martial system.” *Id.* With a balanced perspective, he noted many of the evils the proposed legislation was “designed to mitigate or prevent [had] already been recognized by the War Department, which [had] issued regulations intended to remedy or obviate them, without, however, surrendering, or even materially impairing the military theory of the character and functions of [courts-martial].” *Id.*

<sup>185</sup> In addition to commander approval, during World War II presidential approval authority on death sentences was delegated to the Secretary of War because of the intensity of other presidential duties. *See* Exec. Order No. 9,556, 10 C.F.R. 6151 (1945). Specific authority to approve death sentences was delegated because “the burden of duties upon the President is becoming increasingly heavy because of the pressure of war conditions.” *Id.*

<sup>186</sup> Minutes of Judge Advocates Conference, University of Michigan, pt. I at 20 (May 1945) [hereinafter Judge Advocates Conference]. Of these executions, twenty-five occurred in the United States and ten occurred in France. “[T]wo were for murder, nineteen for murder and mutiny, eleven for rape, three for rape and murder.” *Id.* In the interwar years, there were only three executions, “all of whom were executed for murder.” *Id.*

<sup>187</sup> *See Congressional Floor Debate on Uniform Code of Military Justice*, 95 CONG. REC. 4120, at 19 (1949) (statement of Cong. Vinson); *see also Committee on Military Affairs, House of Representatives*, 79th Cong. 2d Sess. (1949). “During the period December 7, 1941, to February 22, 1946, 141 death sentences adjudged by Army courts martial were carried into execution; 71 for murder, 51 for rape, 18 for murder and rape, 1 for desertion.” *Id.* at 3. While the bulk of World War I executions occurred in the United

This large number of executions coupled with lingering public disdain over ignoble instances like the 1917 mass execution of ten black Soldiers on the day after their military trial<sup>188</sup> aroused strong opposition. Public condemnation was not limited to capital courts-martial, for the public denounced the conduct of military justice in general.<sup>189</sup> The primary faults were an inadequate number of attorneys and no independent legal review process<sup>190</sup> to mitigate commanders' ability to exert undue influence over the proceedings.<sup>191</sup> Americans demanded greater civilian control<sup>192</sup> and this led to the current system. Congress

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States, during World War II, only twenty-three cases were carried out in the United States. See Judge Advocates Conference, *supra* note 186, at 20.

<sup>188</sup> LURIE, *supra* note 163, at 69. See generally 58 CONG. REC. 6495 (statement of Sen. Chamberlain) (discussing Texas execution of ten men two days after their court-martial, but case not reviewed by Army until four months later, leading to War Department order to cease all executions until reviewed by the President); Rowland Thomas, *The Thing that Is Called Military Justice—Concrete Official Evidence Which Establishes that United States Military Courts-Martial Indorse and Approve of Oppression and Arbitrarily Impose Gross Injustice*, N.Y. WORLD, Jan 19, 1919, in 58 CONG. REC. 57, pt. 3, at 2108–13 (discussing Texas execution and similar military executions in Europe during World War I.).

<sup>189</sup> See ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 9 (1956).

When Johnny came marching home again from World War II, he brought with him numerous complaints about the justice as then dispensed by the Army and the Navy. Many of these were prompted by a conviction that the administration of military justice had not always lived up to the goals of fairness and impartiality which were accepted as part of the American legal tradition. Other complaints may merely have reflected the basic maladjustment to military life of the person complaining.

*Id.*; see also Kenneth C. Royall, *Revision of the Military Justice Process as Proposed by the War Department*, 33 VA. L. REV. 269 (1947). Near the end of World War II, the War Department created a Clemency Review Board chaired by former U.S. Supreme Court Justice, the Honorable Owen J. Roberts, “to equalize sentences for similar offenses, and to eliminate excessive sentences, which had been adjudged under the stress of combat . . .” *Id.* at 279.

<sup>190</sup> See generally Colonel Samuel T. Ansell, *Military Justice*, 5 CORNELL L.Q. 1 (1919).

<sup>191</sup> *Id.* at 16 (noting “vices of the present system, which Congress ought to at once remedy”).

<sup>192</sup> UNIFORM CODE OF MILITARY JUSTICE INDEX AND LEGISLATIVE HISTORY HH 597 (1950) [hereinafter UCMJ INDEX] (statement of James Forrestal, Secretary of Defense).

Another problem faced by the [UCMJ] committee was to devise a code which would insure the maximum amount of justice within the framework of a military organization. [T]he point of proper accommodation between the meting out of justice and the . . .

regulates the land and naval forces<sup>193</sup> and as such enacted the UCMJ<sup>194</sup> akin to federal and state criminal procedures,<sup>195</sup> thereby instituting significant protections.<sup>196</sup> The primary changes expanded the Judge Advocate General's Corps, established two legal review systems, one of which is composed entirely of civilian judges,<sup>197</sup> and eliminated commander approval of death sentences to allow the President an opportunity to correct perceived injustices.<sup>198</sup>

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winning of wars-is one which no one has discovered . . . Suffice it so say we are striving for maximum military performance and maximum justice.

*Id.*

<sup>193</sup> U.S. CONST. art. I, § 8, cl. 14; *see also* PECKHAM & SHERMAN, *supra* note 26, at 1–3 (citing M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911), wherein the drafters feared state militias that were not subjected to uniform discipline would be an ineffective fighting force as evidenced by episodes in the American Revolution).

<sup>194</sup> UCMJ ch. 169, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–940 (1994) (originally codified as 10 U.S.C. subtit. A, pt. II, ch. 47)); *see also* Pub. L. No. 81-506, 64 Stat. 108 (1950).

<sup>195</sup> UCMJ INDEX, *supra* note 192, at HH 599–600 (statement of Professor Edmund Morgan, Chairman of the Drafting Committee of House Resolution 2498, the proposed Uniform Code of Military Justice).

Our directive . . . was to create a code that would be applicable to all the armed forces . . . [and] operate uniformly . . . phrase[d] in modern legislative language [and] understandable to laymen and to civilian lawyers as well as to men learned in military law . . . [t]here will be the same law and the same procedure governing all personnel in the armed services [and as] all persons in this country are subject to the same Federal laws and triable by the same procedures in all Federal courts, so it will be in the armed forces.

*Id.*

<sup>196</sup> *See also* O'Connor, *supra* note 160, at 180. The adoption of federal civilian procedures is apparent when examining the foundations for the rules of evidence and procedure. For example, the provision stating the purpose and construction of the rules of evidence, Military Rule of Evidence 102, “is taken without change from Federal Rule of Evidence 102.” *See* MCM, *supra* note 5, MIL. R. EVID. 102 analysis, at A22-2.

<sup>197</sup> *See* LURIE, *supra* note 163, at 214–57.

<sup>198</sup> *Sundry Legislation Affecting the Naval and Military Establishments: Hearings Before the H. Comm. on Armed Servs.*, 80th Cong. 2069 (containing Volume I of the Subcommittee Hearings on H. R. 2575 held in April 1947) (statement of Hoover) (“When you exercise the confirming power, you have the power to correct injustices that appear from any source. You can disapprove a sentence merely by the exercise of the discretionary power [to act upon] . . . cases in which, although the sentences are legally supported by the records, it appears that the sentences are too harsh or that they are unjust.”).

## 2. *Politics and a Lack of Time Limits Veto Presidential Approval*

Article 71(a) demands the President review the case, and where appropriate, approve the sentence. It does not require approval to be completed in any particular methodology or time. The presidential approval process is triggered following a final judgment of the legality of the death sentence.<sup>199</sup> The Judge Advocate General of the Army (TJAG) shall transmit the entire case, along with a specific recommendation, to the Secretary of the Army (SecArmy),<sup>200</sup> who *may*, at his *discretion*, make a written recommendation to the President.<sup>201</sup> The case is then forwarded to the Secretary of Defense (SecDef)<sup>202</sup> to do likewise. This part of the process is a recent amendment to the Rules for Courts-Martial.<sup>203</sup> The case is then sent to the President.<sup>204</sup>

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<sup>199</sup> UCMJ art. 71(c)(1) (2008).

<sup>200</sup> See generally Headquarters, Dep't of Army, Gen. Order No. 3 (9 July 2002) (assignments of functions and responsibilities within Headquarters, Department of the Army). The Secretary of the Army (SecArmy) is the senior official of the Department of the Army and responsible for the effective and efficient functioning of the Army. 10 U.S.C.S. § 3013 (LexisNexis 2008).

<sup>201</sup> See generally MCM, *supra* note 5, R.C.M. 1204(c)(2) & (4), 1205(b), 1207. The specific items are the record of trial, the decision of the Court of Criminal Appeals, the decision of the Court of Appeals for the Armed Forces, the decision of the Supreme Court, and "any clemency petition by the prisoner and/or counsel." U.S. DEP'T OF ARMY, REG. 190-55, U.S. ARMY CORRECTIONS SYSTEM: PROCEDURES FOR MILITARY EXECUTIONS ¶ 2-1a (17 Jan. 2006) [hereinafter AR 190-55]. If the President commutes the death sentence, the SecArmy "may remit or suspend any part or amount of the unexecuted portion of the sentence." MCM, *supra* note 5, R.C.M. 1206(b)(3).

<sup>202</sup> The SecDef is the principal defense policy adviser to the President and is responsible for the formulation of general defense policy and policy related to all matters of direct concern to the DOD, and for the execution of approved policy. U.S. Department of Defense, Top Civilian and Military Leaders, *available at* <http://www.defenselink.mil/osd/topleaders.aspx> (last visited May 1, 2008). The SecDef is advised on all legal matters and services by the General Counsel of the Department of Defense (DOD GC), who is by law the Chief Legal Officer of the Department. 10 U.S.C. § 140 (2000). The DOD GC has delegated primary responsibility for review of capital courts-martial to the Associate Deputy General Counsel for Military Justice and Personnel Policy. Telephone Interview with Major Alison Martin, Chief, Operations & Training Branch, Criminal Law Division, Office of the Judge Advocate General, U.S. Army (Mar. 13, 2007) [hereinafter Martin Interview].

<sup>203</sup> See Notices of Proposed Revisions to the Manual for Courts-Martial, 71 Fed. Reg. 78,137, 78,139 (proposed Dec. 28, 2006):

(j) R.C.M. 1204(c)(2) is amended by inserting the following at the end of the sentence:

(c) Action of decision by the Court of Appeals for the Armed Forces.  
(2) Sentence requiring approval of the President. If the Court of Appeals for the Armed Forces has affirmed a sentence which must be

The approval requirement<sup>205</sup> used to serve an important function, to give Americans confidence that the American military was subject to the rule of law.<sup>206</sup> At the time the provision was drafted, the new civilian oversight court was in its infancy and there was no direct access to the Supreme Court or the federal court system.<sup>207</sup> During the formulation of this provision, the legislators clearly never foresaw such extensive appeals and delays. At the congressional hearings, the chairman for whom the bill leading to the UCMJ was named after remarked, “[i]t might be that the President would want to review the case a little longer and suspend it for 30 or 60 days until he has an opportunity to thoroughly investigate all the facts.”<sup>208</sup>

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approved by the President before it may be executed, the Judge Advocate General shall transmit the record of trial, the decision of the Court of Criminal Appeals, the decision of the Court of Appeals for the Armed Forces, and the recommendation of the Judge Advocate General to the Secretary concerned, who, *at his discretion, may* provide a recommendation. All courts martial transmitted by the Secretary concerned, other than the Secretary of the Department of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, for the action of the President shall be transmitted to the Secretary of Defense, who, *at his discretion, may* provide a recommendation.

(emphasis added). There were no public comments on the proposed rule. Telephone Interview, Lieutenant Colonel Peter Yob, Chief, Policy Branch, Criminal Law Division, Office of the Judge Advocate General’s Corps, U.S. Army (Jan. 26, 2007). This amendment is now in force in the 2008 *Manual for Courts-Martial*. MCM, *supra* note 5, R.C.M. 1204(c)(2). It is an example of how the capital courts-martial approval process is modified by internal regulations not initially required by the congressional committee that drafted the UCMJ.

<sup>204</sup> Cf. SULLIVAN, *supra* note 13, at 143–44 (arguing that UCMJ Article 74 gives Secretaries direct clemency power over death sentences).

<sup>205</sup> UCMJ art. 71(a) (2008).

<sup>206</sup> “It is very important for American citizens to be convinced that when they serve in the United States Army they will be ruled by a system of justice which is not less scrupulous and fair than that which prevails in civil life.” INVESTIGATIONS OF THE NATIONAL WAR EFFORT: REPORT OF THE COMMITTEE ON MILITARY AFFAIRS HOUSE OF REPRESENTATIVES, SEVENTY-NINTH CONGRESS, 2ND SESSION, PURSUANT TO H. RES. 2, A RESOLUTION AUTHORIZING THE COMMITTEE ON MILITARY AFFAIRS TO STUDY THE PROGRESS OF THE NATIONAL WAR EFFORT, JUNE 1946, at 1 [hereinafter INVESTIGATIONS].

<sup>207</sup> See generally Captain Dwight Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death*, 144 MIL. L. REV. 1 (1994) (explaining progression of access to federal courts).

<sup>208</sup> UCMJ INDEX, *supra* note 192, at HRH 1199 (discussing Article 71(d) which provides that a death sentence may not be suspended).

Before they reach the President, these cases may be delayed by competing military missions but are more likely to languish in the inboxes of at least two political appointees.<sup>209</sup> Political appointees may come and go, but politics remains a permanent institution; there is simply

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Mr. Elston. Why do they provide that they can't suspend a death sentence?

Mr. Larkin. Well, I think it would be cruel and unusual, wouldn't it to suspend a death sentence, have a man continue under a death sentence the execution of which is suspended.

Mr. Elston. *Well, they might suspend it for 30 days. They do it in civil courts, until the governor has a chance to review the case. It might be that the President would want to review the case a little longer and suspend it for 30 or 60 days until he has an opportunity to thoroughly investigate all the facts.*

Mr. Larkin. Oh, I think he has that opportunity clearly, because it can't be executed until he approves it. So rather than having him go through the formality of suspending the execution of it, it is in effect suspended from the very beginning until he in his own good time does approve it. I think it is the same thing.

Mr. Elston. *Then, he does have the power to suspend the execution of the sentence for a short period of time?*

Mr. Larkin. *To be specifically technical, rather than to suspend it, why it is in a state of suspense until he approves it, you see.*

Mr. Elston. What I mean is this: When a death sentence is given in the Army who fixes the date of execution?

Colonel Dinsmore. The commanding general in the area, Mr. Elston.

Mr. Elston. Well, suppose the date of execution of the sentence is just a day or so after the case gets to the President and he wants more time.

Colonel Dinsmore. Oh, no; he can't do that, sir. He can't fix the date of the sentence. Let me remind you, a case has to *go all the way through the judicial process and to the President*. Now going back for a moment to your first question, *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.

Mr. Elston. Oh. That is what I wasn't clear about.

Colonel Dinsmore. Then that mandate goes back and some convenient time is fixed.

Mr. Elston. That answers my question.

Colonel Dinsmore. The President doesn't undertake to say when they have to do it, because it is a matter of local conditions.

Mr. Larkin. And there is no date set before he gets it.

*Id.* (emphasis added).

<sup>209</sup> See 10 U.S.C.S. § 113(a) (LexisNexis 2008). There is a Secretary of Defense, who is the head of the Department of Defense appointed from civilian life by the President, by and with the advice and consent of the Senate; see also 10 U.S.C. § 3013(a)(1). There is a Secretary of the Army, appointed from civilian life by the President and with the advice and consent of the Senate. The Secretary is the head of the Department of the Army. *Id.*



too much bureaucracy in post-appellate review.<sup>210</sup> What is the impetus for these government officials to prioritize their responsibilities in the approval process and carry them out expeditiously? Is this some of the mud in the works that needs to be washed out to stop delays which allow defendants to constantly avail themselves of evolving capital litigation precedents?<sup>211</sup> The intent behind adding these political appointees may be to ensure that review remains with those responsible for overseeing and employing the military,<sup>212</sup> even if they have no particular expertise on the matter.<sup>213</sup> Nonetheless, adding open-ended,<sup>214</sup> non-judicial<sup>215</sup>

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<sup>210</sup> LURIE, *supra* note 163, at 193.

<sup>211</sup> See generally Kevin Anderson, *US 'Whittling Away at Death Penalty*, BBC NEWS, Mar. 3, 2005, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/4314207.stm>.

<sup>212</sup> *Sundry Legislation Affecting the Naval and Military Establishments: Hearings Before the H. Comm. on Armed Servs.*, 80th Cong. 4425 (1947) (containing Volume II of the Full Committee Hearings on H. R. 2964, 3417, 3735, 1544, 2993, 2575, July 15, 1947) (statement of General Dwight D. Eisenhower, U.S. Army Chief of Staff) (discussing with Congress why final approval should not rest with the Judge Advocate General if that person is not under the chain of command in the military).

When [a capital case] finally gets into the War Department and it is reviewed . . . [i]t has to be legally sufficient, in accordance with the rules of evidence and all the rest of it . . . . But when it comes to the mitigating of that sentence I say it has got to be in the chain of authority, to be done by someone that has some responsibility for winning the war, and not just sitting on the outside.

*Id.* at 4424.

<sup>213</sup> SUN-TZU, *THE ART OF WAR* 81 (Samuel B. Griffith trans., Oxford Univ. Press 1963) (ca. 500 B.C.). A simple way in which a ruler can bring misfortune upon his army is when ignorant of military affairs, to participate in their administration and thereby cause confusion. *Id.*

<sup>214</sup> This proposed amendment contains neither timelines for completing the recommendation nor timelines to deliver the entire matter to the President for action. See Notices of Proposed Revisions to the Manual for Courts-Martial, 71 Fed. Reg. 78,139 (proposed Dec. 28, 2006).

<sup>215</sup> The present involvement of the Secretaries harkens back to the same flaws seen in 1919 where the Secretaries and the top military commanders exercised significant discretion.

The President and the appointing authorities respectively usually follow the advice of the Judge Advocate General, but they are not obliged so to do, and in some instances they disregard it. It must be understood that the Judge Advocate General's opinion does not go directly to the President but is transmitted through the Chief of Staff and the Secretary of War, who submit their recommendations thereon. The system then is clearly one of review by superior

review delays finality, especially when the military courts presume continuing jurisdiction.

3. *Delays in Private Loving's Case Prove Article 71(a) is a Relic.*

Between 1996 and 1998, a variety of political and circumstantial factors prevented the Army from receiving a recommendation from the Department of the Army (DA) on PVT Loving's death sentence in order to deliver the file to the President. On 22 November 1993, the Honorable Togo D. West was sworn in as the Secretary of the Army following Senate confirmation of his appointment by President William J. Clinton.<sup>216</sup> The SecArmy is the senior official of the DA and responsible for the effective and efficient functioning of the Army and has all authority to conduct the affairs of the DA.<sup>217</sup> In 1996, the Army forwarded PVT Loving's case through the DA General Counsel (GC) to the SecArmy.<sup>218</sup> The GC is the chief legal officer of the DA and the legal counsel to the SecArmy.<sup>219</sup> The GC determines the DA position on any legal question and serves as point of contact for legal matters between the DA and the Office of the General Counsel, Department of Defense (DOD), and the general counsel offices of the other Services and federal agencies.<sup>220</sup> The SecArmy did not write a recommendation and took no action on PVT Loving's case between the Supreme Court decision on 3 June 1996 and the CAAF issuance of a stay on 5 November 1996.<sup>221</sup> The TJAG was not informed why the SecArmy did not take action on the case; however, several defense motions to CAAF

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military authority, which may, but need not, ask or follow the opinion of legal advisers, and is in no respect judicial.

Morgan, *supra* note 1, at 64–65 (citations omitted).

<sup>216</sup> See U.S. Army Center of Military History, <http://www.army.mil/cmh-pg/books/sw-sa/West.htm> (Mar. 13, 2001) [hereinafter *Military History*].

<sup>217</sup> Headquarters, Dep't of Army, Gen. Order No. 3 (9 July 2002) (Assignments of Functions and Responsibilities within Headquarters, Department of the Army) (referencing 10 U.S.C.S. § 3013 (LexisNexis 2008)) [hereinafter *DA Responsibilities*].

<sup>218</sup> Interview with Major General (MG) (Retired) John Altenburg, formerly The Deputy Judge Advocate General, U.S. Army, in Springfield, Va. (15 Mar. 2007) [hereinafter *Altenburg Interview*]; see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 543(a)(2), 122 Stat. 114 (2008) (amending 10 U.S.C. § 3037 by redesignating The Assistant Judge Advocate General as The Deputy Judge Advocate General).

<sup>219</sup> See *DA Responsibilities*, *supra* note 217, ¶ 10.

<sup>220</sup> *Id.* ¶ 10m.

<sup>221</sup> Altenburg Interview, *supra* note 218.

may have caused officials to delay action that might have been affected by pending CAAF opinions.<sup>222</sup>

Additional delay resulted from the actions of the SecArmy assistants. For example, the Assistant Secretary of the Army (ASA) for Manpower and Reserve Affairs (M&RA)<sup>223</sup> believed that approving the action on death sentence cases was among the SecArmy authorities delegated to her, thereby further delaying a recommendation and transfer to the President.<sup>224</sup> Also, during the middle and late 1990s the DA debated several procedural issues related to the death penalty. The ASA(M&RA) and others believed the Army should “outsource” executions to the U.S. Bureau of Prisons.<sup>225</sup> Others within the DA believed that the Army should effect its own executions at the U.S. Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas. Such debates affected the plans and delayed the building of the new USDB until the DA resolved that it should include a death chamber.<sup>226</sup> Another issue was that legal counsel within the DA had differing opinions on capital punishment; some opposed the death penalty in principle.<sup>227</sup>

Moreover, public sentiment that the military ranks were populated by racists gave pause to the SecArmy on recommending the execution of a black Soldier when two white Soldiers convicted in state court for murder were not sentenced to death. On 7 December 1995, in Fayetteville, North Carolina, three Soldiers assigned to the 82d Airborne Division at Fort Bragg shot and killed a black couple in a racially motivated hate crime.<sup>228</sup> The Soldiers were members of a white supremacist group; a North Carolina court sentenced them to life in prison on 12 May 1997.<sup>229</sup> The slayings led the SecArmy to undertake a service-wide investigation into racism in the military.<sup>230</sup> Nonetheless, regardless of the reasons for inaction by the politically appointed civilian

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<sup>222</sup> *Id.*

<sup>223</sup> See DA Responsibilities, *supra* note 217, ¶ 9 (listing the five ASA who report to the SecArmy). The ASA(M&RA), in coordination with the DAGC, has the principal responsibility for setting the strategic direction and providing the overall supervision for military justice matters. *Id.*

<sup>224</sup> Altenburg Interview, *supra* note 218.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See *State v. Burmeister*, 506 S.E.2d 278 (N.C. Ct. App. 1998).

<sup>229</sup> *Id.*

<sup>230</sup> See generally Kevin Sack, *Army Report Says Racist Groups Aren't Problem at Ft. Bragg*, N.Y. TIMES, Dec. 23, 1995, at 1–7.

leadership of the Army, CAAF's grant of oral argument and issuance of a stay in the proceedings on 5 November 1996 stalled any executive action on PVT Loving's case.<sup>231</sup>

Between 1998 and 2003, a variety of political and circumstantial factors also prevented the Army from receiving a recommendation from the DA on PVT Loving's death sentence in order to deliver the file to the President. On 2 July 1998, the Honorable Louis E. Caldera was sworn in as the SecArmy following Senate confirmation of his appointment by President Clinton.<sup>232</sup> The SecArmy retained PVT Loving's case file after the CAAF opinion on 26 February 1998.<sup>233</sup> The SecArmy returned the case file to the Army without a recommendation after the Supreme Court denial of certiorari on 7 December 1998.<sup>234</sup> Upon returning the file, an assistant to Secretary Caldera stated that it was preferable to delay a decision and recommendation until there was a political advantage to be gained.<sup>235</sup> The Army TJAG simply wanted a recommendation one way or the other so the case could be forwarded to the President for decision.<sup>236</sup>

Additional complicating factors outside of the DA delayed approval of PVT Loving's sentence. First, the Army provided the Department of Justice (DOJ) with PVT Loving's case file to allow them to review it and present the President advice or recommendations on the death sentence.<sup>237</sup> The intent was not to create a formal requirement for DOJ review, but to avoid any delay once the case was delivered to the President as he would likely seek input from the DOJ.<sup>238</sup> The DOJ did not provide a formal response or recommendation on PVT Loving's death sentence prior to the terrorist attacks on 11 September 2001, and has not since.<sup>239</sup>

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<sup>231</sup> See *Loving v. Hart*, 46 M.J. 180 (1996).

<sup>232</sup> Military History, *supra* note 216.

<sup>233</sup> Altenburg Interview, *supra* note 218.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Interview with Colonel Lawrence J. Morris, former Deputy Chief, Office of the Judge Advocate General, Criminal Law Division, U.S. Army, in Charlottesville, Va. (27 Mar. 2007). In an abundance of caution, the Army sent the case to DOJ in the late 1990s in light of the DOJ review of the last capital court-martial sent to the President in 1962. *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

Second, PVT Loving's case sat inactive under Secretary Caldera. When he left office on 20 January 2001, further political factors inhibited action—delay in approval of the next SecArmy and the appointment of a new SecDef. On 20 January 2001, President Bush was sworn into office and Gregory Dahlberg became acting SecArmy until 5 March 2001.<sup>240</sup> He was replaced by Joseph Westphal as acting SecArmy until 31 May 2001, when he was replaced by the Honorable Thomas E. White.<sup>241</sup> On 20 January 2001, the Honorable Donald H. Rumsfeld became the SecDef.<sup>242</sup> Under the direction of the President, the SecDef exercises authority, direction, and control over the DOD.<sup>243</sup> Secretary Rumsfeld wanted to insert the DOD into the death sentence approval loop prior to DOJ review.<sup>244</sup> He also indicated a desire to make specific changes to the approval process such as providing the family of the victims an opportunity to appear before the SecDef or the President.<sup>245</sup> Possibly, his decision to insert the DOD into the approval loop may have simply reflected Secretary Rumsfeld's philosophy that he had broad authority to conduct DOD matters.<sup>246</sup>

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<sup>240</sup> See generally U.S. Army, Former Under Secretaries of the Army, <http://www.army.mil/leaders/leaders/sa/index.html> (last visited May 1, 2008).

<sup>241</sup> *Id.*

<sup>242</sup> See DefenseLink, Special Reports, [http://www.defenselink.mil/specials/secdef\\_histories/bios/rumsfeld.htm](http://www.defenselink.mil/specials/secdef_histories/bios/rumsfeld.htm) (follow "SecDef Histories" hyperlink; then follow "Donald Rumsfeld" hyperlink) (last visited May 1, 2008) [hereinafter Rumsfeld History].

<sup>243</sup> See DefenseLink, Defense Department, Top Leaders, <http://www.defenselink.mil/osd/topleaders.aspx> (last visited May 1, 2008) (referencing 10 U.S.C.S. § 113 (LexisNexis 2008)) (stating that the SecDef is the principal defense policy adviser to the President and is responsible for the formulation of general defense policy and policy related to all matters of direct concern to the Department of Defense, and for the execution of approved policy).

<sup>244</sup> Altenburg Interview, *supra* note 218.

<sup>245</sup> *Id.* Attempting to insert victims into the approval loop likely reflects Secretary Rumsfeld's recognition of the public outrage arising from President Clinton's grant of clemency to sixteen felons who belonged to the violent Puerto Rican separatist organization called the Armed Forces for National Liberation (known by its Spanish initials, FALN). See S. REP. NO. 106-231, at 232 (2000) (discussing The Pardon Attorney Reform and Integrity Act; legislation aimed at reforming Office of Pardon Attorney investigation procedures for potential grants of executive clemency as necessitated by inadequacy of DOJ regulations which fail to address the legitimate concerns of victims and law enforcement as demonstrated by events leading to President Clinton's grant of clemency on 11 August 1999 to persons who planted bombs in 130 locations in the United States that killed six people).

<sup>246</sup> His philosophy may be based upon his prior experience as SecDef under President Gerald Ford from 1975–1977 and the fact that the Vice-President, Richard Cheney, was formerly the SecDef under President George H.W. Bush. See generally Rumsfeld History, *supra* note 242.

Third, delay in delivering PVT Loving's case to the President after September 11th is understandable given the dramatic shift in military operations following the terrorist attacks on the United States.<sup>247</sup> Prior to PVT Loving's filing the motions which led to the current remand, the Army started preparing for Operation Iraqi Freedom, which commenced on 20 March 2003.<sup>248</sup> Acknowledging these military operations respects the fact that commanders and civilian leadership of the military have duties that compete with resolution of military justice. However, the relevance of these duties further supports removing executive officials from the post-appellate approval process, except to grant clemency.<sup>249</sup>

#### B. Continuing Subject Matter Jurisdiction Is Unjustified

Before the presidential approval process, an accused is entitled to unique<sup>250</sup> direct and unitary<sup>251</sup> legal review of his death sentence in two separate courts. The military capital litigation system's problems of bureaucratic sloth during presidential approval are compounded by judicial vigor in legal review.<sup>252</sup> Therefore, in addition to the obvious

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<sup>247</sup> See U.S. Dep't of Defense, <http://www.defenselink.mil/home/features/2006/9-11/index.html> (last visited May 1, 2008) (noting terrorists hijacked a commercial jetliner and crashed it into Pentagon, Department of Defense headquarters; this attack followed similar attacks on twin towers of World Trade Center in New York City); see also Press Release, The White House, Presidential Address to the Nation (Oct. 7, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> (discussing start of military operations in Afghanistan against Al Qaeda and the Taliban to eliminate terrorist bases and training camps and to attack the military capability of the Taliban).

<sup>248</sup> Press Release, The White House, President Bush Addresses the Nation (Mar. 29, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html>.

<sup>249</sup> See, e.g., Fidell, *supra* note 21, at 361. "Even if commanders retain their central role in the administration of justice, there needs to be further attention to where military justice fits among the matters that compete for the time, resources, and attention of [commanders] on whom we increasingly rely in this era." *Id.* at 366.

<sup>250</sup> See Sullivan, *supra* note 13, at 19 ("[T]he military justice system is one of only two jurisdictions in the United States that provide two levels of mandatory appeals for capital cases."). Only Tennessee requires two levels of mandatory review. *Id.* at 20 n.60 (referencing TENN. CODE ANN. § 39-13-206(a)(1) (2003)).

<sup>251</sup> See Sullivan, *supra* note 207, at 3 (explaining appeals at the service courts function as direct review). Other states follow a "bypass" system where the case goes to the highest criminal court of the state; yet, these states also have a post-conviction process too. See Sullivan, *supra* note 13, at 21 n.68.

<sup>252</sup> See Sullivan, *supra* note 207, at 3 (noting an eight year "average capital appellate delay . . . [to complete] direct, post-conviction, and federal habeas" review).

burdens of continuing and successive appeals, excessive delay while awaiting presidential approval may generate sentence relief for an accused.

### *1. Capital Courts-Martial Undergo Significant Legal Review*

The TJAG must refer the record of all death sentence cases to the Army Court of Criminal Appeals (ACCA).<sup>253</sup> The unique jurisdiction of the service courts of criminal appeals includes fact-finding powers.<sup>254</sup> The ACCA “may affirm only such findings of guilt and . . . such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.”<sup>255</sup> Jurisdiction continues until the accused petitions the CAAF.<sup>256</sup>

The CAAF has jurisdiction to review all death sentences affirmed by the court of criminal appeals.<sup>257</sup> The CAAF does not have fact-finding powers and can only examine matters of law.<sup>258</sup> Furthermore, it may not reassess the sentence, but may direct the service courts to reassess an improper sentence.<sup>259</sup> After the CAAF affirms the death sentence, the Supreme Court may review it on a very limited basis upon a petition for a writ of certiorari.<sup>260</sup>

Previously, if the CAAF had not resolved the case, the Soldier could not petition for certiorari review and must instead rely on collateral federal review.<sup>261</sup> The Military Justice Act of 1983 changed that by giving an accused the opportunity to petition for certiorari in any case

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<sup>253</sup> UCMJ art. 66(b)(1) (2008); *see also* MCM, *supra* note 5, R.C.M. 1203. Each military service has a court of criminal appeals.

<sup>254</sup> DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 1068 nn.16–18 (6th ed. 2005) (referencing RCM 1203(b) discussion).

<sup>255</sup> UCMJ art. 66(c).

<sup>256</sup> SCHLUETER, *supra* note 254, at 1067 n.15 (referencing RCM 1203(d)(2) discussion).

<sup>257</sup> *See* UCMJ art. 67(a)(1); *see also* MCM, *supra* note 5, R.C.M. 1204.

<sup>258</sup> SCHLUETER, *supra* note 254, at 1078 n.16 (referencing UCMJ art. 67(d)).

<sup>259</sup> *Id.* at 1078 nn.20, 23.

<sup>260</sup> 28 U.S.C.S. § 1259 (LexisNexis 2008); UCMJ art. 67(a); *see also* MCM, *supra* note 5, R.C.M. 1205. The Supreme Court is directly available to a convicted servicemember through petition of writ of certiorari “except to challenge CAAF’s refusal to grant a petition for review.” *See* 2 FRANCIS A. GILLIGAN, *COURT-MARTIAL PROCEDURE* 161 n.234 (1991) (referencing art. 67a(a)).

<sup>261</sup> *See* GILLIGAN, *supra* note 260, at 180 n.5.

reviewed by the CAAF.<sup>262</sup> As such, Supreme Court access “is still tightly controlled . . . . In all probability [the Court] will accept only those few cases of extraordinary importance to the military criminal justice system.”<sup>263</sup> Following any action by the Supreme Court, unless the case is returned to the CAAF, the TJAG shall forward the case through the SecArmy to the President.<sup>264</sup>

Federal civil courts have habeas corpus jurisdiction over military capital cases, just as in federal civilian capital cases, to issue writs to prisoners “in custody under . . . the authority of the United States.”<sup>265</sup> When habeas relief will not result in prompt release, the petition is premature.<sup>266</sup> However, if “[p]ostponing a collateral challenge creates the risk of prejudice . . . because of failing memories, death of key witnesses, and other problems caused by stale proceedings” and robs the applicant of an opportunity to vacate the conviction or sentence before actually serving it, the petition is ripe.<sup>267</sup> Thus, an accused may be able to successfully petition for federal habeas relief based upon the length of the delay caused by awaiting presidential approval.

## 2. *Finality of Legal Review Required Before Article 71(a) Approval*

Capital courts-martial have many reasons for post-trial delay.<sup>268</sup> For an accused facing a capital sentence, inability to waive post-trial review

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<sup>262</sup> See The Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405–06 (codified as 28 U.S.C. § 1259 (2000)); see also UCMJ arts. 67(a), 71(c)(1) (2008); MCM, *supra* note 5, R.C.M. 1205. By providing for Supreme Court issuance of writs of certiorari, “Congress did not intend thereby to reduce the independence of the military courts: ‘the Court of Military Appeals will remain the primary source of judicial authority under the Uniform Code of Military Justice.’” *Williams v. Sec’y of Navy*, 787 F.2d 552, 560 (Fed. Cir. 1986) (citations omitted).

<sup>263</sup> See GILLIGAN, *supra* note 260, at 160. This restrictive jurisdictional grant is evident from the selective review of PVT Loving’s numerous petitions. See *supra* Pt. II.

<sup>264</sup> MCM, *supra* note 5, R.C.M. 1205(b).

<sup>265</sup> See Sullivan, *supra* note 208, at 8 (citing 28 U.S.C. § 2241 (1988), and *Burns v. Wilson*, 346 U.S. 137, 139 & n.1 (1953)).

<sup>266</sup> GILLIGAN, *supra* note 260, at 193.

<sup>267</sup> *Id.* at 193 n.82.

<sup>268</sup> See, e.g., New NMCCA Chief Judge, posting of Dwight Sullivan, to CAAFLOG, <http://caaflog.blogspot.com/2007/02/new-nmcca-chier-judge.html> (Feb. 23, 2007, 19:42 EST). “To give you some idea of the gate [sic] at which capital cases can proceed through the military appellate system, [U.S. Marine Lance Corporal] Walker was sentenced to death on 2 July 1993 and had his case orally argued at NMCCA for the first time today.” *Id.*



subjects him to the delays within the system. It also allows the accused to challenge sentence appropriateness because of these delays. As the CAAF said in *Loving*, it “is equally clear from the plain words of Article 71(a) that the President must approve a sentence of death before a capital case is final within the meaning of Article 76, UCMJ.”<sup>269</sup> This opinion creates a distinction between “finality” under Article 76<sup>270</sup> as the terminal point of the proceedings and “final judgment as to legality of the proceedings” under Article 71(c)(1) as the terminal point of the direct legal review.<sup>271</sup>

Potentially, an accused may be able to petition the service courts of criminal appeals for relief following unnecessarily long delay in obtaining presidential approval of a death sentence.<sup>272</sup> If an accused can demonstrate an inability to attack trial level errors based on this delay, the court can reassess the sentence to what it would have been absent the error.<sup>273</sup> Furthermore, the military court system permits Soldiers to pursue habeas corpus relief before the ACCA and the CAAF. Pursuant to the All Writs Act, 28 U.S.C. § 1651(a), “all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of

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<sup>269</sup> *Loving v. United States*, 62 M.J. 235, 240 (2005).

<sup>270</sup> UCMJ art. 76 (2008). Finality of proceedings, findings and sentence.

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President.

*Id.*

<sup>271</sup> *Loving*, 62 M.J. at 242.

<sup>272</sup> *United States v. Moreno*, 63 M.J. 129 (2006) (due process implications for excessive delays).

<sup>273</sup> SCHLUETER, *supra* note 254, at 1071 n.34 (discussing scope of court’s powers to reassess sentence and citing *United States v. Taylor*, 47 M.J. 322 (1997) and *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994)).

law.”<sup>274</sup> The ACCA and the CAAF are courts established by Congress that have authority to review a Soldier’s post-conviction challenges.<sup>275</sup>

Although he has not undergone the longest imprisonment pending execution,<sup>276</sup> PVT Loving’s confinement has outlasted all of the military judges who conducted his trial and direct review, and the civilian judges who affirmed his case in 1994.<sup>277</sup> In what would be her last opinion at the CAAF on a case involving PVT Loving, Judge Crawford challenged the remand on statutory and doctrinal grounds.<sup>278</sup> She emphasized that allowing unlimited extraordinary writs would be an abuse of the court’s discretion, because the “interest in finality of judgments dictates that the standard for a successful collateral attack on a conviction be more stringent than the standard applicable on a direct appeal.”<sup>279</sup> Other courts have phrased this same concern more bluntly: “No litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or changes in the composition of the court will provide a more favorable result the second time.”<sup>280</sup>

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<sup>274</sup> See *Ponder v. Stone*, 54 M.J. 613, 615 (N-M. Ct. Crim. App. 2000) (citing 28 U.S.C. § 1651(a) (2000)).

<sup>275</sup> See *Dettinger v. United States*, 7 M.J. 216, 219 (C.M.A. 1979); see also *United States v. Frischholz*, 36 C.M.R. 306 (C.M.A. 1966) (All Writs Act applicable not only to Article III courts, but to all courts established by Congress); *Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993) (military courts empowered under the All Writs Act to grant extraordinary relief where appropriate).

<sup>276</sup> See generally Karl S. Myers, *Practical Lackey: The Impact of Holding Execution After a Long Stay on Death Row Unconstitutional Under Lackey v. Texas*, 106 DICK. L. REV. 647 (2002) (referencing Jose Ceja and proposing Eight Amendment challenges to lengthy stay on death row following *Ceja v. Stewart*, 134 F. 3d 1368 (9th Cir. 1998) (convicted in 1974 and executed in 1998 for total of twenty-three years on death row)).

<sup>277</sup> *Loving v. United States*, 64 M.J. 132, 161 (2006) (Crawford, J., dissenting) (asking “what other than the personnel at this Court, has changed since 1994?”). When PVT Loving’s case returns to the CAAF, there will be two new judges; Judges Stucky and Ryan took the judicial oath on 20 December 2006. They replaced Judges Gierke and Crawford, whose terms expired on 30 September 2006. Chief Judge Effron’s term at the CAAF expires on 30 September 2011. See U.S. Court of Appeals for Armed Forces, Judges, <http://www.armfor.uscourts.gov/Judges.html> (last visited May 1, 2008).

<sup>278</sup> *Loving*, 64 M.J. at 162–63 (discussing AEDPA and doctrines of finality and law of the case).

<sup>279</sup> *Id.* at 163 (Crawford, J., dissenting) (referencing *United States v. Stoneman*, 870 F.2d 102, 103 (3d Cir. 1989)).

<sup>280</sup> *United States v. Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517, 520 (Ct. Cl. 1979).

It is certainly true that “[n]o system of law, civil or military, will ever be devised . . . that will satisfy all . . . or eliminate the personal equation that causes most of the injustice.”<sup>281</sup> Accordingly, changes to the UCMJ should not be focused solely on removing the “personal equation” attributed to commanders. As seen in the wide variance of judicial opinions in PVT Loving’s case that coincide with changes in the composition of the courts, post-appeal processing delays of capital courts-martial subjects these cases to a “personal equation” attributable to judges as well. Consequently, changes to the UCMJ demand a broader perspective which encompasses removing the direct or inadvertent “personal equation” attributable to commanders, political appointees, and judges.

### C. Political Aspects of Presidential Approval of Capital Courts-Martial

Death is the “most controversial of all punishments” and is “a highly emotional issue on which individuals tend to become polarized.”<sup>282</sup> Thus, “[a]nyone who reflects on the practice of capital punishment has to work through . . . the *justification of punishment* generally, . . . [and] the *place* death has within his or her overall theory of punishment.”<sup>283</sup> American civil society generally evaluates sentencing along two principles—proportionality<sup>284</sup> and justification.<sup>285</sup> Examination of where capital punishment fits within those justifications reveals diverse and often contentious political culture perspectives.<sup>286</sup> In the military, the

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<sup>281</sup> ALYEA, *supra* note 22, at 95.

<sup>282</sup> DAVID LEVINSON, ED., 1 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 333 (2002) (noting levels of disagreement ranging from philosophical concepts to pragmatic considerations.).

<sup>283</sup> William A. Edmundson, Afterword: *Proportionality and the Difference Death Makes*, 21 CRIM. JUST. ETHICS 40–43 (2002) (proposing arguments to reconcile death-penalty advocates’ retributive viewpoint with death-penalty opponents’ empirical approach) (emphasis added).

<sup>284</sup> LEVINSON, *supra* note 282, at 333 (proportionality considers “the nature and amount or punishment . . . compared to the type and severity of crime committed.”).

<sup>285</sup> *Id.* (justification is usually “divided into two general classifications: retribution and prevention. Retribution justifications place emphasis on past behavior . . . to punish those who have committed a wrong . . . [and is rooted in] the concept of revenge.) Prevention justifications emphasize “present or future behavior” and embody theories of “general deterrence [to ‘prevent others from committing crimes’], specific deterrence [to ‘prevent that defendant from committing future crimes’], rehabilitation, and reintegration.” *Id.*

<sup>286</sup> See Patrick Fisher et al., *Political Culture and the Death Penalty*, 17 CRIM. JUST. POL’Y REV. 48 (Mar. 2006) (determining the frequency of executions correlates to the state’s political culture—“a shared set of ideas about the role of government”—the

justification of punishment is grounded in “generally accepted sentencing philosophies.”<sup>287</sup> Further, death has always occupied the top place within the military’s overall theory of punishment to highlight those offenses that are subversive or most disruptive to the service’s internal obedience.<sup>288</sup>

Within the military framework—where death must remain a potential sentence—the President necessarily retains the authority to grant clemency regardless of any requirement to approve a death sentence because of the political significance of his role as Commander in Chief.<sup>289</sup> The military experience of the drafters of the Constitution impacted their views on military independence, such that the military could not be allowed to engage in actions apparently independent of civil power.<sup>290</sup> Fresh in their minds were the “[a]buses of British military authority [that] had been a major item of complaint in the colonists’ list of grievances.”<sup>291</sup> Moreover, the small standing forces required reliance on militias, and it was feared “that when men know how small offenses subjected them to death, they would be deterred from or disgusted in serving their country.”<sup>292</sup>

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highest frequency occurring where the culture is “traditionalistic” and minimizes governmental regulation of the current social order).

<sup>287</sup> MCM, *supra* note 5, R.C.M. 1001(g). Trial counsel cannot “purport to speak for the convening authority or any higher authority.” *Id.* In proposing a specific sentence, trial and defense counsel can refer to “rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution.” *Id.* U.S. DEP’T OF WAR, ARMY REGULATIONS 600-10, PERSONNEL 1 (Dec. 6, 1938). “Military discipline is that mental attitude and state of training which renders obedience and proper conduct instinctive under all conditions. It is founded upon respect for, and loyalty to, properly constituted authority.” *Id.*

<sup>288</sup> See UCMJ arts. 94, 99, 100, 102, 104, 106a, 118(1), (4), 120 (2008).

<sup>289</sup> PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT, CH. CHARLES E. GOODELL 175 (U.S. Gov’t Prtg. Office 1976) [hereinafter PRESIDENTIAL REPORT] (discussing executive clemency in a historical perspective and outlining how the conditional use of clemency by President Ford is appropriately tailored to the circumstances of post-Vietnam America).

<sup>290</sup> PECKHAM & SHERMAN, *supra* note 26, at 1–2.

<sup>291</sup> *Id.* at 1–3.

<sup>292</sup> Wiener, *supra* note 133, at 20 (citing debates around the approval of the 1806 Articles of War, at 15 Annals of Cong. 326 (1806)).

1. *Political Factors Related to Executive Clemency Considerations*

Final approval by the President is comparable to “the judgment of a court of last resort.”<sup>293</sup> A criminal justice system that contains the death penalty to the exclusion of clemency “would be totally alien to our notions of criminal justice,” but clemency must not be administered in an arbitrary manner under the influence of politics.<sup>294</sup> “Various forms of official and/or executive (royal, presidential, gubernatorial, etc.) mercy for criminal offenders have existed since antiquity.”<sup>295</sup> The President’s pardon power is replicated in most state constitutions and state statutes.<sup>296</sup> Pardons are more than mere gifts; they serve “as a powerful tool for achieving a variety of political ends . . . [by the] skillful exercise of the pardon to subdue a restive populace . . . .”<sup>297</sup> Failure to diligently resolve military death sentences may perform a valued “shielding function” that exists as a “political cushion” for the President.<sup>298</sup> Nevertheless, “[t]he power to remit or commute sentences of death . . . remains with the President,”<sup>299</sup> yet the President does not entertain Soldiers seeking clemency on other military sentences.<sup>300</sup> It is into this

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<sup>293</sup> *Wooley v. United States*, 1857 U.S. Ct. Cl. LEXIS 148 (Ct. Cl. 1857). “His approval was in legal effect the same as a final judgment of a court of competent jurisdiction, and the only thing which then remained to be done was to carry the sentence of the court into execution.” *Id.*

<sup>294</sup> Michal Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 242 (2003) (citing *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976)).

<sup>295</sup> Clifford Dorne, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 414 (1999).

<sup>296</sup> *Id.* at 414 (citing U.S. CONST. art. II, § 2 and Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest* 4–5 (1989)). “All fifty states and the Federal system allow for the possibility of executive clemency . . . .” *Id.* at 430.

<sup>297</sup> *Id.* at 418.

<sup>298</sup> *Id.* at 445; *see also* THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (J. Cooke ed., 1961) (“But the principal argument for reposing the power of pardoning in this case in the chief magistrate is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth . . . .”).

<sup>299</sup> DUDLEY, *supra* note 27, at 160 (citation omitted). “The sentence of death, though it cannot be mitigated, *i.e.*, reduced in amount or quantity, may be remitted or commuted by the President,” such power being withheld, “[it] cannot be exercised by the military commander.” *Id.*

<sup>300</sup> RULES GOVERNING PETITIONS, *supra* note 80, § 1.1 (“A petitioner applying for executive clemency with respect to military offenses should submit his or her petition directly to the Secretary of the military department that had original jurisdiction over the court-martial trial and conviction of the petitioner.”).

gap, between the intended power to pardon and the intended power as Commander in Chief, that executive approval of the military death sentence slips. Perilously, the clemency effect of executive inaction on a capital sentence may run afoul of the Fifth Amendment Due Process Clause if “some *minimal* procedural safeguards”<sup>301</sup> are not applied.

President Lincoln signed numerous executive clemency actions, but also approved execution of over a hundred Union Army deserters.<sup>302</sup> During his Presidency, the power to confirm military death sentences was amended to require presidential approval in all death sentences, with the exception that the commanding general in the field or commander of the department could approve death for certain offenses.<sup>303</sup> This commander approval was merely a resurrection of the powers given during the Revolutionary War.

Executive clemency might not be granted if the President has confidence in the verdict structure, or if the approval process allows for a diffusion of responsibility.<sup>304</sup> States in which the governor, or a specified

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<sup>301</sup> *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

<sup>302</sup> PRESIDENTIAL REPORT, *supra* note 289, at 361 (referencing JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON (1953)).

<sup>303</sup> WINTHROP, *supra* note 145, at 460 (citing the precursor to Article 105, American Articles of War of 1892).

[Article 105] consists of a provision of Art. 65 of the code of 1806 . . . [which] had required the approval of the President in case of death sentences, only in time of war. The Act of 1862 made this approval a requisite to the execution of *all* death sentences. The Act of 1863 engrafted an exception upon this general rule by authorizing the execution of such sentences “upon approval of the commanding general in the field,” in cases of “any person convicted as a spy or deserter, or of mutiny or murder.”

*Id.* at 460.

<sup>304</sup> Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J. L. & POL. 669 (2001) (noting a dramatic decline in executive clemency as evidenced by comparing the 204 commutations and 194 executions from 1960 to 1972, against the forty-four commutations and 595 executions from 1976 to January 2001); *see also* THE FEDERALIST NO. 74 (Alexander Hamilton).

On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these

clemency board, retains exclusive clemency power, grant clemency more often than those states that split responsibility between the governor and the clemency board.<sup>305</sup> As in the federal criminal system, the President is the sole authority to grant clemency following approval of the sentence by the convening authority, the military courts, and the Judge Advocate General. However, the combined recommendations of the Judge Advocate General, the Service Secretary, and the SecDef could be seen as a collective clemency board to which the President may unknowingly defer responsibility.<sup>306</sup>

## 2. Political Factors Related to Capital Punishment

The death penalty still exists, even if it is based on retribution—“the belief that certain crimes can be adequately punished only by a sentence of death.”<sup>307</sup> Accepting that as a starting point, “[w]hat value does the death penalty serve without executions, and what mechanisms prevent executions . . . and yet leave death penalty statutes and death sentencing practices undisturbed?”<sup>308</sup> Capital punishment ignites strong feelings within American society.<sup>309</sup> Previous attempts to abolish capital punishment were driven largely by religious organizations that attacked the sentence on moral grounds,<sup>310</sup> but secular groups direct the

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accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.

*Id.*

<sup>305</sup> Gershowitz, *supra* note 304, at 680.

<sup>306</sup> *Id.* at 697 (recalling the death of Kitty Genovese while neighbors heard her screams but did not act because they assumed someone else would; and analogizing clemency apparatus to the social science concept that “individuals are less likely to take action when there is a diffusion of responsibility.”).

<sup>307</sup> Sundby, *supra* note 150, at 1962 (describing this belief as the “McVeigh” factor for offenses of violence, regardless of the defendants notoriety, “whenever the individual believes that the taking of the victim’s life can only be morally redressed through the taking of the defendant’s life.”).

<sup>308</sup> Steiker, *supra* note 151, at 1871.

<sup>309</sup> See generally James J. Megivern, *Our National Shame: The Death Penalty and the Disuse of Clemency*, 28 CAP. U. L. REV. 595 (2000); see also U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 105 (31st ed. 2003) (providing tables compiled from opinion polls on attitudes toward capital punishment); Sourcebook of Criminal Justice Statistics Online, *available at* <http://www.albany.edu/sourcebook/pdf/section2.pdf> (last visited May 1, 2008).

<sup>310</sup> See *Hearings Before Subcomm. No. Two of the H. Comm. on the Judiciary*, H.R. Rep. No. 870, 86th Cong., 2d Sess., ser. 21 (1960) (containing reports and articles submitted by numerous religious groups and testimony by a cross-section of clergy recommending

contemporary death penalty debates. At the state level, capital punishment schemes vary widely as a reflection of the divisive nature of this issue. Also, state and federal statutes and case law continue to refine the judicial procedures in arriving at the verdict.<sup>311</sup>

Presidential authority over the military and presidential power over clemency reveals society's view of the Executive's role and its perceived effectiveness in these matters. The federal death penalty system requires no presidential approval for imposition.<sup>312</sup> Congress has never attempted to make presidential approval a part of the federal system. Furthermore, state death sentences need not be approved by the President, because we rely on the presidential legacy to be aware of the times or circumstances for clemency and the existing pardon process by the Attorney General.

Because the President "shall have the Power to grant Reprieves and Pardons for Offences against the United States, except in cases of impeachment,"<sup>313</sup> there seems to be little reason to pardon or commute a military death sentence simply by inaction. The President's penultimate power on the military death sentence has existed to the exclusion of the military commander in recognition of this executive privilege.<sup>314</sup> "Therefore, the only relief from a death sentence—if that sentence and the supporting findings of guilt were not tainted by legal error—is from the President."<sup>315</sup> From Presidents Washington, Lincoln, Andrew Johnson, Truman, and Ford, it is obvious that the power of clemency is traditionally reserved "to forge reconciliation by offering political outcasts and offenders an opportunity to regain the full benefits of citizenship."<sup>316</sup> Yet, these historical examples relate to post-war or post-conflict clemency as a response to a publicly held need to end

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abolishing the death penalty but not in the military); GARDNER C. HANKS, *AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST CAPITAL PUNISHMENT* 31 (Evan J. Mandery ed. 2005).

<sup>311</sup> See *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that death penalty cannot be imposed where jury is given discretion without guidelines on when to impose it).

<sup>312</sup> See generally 18 U.S.C.S. § 3596(a) (LexisNexis 2008). Following the exhaustion of appeals, "an execution is to be conducted according to the laws of the state in which the sentence is imposed." See BAZAN, *supra* note 59, at C-19.

<sup>313</sup> U.S. CONST. art. II, § 2.

<sup>314</sup> DUDLEY, *supra* note 27, at 208 (explaining that commanders have had the authority to remit or mitigate a sentence, but only the President may grant pardon or commute the death sentence) (citing Article 112, Articles of War).

<sup>315</sup> EVERETT, *supra* note 189, at 279.

<sup>316</sup> PRESIDENTIAL REPORT, *supra* note 289, at 176.



divisiveness.<sup>317</sup> Further, clemency provided after the Whiskey Rebellion, the Civil War, World War II, and the Vietnam Conflict was not amnesty but a limited,<sup>318</sup> definite, and case-by-case approach to determine that deserving persons received it.<sup>319</sup>

### 3. Other Political Factors Related to Presidential Approval

There appear to be no limitations to the information that the President can consider with regard to approval of the sentence.<sup>320</sup> “While the *Manual for Courts-Martial* provides a template for presidential review and action in a military death sentence case, that template does not necessarily foreclose input and action by other agencies.”<sup>321</sup> In addition to the previously provided recommendations, the President could “solicit the input and recommendations of not only the Secretary of Defense, and the Attorney General, but also that of the DOD General Counsel and Army General Counsel,”<sup>322</sup> or even the U.S. Department of Justice Pardons Office following investigation by the Federal Bureau of Investigation.<sup>323</sup> These additional sources of review may slow the approval process, but may also lend “even more credibility to the ultimate conclusion that the court-martial had produced a ‘reliable result.’”<sup>324</sup> When the President reaches a determination he is only

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<sup>317</sup> *Id.* at 178.

<sup>318</sup> See Codification of Presidential Proclamations and Executive Orders: 13 April 1945–20 January 1989, Ch. 2, Truman, Proclamation No. 2676, dated Dec. 24, 1945.

<sup>319</sup> PRESIDENTIAL REPORT, *supra* note 289, at 345–50 (detailing the Anglo-American history of clemency, citing the Norman Conquest of 1066, as the beginning of the consolidation of clemency power with the king). “As representative of the state, the King may frustrate by his pardon an indictment prosecuted in his name. In every crime that affects the public his is the injured person in the eye of the law, and may therefore, it is said, pardon an offense which is held to have been committed against himself.” *Id.* at 345 n.5 (citing JOHN ALLEN, *INQUIRY INTO THE RISE AND GROWTH OF THE ROYAL PREROGATIVE IN ENGLAND* 108 (1849)).

<sup>320</sup> See generally Heise, *supra* note 294. The CA has wide latitude over what materials he may consider and is not bound by the Military Rules of Evidence. MCM, *supra* note 5, R.C.M. 1105. An accused can submit “any matter that may reasonably tend to affect the convening authority’s decision.” *Id.* R.C.M. 1105(b)(1). This includes any new matters in mitigation and clemency recommendations. *Id.* R.C.M. 1105(b)(2)(C)–(D).

<sup>321</sup> Major Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals*, ARMY LAW., May 2000, at 103, 105 n.17.

<sup>322</sup> *Id.* at n.17.

<sup>323</sup> *Id.* (citing David E. Rovella, *Closing Ranks on Executions, Military Nears First Death Penalty Since JFK, Policy Assailed*, NAT’L L. J. 3 (1999)).

<sup>324</sup> *Id.* (citing *United States v. Murphy* 50 M.J. 4, 14 (1998)).

precluded from suspending the sentence.<sup>325</sup> These same matters may also arise under the Military Commissions because of similar provisions for presidential approval after appellate review of the death sentence.<sup>326</sup>

#### IV. Private Loving's Pyrrhic Victory and the Existing Crisis<sup>327</sup>

This section will not address every aspect, but by penetrating deeply into the details and timing of appeals, denials, and re-files, it shows the friction in the capital litigation process. While PVT Loving's strategy relies on delaying presidential approval even though it also delays federal habeas review,<sup>328</sup> the Army's strategy relies on numerical superiority and hope.<sup>329</sup> On 3 April 1989, at Fort Hood, Texas, a general court-martial

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<sup>325</sup> GILLIGAN, *supra* note 260, at 569 n.365 (referencing UCMJ art. 71(a)).

<sup>326</sup> See MMC, *supra* note 10, R.M.C. 1207 (Sentences requiring approval by the President stating that "(a) No part of a military commission sentence extending to death may be executed until approved by the President."); see also MCM, *supra* note 5, R.C.M. 1004 (providing information on capital cases, stating the notice, aggravating and mitigating circumstances, voting and deliberation procedures for capital cases); *id.* pts. II-119–II-132 (stating that capital punishment authorized for murder of protected persons, attacking civilians, taking hostages, employing poison or similar weapon, using a protected person as a shield, torture, cruel or inhuman treatment, intentionally causing serious bodily injury, mutilating or maiming, murder in violation of the law of war, using treachery or perfidy, hijacking or hazarding a vessel or aircraft, terrorism, spying, and conspiracy).

<sup>327</sup> See generally THE NEW DICTIONARY OF CULTURAL LITERACY (E.D. Hirsch et al. eds., 3d ed. 2002), available at <http://www.bartleby.com/59/4/pyrrhicvicto.html> (defining a pyrrhic victory as a win accompanied by enormous losses, leaving the winner in as desperate shape as if they had lost). Private Loving's best chances for overturning his sentence may lie with the federal courts. See generally Sullivan, *supra* note 14, at 52 (noting studies asserting that 21% of state capital sentences that completed final legal review were reversed at federal habeas proceedings).

<sup>328</sup> Military terminology appropriately describes PVT Loving's case as part of the anti-death penalty paradigm. See CAL. DIST. ATT'YS ASS'N, PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S DEATH PENALTY (2003) (referencing *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439, 457 (1989) ("The delays are primarily due to a strategy by convicted prisoners to prolong the appeal proceedings as much as possible.")); Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years after Furman*, 24 COLUM. HUM. RTS. L. REV. 395, 411 (1993) ("The inherent incentive in death penalty cases to employ *tactics* of delays adds to this problem [of delay] . . . Here every day of delay is another day of life for the client.") (emphasis added).

<sup>329</sup> This strategy is reminiscent of World War I trench warfare, where a stalemate existed until American forces created numerical superiority, overcoming Germany's technical and tactical superiority. Personnel and materiel superiority became the hallmark of American strategy if decisive maneuver failed. See generally Russell F. Weigley, *American Strategy from Its Beginnings through the First World War*, in MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE 440 (Peter Paret ed., 1986).

composed of eight officers<sup>330</sup> convicted PVT Loving of premeditated murder, felony murder, attempted murder, and five specifications of robbery.<sup>331</sup> Following a sentencing hearing, the court-martial found three aggravating factors and sentenced PVT Loving to a dishonorable discharge, total forfeitures, and death.<sup>332</sup> His case was reviewed on direct appeal and affirmed twice by the Court of Military Review,<sup>333</sup> the CAAF,<sup>334</sup> and in 1996 by the Supreme Court.<sup>335</sup> His case should have

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<sup>330</sup> MCM, *supra* note 5, R.C.M. 501(a)(1)(B). The current version of RCM 501(a)(1)(B) was amended to require at least twelve members in a capital case unless that number is not reasonably available.

<sup>331</sup> See *Loving v. United States*, 517 U.S. 748, 751 (1996). Private Loving was convicted of premeditated murder in violation of UCMJ article 118(1) and felony murder in violation of UCMJ article 118(4). He “murdered two taxicab drivers from the nearby town of Killeen. Loving then attempted to rob and murder a third, but the driver disarmed him and escaped.” *Id.* The first victim “was an active-duty soldier, Private (PVT) E-2 Christopher L. Fay, working for extra money, [Private Loving], at gunpoint, demanded all his money [then] shot him in the back of the head. While watching the blood “gushing out” of the back of Fay’s head, [Private Loving] shot him in the back of the head a second time.” See *United States v. Loving*, 41 M.J. 213, 230 (C.M.A. 1994). Private Loving’s motive was to get a few thousand dollars in order to buy his girlfriend a Christmas present. *Id.*

<sup>332</sup> *Loving*, 517 U.S. at 751. The panel found: (1) that the premeditated murder of the second driver was committed during the course of a robbery (RCM 1004(c)(7)(B)); (2) that Loving acted as the triggerman in the felony murder of the first driver, PVT Christopher Fay (RCM 1004(c)(8)); and (3) that Loving, having been found guilty of the premeditated murder, had committed a second murder, also proved at the single trial (RCM 1004(c)(7)(J)). *Id.*

<sup>333</sup> *United States v. Loving*, 34 M.J. 956, *on recon.*, 34 M.J. 1065 (A.C.M.R. 1992).

<sup>334</sup> *Loving*, 41 M.J. 213.

<sup>335</sup> *Loving*, 517 U.S. 748. The Supreme Court heard oral argument on 9 January 1996 and issued the opinion on 3 June 1996. *Id.* Compare this with the CAAF pace where argument was heard on 30 September 1993, but the opinion did not issue until 10 November 1994. *Loving*, 41 M.J. 213. If PVT Loving’s case is approved by the President and PVT Loving subsequently files a petition for a writ of habeas corpus pursuant to 10 U.S.C. § 2241, there appear to be at least two grounds that he will raise that were allegedly overlooked or left ambiguous by the Supreme Court’s ruling. See Christine Daniels, *Capital Punishment and the Courts-Martial: Questions Surface Following Loving v. United States*, 55 WASH. & LEE L. REV. 577 (1998) (noting that “counsel neglected two issues that might have altered the outcome of the case.”). One author asserts that the *Loving* opinion left open two issues:

the constitutionality of court-martial jurisdiction over common-law capital crimes committed during times of peace [and] the legitimacy of the conclusion that courts-martial should be bound by the same Eighth Amendment procedural restrictions that bind civilian courts addressing capital punishment issues.

*Id.* at 578.

gone to the President, yet PVT Loving initiated another round of petitions before the ink dried on the first Supreme Court opinion.<sup>336</sup>

Five years of military review and two more Supreme Court visits did not vacate the death sentence.<sup>337</sup> Weeks after his case was affirmed, PVT Loving challenged the constitutionality of UCMJ felony murder. The service court denied his petition on 9 September 1996, but on 30 September, PVT Loving secured a foothold at the CAAF.<sup>338</sup> After oral argument in December 1996, the CAAF took fourteen months to deny his petition.<sup>339</sup> Private Loving's next petition alleged that the military trial judge erred, but it too was denied,<sup>340</sup> followed by unanimous denial of his certiorari petition in December 1998.<sup>341</sup> A third petition in 2001, asserting that the CAAF incorrectly evaluated his ineffective assistance claim under recent Supreme Court cases,<sup>342</sup> was denied by the CAAF and

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<sup>336</sup> See *Loving*, 46 M.J. 215. Private Loving's case was affirmed by the Supreme Court on 3 June 1996 and he immediately petitioned the Army Court of Criminal Appeals (ACCA) (formerly Army Court of Military Review (ACMR)). *Id.*

<sup>337</sup> Appeals occurred from 1996 to 1998. See *Loving v. Hart*, 47 M.J. 438 (1998), *cert. denied*, 525 U.S. 1040 (1998). Subsequent appeals occurred from 1998 to 2001. See *United States v. Loving*, 54 M.J. 459, 459 (2001) (summary opinion), *cert. denied*, 534 U.S. 949 (2001).

<sup>338</sup> See, e.g., *Loving v. Hart*, 49 M.J. 387 (Effron, J., dissenting). Judge Effron was nominated to the CAAF by President William J. Clinton and took the judicial oath on 1 August 1996. See U.S. Court of Appeals for Armed Forces, Judges, <http://www.armfor.uscourts.gov/Judges.html> (last visited May 1, 2008).

<sup>339</sup> *Loving v. Hart*, 47 M.J. 438, 444 (1998) (felony murder under UCMJ Article 118(4)) (constitutional where panel found Petitioner "actual perpetrator of the killing."). Oral argument heard on 17 December 1996, but the CAAF opinion denying relief was not issued until 26 February 1998. *Id.*

<sup>340</sup> *Loving*, 49 M.J. 387 (summary disposition). On 9 April 1998, Judge Effron wrote a one sentence dissent that he would have granted the petition for the reasons in his previous dissent. *Id.* (Effron, J., dissenting). That previous dissent unequivocally accepted the findings of guilt, but saw that "fundamental questions regarding the legality of the sentencing proceeding remain unresolved." *Loving*, 47 M.J. at 454 (Effron, J., concurring in part and dissenting in part). On 15 April 2003, five years later, Judge Effron finally had the opportunity to revisit his dissent. See *Loving v. United States*, 62 M.J. 235, 238 (2005). While that writ ultimately failed, accepting it allowed PVT Loving to avail himself of later precedent forming the basis for remand. See *Loving v. United States*, 64 M.J. 132, 153-61 (2006) (Effron, J., concurring in part and in the result). In the 2006 opinion, Judge Effron takes the additional measure of writing a separate eight page concurrence to elaborate his interpretation of the court's habeas jurisdiction. In sustaining PVT Loving's claim that he did not receive a "full and fair hearing" during direct review, Judge Effron has the opportunity to vindicate his lone dissent, but with two new CAAF members. *Id.* at 160.

<sup>341</sup> *Loving v. Hart*, 525 U.S. 1040 (1998), *cert. denied*, *Loving v. Hart*, 49 M.J. 387.

<sup>342</sup> See *United States v. Loving*, 54 M.J. 459 (2001) (summary disposition). Foreshadowing PVT Loving's subsequent ineffectiveness petitions, during this particular

a unanimous Supreme Court.<sup>343</sup> After five years of legal review, the case should have gone to the President, yet PVT Loving regrouped and filed more petitions.

After an approximate two year lull, on 15 April 2003 PVT Loving filed a petition for extraordinary relief in the nature of a writ of error *coram nobis*.<sup>344</sup> Following the Supreme Court's June 2002 decision in *Ring v. Arizona*,<sup>345</sup> he drafted a variation of his original 1992 petitions.<sup>346</sup> The CAAF heard oral argument anyway on 14 January 2004. While this petition was pending, PVT Loving drafted his third ineffectiveness petition on 17 February 2004,<sup>347</sup> relying again on a Supreme Court decision from the previous June, *Wiggins v. Smith*.<sup>348</sup> After oral argument on 8 December 2004, the CAAF dismissed both petitions for procedural error on 20 December 2005.<sup>349</sup> Significant in this decision is the pronouncement of continuing jurisdiction to avoid a "legal vacuum,"<sup>350</sup> and an invitation to PVT Loving to re-file.

It might have been pure serendipity for PVT Loving that the CAAF's opinion was issued before his case was transferred to the President on 23

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appeal he sought relief by claiming that two recent cases showed CAAF had improperly modified *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>343</sup> United States v. Loving, 54 M.J. 459 (summary disposition), *cert. denied*, 534 U.S. 949 (2001).

<sup>344</sup> *Loving*, 62 M.J. at 239. *Coram Nobis* is Latin for "let the record remain before us," a common law means to remedy judicial wrongs that had no established remedy, and submitted to the court imposing original judgment. *Id.* at 251 (referencing Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 VA. J. SOC. POL'Y & L. 1, 9 (2003), and 2 STEVEN CHILDRESS ET AL., FEDERAL STANDARDS OF REVIEW §§ 13.01, 13.04 (3d ed. 1999)).

<sup>345</sup> 536 U.S. 584 (2002) (applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and holding constitutional due process and jury trial guarantees require a jury find the existence of aggravating factors).

<sup>346</sup> See *Loving v. United States*, 517 U.S. 748, 773 (1996) (Congress delegated authority to President to promulgate RCM 1004 aggravating factors under *Furman v. Georgia*, 408 U.S. 238 (1972)); MCM, *supra* note 5, R.C.M. 1004; see also Sullivan, *supra* note 162.

<sup>347</sup> *Loving v. United States*, 62 M.J. 235, 239–40 (2005).

<sup>348</sup> 539 U.S. 510 (2003) (providing guidance on resolving ineffective assistance claims by directing courts to evaluate if defense investigation into a defendant's background reasonably provided factual predicate for counsel's reasonable tactical decisions). *Id.* at 523.

<sup>349</sup> 62 M.J. 235, 240 (2005) (dismissing without prejudice, only a petition for a writ of habeas corpus available).

<sup>350</sup> *Id.* at 239–46.

January 2006.<sup>351</sup> Nonetheless, on 2 February 2006 he petitioned for a writ of habeas corpus by combining his prior motions.<sup>352</sup> Breaking the one year mark for the first time on 29 September 2006, the CAAF found that because his case had completed direct review,<sup>353</sup> PVT Loving could not rely on the new procedural rule in *Ring*.<sup>354</sup> Turning to the ineffective assistance claim, it held that *Wiggins*<sup>355</sup> was not new law.<sup>356</sup> The CAAF adopted the federal habeas review standard used to evaluate state convictions<sup>357</sup> to find he was entitled to an evidentiary hearing.<sup>358</sup>

The *DuBay*<sup>359</sup> hearing, as it is known, will examine if his defense counsel conducted a *reasonable* investigation into his background “and other matters that *may have* produced evidence in either extenuation or mitigation.”<sup>360</sup> Private Loving, armed with these precise terms of “reasonable” and “may have,” plus the benefit of eighteen years of hindsight, will present potential evidence omitted or incompletely presented at trial.<sup>361</sup> The judge has to reweigh the trial evidence, such as PVT Loving’s undisputed videotaped confession,<sup>362</sup> against the *DuBay*

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<sup>351</sup> In early 2005, the Army notified defense counsel for PVTs Loving and Gray of pending case transfer and allowed them to submit matters for the President to consider. Private Gray’s completed file was delivered to the White House that September. See Martin Interview, *supra* note 202.

<sup>352</sup> Loving v. United States 64 M.J. 132, 136 (2006).

<sup>353</sup> *Id.* at 140 (noting procedural rules do not generally apply retroactively).

<sup>354</sup> Ring v. Arizona, 536 U.S. 584 (2002).

<sup>355</sup> Wiggins v. Smith, 539 U.S. 510 (2003).

<sup>356</sup> 64 M.J. 132, 141–43. It was simply an illumination of well established standards to evaluate ineffectiveness claims with respect to the reasonableness of capital defense counsel investigations.

<sup>357</sup> *Id.* at 145 (referencing AEDPA, *supra* note 59, as codified principally at 28 U.S.C. §§ 2244–2255 (2000) for both the scope and standard of review).

<sup>358</sup> *Id.* at 146 (viewing the AEDPA as substantially same standard in evaluating right to an evidentiary hearing on direct appeal under United States v. Murphy, 50 M.J. 16 (1998) and United States v. Ginn, 47 M.J. 236 (1997)).

<sup>359</sup> United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967). Such hearings are used to determine specified issues on appeal by returning to trial court for fact finding.

<sup>360</sup> Loving, 64 M.J. at 152 (emphasis added).

<sup>361</sup> *Id.* The court will try to determine if such evidence would have been developed by a reasonable investigation during the four months between the 12 December 1988 murders and the 3 April 1989 conviction. The speculation continues, because the judge then will attempt to ascertain if “there is a reasonable probability that, but for the omission” the sentence would have been different. *Id.*

<sup>362</sup> United States v. Loving, 41 M.J. 213, 230 (1994). In the videotaped confession PVT Loving told agents the details of the murders and where he hid the murder weapon. The confession was transcribed, PVT Loving reviewed it, signed it, and swore to it, and it was admitted at trial. *Id.* at 243.

hearing evidence, such as affidavits<sup>363</sup> that he grew up in a bad neighborhood with alcoholic parents.<sup>364</sup> The court must then decide whether “at least one member would have struck a different balance thereby not voting for a death sentence.”<sup>365</sup> Yet, as the lone dissenting judge remarked, “[n]either the facts nor the legal standards applicable to the facts have changed since” the CAAF thoroughly reviewed his claim on direct appeal in 1994.<sup>366</sup>

Private Loving initiated additional action in federal district court on 26 September 2006.<sup>367</sup> However, the CAAF remand appears to create a roadblock between his sentence and the President’s pen, anyway.<sup>368</sup> The Government petitioned in vain, but on 18 December 2006, the CAAF declined to reconsider or stay the order.<sup>369</sup> The Solicitor General did not file a certiorari petition for the Army by the 12 March 2007 deadline,<sup>370</sup> confirming that the Army should abandon hope the Supreme Court will rescue it from further exhaustive appeals.

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<sup>363</sup> *Loving*, 64 M.J. at 151–52 (viewing these submissions about PVT Loving’s “traumatic past” as “powerful” mitigation evidence required by *United States v. Wiggins*, 539 U.S. 510, 534 (2003)).

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 153 (Effron, J., concurring) (referencing *Wiggins*, 539 U.S. at 537).

<sup>366</sup> *Id.* at 161 (Crawford, J., dissenting). The present opinion was delivered by Chief Judge Gierke, in which Judges Baker, Erdmann and Effron joined, while Judge Crawford dissented. In 1994, direct review opinion also written by Judge Gierke, in which Chief Judge Sullivan and Judges Cox and Crawford, joined, but with a dissent by Judge Wiss. *See Loving*, 41 M.J. 213.

<sup>367</sup> *See Loving* FOIA Case, posting of Dwight Sullivan, to CAAFLOG, <http://caaflog.blogspot.com/2006/09/loving-foia-case.html> (Sept. 27, 2006, 09:58 EST) (noting Freedom of Information Act action in U.S. District Court for the District of Columbia seeking documents of Army Judge Advocate General under RCM 1204(c)(2) that were provided in transmittal of PVT Loving’s case through the political appointees to the President). *See Loving v. United States Dep’t of Defense*, 496 F. Supp. 2d 101, 104 (D.D.C. 2007) (denying PVT Loving’s FOIA requests for documents regarding procedures for forwarding military death penalty cases to the President and the recommendations for the approval or commutation of his death sentence).

<sup>368</sup> It is unclear if the President will take action while the case is remanded.

<sup>369</sup> No. 06-8006/AR, 69 M.J. 367 (Dec. 16, 2006) (unpublished).

<sup>370</sup> The Solicitor General conducts all litigation on behalf of the United States in the Supreme Court. 28 C.F.R. pt. 0.20 (2006) (referencing 28 U.S.C. § 505 (2000)). He will not appeal the CAAF’s order because only in rare circumstances will he seek certiorari over the remand for an evidentiary hearing. Telephone Interview with Thomas E. Booth, Attorney, Office of the Solicitor General, U.S. Dep’t of Justice (Mar. 15, 2007). Further, the Army decided not to pursue the matter. *Id.*

Turning to the only other capital court-martial delivered to the President, PVT Ronald Gray has had no court filings since 2001, but his case was not delivered until September 2005.<sup>371</sup> If the President approves PVT Gray's 1988 sentence for the rape and premeditated murder of two women, and the rape and attempted premeditated murder of a third woman, then PVT Gray may attempt to avail himself of federal habeas jurisdiction under 10 U.S.C. § 2241.

Comparing PVT Loving's case with a federal civilian capital case shows the basic disparity caused by executive approval; crimes similar in brutality are divergent in finality. On 23 October 1995, a jury in U.S. District Court in Texas convicted Louis Jones, Jr., a former Soldier,<sup>372</sup> of kidnapping and murdering a female Airman.<sup>373</sup> The jury sentenced him to death upon finding two aggravating circumstances.<sup>374</sup> By 1999,

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<sup>371</sup> See Martin Interview, *supra* note 202. Before his 1988 court-martial, PVT Gray pled guilty, pursuant to a pretrial agreement, "in the Cumberland County, North Carolina, Superior Court on 2 November 1987, to two counts of second degree murder, two counts of first degree burglary, five counts of first degree rape, five counts of first degree sexual offense, attempted first degree rape, three counts of second degree kidnapping, two counts of robbery with a dangerous weapon, and assault with a deadly weapon with the intent to kill, and inflicting serious injury." See *United States v. Gray*, 37 M.J. 730, 733 n.1 (C.M.R. 1992). Private Gray was sentenced in North Carolina state court to three consecutive and five concurrent life terms after pleading guilty to two counts of second degree murder and five counts of first degree rape against different victims. *Id.* (noting that "[t]hese offenses involved different victims and the state proceeding was wholly separate from [PVT Gray's] court-martial."). He was then court-martialed in 1988 and sentenced to death for the rape and premeditated murder of two women, and the rape and attempted premeditated murder of a third woman. See *United States v. Gray*, 51 M.J. 1, 9 (1999); *United States v. Gray*, 54 M.J. 231 (2000), *cert. denied*, 532 U.S. 919 (2001), *reh'g denied*, 532 U.S. 1035 (2001).

<sup>372</sup> See *Jones v. United States*, 527 U.S. 373, 379 (1999). Jones retired as a master sergeant with twenty-two years of honorable service, including assignments to the U.S. Army Rangers, a combat jump into Grenada, and service in Operation Desert Storm. *Id.*

<sup>373</sup> *Id.* at 377. Jones was convicted of kidnapping with death resulting to the victim under 18 U.S.C. § 1201(a)(2). He entered Goodfellow Air Force Base in San Angelo, Texas and kidnapped Airman Tracie Joy McBride. Jones confessed to sexually assaulting her and striking her repeatedly with a tire iron with such severity that large chunks of her skull were missing. *Id.* The base is approximately 180 miles from Fort Hood. See MapQuest.com, <http://www.mapquest.com/directions/main.adp?> (last visited May 1, 2008). Because Goodfellow Air Force Base is located in Tom Greene County, the U.S. District Court for the Northern District of Texas (N.D. Tex.) had federal jurisdiction for Jones's prosecution; and because Fort Hood is located in Bell County, the U.S. District Court for the Western District of Texas (W.D. Tex.) would have exercised federal civil jurisdiction if Jones had not been court-martialed.

<sup>374</sup> 527 U.S. at 377. The jury found (1) that murder of Tracie Joy McBride occurred during the commission of a kidnapping (18 U.S.C. § 3592(c)(1)); and (2) that Jones committed the offense in an especially heinous, cruel, and depraved manner in that it



Jones's case was affirmed by the district, circuit, and Supreme Court.<sup>375</sup> Jones then filed habeas petitions for counsel ineffectiveness over evidence he suffered from poverty and sexual abuse as a child. His petitions failed: habeas denied on 27 March 2002,<sup>376</sup> certiorari denied on 12 November 2002,<sup>377</sup> and clemency denied on 17 March 2003.<sup>378</sup> Jones was executed on 18 March 2003,<sup>379</sup> eight years after he led the police to Airman McBride's remains. One month later, PVT Loving filed the *coram nobis* petitions that led the CAAF to remand his case.

18 March 2008 marked the five year anniversary of Jones's execution. Was it necessary for PVT Loving's court-martial to require an additional fourteen years of review when the sentence was affirmed by the Supreme Court after six years of appellate review? How can this post-appellate delay be eliminated while maintaining the legality of the system? Initially, an examination of the trial and review process is essential. Yet, when the service courts and the CAAF have specialized expertise in legal review of capital courts-martial, careful reconsideration of the appropriateness of presidential review is also essential. Other changes in the court-martial system may be necessary to trim excess delay. Nonetheless, PVT Loving's remand is a harbinger that the CAAF will embark upon legal activism in order to avoid a perceived legal vacuum.

The other potential capital courts-martial that may require presidential approval include several Army cases. Specialist Ivette Gonzalez Davila is facing court-martial for premeditated murder for the shooting deaths of a military couple and the kidnapping of their six-

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involved torture or serious physical abuse to Tracie Joy McBride (18 U.S.C. § 3592(c)(6)).

<sup>375</sup> United States v. Jones, 132 F.3d 232 (5th Cir. Tex. 1998), *sub nom.*, 527 U.S. 373 (1999).

<sup>376</sup> United States v. Jones, 287 F.3d 325 (5th Cir. Tex. 2002). The total time to disposition of Jones's habeas petition gives a glimpse into what may occur in PVT Loving's case, and Jones's disposition time was consistent compared with "the vast majority of [capital habeas] prisoners . . . [because] the total time required to process all district and appellate petitions is less than 1,100 days." SCOTT GILBERT & PATRICIA LOMBARD, A REPORT TO THE CONFERENCE OF CHIEF CIRCUIT JUDGES AND CIRCUIT EXECUTIVES: AN ANALYSIS OF DISPOSITION TIMES FOR CAPITAL HABEAS CORPUS PETITIONS 11, tbl. 8 (Federal Judicial Center, Sept. 1, 1995).

<sup>377</sup> Jones v. United States, 537 U.S. 1018 (2002), *cert. denied*, 287 F. 3d 325 (2002).

<sup>378</sup> Telephone Interview with Brenda McElroy, Case Management Specialist, Office of the Pardon Attorney, U.S. Dep't of Justice (16 Mar. 2007). Jones filed a clemency application on 16 December 2002.

<sup>379</sup> *Id.*

month-old baby.<sup>380</sup> Staff Sergeant Alberto B. Martinez is facing court-martial for premeditated murder arising from the June 7, 2005, death of two officers in Tikrit, Iraq.<sup>381</sup> Master Sergeant Timothy Hennis may also face a capital court-martial for the 1985 rape and premeditated murder of the wife of an Air Force officer, and the premeditated murder of her five and three year old daughters.<sup>382</sup> “Autopsies of the three victims revealed that the cause of death of all three had been stab wounds and a large cut in the neck of each.”<sup>383</sup> Sergeant Hasan Akbar is pending appellate review of his court-martial death sentence for the 2003 premeditated murder of two American Soldiers in Kuwait.<sup>384</sup> Sergeant Akbar was convicted of using grenades and his military rifle to assault his fellow Soldiers as they slept in their tents, killing two.<sup>385</sup> As previously mentioned, PVT Ronald Gray is also pending presidential approval of the death sentence from his 1988 capital court-martial for rape, premeditated murder, and attempted premeditated.<sup>386</sup> Finally, PVT William Kreutzer is pending re-sentencing or other trial level proceedings as a result of his death sentence being overturned for failure to provide a mitigation expert.<sup>387</sup>

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<sup>380</sup> See Jennifer Sullivan, *Murder Case a Military Matter; Double Homicide—Army Takes over Case from Pierce County, May Seek Death Penalty*, SEATTLE TIMES, Mar. 6, 2008, at B1. Authorities arrested Specialist Davila “after she told a fellow soldier that she had killed the couple” *Id.* Davila alleged that Randi Miller “had an affair with Davila’s ex-boyfriend . . . Davila then dragged Randi Miller’s body into the bathtub and poured muriatic acid on both bodies ‘to get rid of them,’ court documents say.” *Id.*

<sup>381</sup> See American Forces Information Service, *Task Force Liberty Soldier Charged in Deaths of Unit Officers*, June 16, 2005, available at [http://www.defenselink.mil/news/Jun2005/20050616\\_1749.html](http://www.defenselink.mil/news/Jun2005/20050616_1749.html). Both officers were married and each had several children.

<sup>382</sup> Michelle Tan, *Retired Master Sergeant in Court Again*, ARMY TIMES, Jan. 22, 2008, available at [http://www.armytimes.com/news/2008/01/army\\_hennis\\_080120w/](http://www.armytimes.com/news/2008/01/army_hennis_080120w/). Soldier sentenced to death in state court in 1986 but case was overturned by North Carolina Supreme Court and the retrial resulted in acquittal. Soldier was recalled to active duty for court-martial based on recent examination of sperm found at the scene.

<sup>383</sup> *State v. Hennis*, 323 N.C. 279, 281 (1988).

<sup>384</sup> *Death Sentence Affirmed for Soldier Who Killed Comrades in Kuwait*, AGENCE FRANCE-PRESSES, Nov. 20, 2006, available at <http://www.political-news.org/topic/death-penalty/> (last visited May 1, 2008).

<sup>385</sup> *Id.*

<sup>386</sup> See *United States v. Gray*, 51 M.J. 1, 9 (1999), *reh’g denied*, 532 U.S. 1035 (2001) (detailing the post-conviction timelines for the case); see also *United States v. Gray*, 37 M.J. 730, 733 (C.M.R. 1992).

<sup>387</sup> See *United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004).

## V. Revision of Presidential Approval of Capital Courts-Martial

Capital punishment is constitutionally excluded for specific categories of defendants, including the insane<sup>388</sup> and juveniles.<sup>389</sup> The confluence of the executive approval requirement and executive inaction appears to create a de facto exclusion for servicemembers sentenced at court-martial.<sup>390</sup> For Soldiers sentenced to death in state courts, neither executive inaction nor direct clemency could stay the execution.<sup>391</sup> Likewise, if a Soldier were sentenced to death in federal court, executive inaction would not stay the execution.<sup>392</sup> This resultant difference between the military and civilian legal systems serves no legitimate purpose.

“The civil courts have their defects and imperfections [and it] is the continuous effort of the legal profession [and] legislators . . . to improve

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<sup>388</sup> See *Ford v. Wainwright*, 477 U.S. 399 (1986); see also 18 U.S.C. § 3596(c) (1994); 21 U.S.C. § 848(l) (1994).

<sup>389</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>390</sup> The non-exclusive nature of military criminal jurisdiction for murder does not prevent Soldiers from being sentenced and executed under state or federal capital legal systems. See MCM, *supra* note 5, R.C.M. 201(d)(2) (“[a]n act or omission which violates both the code [of military justice] and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal”). *Id.*

<sup>391</sup> See generally U.S. CONST. art. II, § 2 (authority of the President as Chief Executive); 28 U.S.C. §§ 509, 510 (LexisNexis 2008); RULES GOVERNING PETITIONS, *supra* note 80 pt. I, § 1.4 (“Petitions for executive clemency shall relate only to violations of laws of the United States.”). For example, on 5 January 2006, Private Steven Debow was mobilized to active duty as a member of the Connecticut National Guard on the same night that he murdered two store clerks the night before his unit was to move to an Army base in North Carolina. Hartford Police Department, News Release (Jan. 19, 2006), available at <http://www.hartford.gov/police/PR/Debow%20arrest%20for%20elizabeth%20grocery%20homicides%2006.htm>. This Soldier’s crimes are similar in nature to those committed by PVT Loving and he could have been tried by the U.S. Army. However, because Connecticut assumed jurisdiction, any death sentence would not require presidential approval.

<sup>392</sup> For example, former Army Soldier Steven D. Green is facing capital prosecution in federal court for crimes committed while on active duty. See A.P., *The War In Iraq: Lawyers: Ex-Soldier’s Case Not One for Military; He Should Be Tried in Killings, Rape as Civilian, Prosecutors Say*, HOUSTON CHRON., Mar. 24, 2008, at A-10 (noting that government asserts defendant “was properly discharged from the military before being charged as a civilian in the rape and killing of an Iraqi girl and the killing of her family in 2006.”) “Four other soldiers pleaded guilty or were convicted for roles . . . [producing testimony that] they took turns raping the girl while Green shot and killed her mother, father, and younger sister, and that Green raped the girl and shot her.” *Id.*

their functions.”<sup>393</sup> When revising or reforming military justice, we must begin by determining which institution is best equipped to initiate change.<sup>394</sup> More importantly, we must determine the appropriate division of authority when the President is empowered to act as Commander in Chief, and Congress has the power to make rules and regulations for the armed forces.<sup>395</sup> It is unlikely that the President will divest himself of the approval power, which creates the legal vacuum. Without a Supreme Court decision “that would necessitate major structural revision, the only institution in a position to effect major reform is Congress.”<sup>396</sup> After World War II, Congress responded to the lack of confidence in the military justice system under the Articles of War and imposed numerous reforms via the UCMJ. However, just as Congress neglected to act on military capital punishment following World War I, the issue of executive action prior to final legal review has gone unnoticed.<sup>397</sup> Article 71(a) is a protective measure, best served under the previous system where the need for discipline unchecked by legal review created the appearance of needless executions. Nearly six decades later, the UCMJ provides superior legal protections against arbitrary imposition of the death sentence.<sup>398</sup> In light of this legacy, it is time for Congress to remove the last vestiges of non-judicial approval.<sup>399</sup>

#### A. Resolving the Legal Vacuum

The President could resolve the issue of death sentence delay constitutionally by issuing an Executive Order to preclude capital

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<sup>393</sup> Royall, *supra* note 189, at 288 (discussing changes under Elston Bill, the legislation that became the UCMJ).

<sup>394</sup> HOMER E. MOYER, JR. JUSTICE AND THE MILITARY 778 (1972) (providing discussion, analysis, case law, and debate on numerous “fundamental issues regarding the proper relationship between military discipline and criminal justice . . . [in] an effort to address the underlying policy considerations which should ultimately determine the shape of operative rules and procedures.” *Id.* at v.

<sup>395</sup> Sullivan, *supra* note 161, at 182.

<sup>396</sup> MOYER, *supra* note 395, at 407.

<sup>397</sup> Interview with Lieutenant Colonel Peter Yob, Chief, Policy Branch, Criminal Law Division, Office of the Judge Advocate General’s Corps, U.S. Army, in Charlottesville, Va. (Jan. 26, 2007) (stating there are no Joint Service Committee records of previous attempts to change the presidential approval requirement of Article 71(a) since the 1984 amendments establishing aggravating factors).

<sup>398</sup> See generally Sullivan, *supra* note 14 (providing statistical analysis showing that UCMJ capital sentence reversal rate is comparable to state and federal systems).

<sup>399</sup> Congress prescribes the articles of the UCMJ. See U.S. CONST. art. I, § 8, cl. 14. However, the RCM and MRE and other parts of the MCM are not statutory.

punishment in the military.<sup>400</sup> However, the irony of allowing commanders to send Soldiers into battle but not to decide if they should receive the death sentence after a full and fair trial is visceral.<sup>401</sup> The President could instead require the military to obtain approval from the Attorney General prior to seeking a capital sentence. However, this would not shorten the post-trial delay crisis and may run afoul of the decentralized nature of military justice.<sup>402</sup> Another simple resolution

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<sup>400</sup> UCMJ art. 56 (2008) (Punishment at court-martial cannot exceed limits prescribed by the President.).

<sup>401</sup> *Sundry Legislation Affecting the Naval and Military Establishments: Hearings Before the H. Comm. on Armed Servs.*, 80th Cong. Vol. I (Apr. 1947) (statement of Lieutenant General J. Eawtom Collins, U.S. Army):

[T]he commander must have authority commensurate with his responsibility. When you consider the other things that a commander does, he has control over life and death, then it certainly seems to me that you should not divorce from him the authority of his chain of command, which extends to the ultimate business of courts martial. Our responsibility for ordering men into action under terribly adverse conditions carries a far more powerful authority than the authority we now have under the court-martial system. If you can trust us with one, then I think in all logic you must trust us with the other.

*Id.* at 2155.

<sup>402</sup> The President has the authority to establish procedures that “so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts” consistent with the UCMJ. UCMJ art. 36. However, it would be inconsistent with the UCMJ if the President were to require Attorney General approval for all capital courts-martial. “The current system, which allows a commander to refer cases capital without either [Department of Army] or Presidential approval, is consistent with the decentralized nature of the military justice system . . . [t]he Manual for Courts-martial and case law affirm the necessity for the free exercise of command authority in the military.” E-mail from Colonel Flora D. Darpino, Chief, Criminal Law Division, Office of the Judge Advocate General, U.S. Army (12 Feb. 2007) [hereinafter Darpino e-mail] (on file with author) (referencing MCM, *supra* note 5, R.C.M. 306). Specifically, if the President adopts the same rules that apply to approval of capital sentences within the DOJ, the Attorney General could potentially direct a commander to seek the death penalty when the convening authority later desires to preclude capital punishment, thereby raising the specter of unlawful command influence (UCI). *Id.* Moreover, this could possibly create greater pre-trial delay because the U.S. Attorney General is also a political appointee. *See* 28 § U.S.C. 503 (2000). “The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States.” Thus, his decisions on how best to enforce the laws may be subject to political motivations. *See, e.g.*, Jim Malone, *US Attorney General under Fire over Sacked Prosecutors*, VOICE OF AMERICA (13 Mar. 2007), <http://www.voanews.com/english/2007-03-13-voa72.cfm> (noting that a political firestorm erupted between Congress and Bush administration over firing of federal prosecutors in 2006). *Cf.* 28 U.S.C. § 541 (U.S. Attorneys). The President shall appoint,

would be to transfer primary jurisdiction for military capital eligible offenses to the Department of Justice, but such changes are unnecessary and do not address the reason for post-trial delay, executive inaction.<sup>403</sup> Even though Article 71(a) does not require mandatory written approval or issuance of a warrant, as seen in *Morganelli v. Casey*,<sup>404</sup> presidential inaction undermines the spirit of the provision. Revision to a mandatory approval, or simply requiring issuance of an execution warrant, would allow the condemned to seek federal legal review. Yet, it would be counter to the “necessity for free exercise of command authority in the military.”<sup>405</sup> Paring presidential approval to only military unique offenses, or those offenses punishable by death when committed in time of war, would eliminate some of the delay on the most frequent military death penalty sentences.<sup>406</sup> These partial solutions do not fix the primary defect—requiring presidential approval prior to final habeas legal review. All legal review should be completed before executive approval, both for efficiency and for fairness to an accused seeking relief before federal judges, when his death sentence already bears the President’s personal approval.<sup>407</sup>

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by and with the advice and consent of the Senate, a U.S. attorney for each judicial district. Each U.S. Attorney is subject to removal by the President. *Id.* § 541(c).

<sup>403</sup> Darpino e-mail, *supra* note 402.

Commanders have exercised their ability to refer cases in a prudent and judicious manner as evidenced by the small number of [capital] cases; all with egregious fact patterns . . . [and] post-appeal delay does not seem to stem from the nature of the case but in the nature of the staffing process.

*Id.*

<sup>404</sup> 641 A.2d 675 (Pa. Cmwlth. 1994).

<sup>405</sup> See Darpino e-mail, *supra* note 402 (referencing MCM, *supra* note 5, R.C.M. 306(a) and *United States v. Gammons*, 51 M.J. 169 (1999)). “One of the hallmarks of the military justice system is the broad discretion vested in commanders to choose the appropriate disposition of alleged offenses. The critical responsibility of commanders for the morale, welfare, good order, discipline, and military effectiveness of their units [requires] the exercise of such discretion.” 51 M.J. at 173.

<sup>406</sup> Sullivan, *supra* note 13, at 5. “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.” *Id.*

<sup>407</sup> See, e.g., George Lardner Jr., *Death Penalty Sought in Oklahoma Blast; U.S. Notifies Pair Charged in April Bombing that Killed 169*, WASH. POST, 21 Oct. 1995 (noting formal approval by Attorney General Janet Reno to seek death penalty against Timothy McVeigh and Terry Nichols for the bombing of the Alfred P. Murrah Federal Building in Oklahoma City on 19 April 1995 that killed 169 people). McVeigh’s lawyers challenged the ability to get a fair trial because “[t]he attorney general and the president [publicly]

1. *Proposed Revisions to the UCMJ Eliminate Executive Approval*

From the very outset, the UCMJ was designed to ensure that “the military judicial processes shall be based upon a system of law removed as far as possible from the influence of personal beliefs of officers charged with the responsibility of its administration.”<sup>408</sup> When Governor of Texas, President Bush stated that in clemency cases he considered whether the prisoner was guilty or innocent and whether the prisoner had full access to the courts.<sup>409</sup> Under those criteria, the guilt prong can be satisfied by reviewing PVT Loving’s undisputed videotaped confession.<sup>410</sup> As to the access prong, review of PVT Loving’s numerous motions and hearings satisfies this prong.<sup>411</sup> Therefore, the post-appeal delay is not exclusively the result of executive indecision, nor does it appear to emanate mainly from the nature of the case. Consequently, the primary cause of this indefinite delay is structural; delay results from the existing procedural apparatus.

Recall the sequence of direct legal review followed by habeas review then clemency review under the federal system as illustrated by the Louis Jones, Jr., case. The UCMJ drafters wanted the President to be involved but as the final approval, not the middle man.<sup>412</sup> Nowhere in the discussion of the provision was it envisioned that the President would approve the sentence prior to federal court review because federal review was not contemplated at the time.<sup>413</sup> Therefore, as seen in the

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announced they would seek the death penalty before they even knew who the defendants were.” *Id.* (quoting McVeigh’s defense counsel Stephen Jones).

<sup>408</sup> Royall, *supra* note 189, at 279–80.

<sup>409</sup> Woods, *supra* note 90, at 1147 (referencing Jim Henderson, *Controversy Dogs Actions of the State’s Parole Board*, HOUSTON CHRON., Jan. 10, 1999, at 1E).

<sup>410</sup> Loving v. United States, 64 M.J. 132, 168 (2006) (Crawford, J., dissenting); *see also* Loving v. Hart, 47 M.J. 438, 454 (1998) (Effron, J., concurring). Even Judge Effron, who arguably has “indulged” PVT Loving’s requests more than any other CAAF judge, has clearly stated that he concurs in the finding of guilt. *Id.*

<sup>411</sup> *See, e.g.*, Loving v. United States, 34 M.J. 956, *reh’g denied*, 34 M.J. 1065 (A.C.M.R. 1992); 41 M.J. 213, *recon. denied*, 42 M.J. 109 (1994), *aff’d*, 517 U.S. 748 (1996); *see also* Loving v. Hart, 46 M.J. 125 (1996); 47 M.J. 438 (1998), *recon. denied*, 49 M.J. 387 (1998), *cert. denied*, 525 U.S. 1040 (1998); Loving v. United States, 54 M.J. 459 (2001), *cert. denied*, 534 U.S. 949 (2001); Loving v. United States, 58 M.J. 281 (2003); 62 M.J. 235 (2005), *remanded*, 64 M.J. 132 (2006).

<sup>412</sup> “We are not final because we are infallible, but we are infallible only because we are final.” Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>413</sup> *See* UCMJ INDEX, *supra* note 192, at S.H. 334 (referencing charts “which indicate graphically (1) appellate review of Army and Air Force general court-martial case, (2)

introductory quote, the military and civilian judiciary would be free from the influence of the executive in performing their functions.<sup>414</sup>

Our President's duties as Commander in Chief "require him to take responsible and continuing action to superintend the military, including the courts-martial."<sup>415</sup> Presidential approval of court-martial death sentences served a vital function when the military justice system lacked adequate appellate review. The rationale behind reserving the most serious cases for presidential approval was to ensure "careful, authoritative, and independent consideration before the execution of the sentence."<sup>416</sup> This rationale lost its force as a justification for three essential reasons. First, the UCMJ and its subsequent changes established a robust system of due process closely linked to federal requirements, an independent trial and appellate judiciary, a corps of professional attorneys serving as military defense counsel, and a commitment to funding civilian capital defense counsel and mitigation experts. Second, the President's authority to grant clemency in military courts-martial is inherent in his role as Commander in Chief, whether he approves capital courts-martial or not. Third, there has been no action to curtail the infinite post-appellate judicial activism which clearly precludes presidential review. As such, there is a noticeable absence of steadfast fidelity to the actual concept of presidential review and the corresponding finality of an approved capital sentence.

By apparently abandoning the executive authority to review capital courts-martial, Congress and the President seem to no longer view Article 71(a) as necessary to protect Soldiers' rights. As a result, the presidential approval requirement has become obsolete as a result of "a long period of intentional nonenforcement and notorious disregard"<sup>417</sup>

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present naval general court-martial procedures, (3) Uniform Code of Military Justice general court-martial review," under the new UCMJ provisions). *Id.*

<sup>414</sup> See Morgan, *supra* note 1.

<sup>415</sup> *Loving v. United States*, 517 U.S. 748, 772 (1996). President George W. Bush has taken action on certain military justice matters including signing three executive orders amending the *MCM*. See Exec. Order No. 13,262, 67 Fed. Reg. 18,733 (Apr. 17, 2002), reprinted in *MCM*, *supra* note 5, at A25-52; Exec. Order No. 13,365, 69 Fed. Reg. 71,333 (Dec. 3, 2004), reprinted in *MCM*, *supra* note 5, at A25-73. A third executive order was signed on 14 October 2005, and along with any subsequent orders, will be published with the next version of the *MCM*. E-mail from Lieutenant Colonel Peter Yob, Chief, Policy Branch, Criminal Law Division, Office of the Judge Advocate General, U.S. Army (16 Mar. 2007) (on file with author).

<sup>416</sup> INVESTIGATIONS, *supra* note 206, at 53.

<sup>417</sup> *Desuetude*, *supra* note 17, at 2211-12.



and as a result of substantial improvements in legal review under the UCMJ. Eliminating presidential approval under Article 71(a) does not demolish the foundational principles of civilian control and individual rights. Elimination simply allows military capital litigation to extricate itself and move toward verdict finality by completing federal habeas review as needed. More importantly, simply eliminating Article 71(a) is the most decisive measure to resolve the problem of indefinite delay by post-appellate judicial review.<sup>418</sup>

## 2. *Proposed Revisions to the RCM Eliminate Political Appointees*

Alternatively, if Article 71(a) is not eliminated and federal court jurisdiction arises only after presidential action, regulatory revisions must maximize “the potential benefits to society [over] the potential costs.”<sup>419</sup> Accepting the premise that military society is unique,<sup>420</sup> the President could delegate approval<sup>421</sup> prior to the current protections. With these protections in place, the final level of approval requires balancing the opportunity for further delegation. The same reasons exist today that necessitated delegation of this power in the past;<sup>422</sup> namely, if engaged in their duties as Commander in Chief or SecDef, approving capital sentences could not be done with the requisite care. Likewise, the Secretary of the Army has already delegated all his responsibilities on military justice to the Undersecretary of the Army.<sup>423</sup> Delegating this power to commanders, as was a past practice, is not without cost to the military leadership.<sup>424</sup> The cost-benefit analysis supports a deadline for

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<sup>418</sup> In any measure we may undertake, we always have the choice between the most audacious and the most careful solution; but in deciding, “pursue one great decisive aim with force and determination.” CARL VON CLAUSEWITZ, *PRINCIPLES OF WAR* 13 (Hans W. Getzke trans., 1942).

<sup>419</sup> See Jack Goldsmith et al., *The Most Dangerous Branch? Mayors, Governors, Presidents and the Rule of Law: The President’s Completion Power*, 115 *YALE L.J.* 2280, 2296 (2006) (referencing Exec. Order No. 12, 291, 3 C.F.R. 128 (1981)).

<sup>420</sup> See *Parker v. Levy*, 417 U.S. 733, 743 (1974).

<sup>421</sup> “The President may delegate any authority vested in him under this chapter and provide for the subdelegation of any such authority.” UCMJ art. 140 (2008).

<sup>422</sup> UCMJ INDEX, *supra* note 192 (delegation to Undersecretary Royall and to commanders).

<sup>423</sup> U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE 5–39 (16 Nov. 2005) (Clemency under Article 74). The SecArmy’s functions, powers, and duties concerning military justice matters, which include Article 74 clemency powers, have been assigned to the ASA (M&RA). See 10 U.S.C.S. § 3013(f) (LexisNexis 2008).

<sup>424</sup> In the current operational environment, commanders would have to devote adequate time for this final consideration, even though they have done so at referral and post-trial.

delivering affirmed capital cases to the President because of the political character of civilian oversight.

Change is the rule rather than the exception in the political process, and the constant rotation of officials at the upper levels of government causes frequent gaps in executive progression. Interruptions may result from a change of administration or through the dismissal, reassignment, resignation, illness, or death of an incumbent.<sup>425</sup>

Drawing on the constitutional executive duty to “take Care that the Laws be faithfully executed,”<sup>426</sup> the President must also “supervise and guide executive officers [to secure] unitary and uniform execution of the laws.”<sup>427</sup> Therefore, RCM 1207 should be revised to require delivery of capital courts-martial to the President’s desk within thirty days of completion of the direct appeal and any discretionary certiorari review.<sup>428</sup>

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The post-appeal approval would likely not be an emotional burden for persons charged with making life and death decisions, but there would be an opportunity cost suffered upon other equally vital military functions. *See* Fidell, *supra* note 21, at 366 (referencing Charles J. Dunlap, *Learning from Abu Ghraib: The Joint Commander and Force Discipline*, NAV. INST. PROC. 34 (Sept. 25, 2005)); *see also* *Sundry Legislation Affecting the Naval and Military Establishments: Hearings Before the H. Comm. on Armed Servs.*, 80th Cong., vol. I, at 4424 (1947) (statement of Gen. Dwight D. Eisenhower, Chief of Staff, U.S. Army).

I want to tell you that my most onerous problem in the war was the administrative burden of giving consideration to court-martial sentences [involving] the death of an enlisted man . . . and every single week I gave an entire day to the detailed consideration of such cases. If any commander in the future can be relieved of that, he would very much like to be relieved of it. It is a terrific burden.

*Id.* at 4424.

<sup>425</sup> WILLIAM GARDNER BELL, SECRETARIES OF WAR AND SECRETARIES OF THE ARMY: PORTRAITS & BIOGRAPHICAL SKETCHES app. A (1992).

<sup>426</sup> U.S. CONST. art. II, § 3.

<sup>427</sup> *See* Goldsmith, *supra* note 419, at 2297 (referencing *Myers v. United States*, 272 U.S. 52, 135 (1926)).

<sup>428</sup> The proposed revision adopts the thirty day deadline established by the Pardon Attorney to get clemency applications fully investigated and prepare a recommendation for the President. *See supra* Pt. IV.A.2 (proposed RCM 1207):

No part of a court-martial sentence extending to death may be executed until approved by the President. Whenever the President does not receive the recommendation within thirty days after the date

If the case fails to reach the President, accountability can be properly determined and action taken.<sup>429</sup>

Ensuring that capital cases are timely presented to the President following appellate review would eliminate some of the internal staffing delay. Yet, the CAAF would assert that the legal vacuum<sup>430</sup> would still exist until the President takes action, which has not occurred since receipt of PVT Loving's case nearly three years ago.<sup>431</sup> Alternatively, the President could create a self-imposed deadline to approve the sentence akin to the manner in which the Military Rules of Evidence are amended.<sup>432</sup> Thus, executions shall be deemed approved ninety days<sup>433</sup> after completion of direct appellate review unless action to the contrary is taken by the President.<sup>434</sup>

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of completion of the direct legal review of the proceedings, it shall be presumed the President disapproves of the death sentence, and the Service Secretary shall commute the death sentence in writing.

<sup>429</sup> See, e.g., Kathleen T. Rhem, *Army Secretary Resigns in Wake of Walter Reed Outpatient-Care Shortfalls*, AM. FORCES PRESS SERV., Mar. 2, 2007. "Defense Secretary Robert M. Gates announced this afternoon that he has accepted the resignation of Army Secretary Francis J. Harvey in light of allegations of shortfalls in care of outpatients at Walter Reed Army Medical Center here." *Id.*

<sup>430</sup> *Loving v. United States*, 62 M.J. 235, 250 (2005).

<sup>431</sup> See Martin Interview, *supra* note 202. Another dilemma surrounding PVT Loving's case is whether the President can take action when the CAAF has indicated that legal review is not complete. *Id.*

<sup>432</sup> Any amendments to the Federal Rules of Evidence "shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President." MCM, *supra* note 5, MIL. R. EVID. 1102. This time period "allows for the timely submission of changes through the annual review process." *Id.* The armed forces can the review "the final form of amendments and to propose any necessary modifications to the President." *Id.*

<sup>433</sup> This ninety day period reflects the timeline of President Bush's denial of clemency to Louis Jones, Jr. See *supra* at Pt. II. There are equally valid arguments for longer periods of approval. Originally, the rules of evidence were automatically amended within six months because it "was considered the minimally appropriate time period." See MCM, *supra* note 5, MIL. R. EVID. 1102 analysis, at A22-61.

<sup>434</sup> Importing the language directly from MRE 1102 satisfies the duties under Article 71(a) but transforms it into default acceptance while providing time for the President to review the case and disapprove the sentence as he sees fit.

## B. The President's Inherent Right of Executive Clemency

A criminal justice system that imposes the death penalty but excludes clemency “would be totally alien to our notions of criminal justice.”<sup>435</sup> Efficient processing of death sentence cases should never take priority over accurate and confident results.<sup>436</sup> Eliminating executive approval does not disadvantage a condemned Soldier by denying him a chance for executive clemency.<sup>437</sup> The Constitution is clear that the President “shall have the Power to grant Reprieves and Pardons for Offences against the United States.”<sup>438</sup> The President's power to pardon includes “the power to commute sentences on conditions . . . not specifically provided for by statute.”<sup>439</sup> The Supreme Court agrees, and has clarified that clemency has not traditionally been the business of the courts.<sup>440</sup> Presidents even have the power to make politically unpopular clemency decisions.<sup>441</sup> So, if the President has unfettered discretion in granting clemency, should it be administered arbitrarily through executive inaction?<sup>442</sup>

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<sup>435</sup> Heise, *supra* note 294 (citation omitted).

<sup>436</sup> Contrasting PVT Loving's appeals with those of PVT William Kreutzer, if the death penalty was decidedly wrongly in the latter case, then the thorough and lengthy review must be accepted as the cost of pursuing justice. *See* *United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004) (noting trial court did not provide a mitigation specialist to explain mental health issues where servicemember had suicidal ideations and fantasized about killing fellow Soldiers). “Appellant's trial can be summed up in one sentence: Three defense counsel who lacked the ability and experience to defend this capital case were further hampered by the military judge's erroneous decision to deny them necessary expert assistance, thereby rendering the contested findings and the sentence unreliable.” *Id.* at 786 (Curie, J., concurring in result).

<sup>437</sup> *See* *Schick v. Reed*, 419 U.S. 256 (1976) (holding President Eisenhower could commute court-martial death sentence to life without parole even though the UCMJ did not provide for this type of sentence).

<sup>438</sup> U.S. CONST. art. II, § 2.

<sup>439</sup> *Schick*, 419 U.S. at 264.

<sup>440</sup> *Ohio v. Woodward*, 523 U.S. 272, 284 (1998) (citations omitted).

<sup>441</sup> *See* S. REP. NO. 106-231, at 232 (2000) (referencing public outrage at President Clinton's grant of clemency to members of the FALN); *see also supra* note 245.

<sup>442</sup> *Sundry Legislation Affecting the Naval and Military Establishments: Hearings Before the H. Comm. on Armed Servs.*, 80th Cong. (Vol. II: Full Committee Hearings on H. R. 2964, 3417, 3735, 1544, 2993, 2575, July 15, 1947) (statement of General Dwight D. Eisenhower, U.S. Army Chief of Staff) (opposing final approval vested in persons outside military chain of command).

When [a capital case] finally gets into the War Department and it is reviewed . . . [i]t has to be legally sufficient, in accordance with the rules of evidence and all the rest of it . . . But when it comes to the mitigating of that sentence I say it has got to be in the chain of

Executive approval is necessarily intertwined with its converse, executive clemency. Proper allocation of the balance of power is essential to ensure that courts decide legal matters and the Executive decides clemency matters.<sup>443</sup> Legislative efforts can limit appeals to curtail perceived abuses by an accommodating judiciary, but the greatest potential risk to the power reposed in a jury may be an inactive Executive. The characteristic virtues of executive clemency require this power be exercised as needed for the further maintenance of the society.<sup>444</sup> This prerogative is no longer absolute and has been limited by some state constitutions that require the approval of clemency boards.<sup>445</sup> Quantitative analysis of such boards shows that these boards may grant less clemency when compared to an Executive who has sole responsibility for clemency; however, the structure of criminal appellate access also impacts on a proper assessment.<sup>446</sup> Regardless, this article does not advocate for any limitation of the President's clemency power, but presents this information to show the widespread practice of separating executive clemency from executive approval of sentences.

The characteristic virtues of executive clemency require this power be exercised as needed for the further maintenance of society.<sup>447</sup> The de facto clemency by inaction erodes military society by diverting attention and resources from Soldiers on the battlefield. Moreover, it further drains resources when the Army is bound to a Sisyphean task of post-appellate review: a dedicated exertion to accomplish nothing. Failure to diligently resolve military death sentences may perform a valued "shielding function" that exists as a "political cushion" for the President.<sup>448</sup> Nevertheless, "[t]he power to remit or commute sentences

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authority, to be done by someone that has some responsibility for winning the war, and not just sitting on the outside.

*Id.* at 4424.

<sup>443</sup> The military courts are established under Article I of the Constitution, whereas the federal courts are established under Article III of the Constitution. Presidential control over the military courts does not upset the balance of power; however, an imbalance may exist if the President's inaction precludes access to the Article III courts in violation of their legitimate jurisdiction. *See* U.S. CONST. arts. I, III.

<sup>444</sup> THE FEDERALIST NO. 74 (Alexander Hamilton). The "principal argument for reposing the power of pardoning [to the President is that] there are often critical moments, when a well timed offer of pardon [could] restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall." *Id.*

<sup>445</sup> *See supra* Pt. III.

<sup>446</sup> *See* Gershowitz, *supra* note 304, at 680.

<sup>447</sup> THE FEDERALIST NO. 74 (Alexander Hamilton).

<sup>448</sup> *Id.* at 445.

of death . . . remains with the President,” independent of any requirement to approve the sentence.<sup>449</sup> Soldiers may “apply to the present President or future Presidents for a complete pardon [or] commutation.”<sup>450</sup>

Despite minor differences, it remains clear that among the states there are no specific or required approval criteria for a death sentence. Analogous to clemency, there are also no limits to what can be considered in deciding sentence approval. Therefore, neither approval nor clemency processes are as detailed as appellate and post-conviction processes because of the distinctly different purposes served by executive review and judicial review.

## VI. Conclusion

Fairness and justice have been achieved under the UCMJ. Both in absolute terms and when compared to the federal and state criminal justice systems, Soldiers enjoy significant substantive and procedural protections that were achieved by adopting the best legal practices and safeguards in these systems while remaining flexible to the UCMJ’s central purpose. Of particular importance is the remarkable extent of appellate and collateral review of capital courts-martial, providing judicial oversight equal to or greater than that provided in these other systems. Unfortunately, the vital importance of sentence finality is at risk because of the piecemeal process by which Congress amended the UCMJ. Indeed, it is ironic that the very rules which helped enforce judicial review to ensure justice now act to delay justice. The challenge facing lawmakers is to ensure sentence finality by eliminating unwarranted and endless appeals while still preventing the dissipation of essential judicial review. This can be done, without diluting federal habeas jurisdiction, by simply removing the requirement for presidential approval or by eliminating the review of capital sentences by other political appointees or by imposing time limits on such reviews. Any of these options would alleviate this crisis and restore finality.

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<sup>449</sup> DUDLEY, *supra* note 27, at 160 (referencing Digest of Judge Advocate General Opinions 341, and stating “[t]he sentence of death, though it cannot be mitigated, *i.e.*, reduced in amount or quantity, may be remitted or commuted by the President,” such power being withheld, “[it] cannot be exercised by the military commander.”).

<sup>450</sup> Schick v. Reed, 419 U.S. 256, 268 (1976).

At some point, litigation must come to an end because, just as in warfare, finality is essential.<sup>451</sup> Reflection on the above history of capital litigation illuminates the inherent tension between the military's need for discipline and the public's need for confidence in the military. In confronting a deluge of progressively trivialized petitions, the Army is compelled "to default or defend the integrity of their judges and their official records, sometimes concerning trials or pleas that were closed many years ago."<sup>452</sup> The courtroom is not a battlefield, and while PVT Loving is entitled to a defense it should not be characterized as a heroic last stand, but as an ongoing legal stagnation. As Justice Jackson noted over a half-century ago, "it is important to adhere to procedures which enable courts readily to distinguish between a probable constitutional grievance from a convict's mere gamble on some indulgent judge to let him out of jail."<sup>453</sup>

The fault does not lie entirely with PVT Loving's case, and "[p]erhaps because we have not had a draft for more than a generation, military justice . . . has largely fallen off the congressional [radar]."<sup>454</sup> Traditionally, wars galvanize Congress into action, as seen by the development and evolution of the UCMJ.<sup>455</sup> The current military operations in Iraq and Afghanistan make "the administration of [military justice] a major theme"<sup>456</sup> for our civilian leadership. Likewise, PVT

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<sup>451</sup> SUN-TZU, *supra* note 213, at 76. "What is essential in war is victory, not prolonged operations."

<sup>452</sup> *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

<sup>453</sup> *Id.* at 536. Private Loving's appeals may benefit him by delay but it may work to the detriment of others. "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Id.* at 537.

<sup>454</sup> Fidell, *supra* note 21, at 366.

<sup>455</sup> *Id.* (citations omitted) (noting major revisions to UCMJ also occurred following the Vietnam War via Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335).

<sup>456</sup> *Id.* at 266, 361 (noting Abu Ghraib detainee abuse trials). Congress is actively engaged in creation and revision of rules for military commissions, detainee treatment and requisite punishment for violations thereof, including efforts to eliminate legal gaps in extraterritorial jurisdiction. *See generally* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006. *See also* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-3267, amended by Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004) (extending jurisdiction to employees of any federal agency or provisional authority when supporting Department of Defense missions); K. Elizabeth Waits, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals*, 23 ARIZ. J. INT'L & COMP. L. 493 (2006) (describing loophole in U.S. criminal law that appeared to render contractors at Abu Ghraib immune from prosecution).

Loving's exhaustive appeals and "long march through the American judicial system"<sup>457</sup> should make capital military justice a major theme. But as seen in the opening quotes, will it be a major theme in this administration or the next?<sup>458</sup>

No other capital litigation system, state or federal, requires executive approval and then allows executive inaction without alternatives to reach finality. The UCMJ should operate in the same manner as civilian systems unless there are compelling reasons not to. It is certainly true that "[n]o system of law, civil or military, will ever be devised . . . that will satisfy all . . . or eliminate the personal equation that causes most of the injustice."<sup>459</sup> Nevertheless, eliminating Article 71(a) or shifting its requirements to occur after federal habeas review is necessary to restore legal finality, promote justice, and maintain good order and discipline. When the condemned can never be certain of their fate and when the verdict of the jury can never be enforced, there is not simply a legal vacuum but a legal black hole.<sup>460</sup> "No legal system can or should operate in a vacuum, disregarding the changing norms of society."<sup>461</sup> The purpose behind the approval provision is satisfied by the appellate courts; yet, disuse of the approval provision nullifies the purpose of the trial courts. When Professor Morgan drafted the UCMJ to keep commanders out of the jury box, he did not intend for the verdict to languish in the Commander in Chief's inbox. Eliminating presidential approval will not create a hole in the military criminal justice system; it will fill one.

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<sup>457</sup> Loving v. Hart, 47 M.J. 428, 454 (1998) (Sullivan, J., concurring in part and in result).

<sup>458</sup> See *supra* note 2.

<sup>459</sup> ALYEA, *supra* note 22, at 95.

<sup>460</sup> Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (noting absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole).

<sup>461</sup> Lieutenant Colonel James B. Roan et al., *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 186 (2002) (illustrating the necessity and merits of the military justice system "to foster a better understanding and appreciation for the system.").



## Appendix A

### Chronology of Presidential Approval Articles

#### The British Articles of War of 1765

“Section XV, Article X. No sentence of a General Court-martial shall be put into Execution, till after a Report shall be made of the whole Proceedings to [the Government], or to Our General or Commander In Chief, and Our or his Directions shall be signified thereupon . . . .”

1. Act of 30 June 1775, *Rules and Regulations for the Continental Army*, 2 JOUR. CONG. 69, 195 (1775).

“Art. LXVII. That the general, or commander in chief for the time being, shall have full power of pardoning, or mitigating any of the punishments ordered to be inflicted, for any of the offences mentioned in the foregoing articles; and every offender, convicted as aforesaid, by any regimental court-martial, may be pardoned, or have his punishment mitigated by the Colonel or officer commanding the regiment.”

2. Act of 20 September 1776, *The Continental Articles and Rules for the Better Government of the Troops*, 5 JOUR. CONG. 788–807 (1776).

“Section XIV, Art. 8. No sentence of a general court-martial shall be put in execution, till after a report shall be made of the whole proceedings to Congress, or the general, or commander in chief of the forces of the United States, and their or his direction be signified thereupon.”

“Section XVIII, Art. 2. The general, or commander in chief for the time being shall have full power of pardoning or mitigating any of the punishments ordered to be inflicted, for any of the offences mentioned in the foregoing articles; and every offender . . . .”

3. Act of 14 April 1777, *Revision of the Articles of War*, VII JOUR. CONG. 264–66 (1777).

“Art. 3. No sentence of a general court-martial shall be put in execution, till after a report shall be made of the whole proceedings to Congress, the commander In chief, or the continental general

commanding in the state, where such court-martial shall be held, and their or his orders be issued for carrying such sentence into execution.”

“Art. 4. The continental general, commanding in either of the American states, for the time being shall have full power . . . of pardoning or mitigating any of the punishments ordered to be inflicted, for any of the offences mentioned in the aforementioned rules and articles for the better government of the troops; except the punishment of offenders, under sentence of death, by a general court-martial, which he may order suspended until the pleasure of Congress can be known . . . .”

4. Act of 27 May 1777, *Revision of the Articles of War*, VII JOUR. CONG. 264–66.

“That the general, or commander in chief, for the time being, shall have the full power of pardoning or mitigating any of the punishments ordered to be inflicted for any of the offences mentioned in the rules and articles for the better government of the troops raised . . . .”

5. Act of 18 June 1777, *Revision of the Articles of War*.

“That a general officer commanding a separate department, be empowered to grant pardons to, or order execution of, persons condemned to suffer death by general courts-martial, without being obliged to report the matter to Congress or the commander in chief.”

6. Act of 31 May 1786, *Administration of Justice*, 30 JOUR. CONG. 316–32 (1786).

“Article 2. [N]o sentence of a general court-martial . . . in time of peace, extending to the loss of life . . . be carried into execution, until after the whole proceedings shall have been transmitted to the secretary at war, to be laid before Congress for their confirmation, or disapproval, and their orders on the case.”

7. Act of 30 May 1796, *An Act to Ascertain and Fix the Military Establishment of the United States*, ch. 39, sec. 18, I Stat. 485.

“Sec. 18. [No] sentence of a general court-martial, in time of peace, extending to the loss of life . . . be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War,

to be laid before the President of the United States for his confirmation or disapproval, and orders in the case . . . .”

8. Act of 10 April 1806, *An Act for Establishing Rules and Articles for the Government of the Armies of the United States*, ch. 20, 9th Cong, 1st Sess., II Stat. 359, 367.

“Article 65. [No] sentence of a general court-martial, in time of peace, extending to the loss of life . . . be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before *the President* of the United States for his confirmation or disapproval, and orders in the case . . . .”

9. Act of 17 July 1862, ch. 201, sec. 5, 37th Cong, 2d Sess., XII Stat. 598.

“Section 5. *And it be further enacted*, That the President shall appoint by, and with the advice and consent of the Senate, a judge advocate general . . . to whose office shall be returned, for revision, the records and proceedings of all courts-martial . . . [a]nd no sentence of death . . . shall be carried into execution until the same shall have been approved by the President.”

10. Act of 3 March 1863, *An Act for Enrolling and Calling Out the National Forces*, ch. 75, sec. 21, 37th Cong, 3d Sess., XII Stat. 731, 735-736.

“Section 21. *And if be further enacted*, That . . . [Section 5 of the Act of 17 July 1862] as requires the approval of the President to carry into execution the sentence of a court-martial . . . [is] . . . repealed, as far as it relates to carrying into execution the sentence of any court-martial against a person convicted as a spy or deserter, or of mutiny or murder; and hereafter sentences in punishment of these offenses may be carried into execution upon the approval of the commanding-general in the field.”

11. Act of 2 July 1864, *An Act to Provide for the More Speedy Punishment of Guerilla Marauders*, ch. 215, sec. 1, 38th Cong, 1st Sess., XIII Stat. 356.

“Section 1. *Be it enacted* . . . That . . . [Section 21 of the Act of 3 March 1863] shall apply as well to the sentences of military commissions

as to those of courts-martial, and hereafter the commanding general in the field, or the commander of the department, as the case may be, shall have power to carry into execution all sentences against guerilla marauders for robbery, arson, burglary, rape, assault with intent to commit rape, and for violation of the laws and customs of war, as well as sentences against spies, mutineers, deserters and murderers.

Section 2. *And be it further enacted*, That every officer authorized to order a general court-martial shall have power to pardon or mitigate any punishment ordered by such court . . . except the sentence of death . . . which sentences it shall be competent during the continuance of the present rebellion for the general commanding the army in the field, or the department commander, as the case may be to remit or mitigate.”

12. Act of 22 June 1874, *Articles of War*, tit. XIV, ch. 5, 18 Stat. 229, 240.

“Art. 105—No sentence of a court-martial inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the case of guerilla marauders, convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.”

13. Act of 29 August 1916, ch. 418, sec. 1342, 64th Cong, 1st Sess., 39 Stat. 619, 658.

“Article 48 Confirmation—When Required. In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, . . . (d) Any sentence of death, except in the case of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the Territorial department or division . . . .

Article 50 Mitigation or Remission of Sentence. The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence, but . . . no sentence of death shall be mitigated or remitted by any authority inferior to the President.”

14. Act of 28 February 1919, *An Act to Amend the Fiftieth Article of War*, 65th Cong, 3d Sess., ch. 81, 40 Stat. 1211.

“Art. 50. Mitigation or Remission of Sentences. The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence.

. . . .

[B]ut no sentence approved or confirmed by the President shall be remitted or mitigated by any authority inferior to the President.

When empowered by the President to do so, the commanding general of the Army in the field or the commanding general of the territorial department or division may mitigate or remit . . . any sentence which under these articles requires the confirmation of the President before the same may be executed.”

15. Act of June 4, 1920, *National Defense Act Amendments of 1920*, c. 227, sub. II, sec. 1, art. 48, 66th Cong, 2d Sess., 41 Stat. 759, 796-797 (1920).

“Article 48 Confirmation—When Required. In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, . . . (d) Any sentence of death, except in the case of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution, subject to the provisions of article 501/2, upon confirmation by the commanding general of the Army in the field or by the commanding general of the Territorial department or division . . . .

Article 49 Powers Incident to the Power to Confirm. The power to confirm the sentence of a court-martial shall be held to include: (a) the power to confirm or disapprove a finding . . . (b) The power to confirm or disapprove the whole or any part of the sentence.

Article 501/2 Review; Rehearing. The Judge Advocate General shall constitute in his office, a board of review, consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President . . . is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall . . . transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a court-martial involving the penalty of death . . . unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; . . .”

16. Act of 20 August, 1937, *An Act to Amend Articles of War 501/2 and 70*, 75th Cong, 1st Sess., ch. 716, sec. 1-2, 50 Stat. 724.

“*Be it enacted* . . . That the third and fifth paragraphs of Article of War 501/2 (41 Stat. 797-799) be amended by adding . . . *Provided*, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or the Acting Secretary of War.”

Sec. 2 That Article of War 70 (41 Stat. 802) is hereby amended . . . so that the first sentence . . . will read as follows: “No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made.”

17. The Code of Laws of the United States of America in Force on December 6, 1926, Title 10.—ARMY.<sup>462</sup>

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<sup>462</sup> In 1926, Congress formalized the organization of all public laws in existence and the resulting published text of the statutes is the United States Code (U.S.C.). The U.S. Code “is the codification by subject matter of the general and permanent laws of the United States. Since 1926, the United States Code has been published every six years.” *See* U.S. Gov't Printing Office, GPOAccess.gov, United States Code: About, *available at* <http://www.gpoaccess.gov/uscode/about.html> (last visited May 1, 2008).

“Sec. 1519. Confirmation; when required (Article 48).—In addition to the approval required by article 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

....

(d) Any sentence of death, except in cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution, subject to the provisions of article 50½ upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.”

18. Act of 24 June 1948, *Selective Service Act of 1948 (Elston Act)*, ch. 625, sec. 224, 80th Cong, 2d Sess., 62 Stat. 627, 634-635 (effective Feb. 1, 1949); 10 U.S.C. § 1472, 1519.

“Article 48. Confirmation. In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

a. By the President with respect to any sentence—(1) of death.”

19. Act of 5 May 1950, *Uniform Code of Military Justice*, c. 169, tit. II, s. 14, 81st Cong, 2d Sess., 64 Stat. 131 (effective May 31, 1951).

“Article 71 Execution of sentence; suspension of sentence.

(a) No court-martial sentence extending to death . . . shall be executed until approval by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.”

## Appendix B

### ABA Assessment of Florida Clemency<sup>463</sup>

#### *Insufficient Information to Determine Statewide Compliance*

#1: The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.
#2: The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.
#3: Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death-row inmate.
#4: Clemency decision-makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.
#5: Clemency decision-makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.
#11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

#### *Partially in Compliance*

#6: Death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases.
#7: Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources and provided with sufficient time to develop claims and to rebut the State's evidence.
#9: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.

#### *Not in Compliance*

#8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.
#10: Clemency decision-makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.

<sup>463</sup> See MORATORIUM ASSESSMENT, *supra* note 112.



### Appendix C

#### *Habeas Corpus Review and Carrying Out Military Death Sentences*

Should the President approve PVT Loving's death sentence, PVT Loving may collaterally attack his sentence in federal district court. The United States district courts are authorized to grant a writ of habeas corpus to a prisoner "in custody in violation of the Constitution or laws or treaties of the United States."<sup>464</sup>

Historically, habeas corpus review of court-martial convictions ended when the civilian federal court was satisfied that the court-martial had in personam and subject matter jurisdiction and had not exceeded its sentencing power.<sup>465</sup> In *Burns v. Wilson*, a case involving the habeas corpus petitions of Army personnel sentenced to death at court-martial for murder and rape, the Supreme Court broadened the scope of habeas review to permit limited review of constitutional claims.<sup>466</sup> In *Burns*, the Supreme Court cautioned that "[m]ilitary law, like state law, is a jurisprudence which exists separate and apart from the law which governs our federal judicial establishment. . . . Congress has taken great care both to define the rights of those subject to military law . . . [and to] provide a complete system of review within the military system to secure those rights."<sup>467</sup> The Supreme Court concluded that when the military justice system "has dealt fully and fairly with an allegation raised in [the] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."<sup>468</sup> Simply stated, "[i]t is the limited function of the civil courts to determine whether the military [courts] have given fair consideration to each of these claims."<sup>469</sup>

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<sup>464</sup> 28 U.S.C.S. § 2241(c)(3) (LexisNexis 2008); *see also* *Clinton v. Goldsmith*, 526 U.S. 529 (1999).

<sup>465</sup> *Hiatt v. Brown*, 339 U.S. 103, 110–11 (1950); *Ex parte Reed*, 100 U.S. 13, 22–23 (1879); *Smith v. Whitney*, 116 U.S. 167, 177 (1886) ("[T]he acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts.").

<sup>466</sup> 346 U.S. 137, 142 (1953).

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at 142

<sup>469</sup> *Id.* at 144.

The scope of review in the Tenth Federal Circuit<sup>470</sup> is initially limited to determining whether the claim raised by the petitioner was given full and fair consideration by the military courts.<sup>471</sup> If an issue is brought before the military court and is disposed of, even summarily, the federal habeas court will find that the issue has been given full and fair consideration.<sup>472</sup> Thus, where military courts have given full and fair consideration to the allegations raised by a petitioner, the inquiry is at an end.<sup>473</sup> Moreover, “[t]he doctrine of deliberate bypass or waiver . . . as well as that of exhaustion . . . limits collateral review of military convictions.”<sup>474</sup> The test for “deliberate bypass or waiver is ‘an awareness of the availability of state [or military] remedy and a decision not to use it made by the petitioner himself.’”<sup>475</sup> Generally, federal courts are not to entertain habeas petitions by military prisoners until all available military remedies have been exhausted.<sup>476</sup> If a petitioner failed to present a claim to the military courts at trial or on direct appeal, it is

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<sup>470</sup> The Tenth Circuit has the most experience with habeas petitions filed by service members due to the location of the USDB at Fort Leavenworth, Kansas. *Davis v. Lansing*, 202 F. Supp. 2d 1245, 1249 n.3 (D. Kan. 2002), *aff’d*, 65 Fed. Appx. 197 (10th Cir. 2003) (citing *Brosius v. Warden*, 278 F.3d 239, 244 (3d Cir. 2002)). Private Loving is incarcerated at the USDB.

<sup>471</sup> *See, e.g., Fernandez v. Nickles*, 106 F. Supp. 2d 1214, 1216 (D. Kan. 2000).

<sup>472</sup> *See, e.g., Roberts v. Callahan*, 321 F.3d 994, 997 (10th Cir. 2003); *King v. Mosely*, 430 F.2d 732, 735 (10th Cir. 1970). The military court need not specifically address the issue in a written opinion, and fair consideration has been given even if the opinion disposed of the issue by finding that the issue is not meritorious or does not require discussion. *See Davis*, 202 F. Supp. 2d at 1251.

<sup>473</sup> *Roberts*, 321 F.3d at 995 (citing *Burns* and *Lips v. Commandant, United States Disciplinary Barracks*, 997 F.2d 808, 811 (10th Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994)).

<sup>474</sup> *Angle v. Laird*, 429 F.2d 892, 894 (10th Cir. 1970).

<sup>475</sup> *Id.* at 894 (citing *Watkins v. Crouse*, 344 F.2d 927, 929 (10th Cir. 1965)).

<sup>476</sup> *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975); *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986). Likewise, the courts have consistently refused to entertain successive “nuisance” applications for habeas corpus because the practice of filing successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts. *See Dorsey v. Gill*, 148 F.2d 857 862 (D.C. Cir. 1945) (noting that “petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief.”). Moreover, 28 U.S.C. § 2244(a) bars successive petitions under § 2241. *See* 28 U.S.C.S. § 2244(a) (LexisNexis 2008). The express limitation on successive attempts at collateral relief for motions under 28 U.S.C. § 2255, and for petitions under 28 U.S.C. § 2254, enacted with the Antiterrorism and Effective Death Penalty Act (AEDPA) do not apply to § 2241 petitions. Nevertheless, 28 U.S.C. § 2244(a), in existence prior to the AEDPA, bars successive petitions under § 2241 directed to the same issue. *See Romadine v. United States*, 206 F.3d 731, 736 (7th Cir. 2000).

waived because a federal habeas court will not review claims that were not raised before the military courts.<sup>477</sup> Therefore, a Soldier cannot collaterally attack his conviction absent a showing of cause for the waiver and actual prejudice resulting from a constitutional violation.<sup>478</sup> The Supreme Court recognizes one exception—if failure to hear a petitioner’s claims would result in a miscarriage of justice; however, the petitioner must establish that he has a colorable claim of factual innocence, as compared to legal innocence.<sup>479</sup> Yet, if a petitioner bypasses the entire military justice system and raises new issues for the first time in a habeas petition, a clear violation of the exhaustion doctrine will exist. As stated by the Eleventh Circuit, “to decide a [habeas petition] case on the merits without first applying the exhaustion doctrine would only encourage future litigants to deliberately flout military processes, and telegraph that we are no longer serious about, or concerned with, their integrity or autonomy.”<sup>480</sup>

The Tenth Circuit has further refined the parameters of habeas review and counsels against a hearing on the merits to underscore the longstanding preference by federal civil courts to avoid interfering with military affairs.<sup>481</sup> Therefore, only when the military has *not* given a petitioner’s claims full and fair consideration does the scope of review by the federal civil court expand.<sup>482</sup> The Tenth Circuit permits habeas review when the claim was raised before the military courts and military

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<sup>477</sup> Roberts, 321 F.3d at 995 (citing *Watson*, 782 F.2d at 145). Exhaustion of military remedies also includes exhaustion of administrative remedies such as filing an application for review by the TJAG and filing a petition for a new trial with the TJAG. UCMJ art. 69 (Review by TJAG); *id.* art. 73 (petition for new trial). To prevail on a newly discovered evidence claim, the defendant must show that the evidence was discovered after trial; he could not have discovered the evidence at the time of trial using due diligence; and that the newly discovered evidence would probably produce a substantially more favorable result for the accused. MCM, *supra* note 5, R.C.M. 1210(f)(2). A military defendant faces a heavy burden because new trial petitions are disfavored. *United States v. Niles*, 45 M.J. 455, 456-457 (1996).

<sup>478</sup> *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977); *see also* *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Murray v. Carrier*, 477 U.S. 478, 481 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wolff v. United States*, 737 F.2d 877, 879-80 (10th Cir. 1984), *cert. denied*, 469 U.S. 1076 (1984); *United States v. Sorrentino*, 175 F.2d 721, 723 (3d Cir. 1949), *cert. denied*, 338 U.S. 868 (1949).

<sup>479</sup> *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992).

<sup>480</sup> *Wink v. England*, 327 F.3d 1296, 1304 (11th Cir. 2003).

<sup>481</sup> *Chappell v. Wallace*, 462 U.S. 296 (1983); *see also* *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) (civilian judges are not given the task of running the military); *Parker v. Levy*, 417 U.S. 733 (1974) (the need for a separate jurisprudence for the military is necessary to promote the purposes of the armed forces).

<sup>482</sup> *Lips v. Commandant, U.S. Disciplinary Barracks*, 997 F.2d 808, 811 (10th Cir. 1993).

review has been exhausted, but only after application of a four-factor test to determine whether habeas review is proper.<sup>483</sup> If a prisoner meets this test, the court will review the merits of the petition.

Should PVT Loving exhaust his federal appeals, the TJAG will prepare the notification letter and the execution order for the SecArmy.<sup>484</sup> The SecArmy will notify the Commandant of the U.S. Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas, of the prescribed manner and approved location of the execution.<sup>485</sup> The Chief of Legislative Liaison will notify Congress, and conduct any necessary briefings.<sup>486</sup> The prisoner will be notified in the presence of his TDS counsel, who will provide advice on seeking a stay and other advice appropriate concerning an execution, to include settling his legal affairs.<sup>487</sup> “Once the prisoner has been formally notified of the pending execution, the prisoner’s status will be changed to that of ‘condemned prisoner.’”<sup>488</sup> He shall have access to a chaplain and be discharged from the Army prior to execution.<sup>489</sup> After the lethal injection, the condemned prisoner’s remains will be buried in the USDB cemetery if not claimed by the next of kin.<sup>490</sup>

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<sup>483</sup> *Dodson v. Zelez*, 917 F.2d 1250, 1252–53 (10th Cir. 1990) (requiring reviewing court to determine if: (1) the claimed error is of a substantial constitutional dimension; (2) a legal, rather than a factual, issue is involved; (3) military considerations do not warrant different treatment of constitutional claims such that federal civil court intervention would be inappropriate; and (4) the military courts failed to give adequate consideration to the claimed error and applied an improper legal standard).

<sup>484</sup> AR 190-55, *supra* note 206, ¶ 1-4c(1)–(2).

<sup>485</sup> *Id.* ¶ 1-4a. The manner of execution is by lethal injection, and the date of execution “shall be no sooner than 60 days from the date of approval by the President.”; *see also* Execution Procedures, *id.* at. ch. 3; Post-Execution Procedures, *id.* at. ch. 4.

<sup>486</sup> *Id.* ¶ 1-4e.

<sup>487</sup> *Id.* ¶ 2-7b. The prisoner is also provided medical assistance and counseling as needed. *Id.* at ¶ 2-7c.

<sup>488</sup> *Id.* ¶ 2-1i; 2-1k.

<sup>489</sup> AR 190-55, *supra* note 206, ¶ 2-1j (may select chaplain); *id.* ¶ 2-k (discharge is part of the sentence).

<sup>490</sup> *Id.* ¶ 2-3.

**THE SOLDIER AND THE STATE: WHETHER THE  
ABROGATION OF STATE SOVEREIGN IMMUNITY IN  
USERRA ENFORCEMENT ACTIONS IS A VALID EXERCISE  
OF THE CONGRESSIONAL WAR POWERS**

MAJOR TIMOTHY M. HARNER\*

I. Introduction

The Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>1</sup> provides many rights for both Reserve and National Guard military members who leave their employment for a period of time due to federal military service.<sup>2</sup> Some of the more commonly known features and rights under USERRA include the prohibition on discrimination against servicemembers;<sup>3</sup> the right of servicemembers to continue to accrue seniority in their civilian positions during their period of federal service;<sup>4</sup> the right of servicemembers to reenroll in employee-

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<sup>1</sup> 38 U.S.C. §§ 4301–4334 (2000).

<sup>2</sup> The term “federal service” is used in its broad, generic sense. For the specific periods of Guard and Reserve service to which USERRA applies, see *id.* § 4303(13).

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

*Id.*

<sup>3</sup> *Id.* § 4311.

<sup>4</sup> *Id.* § 4316(a).

sponsored health care plans upon termination of their federal service,<sup>5</sup> and the right of servicemembers to accrue benefits in employee pension plans during the period of federal service.<sup>6</sup> Perhaps the best-known right provided under USERRA is the servicemember's right to be reemployed by his or her pre-service employer after the completion of military service.<sup>7</sup> The term "employer" as used in USERRA is broadly defined, and specifically includes state governments.<sup>8</sup> The inclusion of states as employers, however, becomes a problem of constitutional dimensions when it comes to the enforcement mechanisms Congress has placed in the statute. The USERRA permits an individual whose reemployment rights have been violated by a state government employer to file suit for damages against that state, in a state court.<sup>9</sup> Such suits, on their surface, seem to violate the principle of state sovereign immunity as embodied in the Eleventh Amendment to the Constitution.<sup>10</sup> Since the Supreme Court decided *Seminole Tribe of Florida v. Florida* in 1996,<sup>11</sup> lower courts have routinely held that federal statutory provisions permitting private, individual suits against states violate principles of state sovereign immunity, and are prohibited by the Eleventh Amendment.<sup>12</sup> No court, however, including the Supreme Court, has thoroughly examined the issue of whether USERRA's enforcement provision permitting private suits against state government employers is a valid exercise of the Congressional War Powers.<sup>13</sup> This article examines the constitutionality

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<sup>5</sup> *Id.* § 4317.

<sup>6</sup> *Id.* § 4318.

<sup>7</sup> *Id.* §§ 4312–4313.

<sup>8</sup> *Id.* § 4303(4)(A) (“[T]he term ‘employer’ means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including . . . a State . . .”).

<sup>9</sup> *Id.* § 4323(b)(2) (“In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.”).

<sup>10</sup> U.S. CONST. amend. XI (“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”). Although by its plain terms, the Eleventh Amendment applies to cases brought against states by citizens of another state, the amendment has historically been held to apply to suits by a citizen against his own state as well. *See* *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the Eleventh Amendment also prohibited suits by citizens against their own state if that state did not consent to be sued).

<sup>11</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>12</sup> *See* discussion *infra* Part II.C.

<sup>13</sup> U.S. CONST. art. I, § 8, cls. 11–16.

[Congress shall have the power to] declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land

of USERRA's enforcement provisions as a legitimate exercise of congressional War Powers, beginning with a brief historical survey of congressional legislation providing reemployment rights to servicemembers. This article then analyzes the most recent Supreme Court cases governing state sovereign immunity issues, including *Seminole Tribe of Florida v. Florida*, *Alden v. Maine*, and *Central Virginia Community College v. Katz*, and applies the methodology used in those cases to an analysis of USERRA and congressional War Powers. The article further analogizes USERRA enforcement actions to *qui tam* suits, ultimately concluding that the USERRA enforcement provision in relation to state actors is a valid exercise of the congressional War Powers for three primary reasons. First, USERRA is a valid abrogation of state sovereign immunity, as Congress passed USERRA pursuant to its War Powers. Second, a private suit under USERRA enforces a critical federal power, i.e., the power to raise and support armies (in making this assertion, this article analogizes a USERRA enforcement action to a *qui tam* suit). Third, as opposed to the situations in other state sovereign immunity cases, an individual bringing suit under USERRA gains the ability to sue solely due to his or her status as a member of the federal government. Last, this article recommends certain statutory changes to USERRA that could withstand potential scrutiny by the federal courts.<sup>14</sup>

## II. A Brief History of Service-Related Reemployment Rights Legislation as Applicable to State Government Employers

### A. World War II to *Seminole Tribe*

During the World War II era, reemployment rights for military members were governed on the federal level by the Selective Training

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and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

*Id.*

<sup>14</sup> See discussion *infra* Part VII.

and Service Act of 1940 (1940 Act).<sup>15</sup> Unlike USERRA, which is concerned primarily with Guard and Reserve service,<sup>16</sup> the 1940 Act pertained to draftees, and was passed to address the “need to train and induct a substantial number of civilians into the small standing military establishment.”<sup>17</sup> The 1940 Act provided reemployment rights to individuals employed either by private companies or by the federal government, so long as those individuals met the statute’s requirements. The statutory requirements included “induct[ion] into the land or naval forces . . . for training and service,” as well as “satisfactor[y] complete[tion of] such period of training and service.”<sup>18</sup> If a person had to leave his job because of induction, the 1940 Act provided a reemployment right, under which the employer had to restore an individual “to such position or to a position of like seniority, status, and pay”<sup>19</sup> as the employee had previously. This right was subject to several limitations. For example, the person seeking reemployment had to still be “qualified to perform the duties of such position.”<sup>20</sup> Furthermore, the individual seeking reemployment had to apply “within forty days after [being relieved] from such training or service.”<sup>21</sup> The 1940 Act

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<sup>15</sup> Selective Training and Service Act of 1940, Pub. L. No. 783, 76th Cong., 54 Stat. 885, 890 (1940) (*repealed by* Pub. L. No. 759, § 17, 62 Stat. 625 (1948)). *See generally* Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999, 1013–14 (2004) (discussing USERRA’s historical predecessors and a brief history of USERRA); Lieutenant Colonel H. Greg Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 56 (1999) (providing a brief historical overview of USERRA-like statutes).

<sup>16</sup> 38 U.S.C. § 4301(a) (2000).

The purposes of this chapter are—(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services.

*Id.*

<sup>17</sup> Manson, *supra* note 15, at 56.

<sup>18</sup> Selective Training and Service Act of 1940, § 8(a).

<sup>19</sup> *Id.* § 8(b)(A)–(B).

<sup>20</sup> *Id.* § 8(b).

<sup>21</sup> *Id.*



permitted a person whose private employer violated the provisions of the 1940 Act to file suit in federal court.<sup>22</sup>

The 1940 Act recognized that some individuals who would otherwise have been protected by the statute may have been employed by state or local governmental bodies. Congress did not, however, directly apply the provisions of the statute to state employers. The 1940 Act specifically stated that if a person “was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person *should be* restored to such position or to a position of like seniority, status, and pay.”<sup>23</sup> The statute did not *require* that states do anything regarding reemployment of their former employees. Additionally, the 1940 Act contained no enforcement mechanism against state actors.

The next congressional action regarding reemployment rights for military members came after World War II with the Military Selective Service Act (1948 Act).<sup>24</sup> Passed after the conclusion of World War II and towards the beginning of the tensions between the United States and the Soviet Union, the effect of the 1948 Act was to “support the conscription-based force management policies that existed for the first twenty-five years of the Cold War.”<sup>25</sup> The 1948 Act contained provisions similar to those in the 1940 Act, but expanded the scope of reemployment rights. Where the 1940 Act required reemployment so long as the servicemember was “still qualified to perform the duties of such position,”<sup>26</sup> the 1948 Act required, in certain cases, that the employer provide the servicemember with a position of “like seniority, status, and pay, or the nearest approximation thereof.”<sup>27</sup> Like the 1940 Act, however, the 1948 Act did not apply to state employers, and contained references regarding state employers that were similar to those in the 1940 Act. For example, the 1948 Act stated that it was the sense of the Congress that an individual leaving state employment because of induction should be reemployed by a state employer.<sup>28</sup> Additionally, the provisions of the 1948 Act allowing for private suits in federal district

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<sup>22</sup> *Id.* § 8(e).

<sup>23</sup> *Id.* § 8(b)(C) (emphasis added).

<sup>24</sup> Manson, *supra* note 15, at 56.

<sup>25</sup> *Id.*

<sup>26</sup> Selective Training and Service Act of 1940, § 8(b).

<sup>27</sup> The Military Selective Service Act of 1948, Pub. L. No. 759, § 9(b)(B)(ii), 62 Stat. 604, 615 (*repealed by* Pub. L. No. 93-508, § 405, 88 Stat. 1600 (1974)).

<sup>28</sup> *Id.* § 9(b)(C).

courts applied to “private employer[s] [who] fail[ed] or refuse[d] to comply”<sup>29</sup> with the statute, but not to state employers.

The next major piece of legislation regarding reemployment rights of servicemembers was the Vietnam Era Veteran’s Readjustment Assistance Act of 1974 (hereinafter 1974 Act),<sup>30</sup> which became the current USERRA’s “immediate predecessor.”<sup>31</sup> The 1974 Act, like the 1940 and 1948 Acts before it, pertained primarily to inductees rather than to Reservists.<sup>32</sup> Unlike the 1940 and 1948 Acts, however, the 1974 Act contained a provision regarding job protection for Reserve Component Soldiers absent from their employment because of a Reserve obligation.<sup>33</sup> Probably the most notable aspect of the 1974 Act, however, was its expansion of federal authority over state governments: unlike the 1940 and 1948 Acts, the 1974 Act was binding upon state, as well as private, employers.<sup>34</sup> Under provisions of the 1974 Act, federal courts had jurisdiction over suits brought by servicemembers against state employers who violated the statute’s provisions.<sup>35</sup>

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<sup>29</sup> *Id.* § 9(d).

<sup>30</sup> Manson, *supra* note 15, at 57.

<sup>31</sup> Uniformed Services Employment and Reemployment Rights Act of 1994 Final Rules, 70 Fed. Reg. 75,246, 75,246 (Dec. 19, 2005) (codified at 20 C.F.R. pt. 1002).

<sup>32</sup> 38 U.S.C. § 2021(a) (1976) (“In the case of a person who is inducted into the Armed Forces of the United States under the Military Selective Service Act . . .”).

<sup>33</sup> *Id.* § 2021(b)(3).

Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

*Id.* The 1974 Act was not, however, the first congressional legislation intended to protect the employment of Reserve component Soldiers. *See generally* Monroe v. Std. Oil Co., 452 U.S. 549, 555 (1981) (discussing 1950s-era congressional legislation regarding employment protections for Reserve Component members).

<sup>34</sup> 38 U.S.C. § 2021(a)(B) (1976) (“[I]f such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall . . . be restored by such employer . . . to such position or to a position of like seniority, status, and pay . . .”).

<sup>35</sup> *Id.* § 2022.

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021 (a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political

Federal court decisions applying the 1974 Act to state employers reveal that the courts were largely unimpressed with the sovereign immunity defenses presented by the states. In fact, some courts dismissed state Eleventh Amendment concerns almost out of hand. For example, the U.S. District Court for the Eastern District of Michigan almost peremptorily dismissed the State of Michigan's concerns about the federal legislation, saying that "Congress has acted within its authority to secure reemployment rights to veterans . . . . In doing so, Congress has preempted all state law to the contrary."<sup>36</sup> The constitutionality of the new provision was addressed by at least two circuit courts, both of which came down firmly on the side of federal power. In *Jennings v. Illinois Office of Education*, the Seventh Circuit directly addressed the issue of whether the reemployment provisions of the 1974 Act violated the Eleventh Amendment.<sup>37</sup> In deciding the issue, the Seventh Circuit analyzed precedent regarding congressional War Powers, the Tenth Amendment,<sup>38</sup> and the Eleventh Amendment, finally holding that "in this case the war powers serve as the vehicle for overriding the bar of the Eleventh Amendment."<sup>39</sup> Although recognizing that the "proper interpretation of the Eleventh Amendment and the common law doctrine of sovereign immunity has been a fertile source of controversy for both courts and commentators,"<sup>40</sup> the Seventh Circuit felt

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subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action.

*Id.*

<sup>36</sup> *Fitz v. Bd. of Educ.*, 662 F. Supp. 1011, 1014 (E.D. Mich. 1985). Although the court was addressing whether Michigan's own laws kept it from complying with the terms of the federal statute, and not the issue of sovereign immunity, this quotation demonstrates concisely an attitude that state laws are of little, if any, concern when applying the federal law.

<sup>37</sup> *Jennings v. Ill. Office of Educ.*, 589 F.2d 935, 937 (7th Cir. 1979). "[T]he judgment below was proper unless the [1974 Act] is unconstitutional under the Eleventh Amendment."

<sup>38</sup> U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

<sup>39</sup> *Jennings*, 589 F.2d at 938.

<sup>40</sup> *Id.* at 938-39.

that, at least under the 1974 Act, “the congressional action [was] proper and enforceable.”<sup>41</sup>

Similarly, in *Peel v. Florida Department of Transportation*, the Fifth Circuit considered the question of “whether the [T]enth [A]mendment or the [E]leventh [A]mendment prevents a federal court from ordering a state agency to reinstate a former employee under the Veteran’s Reemployment Rights Act.”<sup>42</sup> The Fifth Circuit recognized that even though “Congress has the power under its war power and the necessary and proper clause . . . to provide for the nation’s defense, the [E]leventh [A]mendment limits the power of the federal judiciary to enforce private actions against the states.”<sup>43</sup> Notwithstanding the friction between state sovereign immunity and the enforcement provisions of the 1974 Act, the Fifth Circuit, after analyzing Supreme Court precedent, held that “the express language in the Act authorizing suits against the states is sufficient to overcome the potential bar of the [E]leventh [A]mendment.”<sup>44</sup>

Congress passed what is substantially the current version of USERRA in 1994.<sup>45</sup> By this time, the military draft had been abolished,<sup>46</sup> and the primary purpose of employment legislation was no longer to protect the jobs of inductees. Rather, USERRA was passed primarily to encourage noncareer military service, including service in the Reserve Component.<sup>47</sup> The USERRA, like the 1974 Act, established federal court jurisdiction over servicemember suits against state employers who violated the statute’s provisions.<sup>48</sup> After the federal cases interpreting the 1974 Act, the power of Congress to establish this jurisdiction seemed firmly established.

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<sup>41</sup> *Id.* at 939.

<sup>42</sup> *Peel v. Fla. Dep’t. of Transp.*, 600 F.2d 1070, 1072 (5th Cir. 1979).

<sup>43</sup> *Id.* at 1074.

<sup>44</sup> *Id.* at 1081.

<sup>45</sup> Uniformed Services Employment and Reemployment Rights Act of 1994 Final Rules, 70 Fed. Reg. 75,246, 75,246 (Dec. 19, 2005) (codified at 20 C.F.R. pt. 1002).

<sup>46</sup> Manson, *supra* note 15, at 57.

<sup>47</sup> 38 U.S.C. § 4301(a) (1994); *see also supra* note 16.

<sup>48</sup> *See id.* § 4301(a)(2) (regarding a private cause of action). “A person may commence an action for relief with respect to a complaint . . . .” *Id.* § 4301(b) (regarding the authority of a federal court). “In the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function.” *Id.*

### B. The *Seminole Tribe* Case

In March 1996, the Supreme Court decided *Seminole Tribe of Florida v. Florida*.<sup>49</sup> The case involved the constitutionality of the Indian Gaming Regulatory Act (IGRA), passed by Congress pursuant to its powers under the Indian Commerce Clause.<sup>50</sup> The IGRA generally set forth “a statutory basis for the operation and regulation of gaming by Indian tribes.”<sup>51</sup> The IGRA divided Indian gaming into three different categories,<sup>52</sup> the category termed class III being “the most heavily regulated.”<sup>53</sup> Class III gaming was permitted only under certain circumstances, one of the requirements being an agreement (termed a “compact”) between the tribe and the state in which it was located.<sup>54</sup> States were required to negotiate the compact in good faith,<sup>55</sup> and this requirement was enforceable by Indian tribes in federal court.<sup>56</sup> The *Seminole Tribe* case arose when the Seminole Tribe of Florida attempted to enforce the good-faith requirement against the State of Florida in federal court.<sup>57</sup> A primary question the Court faced was whether “the Eleventh Amendment prevent[ed] Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause.”<sup>58</sup>

In a five to four decision,<sup>59</sup> the Court held that the provision of the IGRA allowing Indian tribes to sue states in federal court was a violation of state sovereign immunity as embodied in the Eleventh Amendment.<sup>60</sup> The Court stated that even if the Constitution provided for exclusive federal control over a particular area, such as regulating commerce with Indian tribes, that exclusive control did not authorize Congress to violate the Eleventh Amendment by allowing citizens to sue states in federal

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<sup>49</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 44 (1996).

<sup>50</sup> *Id.* at 47. The Commerce Clause in general, including the Indian Commerce Clause, states: “The Congress shall have power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .” U.S. CONST. art. I, § 8, cl. 3.

<sup>51</sup> *Seminole Tribe*, 517 U.S. at 48.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 48–49.

<sup>55</sup> *Id.* at 49.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 51–52.

<sup>58</sup> *Id.* at 53.

<sup>59</sup> *Id.* at 46.

<sup>60</sup> *Id.* at 72.

court.<sup>61</sup> The Court used language that was much broader than needed to simply invalidate the unconstitutional provisions of the IGRA. Rather, the Court's dicta seemed to cover a wide range of congressional activity, potentially including activity commenced under the War Powers Clause.<sup>62</sup>

### C. *Seminole Tribe*'s Impact on USERRA

*Seminole Tribe* created a split in the lower federal courts' applications of the USERRA provisions permitting servicemember suits against state employers in federal court. In *Velasquez v. Frapwell*,<sup>63</sup> the Seventh Circuit revisited the issue of the constitutionality of the enforcement provisions of USERRA as applied to state actors. The Seventh Circuit explained the Supreme Court's reasoning in *Seminole Tribe* as, "Congress cannot abrogate a state's sovereign immunity by a federal statute based on Congress's power over various forms of commerce, because that power was conferred on Congress by the original Constitution, which predates the Eleventh Amendment and so cannot limit it."<sup>64</sup> The Seventh Circuit recognized that USERRA was passed under the War Powers Clauses rather than any type of commerce clause,<sup>65</sup> but interpreted *Seminole Tribe* as applying to "all federal statutes based on Article I [of the Constitution]."<sup>66</sup> In invalidating the provisions of USERRA rendering state violations privately enforceable in federal court, the *Velasquez* court stated that the "subject matter of the suit to which the defense of sovereign immunity is interposed is . . . irrelevant,"<sup>67</sup> and that *Seminole Tribe* "point[ed] to the conclusion that legislation founded on the war power does not override state sovereign immunity."<sup>68</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> See discussion *infra* Part III.A (providing a more detailed discussion of the Court's reasoning in the *Seminole Tribe* case).

<sup>63</sup> *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998).

<sup>64</sup> *Id.* at 391; see also *Palmatier v. Mich. Dep't of State Police*, 981 F. Supp. 529, 532 (W.D. Mich. 1997) (stating that under *Seminole Tribe*, Congress could not abrogate state sovereign immunity using its War Powers). But see *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996) (stating that the *Seminole Tribe* rationale did not apply to a War Powers analysis).

<sup>65</sup> *Velasquez*, 160 F.3d at 392.

<sup>66</sup> *Id.* at 394.

<sup>67</sup> *Id.* at 393.

<sup>68</sup> *Id.* at 394.

The First Circuit, on the other hand, still permitted individual suits against state employers instituted under the Veteran's Reemployment Rights Act of 1968. The court relied on a prior First Circuit precedent allowing such suits notwithstanding a state's Eleventh Amendment claims,<sup>69</sup> and specifically said that *Seminole Tribe* "does not control the War Powers analysis."<sup>70</sup> The First Circuit, however, did not analyze how *Seminole Tribe* may have affected the War Powers analysis, if at all, instead relying solely on the First Circuit precedent.

The Supreme Court did not address the split in the circuit courts concerning the power of Congress to abrogate states' sovereign immunity pursuant to its constitutional War Powers. Congress itself seemingly made the issue a moot point when it revised USERRA in 1998, ostensibly removing federal jurisdiction over servicemembers' private USERRA-related causes of action against state employers.<sup>71</sup> In amending USERRA to remove federal jurisdiction over these private causes of action, some members of Congress felt that they were solving the constitutional issue.<sup>72</sup> The current version of USERRA, with the

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<sup>69</sup> *Diaz-Gandia*, 90 F.3d at 616. As precedent, the First Circuit relied on *Reopell v. Massachusetts*, 936 F.2d 12 (1st Cir. 1991).

<sup>70</sup> *Diaz-Gandia*, 90 F.3d at 616.

<sup>71</sup> *Velasquez v. Frapwell*, 165 F.3d 593, 593 (7th Cir. 1999).

<sup>72</sup> See 144 CONG. REC. H34, 1397-1398 (statement of Cong. Evans):

The need for this legislation became apparent after the Supreme Court's 1996 ruling in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, that Congress was precluded by the Eleventh amendment from providing a federal forum for suits under laws enacted pursuant to the Commerce Clause of the United States Constitution. Although the authority for laws involving veterans benefits is derived from the War Powers clause, several courts have held the reasoning of the *Seminole Tribe* case precludes federal court jurisdiction of claims to enforce federal rights of State employees under the Uniformed Service Employment and Re-employment Rights Act (USERRA).

*Id.*; see also 144 CONG. REC. S151, 12934 (statement of Sen. Rockefeller):

However, several states have taken the position that the Eleventh Amendment to the Constitution bars USERRA from applying to State agencies as employers. This argument is based on the 1996 Supreme Court decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which held that Congress was unable to enact a law that allowed individuals to sue states for violating federal statutes under the Eleventh amendment. Several district courts have applied the *Seminole* decision to dismiss USERRA cases against states as employers.

1998 amendments, specifically envisions that the United States, rather than a servicemember acting in his or her private capacity, would bring a case in federal court against state employers who violate the statute.<sup>73</sup> USERRA's enforcement scheme still envisions, however, that servicemembers can bring private enforcement actions against state employers in state courts.<sup>74</sup> The constitutionality of this provision has likewise been called into question as a result of the Supreme Court's decision in *Alden v. Maine*, which generally applied the *Seminole Tribe* rationale to actions by private parties attempting to enforce federal statutorily-created rights in state courts.<sup>75</sup> Notwithstanding the *Alden* decision, the USERRA provision providing enforcement by individuals in state courts remains in force. The *Seminole Tribe* and *Alden* decisions, in conjunction with the congressional amendments to USERRA, seem to have eviscerated any enforcement provisions permitting private servicemember suits against state employers who violate USERRA. The *Seminole Tribe* and *Alden* decisions, however, concerned statutes passed pursuant to the Commerce Clause, while USERRA is a War Powers statute. This raises several important questions. First, how did the Court in *Seminole Tribe* and *Alden* examine how congressional Commerce Powers interacted with state sovereign immunity under the Eleventh Amendment? Second, how is such an analysis related to a War Powers analysis? Are the congressional War Powers on an equal footing with the Commerce Clause Powers, or does the judiciary treat War Powers legislation differently? How did the Founding Fathers view the Constitution as a check upon state sovereignty in both the War Powers and the Commerce Powers areas? The remainder of this article examines

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Title II would substitute the United States for an individual veteran as the plaintiff in cases where the Attorney General believes that a state has not complied with USERRA. This restores the ability of veterans who are employed by a state to seek redress for violations of their reemployment rights.

*Id.*

<sup>73</sup> 38 U.S.C. § 4323(a)(1) (2000) ("In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action."); *see* § 4323(b)(1) (jurisdiction) ("In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.").

<sup>74</sup> *Id.* § 4323(b)(2) ("In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.").

<sup>75</sup> *Alden v. Maine*, 527 U.S. 706, 712 (1999) ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.").



these questions, demonstrating that the USERRA abrogation of state sovereign immunity is on a much firmer constitutional foundation than the commerce legislation analyzed in *Seminole Tribe* and *Alden*. The analysis begins by examining the Supreme Court's methodology in *Seminole Tribe* and other modern Eleventh Amendment cases, and then examines the traditional judicial views of War Powers legislation.

### III. The Supreme Court's Methodology in Modern Eleventh Amendment Jurisprudence

#### A. *Seminole Tribe*: The Rebirth of the Eleventh Amendment

The specific question before the Supreme Court in the *Seminole Tribe* case was "Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?"<sup>76</sup> While the issue in the case as enunciated by the Court is quite narrow on its face, the Court used a very broad constitutional analysis to answer it. The Court, citing primarily *Hans v. Louisiana*,<sup>77</sup> recognized that the Eleventh Amendment is not simply a jurisdictional limit—rather, the Eleventh Amendment is the constitutional embodiment of the proposition that states are sovereign entities that cannot be sued by citizens without the state's consent.<sup>78</sup> In certain circumstances, Congress has the power to abrogate a state's sovereign immunity, but any statute seeking to abrogate must be "a valid exercise of Congressional power."<sup>79</sup> In other words, laws passed by Congress must comply with the limitations in the Eleventh Amendment.

The Court stated that it had found valid exercises of congressional authority to abrogate in only two situations: Fourteenth Amendment cases (citing *Fitzpatrick v. Bitzer*<sup>80</sup>) and certain Commerce Clause cases

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<sup>76</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 53 (1996).

<sup>77</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>78</sup> *Seminole Tribe*, 517 U.S. at 54.

<sup>79</sup> *Id.* at 55.

<sup>80</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that the 1972 amendments to the Civil Rights Act of 1964 permitting private suits against State actors was not prohibited by the Eleventh Amendment, as it was a valid exercise of congressional power under the Fourteenth Amendment).

(citing *Pennsylvania v. Union Gas Co.*<sup>81</sup>). The Court, stating that *Union Gas* was only a plurality opinion which would, if followed consistently, effectively render *Hans* and its progeny impotent, expressly overruled the *Union Gas* decision.<sup>82</sup> The *Union Gas* case, in the Court's opinion, had come to stand for the proposition "that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III,"<sup>83</sup> a proposition that the five-member majority in *Seminole Tribe* emphatically rejected. The Court explained the different result in *Fitzpatrick* by stating that the Fourteenth Amendment, because it was adopted after the Eleventh Amendment, "altered the preexisting balance between federal and state power achieved by Article III and the Eleventh Amendment."<sup>84</sup> The Court's approach in explaining *Fitzpatrick* has sometimes been called the chronological approach.<sup>85</sup> Apparently recognizing and accepting that such an approach would invalidate almost any congressional attempts to abrogate pursuant to its enumerated powers, the Court left a small loophole, explaining that "states [are] immune from suits without their consent save where there has been a surrender of this immunity in the plan of the convention."<sup>86</sup> In other words, if the states had waived their immunity as part of ratification of a certain constitutional provision, then abrogation by Congress could be valid. However, the Court made an extremely sweeping pronouncement on the scope of their decision:

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh

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<sup>81</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (holding that Congress had the authority under the Commerce Clause to enable private Superfund suits for damages against state actors who violated the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), *rev'd*, 517 U.S. 44 (1996)).

<sup>82</sup> *Seminole Tribe*, 517 U.S. at 66.

<sup>83</sup> *Id.* at 65.

<sup>84</sup> *Id.* at 66.

<sup>85</sup> See, e.g., Hirsch, *supra* note 15, at 1005.

<sup>86</sup> *Seminole Tribe*, 517 U.S. at 68.

Amendment prevents congressional authorization of suits by private parties against unconsenting states.<sup>87</sup>

The Court decided that the suit by the Seminole Tribe of Florida against a state government was “barred by the Eleventh Amendment and must be dismissed for lack of jurisdiction.”<sup>88</sup>

#### B. *Alden v. Maine*: Expanding the Court’s Historical Approach

*Alden v. Maine* applied *Seminole Tribe* to actions pursued against states in state courts under color of federal law. The *Alden* case involved a suit by probation officers against Maine for an alleged violation of the Fair Labor Standards Act of 1938 (FLSA).<sup>89</sup> After the federal case was dismissed in the wake of the *Seminole Tribe* decision, the parole officers filed suit in the state court system of Maine,<sup>90</sup> and the case eventually reached the Supreme Court. The *Alden* Court interpreted its prior *Seminole Tribe* decision as “ma[king] it clear that Congress lacks power under Article I to abrogate the States’ sovereign immunity from suits commenced or prosecuted in the federal courts.”<sup>91</sup> The Court, reiterating the understanding of the Constitution outlined in *Seminole Tribe*, stated that Congress’s Article I powers in conjunction with the Necessary and Proper clause<sup>92</sup> did not amount to “incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers.”<sup>93</sup> The Court stated that the rationale of the line of cases upholding Eleventh Amendment sovereign immunity of states in federal courts applied in state courts as well.<sup>94</sup> Since *Alden* presented what was essentially a case of first impression, however, the Court went on to engage in a lengthy discussion of the

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<sup>87</sup> *Id.* at 72.

<sup>88</sup> *Id.* at 76.

<sup>89</sup> *Alden v. Maine*, 527 U.S. 706, 710 (1999).

<sup>90</sup> *Id.* at 712.

<sup>91</sup> *Id.* Note that this view of *Seminole Tribe*’s holding is much broader than the narrow issue presented in that decision. This is most likely a result of the extremely broad language the Court used to justify the result in *Seminole Tribe*.

<sup>92</sup> U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have power to . . . make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”).

<sup>93</sup> *Alden*, 527 U.S. at 732.

<sup>94</sup> *Id.* at 733.

specific issue presented (i.e., could Congress abrogate a state's sovereign immunity in state court).<sup>95</sup>

In analyzing the issue, the Court delved into history in the way originally hinted at in *Seminole Tribe*, and attempted to ascertain “whether there is ‘compelling evidence’ that this derogation of the States’ sovereignty is ‘inherent in the constitutional compact,’ . . . .”<sup>96</sup> In doing so, the Court analyzed four separate factors: first, “evidence of the original understanding of the Constitution”;<sup>97</sup> second, “early congressional practice”;<sup>98</sup> third, the “theory and reasoning of our earlier cases”;<sup>99</sup> and fourth, “whether a congressional power to subject nonconsenting States to private suits in their own courts is consistent with the structure of the Constitution.”<sup>100</sup> The first two parts of the analysis draw heavily from history, and is thus referred to as an historical analysis.<sup>101</sup> In its historical analysis of the issue, the *Alden* Court argued that the “founder’s silence [on the issue] is best explained by the simple fact that no one, not even the Constitution’s most ardent opponents, suggested the document might strip the States of the immunity [in their own courts.]”<sup>102</sup> This immunity was “so well established that no one conceived it would be altered by the new Constitution.”<sup>103</sup> The Court reasoned that the lack of legislation from the early Congresses providing for personal causes of action in state courts points to the conclusion that the “early Congresses did not believe they had the power to authorize private suits against the States in their own courts.”<sup>104</sup>

### C. *Central Virginia Community College v. Katz*: The Historical Approach Trumps State Sovereign Immunity

In *Central Virginia Community College v. Katz*,<sup>105</sup> the Supreme Court used the historical methodology to an even greater degree, basing its decision almost entirely on a historical analysis of the Bankruptcy

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<sup>95</sup> *Id.* at 741.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 743.

<sup>99</sup> *Id.* at 745.

<sup>100</sup> *Id.* at 748.

<sup>101</sup> See, e.g., Hirsch, *supra* note 15, at 1022.

<sup>102</sup> *Alden*, 527 U.S. at 741.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 744.

<sup>105</sup> *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

Clause.<sup>106</sup> The *Katz* case involved a “court-appointed liquidating supervisor of [a] bankrupt estate . . . [seeking] to avoid and recover alleged preferential transfers to [the state].”<sup>107</sup> The State of Virginia attempted to invoke its sovereign immunity, and the Supreme Court was called to answer whether a purported congressional abrogation of state sovereign immunity was valid in the bankruptcy context.<sup>108</sup> The Court recognized that dicta in *Seminole Tribe* “reflected an assumption that the holding in that case would apply to the Bankruptcy Clause,”<sup>109</sup> but rejected this dicta as an erroneous assumption.<sup>110</sup> The Court held that Virginia’s sovereign immunity defense was invalid, stating that congressional power to treat states as any other creditor “arises from the Bankruptcy Clause itself; the relevant ‘abrogation’ is the one effected in the plan of the Convention, not by statute.”<sup>111</sup> In so holding, the Court examined the historical underpinnings of the Bankruptcy Clause in great detail.<sup>112</sup> After examining the “wildly divergent schemes for discharging debtors and their debts”<sup>113</sup> in the colonies, the Court determined that the constitutional grant of authority to Congress to establish uniform bankruptcy laws was “a unitary concept rather than an amalgam of discrete segments.”<sup>114</sup> At the time of ratification, the states had

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<sup>106</sup> See, e.g., Anthony J. Enright, Note: *The Originalist’s Dilemma: Katz and the New Approach to the State Sovereign Immunity Defense*, 81 NOTRE DAME L. REV. 1553, 1555 (2006).

*Katz* is remarkable not merely for its outcome, but also because of the different approaches reflected in the majority and dissenting opinions. Although much of the Court’s sovereign immunity jurisprudence has been characterized by sharply divided, 5–4 opinions, all of the Justices have recognized history as playing an important role in determining what the law is today. *Katz* goes a step further with respect to its use of history. Although it is a 5–4 decision, the central inquiry for both the majority and the dissent in *Katz* is an originalist one: How was Congress’s Article I bankruptcy power understood by the Constitution’s framers?

*Id.*

<sup>107</sup> *Katz*, 546 U.S. at 360.

<sup>108</sup> *Id.* at 359–60.

<sup>109</sup> *Id.* at 363.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 379.

<sup>112</sup> The four-member dissent, while not disputing the historical methodology of the majority, took issue with the majority’s interpretation of history. See *id.* at 385 (Scalia, J., dissenting) (“The majority also greatly exaggerates the depth of the Framers’ fervor to enact a national bankruptcy regime.”).

<sup>113</sup> *Id.* at 365.

<sup>114</sup> *Id.* at 370.

recognized that historically, courts acting in bankruptcy “had the power to issue ancillary orders enforcing their *in rem* adjudications.”<sup>115</sup> This indicates that the drafters of the Bankruptcy Clause would “have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property.”<sup>116</sup> As far as state sovereign immunity was implicated in this power, by ratifying the Constitution “the States agreed in the plan of the Convention not to assert that immunity,”<sup>117</sup> at least in the bankruptcy context. The Court went on to analyze early congressional statutes,<sup>118</sup> which provided evidence that “the Bankruptcy Clause of Article I, the source of Congress’[s] authority to effect this intrusion upon state sovereignty, simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify.”<sup>119</sup>

There are clear differences between the enforcement provisions of USERRA and the bankruptcy provisions at issue in *Katz*. First, bankruptcy primarily involves *in rem* jurisdiction, and hence “does not implicate States’ sovereignty to nearly the same degree as other kinds of jurisdiction.”<sup>120</sup> Additionally, respondent *Katz* was not enforcing any type of individual congressionally-created rights; he was overseeing the liquidation of Wallace’s Bookstore’s bankrupt estate, as he was appointed by the federal bankruptcy court to do.<sup>121</sup> In this manner, he was essentially acting at the behest of the federal government. However, as the *Katz* case represents the Court’s tentative retreat from its sweeping dicta in *Seminole Tribe* and *Alden*, it is necessary to look at its analysis in analyzing the USERRA issue. Are the congressional War Powers, like the powers conferred by the Bankruptcy Clause, a “unitary concept” necessitating state subordination to federal decisions? If so, does the USERRA enforcement provision at issue validly fall under that power?

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 372.

<sup>117</sup> *Id.* at 373.

<sup>118</sup> *See id.* at 373–76 (examining the Bankruptcy Act of 1800, which gave habeas corpus power to the federal courts in situations where debtors had been arrested by the states after discharge in bankruptcy).

<sup>119</sup> *Id.* at 375.

<sup>120</sup> *Id.* at 362.

<sup>121</sup> *Id.* at 360.

#### IV. The Congressional War Powers and State Rights

The Supreme Court's analytical approaches in *Seminole Tribe*, *Alden* and *Katz* render it necessary to analyze the congressional War Powers in their historical context, and then apply that analysis to the USERRA provisions permitting individual servicemember suits against state employers who violate the statute. The essential question then becomes whether the congressional exercise of its War Powers includes the power to subject states to suits by individual servicemembers. This analysis begins with a brief examination of the Framers' views of congressional War Powers.

##### A. Congressional War Powers at the Time of Ratification

From the beginnings of the Republic, the War Powers of Congress have been considered almost absolute vis-à-vis the states. In *The Federalist Number 23*, Alexander Hamilton wrote that

[t]he authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed . . . . [T]here can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the National Forces.<sup>122</sup>

It is important to note that Hamilton wrote this sweeping language as an argument *for* the adoption of the Constitution over the Articles of Confederation, which itself “granted Congress a near-monopoly of

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<sup>122</sup> THE FEDERALIST NO. 23 (Alexander Hamilton).

overtly war-related and foreign relations powers.”<sup>123</sup> Although the use of the War Powers to override state sovereign immunity from private suits was not overtly discussed at the Constitutional Convention, in the Articles of Confederation Congress already had a substantial measure of control over the states when it came to the power to raise armies. For example, to “provide military forces, Congress could ‘build and equip’ a navy and set the size of land forces, ‘mak[ing] requisitions from each State for its quota, in proportion to the number of white inhabitants in such State . . . .’”<sup>124</sup> This power of requisitioning was not the same as a direct draft. Although the federal government under the Articles of Confederation did have this power to requisition troops from the states, the Framers found this power inadequate. Alexander Hamilton wrote that the “power of raising armies by the most obvious construction of the articles of Confederation is merely a power of making requisitions upon the States for quotas of men.”<sup>125</sup> Hamilton found this method of raising armies “replete with obstructions to a vigorous and to an economical system of defense.”<sup>126</sup> A large potential problem with this method of raising armies, a problem that actually presented itself during the Revolution, was that states far from the war would not meet their personnel quotas.<sup>127</sup> In this respect, the expansion of federal power under the Constitution in the area of “rais[ing] and support[ing] Armies”<sup>128</sup> was based in part on the need of the federal government to coerce the states into providing troops for a national Army.

Another War Powers clause which was a cession of power to the federal government was the Militia Clause.<sup>129</sup> Militias had normally been under exclusive state control, and had for some time been considered as protection against the dangers of a standing army.<sup>130</sup> Nonetheless, the Constitution envisioned that the federal government would exercise a great deal of control over the militia. Because militias were commonly seen as a defense against a standing army, the “remarkable feature of the militia clause is . . . not the existence of

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<sup>123</sup> Charles Lofgren, *War Powers, Treaties, and the Constitution*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 242, 242 (Leonard Levy & Dennis Mahoney, eds., 1987).

<sup>124</sup> *Id.*

<sup>125</sup> *THE FEDERALIST* NO. 22 (Alexander Hamilton).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>129</sup> *Id.* art. I, § 8, cl. 15. Congress has the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions.”

<sup>130</sup> Lofgren, *supra* note 123, at 249.



limitations but the grant itself . . .”<sup>131</sup> Hamilton explained the necessity for at least some measure of federal control over the militia as follows:

It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they would be called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert—an advantage of particular moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority.<sup>132</sup>

Based upon the understanding of the War Powers clauses at the time of ratification, it is clear that exclusive power to raise and control armies and to regulate militias is in the hands of the Congress, and that such power is absolute as opposed to the states. Such an understanding did not exist, however, regarding both the Commerce Clause and the Bankruptcy Clause, the constitutional provisions examined in *Seminole Tribe*, *Alden*, and *Katz*. For example, in the whole of *The Federalist Papers*, the Bankruptcy Clause is mentioned only once.<sup>133</sup> Additionally, the commerce power of the federal government was limited to the regulation of interstate commerce. Intrastate commerce, which is completely internal to a particular state, was not subject to federal regulation.<sup>134</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> THE FEDERALIST NO. 29 (Alexander Hamilton).

<sup>133</sup> THE FEDERALIST NO. 42 (James Madison).

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

*Id.*

<sup>134</sup> See *United States v. Lopez*, 514 U.S. 549, 553 (1995) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824)) (discussing the application of the Commerce Clause).

## B. Judicial Deference to Congressional War Powers Decisions

Federal courts have long recognized that statutes passed by Congress pursuant to the War Powers clauses are qualitatively different than those passed pursuant to its other enumerated powers. The Supreme Court has indicated in dicta that certain of the War Powers, even if not enumerated in the Constitution, would have adhered to the federal government simply due to its nature as supreme sovereign in the land.<sup>135</sup> In other words, the very nature of the sovereign federal government is that it can wage war, and raise and support armies to do that, at the expense of the states, if such governmental rights are at cross purposes. The Supreme Court has always held that congressional War Powers are extremely broad; when the Court addresses the issue, it speaks in terms as broad, if not broader, than the sovereign immunity language in *Seminole Tribe* and its progeny. In upholding the constitutionality of statutes passed pursuant to congressional War Powers, the Court almost always speaks of Congress's power in this regard as being superior to the rights of individual citizens or of the states.

For example, in *Tarble's Case*, the Supreme Court rejected the claim that a state judge could, through the use of the writ of habeas corpus,

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It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would certainly be inconvenient, and is certainly unnecessary.

*Id.*

<sup>135</sup> United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

*Id.* Although there is a difference between the power to declare and wage war (which is external, focused on other nations) and the power to raise armies (which is internal, focused towards the citizens and the states), the former cannot occur without the latter, and the same deference is generally given to each by the courts. *But see Velasquez v. Frapwell*, 160 F.3d 389, 393 (7th Cir. 1998) (arguing that the history as provided by the *Curtiss-Wright* Court may very well be erroneous).

order the release of a Soldier from his service in the federal army.<sup>136</sup> The Court rejected that argument, stating that even if an individual were illegally held by the United States, that person had recourse only in the federal courts.<sup>137</sup> In establishing the primacy of the federal government's actions taken pursuant to its War Powers, the Court stated in extremely broad dicta that the

execution of the [War Powers] falls within the line of [the Federal government's] duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies should be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned . . . . No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.<sup>138</sup>

This broad statement seemed to indicate that the federal constitutional power to raise and support armies trumped absolutely any state power that conflicted with it.

Using similar reasoning and deference, the Court upheld the constitutionality of compulsory military service in the *Selective Draft Law Cases* of 1918.<sup>139</sup> The Court answered multiple constitutional arguments in this case, every time coming down firmly on the side of congressional War Powers in opposition to other perceived individual or state rights. Regarding an argument that the power to raise armies was only applicable to a volunteer force, the Court said that "a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power."<sup>140</sup> The same argument could conceivably be made as

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<sup>136</sup> Tarble's Case, 80 U.S. 397, 401-02 (1872).

<sup>137</sup> *Id.* at 411.

<sup>138</sup> *Id.* at 408.

<sup>139</sup> *Selective Draft Law Cases*, 245 U.S. 366, 366 (1918).

<sup>140</sup> *Id.* at 378.

applicable to the states themselves. The Court rejected Thirteenth Amendment<sup>141</sup> challenges based upon involuntary servitude, stating that “we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.”<sup>142</sup>

The *Selective Draft Law Cases* also included language upholding federal authority at the expense of the states. Regarding state control of militias, the states only had “undelegated control of the militia to the extent that such control was not taken away by the exercise of Congress of its power to raise armies.”<sup>143</sup> In other words, even in the militia realm, where the states had primacy prior to the adoption of the Constitution, the states could only act when Congress left it open for them to do so. The Militia Clause simply left to the states “an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared.”<sup>144</sup> Under this analysis, the Militia Clause enabled Congress to place some of the responsibility for militia training on the state level, although such training was to be directed by Congress, and Congress could decide to act in that area to the fullest extent of its powers at any time.<sup>145</sup> In no event, however, could states intrude upon the federal prerogative of the congressional exercise of its War Powers. When Congress exercised such power, it was “complete to the extent of its exertion and dominant.”<sup>146</sup> Congressional War Powers actions were completely controlling upon the states. There was no wiggle room.

Courts have traditionally given this broad deference to congressional action in War Powers cases. For example, *Rostker v. Goldberg*, which the Supreme Court decided in 1981, involved congressional authority under the Fifth Amendment to require registration of males only for the draft.<sup>147</sup> In the opinion, the Court laid out its traditional view of deference to Congress in general constitutional issues. The Court stated that “Congress is a coequal branch of government whose Members take

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<sup>141</sup> U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

<sup>142</sup> *Selective Draft Law Cases*, 245 U.S. at 390.

<sup>143</sup> *Id.* at 383.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981).

the same oath we do to uphold the Constitution of the United States.”<sup>148</sup> Because of this, the Court normally would defer to Congress and give their determinations “great weight”<sup>149</sup> in determining whether or not a particular statute is constitutional. However, the Court stated that “in perhaps no other area has the Court accorded Congress greater deference”<sup>150</sup> than in the exercise of its War Powers. In reviewing War Powers legislation, the Court recognized that “the lack of competence on the part of the courts [to act in this area] is marked.”<sup>151</sup>

The Court illustrated its traditional deference to Congress in the War Powers area by citing a long list of precedents. These precedents included *Parker v. Levy*,<sup>152</sup> which the *Rostker* Court interpreted as requiring a different standard of constitutional analysis in the military context.<sup>153</sup> The Court stated that this deference to the War Powers decisions of Congress was also evident in *Greer v. Spock*,<sup>154</sup> “where the Court upheld a ban on political speeches by civilians on a military base,”<sup>155</sup> and *Brown v. Glines*,<sup>156</sup> “where the Court upheld regulations imposing a prior restraint on the right to petition of military members.”<sup>157</sup> Although the Court recognized that Congress cannot “disregard the

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<sup>148</sup> *Id.* at 64.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 64–65.

<sup>151</sup> *Id.* at 65.

<sup>152</sup> *Parker v. Levy*, 417 U.S. 733 (1974) (expressing the view that Congress had greater flexibility in legislation regarding the armed forces, notwithstanding concerns that the legislation may raise constitutional issues if applied to civilian society).

<sup>153</sup> *Rostker*, 453 U.S. at 66 (quoting *Parker*, 417 U.S. at 756, 758).

“Congress is permitted to legislate both with greater breadth and flexibility” when the statute governs military society, and that “[while] the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.”

*Id.*

<sup>154</sup> *Greer v. Spock*, 424 U.S. 828 (1976) (explaining that regulations on Fort Dix prohibiting some forms of free speech did not violate the Constitution, as the basic function of Fort Dix was to train Soldiers, not to provide an open forum, and that the post commander traditionally had the power to exclude all civilians from the post).

<sup>155</sup> *Rostker*, 453 U.S. at 66.

<sup>156</sup> *Brown v. Glines*, 444 U.S. 348 (1980) (holding that Air Force regulations requiring command approval for circulation of petitions on the base were not prima facie violations of the First Amendment).

<sup>157</sup> *Rostker*, 453 U.S. at 66.

Constitution when it acts in the area of military affairs . . . the tests and limitations to be applied may differ because of the military context.”<sup>158</sup>

Although the cases cited by the *Rotsker* Court involved individual citizens’ rights rather than states’ rights, the Court has been just as deferential to congressional War Powers actions affecting the latter. In *Perpich v. Department of Defense*,<sup>159</sup> the Court considered whether a federal statutory limit on a governor’s ability to disapprove of the state’s National Guard training in a foreign country was constitutional.<sup>160</sup> The case involved the Montgomery Amendment to the Armed Forces Reserve Act of 1952, which withdrew the gubernatorial consent required for National Guard training outside of the United States.<sup>161</sup> The Governor of Minnesota argued that the Montgomery Amendment was unconstitutional based upon the language of the Militia Clause, which purported to allow the federal government to call out the militia for the three limited purposes enunciated in the clause.<sup>162</sup> Although the Court ultimately decided the issue based upon the status of the National Guard members as members of the Reserve forces of the United States,<sup>163</sup> the Court revisited the reasoning in the *Selective Draft Law Cases* regarding the primacy of the federal government over the state militia. The Court rejected the Minnesota governor’s argument that the interpretations of the Militia Clause had “the practical effect of nullifying an important State power that is expressly reserved in the Constitution.”<sup>164</sup> The Court stated that instead, past precedent “merely recognizes the supremacy of the federal power in the area of military affairs.”<sup>165</sup>

This brief historical review establishes that the Framers placed absolute control of the power to raise and support armies in the federal government. Additionally, the Framers placed an almost exclusive control over the militia in the federal government, subject only to the discretion of Congress in exercising that power. Such deference by the federal courts has traditionally been lacking when it comes to a Commerce Clause analysis. Most Commerce Clause jurisprudence prior to 1887 involved decisions regarding “the Commerce Clause as a limit

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<sup>158</sup> *Id.* at 67.

<sup>159</sup> *Perpich v. Dep’t of Def.*, 496 U.S. 334 (1990).

<sup>160</sup> *Id.* at 336.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 347.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 351.

<sup>165</sup> *Id.*

on state legislation that discriminated against interstate commerce”<sup>166</sup> rather than as a limit on federal power. Once Commerce Clause cases regarding the limits of federal power reached the Supreme Court, however, the Court was far from deferential, “import[ing] from our negative Commerce Clause cases the approach that Congress could not regulate activities such as ‘production,’ ‘manufacturing,’ and ‘mining.’”<sup>167</sup> The Court’s general approach was that “[a]ctivities that affected interstate commerce directly were within Congress’[s] power; activities that affected interstate commerce indirectly were beyond Congress’ reach.”<sup>168</sup> This attitude toward federal power in the commerce clause realm changed substantially during the New Deal,<sup>169</sup> but “even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.”<sup>170</sup>

In short, the War Powers are of such a nature that congressional acts taken pursuant to them require the greatest deference from the courts, and that deference has been traditionally granted. On the other hand, the courts have traditionally not deferred to congressional acts passed pursuant to the Commerce Clause. Even in the post-New Deal era, where more deference has been given to Commerce Clause legislation, federal courts have not provided nearly the amount of deference provided to War Powers legislation. The judiciary has given deference to War Powers legislation, even when such legislation has seemingly run afoul of other important constitutional concerns, such as the rights guaranteed to American citizens by the Bill of Rights, as well as the perceived rights of the states to conduct their own military affairs. The question remains, how does the USERRA provision permitting private suits against state governments fit into this constitutional scheme? Is the sovereign immunity of the states recognized by the Eleventh Amendment such that it overrides the enforcement mechanism of provisions passed pursuant to the War Powers? In analyzing this question, it becomes apparent that courts have overlooked fundamental aspects of the USERRA legislation.

As discussed previously,<sup>171</sup> federal circuit courts holding the pertinent enforcement provisions of USERRA unconstitutional have

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<sup>166</sup> U.S. v. Lopez, 514 U.S. 549, 553 (1995).

<sup>167</sup> *Id.* at 554.

<sup>168</sup> *Id.* at 555.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 556–57.

<sup>171</sup> See discussion *supra* Part II.C.

relied almost solely on the broad dicta of *Seminole Tribe*. For example, in *Velasquez v. Frapwell*, the Seventh Circuit has argued convenience, stating that “[i]t’s a lot simpler to have a rule that the Eleventh Amendment applies to all federal statutes based on Article I than to have to pick and choose among the numerous separate powers conferred on Congress by that article.”<sup>172</sup> Whatever the merits that this “simplicity” argument may have, *Velasquez* was decided prior to *Katz*, which carves out at least a narrow exception to the Eleventh Amendment sovereign immunity. It should be noted that the Seventh Circuit eschewed the historical analysis approach, stating that the “historical analysis in [*Seminole Tribe*] is not binding”<sup>173</sup> and that “judges do not have either the leisure or the training to conduct responsible historical research or competently umpire historical controversies.”<sup>174</sup> The historical analysis approach is, however, the approach that started with *Seminole Tribe*, gained ground in *Alden*, and was finally dispositive in favor of abrogation in *Katz*. On the other hand, courts upholding the constitutionality of USERRA-like enforcement provisions have virtually ignored *Seminole Tribe*. The First Circuit gave short shrift to state sovereign immunity in *Diaz-Gandia*, instead relying on its old First Circuit precedent *Reopell v. Massachusetts*. The major problem with the First Circuit’s method, however, was that *Reopell* was based in large part on *Union Gas*,<sup>175</sup> which was expressly overruled in *Seminole Tribe*.<sup>176</sup> None of the circuit courts’ problems in this area disappeared with the 1998 amendments to USERRA, as individual servicemembers are still permitted, under the terms of the statute, to file suit against state employers in state courts. So, the question remains as to how the historical analysis of War Powers affects the analysis of the constitutionality of USERRA’s purported abrogation of state sovereign immunity.

That USERRA’s constitutional basis derives from the congressional War Powers is beyond doubt.<sup>177</sup> The primary purpose of USERRA is to

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<sup>172</sup> *Velasquez v. Frapwell*, 160 F.3d 389, 394 (7th Cir. 1998).

<sup>173</sup> *Id.* at 393.

<sup>174</sup> *Id.*

<sup>175</sup> *Reopell v. Mass.*, 936 F.2d 12, 16 (1st Cir. 1991) (“The VVRA, to be sure, was not enacted under the Commerce Clause, the focus of *Union Gas*. But the Court’s rationale for holding that Commerce Clause enactments abrogate the Eleventh Amendment equally supports War Powers abrogation.”).

<sup>176</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996).

<sup>177</sup> Although Congress did not explicitly state its constitutional basis for passing USERRA, even courts striking down the enforcement provisions against state actors have



encourage membership in the Reserve and Guard forces.<sup>178</sup> Such a purpose is clearly consistent with the constitutional duty of Congress to raise and support Armies.<sup>179</sup> If a noncareer servicemember's civilian job were not protected by federal legislation, there would exist less of an incentive for those servicemembers to remain in the Armed Forces. Similarly, if a potential applicant to the noncareer uniformed service knew that his or her job would not be protected, he or she would possibly be less likely to commit. The USERRA, in this respect, is a valuable recruiting and retention tool, and as such is a valid exercise of congressional authority. Whether or not an employer is a private company or a state government simply makes no difference when it comes to these concerns.

Assuming that USERRA is a valid exercise of the congressional War Powers, however, it is still necessary to analyze how the USERRA enforcement mechanism works under the Constitution. In so doing, it is essential to recognize two important aspects of USERRA that the circuit courts did not address. First, although a servicemember who is suing a state under USERRA provisions is an aggrieved party,<sup>180</sup> the federal government is also an aggrieved party.<sup>181</sup> The servicemember suing a state employer is not only enforcing an individual statutorily created right; he or she is enforcing a right of the federal government given to it by the express terms of the Constitution (i.e., the power to raise armies). Second, the servicemember suing a state employer has gained the right to sue not simply through statute, but as a direct result of his or her federal service. In this sense, the individual given the right to bring suit under USERRA is not bringing suit simply as a private person, but also as an employee of the federal government.<sup>182</sup> These two factors must be kept in mind at all times when analyzing the constitutional aspects of

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recognized that the legislation was based in the War Powers. *See Velasquez*, 160 F.3d at 392.

<sup>178</sup> 38 U.S.C. § 4301(a) (2000).

<sup>179</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>180</sup> 38 U.S.C. § 4323(a)(2) ("A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer . . .").

<sup>181</sup> *Id.* § 4323(a)(1) ("In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.").

<sup>182</sup> A good analogy for this is the Federal Tort Claims Act (FTCA). Under the FTCA, a member of the military is included in the term "employee of the government." *See* 28 U.S.C. § 2671 (2000). If a servicemember is "acting in line of duty," the servicemember is within the scope of his employment for FTCA purposes. *See id.* Similarly, an individual entitled to sue a state under USERRA has gained that right due to his status as an employee of the government acting within the scope of his service.

USERRA's enforcement mechanism. Although USERRA does not explicitly say this, an individual suing in state court can be seen as suing on the federal government's behalf. Because of this, it is helpful to examine state sovereign immunity in *qui tam* cases as an analogy to the USERRA cases.

## V. For Our Lord the King: *Qui Tam* and an Alternative Approach to USERRA Sovereign Immunity Issues

### A. A Brief Comparison of *Qui Tam* and USERRA

*Qui tam* is an abbreviated form of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which is translated in English as "who pursues this action on our Lord the King's behalf as well as his own."<sup>183</sup> Probably the most popular *qui tam* statute is the False Claims Act, originally passed in 1863, which provided for a private individual (the "relator") to bring suit on behalf of the federal government to enforce the Act's provisions.<sup>184</sup> Although the relator brings suit, he or she must inform the government, who has the discretion to intervene (or not to intervene) as a party.<sup>185</sup> The relator receives a percentage of the proceeds of the action, the percentage depending in large part whether or not the United States intervenes as a party.<sup>186</sup> Although USERRA is not explicitly a *qui tam* statute, the analogy is clear: a Soldier suing under USERRA enforces a federal law (and, in fact, enforces a federal constitutional power). The USERRA does not overtly state this, but the fact that the United States is a party in interest in USERRA legislation shows that, like the False Claims Act, an important governmental interest is at stake.

### B. *Stevens v. Vermont Agency of Natural Resources*: The Second Circuit Rules that *Qui Tam* Trumps Sovereign Immunity

The Supreme Court has left open the question whether the Eleventh Amendment prohibits an individual from suing a state actor under the False Claims Act. At least one circuit court, however, has held that the

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<sup>183</sup> *Vt. Agency of Natural Res. v. Stevens*, 529 U.S. 765, 768 (2000).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 770.

<sup>186</sup> *Id.*

Eleventh Amendment does not prohibit this. In *United States ex rel. Jonathan Stevens v. Vermont Agency of Natural Resources*,<sup>187</sup> the Second Circuit directly addressed the issue. The decision arose from a *qui tam* suit filed by Jonathan Stevens alleging that the Vermont Agency of Natural Resources (hereinafter the Agency) had violated the False Claims Act.<sup>188</sup> Stevens, who worked for the Agency, alleged that the Agency falsified documents regarding time that Agency employees worked on federally funded actions, which resulted in the Agency's receipt of federal funds to which it was not entitled.<sup>189</sup> The United States did not intervene in the action, leaving the action in effect a private suit against a state government.<sup>190</sup> Vermont moved to dismiss based upon, among other things, Eleventh Amendment sovereign immunity.<sup>191</sup>

The Second Circuit saw the question as “whether a *qui tam* suit under the FCA should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred.”<sup>192</sup> The Second Circuit, in rejecting Vermont's sovereign immunity defense, drew broad distinctions between *qui tam* cases and normal suits. The court stated that

[t]he real party in interest in a *qui tam* suit is the United States . . . . It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure of damages that are to be trebled; and it is the government that must receive the lion's share—at least 70%—of any recovery. To be sure, the *qui tam* plaintiff has an interest in the action's outcome, but his interest is less like that of a party than that of an attorney working for contingent fees.<sup>193</sup>

The Second Circuit also cited various rights of the government during the proceedings, including the right to intervene, the right to be informed

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<sup>187</sup> *Vt. Agency of Natural Res. v. Stevens*, 162 F.3d 195 (2d Cir. 1998), *rev'd on other grounds*, 529 U.S. 765 (2000).

<sup>188</sup> *Id.* at 198.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 199.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 202.

<sup>193</sup> *Id.*

of discovery, the primacy of any federal investigations or suits, and the right to control dismissals over the wishes of the *qui tam* plaintiff.<sup>194</sup>

### C. The Supreme Court Avoids the Issue

The Supreme Court, in reversing the Second Circuit decision, left open the question of whether the Second Circuit's Eleventh Amendment analysis was accurate. The Court held that a state was not a "person" within the meaning of the statute and was therefore not amenable to suit by a relator.<sup>195</sup> However, regarding the "question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment,"<sup>196</sup> the Court expressed no opinion (but the Court did express the view that there was "serious doubt"<sup>197</sup> that such a case was permissible under the Eleventh Amendment). The dissent, of course, disagreed, stating that even under *Seminole Tribe*, the state's Eleventh Amendment defense was invalid, as "(1) respondent is, in effect, suing as an assignee of the United States, . . . [and] (2) the Eleventh Amendment does not provide the States with a defense to claims asserted by the United States."<sup>198</sup> The majority concluded that at the most, the "FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim."<sup>199</sup>

Concerning Eleventh Amendment jurisprudence, the Supreme Court's opinion in *Vermont v. Stevens* is as important for what it did not do as for what it did. The Court essentially dodged the issue of Eleventh Amendment sovereign immunity in *qui tam* cases, relying instead on statutory construction alone to reverse the Second Circuit. Although the Court indicated it may be willing to invalidate *qui tam* cases against state governments, it seemed to have trouble reconciling its Eleventh Amendment jurisprudence to the fact that in a *qui tam* suit, the United States is the real party in interest. This reluctance on the Court's part makes the case for servicemember USERRA suits against state employers even stronger, as there are multiple reasons why suits allowed in USERRA have a firmer constitutional basis than *qui tam* suits.

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<sup>194</sup> *Id.* at 202–03.

<sup>195</sup> *Vt. Agency of Natural Res. v. Stevens*, 529 U.S. 765, 787 (2000).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 802 (Stevens, J., dissenting).

<sup>199</sup> *Id.* at 773.

Although there exist important similarities between *qui tam* suits under the False Claims Act and servicemember suits brought under provisions of USERRA, a brief analysis of the two establishes that a USERRA plaintiff's constitutional claim against state sovereign immunity is stronger. For example, although the aggrieved individual in a USERRA case has obviously suffered more monetary damage than a *qui tam* relator, in an important sense the aggrieved party is still the United States. If a state does not re-employ a Reserve or Guard servicemember after that servicemember's federal service, and because of that servicemember's federal service, it is directly impinging upon the federal government's constitutional power to raise and support armies. Although the monetary amount from a USERRA case depends on lost wages and benefits due to the servicemember involved,<sup>200</sup> those benefits accrue only because of the servicemember's federal status. In that sense, the aggrieved individual and the United States are virtually the same party. The *qui tam* plaintiff's interest is generally only pecuniary, and in this way the USERRA plaintiff is in an even stronger position, as his or her interest is pecuniary as well as constitutional. In a very real sense, an action under USERRA is more than a private enforcement of a statutorily created right, whether *qui tam* or otherwise—it is also a method that Congress has chosen to enforce its sovereign federal powers.

## VI. Combining It All: Suggestions for Changes to USERRA

Of course, a USERRA case is not statutorily a *qui tam* case. Although Congress amended USERRA subsequent to the *Seminole Tribe* case, the amendments tended to lessen rather than to increase servicemembers' options at enforcement.<sup>201</sup> Additionally, by still permitting individual servicemember suits in state courts, Congress did nothing to lessen the constitutional issues involved.<sup>202</sup> Clearly, then, USERRA is still in need of amendment. Any amendments to USERRA should maximize the enforcement options of the aggrieved servicemember, while being written in such a way as to withstand scrutiny by the judicial branch. Appendix A provides a suggested revision to the current version of USERRA that will accomplish those goals.

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<sup>200</sup> 38 U.S.C. § 4323(d) (2000).

<sup>201</sup> See discussion *supra* Pt. II.C.

<sup>202</sup> See *supra* Pt. III.B (discussing *Alden v. Maine*).

First, the revised statute retains the ability of the U.S. Attorney to file suit against a state employer in the name of the United States. This obviously is not a constitutional issue. However, the revision would replace the previously rescinded provisions allowing the servicemember to sue a state employer in federal court. The language in the proposed statute at Appendix A permitting individual servicemember suits against state employers is adapted from the False Claims Act's *qui tam* provisions,<sup>203</sup> and clarifies that the individual bringing suit is acting not only on his or her behalf, but on behalf of the U.S. Government and in his or her official capacity as a servicemember. Both of these aspects of the proposed legislation will guard it against any Eleventh Amendment attack. Additionally, the proposed changes explicitly state that USERRA is War Powers legislation. This explicit statement should ensure that any court reviewing the legislation does so with the traditional deference provided to Congress in War Powers cases.

It is hard to conceive that such a revision to USERRA could not withstand judicial scrutiny. The War Powers Clause jurisprudence, in conjunction with the analogous *qui tam* jurisprudence as well as the direct link between the servicemember and the federal government in USERRA cases, would make it difficult for any court to declare such provisions unconstitutional. From a judicial perspective, preserving the proposed legislation does not weaken any of the traditional sovereign immunity cases, but would merely carve out an exceedingly narrow exception. It is hard to conceive of another area where legislation could be so narrowly tailored that a judicial authority could combine the traditional deference to War Powers legislation with a firm nexus between a plaintiff and the federal government to abrogate a state's sovereign immunity. Such a narrowly tailored statute is, in this respect, helpful to both the legislative and judicial branches, leaving Eleventh Amendment jurisprudence intact while allowing for statutory right to accrue to a certain class of individuals. Ultimately, such a statute is clearly in the best interests of those Reserve and Guard citizen-Soldiers

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<sup>203</sup> 31 U.S.C. § 3730(b)(1) (2000).

A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

*Id.*

who are also employees of states, and who are called to serve their country.

## VII. Conclusion

Although certain Supreme Court cases have raised problematic issues, the historical approach used by the Supreme Court in *Alden* and *Katz* demonstrates that under a War Powers analysis, there exists a strong argument for the constitutionality of USERRA's enforcement provisions. Servicemember USERRA enforcement actions are analogous to *qui tam* suits, wherein individual plaintiffs enforce federal legislation. Because a servicemember in a USERRA suit is actually a member of the federal government, and is enforcing a federal, constitutional right rather than simply enforcing federal legislation, the USERRA enforcement provisions are stronger from a constitutional standpoint than the provisions in a *qui tam* suit. This article's proposed revisions to the current USERRA would re-implement a servicemember's right to sue a state government in federal court for violations of the statute, and would withstand constitutional scrutiny by the judicial system.

With the foregoing analysis, it is clear that even if analyzed under the *Seminole Tribe* line of cases, USERRA should pass constitutional muster as it is currently written, and should have passed constitutional muster as it was written prior to the 1998 amendments.<sup>204</sup> Congress has enacted USERRA pursuant to its constitutional power to raise and support Armies. Such a power, like the bankruptcy power analyzed in *Katz*, is a "unitary concept."<sup>205</sup> It is a power that resides solely and completely in the federal government—states cannot encroach on that power, nor can they weaken it through reliance on state sovereign immunity, an immunity that is ineffective against the federal government. USERRA ultimately is a congressional attempt to aid in the raising and supporting of the Army by providing reemployment rights to servicemembers. Because of this, USERRA is a valid exercise of the congressional War Powers, and hence is binding upon state as well as private employers.

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<sup>204</sup> See discussion *supra* Part II.C.

<sup>205</sup> Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 370 (2006).

## Appendix A

## Suggested Statutory Revision to USERRA

Following is a suggested revision to USERRA which re-establishes the ability of servicemembers to sue state employers who violate USERRA in federal court. In conjunction with the other provisions of USERRA, the proposed statute makes explicit the nexus between the servicemember's ability to sue a state with that servicemember's federal status, provides for a qui-tam-like ability of a servicemember to sue on behalf of the federal government, and makes explicit that USERRA is a War Powers piece of legislation. In addition to the proposed changes, the current 38 U.S.C. § 4323 would have to be amended to apply only to private employers. This proposed 38 U.S.C. § 4323a mirrors the current 38 U.S.C. § 4323, with changes denoted in bold. Additionally, proposed changes to 38 U.S.C. § 4301 denoting the constitutional basis for the legislation are in bold.

Title 38, United States Code, § 4301. Purposes; sense of Congress

**(a) Pursuant to Article I, Section 8 of the Constitution, and implementing this Chapter to aid in raising and supporting Armies, providing for and maintaining a Navy, and providing for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the service of the United States, it is the purpose of Congress in enacting this chapter -**

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

Title 38, United States Code, § 4323a. Enforcement of rights with respect to a State employer.

(a) Action for relief.

(1) **[SAME AS CURRENT 38 U.S.C. § 4323(a)(1)]** A person who receives from the Secretary a notification pursuant to section 4322(e) of this title



[38 USCS § 4322(e)] of an unsuccessful effort to resolve a complaint relating to a state (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter [38 USCS §§ 4301 et seq.] for such person. In the case of such an action against a state (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) [SAME AS CURRENT 38 U.S.C. § 4323(a)(1), except “private employer” is deleted] A person may commence an action for relief with respect to a complaint against a State (as an employer) if the person—

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title [38 USCS § 4322(a)];

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(3) **A person commencing an action under section 4323a(a)(2) of this title [38 USCS § 4323a(a)(2) will commence a civil action for the person and for the United States Government. The action shall be brought in the name of the Government. For purposes of an action brought under this paragraph, a person commencing an action against a State (as an employer) will be considered as acting on behalf of a federal agency in his or her official capacity, as well as acting in his or her own behalf.**

(b) Jurisdiction.

(1) In the case of an action against a State (as an employer) commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in **the district courts of the United States** or a State court of competent jurisdiction in accordance with the laws of the State.

(c) Venue. In the case of an action by the United States or by a person against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(d-j) [SAME AS CURRENT 38 U.S.C. § 4323(d-j), except references to “private employers” are deleted]

**BY THE CONTENT OF CHARACTER<sup>1</sup>: THE LIFE AND  
LEADERSHIP OF MAJOR GENERAL KENNETH D. GRAY  
(RET.) (1966–1997), THE FIRST AFRICAN-AMERICAN JUDGE  
ADVOCATE GENERAL OFFICER**

LIEUTENANT COLONEL GEORGE R. SMAWLEY<sup>2</sup>

*“At this crucial time in our history, we must look back to the generations of Soldiers who came before us and know that they were led by visionary and principled leaders; that their service was based on a foundation of values; that they are the epitome of commitment, competence, candor, courage, and compassion; and that they shared a willingness to persevere and never, never, ever gave up.”<sup>3</sup>*

– Major General Kenneth D. Gray

I. Introduction

In his 2001 book, *Good to Great—Why Some Companies Make the Leap . . . and Others Don’t*, author and former Stanford University Business School faculty member Jim Collins explores the leadership qualities of business leaders able to move their organizations from

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<sup>1</sup> “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.” Dr. Martin Luther King, Speech in Washington, D.C. (Aug. 28, 1963) (transcript available at <http://www.usconstitution.net/dream.html>).

<sup>2</sup> Judge Advocate General’s Corps, U.S. Army. Presently assigned as the Assistant Executive Officer, Office of The Judge Advocate General, The Pentagon, Washington, D.C. The U.S. Army Command & General Staff College, Fort Leavenworth, Kan., 2004; LL.M., 2001, The Judge Advocate General’s School, U.S. Army; J.D., 1991, The Beasley School of Law, Temple University; B.A., 1988, Dickinson College. Previous assignments include: Deputy Staff Judge Advocate, 10th Mountain Division (Light Infantry) & Fort Drum, Fort Drum, N.Y. 2004–007; Plans Officer, Personnel, Plans, & Training Office, Office of The Judge Advocate General, Washington, D.C., 2001–2003; Legal Advisor, Chief, Administrative & Civil Law, Chief, International Law, U.S. Army Special Operations Command, Fort Bragg, N.C., 1998–2000; Senior Trial Counsel, Special Assistant U.S. Attorney (Felony Prosecutor), Chief, Claims Division, Fort Benning, Georgia, 1995–1998; Trial Counsel, Special Assistant U.S. Attorney (Magistrate Court Prosecutor), Operational Law Attorney, Chief, Claims Branch, 6th Infantry Division (Light), Fort Wainwright, Alaska, 1992–1995. Member of the bars of Pennsylvania, the U.S. District Court–Northern District of New York, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court.

<sup>3</sup> Major General Kenneth D. Gray, *The Eighth Annual Hugh J. Clausen Lecture on Leadership*, 175 MIL. L. REV. 385, 400 (2003).

merely good to simply great.<sup>4</sup> According to Collins, leaders who consistently demonstrate a “paradoxical blend of personal humility and professional will . . . modest and willful, humble and fearless”<sup>5</sup> are most likely to move their organizations to greatness—“the highest level in a hierarchy of executive capabilities.”<sup>6</sup> Collins’s leadership studies carry important lessons for any organization, including the military, and find expression in the individual leadership styles and philosophies of great leaders who demonstrate an unrestricted focus on institutional gain (vice personal gain), individual values, and a personal humility driven in large measure by apportioned credit for success.

Major General (MG) Kenneth D. Gray, former The Assistant Judge Advocate General of the Army (TAJAG),<sup>7</sup> is one such leader. During an extraordinarily successful Army career, this remarkable Soldier-lawyer was driven by a broad range of personal and organizational values, dedicated to the institutional Army and the quality of Army legal services, and focused on moving Judge Advocates and the Judge Advocate General’s Corps<sup>8</sup> forward—from good to great—with understated but highly effective and principled leadership for individual and institutional success.

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<sup>4</sup> JIM COLLINS, *GOOD TO GREAT—WHY SOME COMPANIES MAKE THE LEAP . . . AND OTHERS DON’T* 3 (2001).

That good is the enemy of great is not just a business problem. It is a *human* problem. If we have cracked the code on the question of good to great, we should have something of value to any type of organization. Good schools might become great schools. Good newspapers might become great newspapers. Good churches might become great churches. Good government might become great agencies. And good companies might become great companies.

*Id.* at 16.

<sup>5</sup> *Id.* at 20–22.

<sup>6</sup> *Id.* at 21.

<sup>7</sup> The Fiscal Year 2008 National Defense Authorization Act (NDAA), signed 28 January 2008, amended 10 U.S.C. § 3037 by re-designating the title of The Assistant Judge Advocate General to the “Deputy Judge Advocate General.” National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 114. For the purposes of this article, the title in effect at the time the officer held the position is the one used.

<sup>8</sup> U.S. Army Judge Advocate General’s Corps. *See generally* <https://www.jagcnet.army.mil/>.

He is perhaps most celebrated as the highest ranking African-American jurist to serve in the U.S. military and the first to serve as a Judge Advocate general officer. But his race, while historically noteworthy, is a remarkably small part of the story. Major General Gray's leadership and service, which continue today in his capacity as the Vice President of Student Affairs for West Virginia University, are simply bigger than that.

This article does not attempt to place a controlling narrative upon MG Gray's life; instead, it is a modest effort to offer the current generation of military and civilian leaders a model for moving themselves, their subordinates, and their organizations forward through value-driven leadership. The biography makes particular note of MG Gray's demonstrated moral compass, recently defined by executive leadership coaches Doug Lennick and Fred Kiel, Ph.D. as:

a set of deeply held beliefs and values—that drives [leaders'] personal and professional lives. They revealed beliefs such as being honest no matter what; standing up for what is right; being responsible and accountable for their actions; caring about the welfare of those who work for them; and owning up to mistakes and failures.<sup>9</sup>

What follows is a lesson of one man's heartfelt journey from rural West Virginia to the highest echelons of America's Army and back, and the character he displayed throughout. It surveys MG Gray's life from Excelsior, West Virginia, and tells the story of his journey from segregated schools, his service in Vietnam, the Pentagon, myriad leadership positions and related military milestones highlighted by his selection and promotion as the first African-American Judge Advocate to serve as a general officer. The concluding section addresses his personal leadership philosophy and principles that are, collectively, a valuable guidepost for just about any professional—military or civilian.

Emphasis is given here to the value-driven approach engrained in MG Gray from childhood, and which helped him flourish as a black military lawyer serving in the post-Vietnam era until his retirement in May 1997 as the second highest ranking Army Judge Advocate. This article provides a chronological perspective on MG Kenneth Gray's personal

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<sup>9</sup> DOUG LENNICK & FRED KIEL, MORAL INTELLIGENCE—ENHANCING BUSINESS PERFORMANCE AND LEADERSHIP SUCCESS xxxiv (2007).

and professional life, from his childhood in West Virginia coal country through his remarkable career in the U.S. Army Judge Advocate General's Corps.

## II. 1944–1970

### A. Rural West Virginia, 1944–1962

William J. Bennett describes moral education as a process of “rules and precepts—the *dos* and *don'ts* of life with others—as well as explicit instruction, exhortation, and training.”<sup>10</sup> That process, Bennett wrote, “must affirm the central importance of moral example.”<sup>11</sup> For Kenneth Gray, that example started with his family. By observing and absorbing the smallest details of life and community near the West Virginia coal mines, he was able to acquire an interior attitude defined by core values, ideas, and practices.

That experience began in the late 1940s and early 1950s in Excelsior, West Virginia—a small town with “two rows of houses between two roads near a railroad track”—surrounded by a large, close-knit family that lived within easy walking distance of one another.<sup>12</sup> Major General Gray grew up in a generally segregated community while his father worked in the coal mines in nearby Caretta, West Virginia.<sup>13</sup> His father, Raymond Gray, provided the family a solid working-class living as a miner during a period of relative prosperity.<sup>14</sup> His grandfather, Reverend Thomas E. Woody, was the minister of the local Rosebud Baptist Church, which played a significant and active role in the family's life,

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<sup>10</sup> WILLIAM J. BENNETT, *THE BOOK OF VIRTUES—A TREASURE OF GREAT MORAL STORIES* 11 (1993).

<sup>11</sup> *Id.*

<sup>12</sup> Major Jeff A. Bovarnick & Major Charles L. Young, *An Oral History of Kenneth D. Gray, Major General (Retired), United States Army (1966–1977)*, at 2 (Feb. 2001), [hereinafter *Oral History*] (unpublished manuscript, on file with The Judge Advocate General's Legal Center and School (TJAGLCS) Library, United States Army, Charlottesville, Virginia). The manuscript was prepared as part of the Oral History Program of the Legal Research and Communications Department at the TJAGLCS. The oral history of Major General Gray is one of nearly four dozen personal histories on file with the TJAGLCS Library. They are available for viewing through coordination with the School Librarian, Mr. Daniel Lavering. See <http://www.jagcnet.army.mil/tjaglcs>.

<sup>13</sup> *Id.* at 2–3.

<sup>14</sup> Interview with Major General Kenneth D. Gray (Retired), in Morgantown, W. Va. (Feb. 27, 2008) [hereinafter *Gray Interview*] (notes on file with the author).

especially that of Gray's mother, who took him to Missionary Society meetings, chorus practices, and related church activities.<sup>15</sup>

Although MG Gray was an only child, he nevertheless grew up amidst a wealth of family that remains an enduring impression of his childhood—of the presence and influence of aunts, uncles, cousins, his grandmother, and the church.<sup>16</sup> They collectively played an instrumental role in the man he would become, instilling in him all the tools necessary for challenges he would face and overcome.

My family instilled in me that I could be anything I wanted to be, and to never let anything or anyone stop you. They also grew in me the idea that one should never use color as an excuse or for blame . . . you never really know the reason things happen, and you should never jump to conclusions or reasons for something not going well. You are responsible for yourself.<sup>17</sup>

That sense of responsibility was cast in the inescapable atmosphere of segregation that existed in rural West Virginia. While the town of Excelsior itself was not uniformly segregated,<sup>18</sup> the ugly hue of racism was certainly a part of Gray's childhood and included schools and public accommodations such as restaurants and movies. He recalls, for example, the segregated movie theater, where "we always sat up in the balcony, while the white folks sat on the main level."<sup>19</sup>

The family also had its economic struggles. After eighteen years of working in the mines his father, a veteran who had fought in the Philippines and served as a local American Legion Commander, was laid off with little compensation during a down-turn in the industry coinciding with expanded use of machinery and mechanized extraction methods.<sup>20</sup> Like many other families, this changed a crucial dynamic between MG Gray's parents. He recalls:

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* "We owned our own home, rather than renting from the coal company. Being an only child afforded my parents greater latitude than they may otherwise have had. I never wanted for anything." *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Oral History, *supra* note 12, at 4–5.

So, the roles reversed in my household. My dad stayed home and my mother went back to college and got her degree from Bluefield State College and became a teacher. She really became the breadwinner in the family, and my dad would stay home and do the cooking and take care of the house. That was really tough; it was a tough thing for them and later led to their divorce . . . when I was a sophomore in college.<sup>21</sup>

Finally, it is worth noting that Gray's segregated high school had a record of producing serious students who went on to be successful in life and in post-secondary education. The faculty at Excelsior High School was universally African American, and most had Master's degrees or equivalent higher education. Gray remembers that they were highly qualified teachers who prepared willing students for success in higher education.<sup>22</sup> "They were dedicated professionals, lived in the community where they worked, and genuinely cared for the children."<sup>23</sup>

#### B. West Virginia State College, 1962–1966

There had never been a serious discussion about MG Gray following his father into the coal mines; his parents didn't want it, and neither did he. The Grays' dream for their son was that he would go to college and into a professional career. Accordingly, upon graduation from Excelsior High School in 1962, Gray and seven of his classmates entered the freshman class of West Virginia State College, a historically black college located in Institute, West Virginia.<sup>24</sup>

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<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> Gray Interview, *supra* note 14.

<sup>24</sup> Oral History, *supra* note 12, at 5, 9.

The atmosphere on campus was largely black students and the campus complexion changed in the evening [when] all of the commuter students came and they were mostly white. If you took a count of the number of students, it would have been a predominately white student body, although West Virginia State is one of the historically black colleges.

*Id.* at 9.

The quality faculty at Excelsior inspired its students toward excellence and provided a marvelous basis for further education. That foundation paid great dividends for Gray, and he found undergraduate college to be a tremendous experience. His long relationship with the military began there as a Reserve Officers' Training Corps (ROTC) cadet. He was also active in a variety of organizations, including the Pershing Rifles,<sup>25</sup> Scabbard and Blade,<sup>26</sup> student government (as treasurer of his class), and Kappa Alpha Psi fraternity (as president of the local chapter).<sup>27</sup> During this period the college required all male college freshmen and sophomores to participate in ROTC, beyond which students competed to remain in the program.<sup>28</sup> College was also where he met his future wife, Carolyn Jane Trice. They were married upon his graduation in 1966.<sup>29</sup>

Major General Gray was awarded a Bachelor of Arts degree in Political Science with minors in French and Military Science, and received a split Reserve Component commission in Army Intelligence and Security—the forerunner of the Military Intelligence Branch—and a Regular Army commission in the Signal Corps. He notes in his oral history, however, “I did not request the Signal Corps, and I did not spend

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<sup>25</sup> Major General Gray was part of a Pershing Rifle Squad that marched in the inaugural parade for President Lyndon Johnson on 20 January 1965. *Id.* at 11–12.

<sup>26</sup> Scabbard and Blade is a joint service honor society emphasizing leadership, community, and enhancing military education at American colleges and universities. *See generally* <http://www.scabbardandblade.org/Search/Search.asp> (last visited Apr. 27, 2008).

<sup>27</sup> Gray Interview, *supra* note 14. Gray feels strongly that the collective effect of this “interaction in college activities facilitated his leadership development.” *Id.*

<sup>28</sup> Oral History, *supra* note 12, at 11–12.

<sup>29</sup> *Id.* at 11, 16.

I met Carolyn during my sophomore year. Although we had seen each other on campus, we did not begin to talk and form a relationship until our second year in college. She worked in the library, and I was required to go to the library every night to study for three hours, and that is where we met. Although talking to her was a violation of the social restrictions imposed by the fraternity, I could talk to the library staff about books and what I needed to complete my studies. You can guess that I needed lots of help with finding books and other items to help me study. We were married in August 1966, the year we graduated from college, and have been together since that time.

*Id.* at 16.



a day in the Signal Corps. I did not have any desire to go into any other branch than the Judge Advocate General's Corps."<sup>30</sup>

C. West Virginia University College of Law, 1966–1969

The interest in law evolved gradually during his years at West Virginia State College, and in 1966 MG Gray learned about the Army's Excess Leave Program<sup>31</sup> that permitted commissioned officers to attend law school at their own expense while deferring their existing active commitment.<sup>32</sup> Officers were generally exempt from most military training during this period and were left to focus on their studies, with only summers or holidays working as an intern in Army legal offices.<sup>33</sup> He chose West Virginia University because the school provided him with in-state tuition, and spent the first year in the dorms while his wife taught school in Cleveland. The second and third year they lived together, but it was not always an easy experience.<sup>34</sup> Gray recalls:

As you know, [the mid-1960s] was a turbulent time in our history for race relations. At the time, Morgantown [West Virginia] was not a very nice place for blacks. We had a difficult time finding a place to live. We would call to rent an apartment and when we would arrive, nothing would be available. I recall one incident in particular. We called to see an apartment that was available for rent. We were told to come right over. As we were walking toward the realtor's office, the shade was pulled down and a "closed" sign was placed in the window. We could still see through a gap in the shade and saw two women inside smoking. We knocked, but they did not answer the door . . . . So, we decided to buy a mobile home, and we were going to park it not too far from where our house is now because we saw a lot of trailer parks in the area. There was a trailer park

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<sup>30</sup> *Id.* at 14, 28.

<sup>31</sup> The precursor to today's Educational Delay program. *See generally* U.S. DEP'T OF ARMY, REG. 601-25, DELAY IN REPORTING FOR AND EXEMPTION FROM ACTIVE DUTY, INITIAL ACTIVE DUTY FOR TRAINING, AND RESERVE FORCES DUTY (19 Oct. 2006).

<sup>32</sup> Oral History, *supra* note 12, at 15.

<sup>33</sup> *Id.*

<sup>34</sup> Gray Interview, *supra* note 14. Gray's wife supported him during his time, and he often remarked that he attended law school on "the Carolyn Gray Scholarship." *Id.*

advertising vacancies next door to the elementary school, and I thought how great this would be because [my wife] could walk to work. The owner of the park refused to rent to us.<sup>35</sup>

In the end, the Grays secured a place to park their mobile home in Morgantown for his second and third year.<sup>36</sup> Fortunately, the experience within the university itself was far more accommodating than the town. Major General Gray describes the law school as his “salvation . . . a wonderful place to be because it embraced us [and] was totally different than what was happening in the community.”<sup>37</sup>

Major General Gray was the only African-American law student in his class, and the only one attending the College of Law during his three years in Morgantown.<sup>38</sup> He was, in that regard, alone without obvious mentors or trailblazers to assist him along the way. But looking back, he was able to turn what could have been a limiting experience into something quite positive, finding it to be “one of the best things that could have happened to me because it gave me an opportunity to exist in an arena that would serve me well later in life.”<sup>39</sup> Gray remembers that:

Several of my friends warned me that I would not succeed if I attended WVU College of Law. In other words, leaving the [mostly black] environment [of West Virginia State College] and going to a totally different environment would be very difficult. But it was just another challenge for me, and I wanted to take it on.<sup>40</sup>

It was an entirely new experience for Gray. He embraced the new manner of instruction and ways of thinking and learning, and overcame much in the transition from undergraduate school. He was successful, “[h]aving spent all three years at the law school as the only black student,”<sup>41</sup> and looked back on the experience with a memorable note for the outstanding professors he had and the life-long friends he made

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<sup>35</sup> Oral History, *supra* note 12, at 17–18.

<sup>36</sup> *Id.* at 18.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 19.

<sup>41</sup> *Id.* at 22.

there.<sup>42</sup> When asked about any secrets to his success, Gray easily credits his fellow students and several junior faculty members who reached out to him; he never felt as though he was treated differently than the others.<sup>43</sup> Gray graduated as one of sixty-three students from a starting class of eighty or ninety,<sup>44</sup> and was admitted to practice law in West Virginia, fully expecting to return there to a civilian practice following his Army commitment.<sup>45</sup>

### III. 1969–1978

#### A. Judge Advocate Officer Basic Course, 1969

In the summer of 1969, MG Gray reported to the 52nd Judge Advocate General's Corps Officer Basic Course located on the grounds of the University of Virginia. The program of instruction lasted one month, necessarily truncated by the needs of the war in Vietnam.<sup>46</sup> He was joined by five law school classmates, who served as a de facto network of friends and peers, including John Hatcher, who commuted to and from West Virginia with Gray on the weekends to see family.<sup>47</sup>

Gray recalls that the Basic Course class was comprised of direct commissionees (attorneys with no preexisting military experience or commitment), excess leave officers like himself, and several individuals with prior service.<sup>48</sup> Key instructors included future leaders of the Army JAG Corps,<sup>49</sup> among them Major (MAJ) Hugh R. Overholt,<sup>50</sup> who taught

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<sup>42</sup> *Id.* 20–23.

<sup>43</sup> Gray Interview, *supra* note 14. Faculty members who “embraced” Gray included John Fisher, Robert King, Willard Lawrenson, and Thomas Cady. *Id.*

<sup>44</sup> Oral History, *supra* note 12, at 23.

<sup>45</sup> *Id.* at 22, 24. “[Carolyn] was expecting four and a half years in and probably returning to Charleston—to return to West Virginia where our family roots were, to live, to work and to raise a family. That is what she expected.” *Id.*

<sup>46</sup> *Id.* at 24.

<sup>47</sup> Gray Interview, *supra* note 14.

<sup>48</sup> Oral History, *supra* note 12, at 26.

<sup>49</sup> *Id.*

<sup>50</sup> Major General (Retired) Hugh R. Overholt (1957–1989), The Judge Advocate General of the Army (TJAG) (1985–1989). See generally George R. Smawley, *Shoeshine Boy to Major General: A Summary and Analysis of An Oral History of Major General Hugh R. Overholt, United States Army (Retired) 1957–1989*, 176 MIL. L. REV. 309 (2003).

in the Criminal Law Department, and MAJ William K. Suter,<sup>51</sup> who taught on the Administrative and Civil Law Faculty. Of his fellow officers, Gray observed:

A lot of officers came into the JAG Corps to avoid the draft and Vietnam. Most had no desire to remain in the military; they were just biding their time. But I never sensed they weren't committed lawyers. They simply reflected the Army we had at the time.<sup>52</sup>

The Basic Course in 1969 was a hurried affair compared to the more than twelve weeks of intense academic and professional military education and program of instruction currently required by the U.S. Army Judge Advocate General's Legal Center and School. Vietnam and the new demands of the 1969 *Manual for Courts-Martial (MCM)* dictated that the Army educate and train as many Judge Advocates as it could, as quickly as it could.

#### B. Fort Ord, California, 1969–1970

At the turn of the decade most of MG Gray's Basic Course classmates volunteered for, or otherwise ended up, deployed to the war in Vietnam. In his case, Gray was assigned to Fort Ord, California,<sup>53</sup> which he recollects was "a popular assignment for returnees from Vietnam. As a result, we had to make room for them, and a lot of us from Fort Ord got shipped to Vietnam."<sup>54</sup> He was not deployed, at least not initially; he and his family enjoyed relative stability for approximately eight months from September 1969 to the spring of 1970.

During this assignment he was a military criminal defense attorney. Today, that is an unusual first step for a young Judge Advocate where experience in other developmental positions is generally considered an important prerequisite for military prosecutors and defense counsel. But not in 1969. He recalls:

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<sup>51</sup> Major General (Retired) William K. Suter (1958–1991), The Acting The Judge Advocate General of the Army (ATJAG) (1989–1992). Major General Suter currently serves as the Clerk of the Supreme Court of the United States.

<sup>52</sup> Gray Interview, *supra* note 14.

<sup>53</sup> Oral History, *supra* note 12, at 27, 29–34.

<sup>54</sup> *Id.* at 27.

You got either legal assistance or defense. I really enjoyed defense work. It was overwhelming. I probably had a caseload of eighty cases just myself. Most were AWOL cases and some desertion cases . . . I spent every night, except Saturday night, at the stockade interviewing clients.<sup>55</sup>

An important change in military justice took effect during this time in the recently enacted changes to the *MCM*, and the accordant establishment of an institutionalized trial judiciary. The Military Justice Act of 1968<sup>56</sup> required dramatic changes in military justice procedure that moved the system in the direction of its civilian counterpart, particularly for special courts-martial empowered to confine a Soldier for up to six months. Previously, special courts-martial were often presided over by “law officers”—line officers with little if any legal training.<sup>57</sup> Nor, for that matter, were prosecutors or defense counsel for special-courts required to be licensed attorneys. For special courts-martial, officers were generally temporarily detailed with Judge Advocates serving only an advisory capacity. The 1968 Act changed that, and increased the need for qualified (licensed) counsel throughout the military services.<sup>58</sup>

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<sup>55</sup> *Id.* at 30.

<sup>56</sup> Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

<sup>57</sup> Oral History, *supra* note 12, at 30–31.

<sup>58</sup> WILLIAM THOMAS ALLISON, *MILITARY JUSTICE IN VIETNAM—THE RULE OF LAW IN AN AMERICAN WAR 18–20* (2007) (citing Sam Ervin Jr., *The Military Justice Act of 1968*, 45 *MIL L REV.* 77, 79 (1969)). Allison summarizes the Military Justice Act of 1968 as follows:

For special courts-martial, qualified legal counsel was required to represent the accused when a bad conduct discharge was involved; for all other special courts-martial, the accused had to be represented by a lawyer unless impractical because of military conditions. The act created an independent judiciary for each of the armed services. These judges would not be under line command and thus avoided command influence. They would also have powers and functions in trial similar to those of federal judge and could now rule on pretrial motions as well as on points of law. The old law officer concept disappeared. Under the act, the accused now had the right to request trial by a military judge instead of a full court and could also object to trial by summary courts-martial for trial in a higher court. The appellate boards of review became more formal-sounding courts of military review staffed by independent judges.

*Id.* at 20.

Major General Gray's firsthand experience with Soldiers was of a conscription Army at war. "The war was being fought by draftees. By people who were forced to go to Vietnam . . . who really did not want to go, and that is why they deserted and went AWOL in the numbers that they did. They just did not want to be part of the military."<sup>59</sup> He found that most of his clients were unconcerned about the characterization of their service upon separation from the Army, despite the adverse consequences of a less than honorable discharge.<sup>60</sup> They simply wanted out.

As one of the few African-American Army Judge Advocates on active duty, Gray's race was a non-issue as a Trial Defense Attorney despite many of the racial tensions prevalent elsewhere in the country at the time. He recalls that Soldiers "[c]ould request lawyers because they had heard about a person and I was probably requested just as much as any other lawyer. [But] I *do not* recall any case where someone did not want me because of my race."<sup>61</sup> Alternatively, he acknowledges that certain clients may have requested him because "[t]hey felt they could relate better . . . [that] I could understand where they were coming from."<sup>62</sup> What is important, however, is that MG Gray never experienced any disparate treatment or impediments to his military practice because of his race. He recalls:

All of us were in the same boat in terms of working hard to get the job done. I don't recall any episode at Fort Ord where my race was a factor. I do know that when we represented clients, especially black Soldiers, there was a tendency for them to want a black lawyer. But, as time went by, they knew the individuals to request, especially if you won a lot of cases. It didn't matter what your race was, they just wanted that particular lawyer to represent them at trial if it was [particularly difficult].<sup>63</sup>

The spring of 1970 was, overall, a fruitful time for the Grays. Life was good along the California coast and he enjoyed his robust military

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<sup>59</sup> Oral History, *supra* note 12, at 32.

<sup>60</sup> *Id.* at 33.

<sup>61</sup> *Id.* at 34 (emphasis added).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

practice; his wife had just been hired as a teacher at one of the elementary schools on Fort Ord.<sup>64</sup> But after only about seven months he received orders to attend the military judges' course in preparation for his next assignment. By August 1970, he was in Da Nang, Vietnam.<sup>65</sup>

### C. Vietnam, 1970–1971

Following receipt of his orders for Vietnam, MG and Mrs. Gray moved their household back to Charleston, West Virginia, where she lived with family, taught school, and furthered her own education while he prepared for the deployment.<sup>66</sup> Major General Gray was specifically identified for deployment to augment a shortage of military judges.<sup>67</sup> “They did not have enough judges in Vietnam. Most of the judges were located in USARV [United States Army Republic of Vietnam] headquarters, and they would travel around and try cases . . . . The idea was to have some part-time judges . . . to help out and try some special courts.”<sup>68</sup>

The help was needed. Historian William T. Allison, citing records of the Army Staff, U.S. National Archives and Records Administration, provides a narrow overview of military justice activity during this period that suggests an extraordinary demand for personnel and resources. For calendar years 1970 and 1971, Allison notes a total of 650 general

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<sup>64</sup> *Id.* at 35–36.

<sup>65</sup> *Id.* at 35.

<sup>66</sup> *Id.* at 36.

<sup>67</sup> *Id.* at 37; *see also* ALLISON, *supra* note 58, at 69:

One of the more constant problems plaguing military justice organization in Vietnam was that there barely seemed to be enough judge advocates to handle massive caseloads. An MACV military judges' conference on the Military Justice Act of 1968 in May 1969 requested an additional seventy judge advocates at the rank of captain and seven military judges in response to the changes brought by the 1968 Act and the new *Manual for Courts-Martial*. The new requirement that special courts-martial be presided over by a judge and that the accused in special courts-martial had the right to qualified counsel required more legal personnel in Vietnam.

<sup>68</sup> Oral History, *supra* note 12, at 37.

courts-martial; 8642 special courts-martial; 434 summary courts-martial; and no fewer than 106,368 non-judicial actions.<sup>69</sup>

Major General Gray arrived in Vietnam in August, 1970, and after a few days spent at USARV headquarters was ordered to the 1st Logistics Command at Da Nang, later called the Da Nang Support Command, where he served as the Command Judge Advocate.<sup>70</sup> His training as a military judge prepared him to support the judiciary, as needed. But his principle role was to supervise the delivery of full-spectrum legal services not unlike the legal services provided by contemporary Brigade and Command Judge Advocates in Iraq, Afghanistan, and elsewhere. Allison, summarizing the role Judge Advocates played in the Vietnam experience, concludes “that U.S. military legal affairs in Vietnam had uneven success. Military justice may not have completely achieved its primary purpose, but the *practice* of military justice in this unique conflict proved adaptable and successful.”<sup>71</sup> Gray remembers:

We did most things. We had legal assistance, trial and defense counsel, and legal clerks. It was a thriving JAG office. We had offices at Phu Bai that were manned by non-JAGs, but they were lawyers. We had at least two or three non-JAG lawyers at Phu Bai. Most of the lawyers at the DaNang Support Command were JAG officers, but we had a couple that [were not]. That was big in those days. There were lawyers that were in the Army as officers, they were not in the JAG Corps, but they did legal work, and [were] assigned to the JAG office.<sup>72</sup>

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<sup>69</sup> ALLISON, *supra* note 58, at 71 (citing U.S. Army Disciplinary Actions, Republic of Vietnam, Box 3, Vietnam Monograph, Record Group 319, Records of the Army Staff, United States National Archives and Records Administration, College Park, Maryland).

<sup>70</sup> Oral History, *supra* note 12, at 38, 43.

<sup>71</sup> ALLISON, *supra* note 58, at xi.

<sup>72</sup> Oral History, *supra* note 12, at 39. See generally ALLISON, *supra* note 58, at 1–49, 67–89; MAJOR GENERAL GEORGE S. PRUGH, VIETNAM STUDIES, LAW AT WAR: VIETNAM 1964–1973 (1974), available at <http://www.army.mil/cmh-pg/books/vietnam/law-war/law-fm.htm>; FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001); George R. Smawley, *The Past as Prologue: Major General George S. Prugh, Jr. (Ret.) (1942–1975)—Witness to Insurgent War, The Law of War, and the Expanded Role of Judge Advocates in Military Operations*, 187 MIL. L. REV. 96, 125–43 (2006).



It is worth noting that Gray does not remember meeting any other black Judge Advocates in Da Nang, or elsewhere in Vietnam. He observes that, “having been the only black at law school helped me overcome any sense of awareness about being the only black officer or Judge Advocate in a unit.”<sup>73</sup> Vietnam, like law school, served to reinforce his personal sense of singularity that might have been an issue, but was not. “I was there to do a job, like everyone else, all of us working very hard under very trying circumstances.”<sup>74</sup>

The Da Nang office received its technical supervision from a Judge Advocate lieutenant colonel located in Quinon.<sup>75</sup> The General Court-Martial Convening Authority resided with the 24th Corps, and was situated locally in Da Nang.<sup>76</sup> Among MG Gray’s most vivid professional memories of his time there involved an attempted murder case where he served as defense counsel.

[T]he accused was charged with placing a fragmentation grenade under his commander’s hooch [living quarters] . . . The one thing that was reinforced to me was that you had to get out and visit the scene. The defense team actually visited the area where the unit was located and interviewed all the witnesses, looked at the commander’s hooch, walked the distances . . . We found a weapons expert whose testimony could come close to exonerating the accused, or at least shed some reasonable doubt as to whether the accused actually committed the offense.<sup>77</sup>

By contrast, Gray recalls that the prosecutor in the case “did not like to travel, and he would have all of the witnesses report to him in Da Nang or he would interview them over the phone.”<sup>78</sup> That officer’s failure to appreciate the importance of understanding all the facts of a case and to know the nexus between allegations and evidence led to an acquittal by MG Gray and his defense team.<sup>79</sup> The lesson, clearly, was

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<sup>73</sup> Gray Interview, *supra* note 14.

<sup>74</sup> *Id.* Gray recalls that his greatest leadership challenge at Da Nang was building a team from a team of personnel new to the office. He also recollects “easy camaraderie among Judge Advocates, and with other special staff including the dentists, doctors, etc.” *Id.*

<sup>75</sup> Oral History, *supra* note 12, at 39.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 40.

<sup>78</sup> *Id.* at 41.

<sup>79</sup> *Id.*

that despite the obvious perils of traveling within Vietnam during the war, Judge Advocates had a professional—perhaps even moral—obligation to represent clients and the Government with the same rigor and dedication expected in less hostile environments.

The broad scope and character of Army legal services may have been a factor in the reluctance of some Judge Advocates to lean forward in their military practice, as it took them closer to the war. Key changes in the role of Army lawyers began with the 31 May 1951 implementation of the Uniform Code of Military Justice, integrating them more than ever into military discipline and displacing the wide latitude previously exercised by commanders since the Second Continental Congress established the sixty-nine Articles of War in 1775. The 1968 expansion of military lawyers into the process, and thereby into military units, only served to further secure their role forward into military “battle space.”<sup>80</sup>

During Vietnam, the expanded requirements for Judge Advocates were often filled by lawyers looking to avoid the draft and any possibility of assignment as a combat arms officer.<sup>81</sup> Major General Gray observed, “[w]e had a lot of JAG officers who were in the JAG Corps because they did not want to be in the infantry as an enlisted man or in another branch as an officer not practicing law. They did not want to be drafted, so they came into the JAG Corps.”<sup>82</sup> The downside of this, of course, was that avoidance of austere and often dangerous conditions was sometimes at odds with rigorous criminal defense work.

It was a reminder that Judge Advocates were indeed Soldier-lawyers, a term and description coined decades later by the generation of Judge Advocate leaders who had hardened their irons in the fire of the Vietnam

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<sup>80</sup> For detailed histories on the development of the military justice system, see generally THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 71–234 (1975); EUGENE R. FIDELL & DWIGHT H. SULLIVAN, EVOLVING MILITARY JUSTICE (2002) (providing an anthology of articles related to military justice published on the 50th anniversary of the passage of the Uniform Code of Military Justice, 1952); ALLISON, *supra* note 58, at 1–20; WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE (1973); George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL L. REV. 21, 37 (2000); JONATHAN LURIE, THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980 (2001); DANIEL WALKER, MILITARY LAW (1954); JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE (1953).

<sup>81</sup> Oral History, *supra* note 12, at 45.

<sup>82</sup> *Id.* “They had no intention of making it a career; they were just there because it kept them from becoming a ‘grunt’ or kept them from being some other place.” *Id.*

conflict. That standard is no less true today, where government and defense counsel, paralegals, and legal administrators actively travel across great expanses of terrain in pursuit of facts, and of justice—from Bagram to Kandahar and Jalalabad; from Baghdad to Mosul, Fallujah, Samarra, and many points in between. As of this writing, the Army Judge Advocate General's Corps has suffered the loss of six killed in Operations Iraqi Freedom and Enduring Freedom, and has honored twenty-six recipients of the Purple Heart for injuries incurred during combat operations.<sup>83</sup>

In August 1971, MG Gray returned home from Vietnam to his family in West Virginia, an experience he recalls as “almost a non-event.”<sup>84</sup> There was no welcome home ceremony or public recognition of his combat service; no “bands playing or people waiving at us as we came back.”<sup>85</sup> From this Gray observed a simple, undeniable lesson about warfare and the American conflict in Vietnam: “It was a war that was not supported by the American people.”<sup>86</sup> He took that somewhat bitter experience, of lives lost and enormous sacrifices made with little empathy by those at home, and developed his own sense of what leaders need to do in times of war.

It taught me a lesson, and I think it taught most future leaders a lesson that you do not go into any conflict if you do not have the support of the American people. I think we saw that with General Powell as they prepared for Desert Shield and Desert Storm that he wanted to ensure the support was there. Vietnam was the first war . . . brought home to the American people on television as they sat down to eat dinner through the reports on the nightly news. The cameramen were on the ground with

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<sup>83</sup> Interview with Command Sergeant Major Michael Glaze, Senior Paralegal Noncommissioned Officer of the Army Judge Advocate General's Corps, in Washington, D.C. (Apr. 25, 2008). The military attorney, legal administrator, and paralegal noncommissioned officers killed in combat zones are: Major Michael Martinez (Tal Afar, Iraq), Chief Warrant Officer Five Sharon T. Swartworth (Tikrit, Iraq), Sergeant Major Cornell W. Gilmore (Tikrit, Iraq), Sergeant Michael M. Merila (Tal Afar, Iraq), Corporal Coty J. Phelps (Iskandariyah, Iraq), and Corporal Sascha Struble (Ghazni, Afghanistan).

<sup>84</sup> Oral History, *supra* note 12, at 41. “My wife met me at the airport, we drove home, and that was about it.” *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

the combat units with a view of what was happening . . . .  
[I]t was a difficult war to win in a difficult place.<sup>87</sup>

Those difficulties manifested themselves in many ways, and certainly transcended the conflict with the enemy. In garrison, idle Soldiers stewed in fatigue and stress, sometimes projecting their frustrations at their own leaders.<sup>88</sup> Incidents of “fragging”—the crime of exploding a fragmentary grenade underneath a commanders “hooch”—and cases of Soldiers shooting noncommissioned officers, were not uncommon.<sup>89</sup> Major General Gray attributes some of this extraordinary and violent misconduct to the conditions on the ground. “Vietnam was very intense, especially in the field. Sometimes, [Soldiers] would be assigned to attack an objective and once they captured it were told to give up the ground the very next day. Sometimes a lot of things that went on did not make sense. It was a difficult time. It was a very unpopular war.”<sup>90</sup>

While the war did not compromise his personal resolve for military service, the lasting take-away for MG Gray was that winning the war at home was integral to winning the war overseas. He recalls:

What it did for me was to make it clear that we should never go into a conflict or war without the support of the American people. . . . There was no fanfare when I returned from Vietnam. There were no parades, no welcome home signs, or any other visible sign recognizing that we had served our country. I said [then that] we should never fight a war without the support of the American people, and Vietnam was one of those where we did not have the support.<sup>91</sup>

#### D. Pentagon, 1972–1974

When he returned from Vietnam in August 1971, MG Gray and his wife planned to close the military chapter of his career and transition to

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<sup>87</sup> *Id.* at 41–42.

<sup>88</sup> *Id.* at 42.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* 42–43.

<sup>91</sup> *Id.* at 43.

civilian practice.<sup>92</sup> At his request, he was reassigned in the Mid-Atlantic region to Fort Meade, Maryland, where he worked as a military administrative law attorney. His recollection of his brief stay there was uniformly positive both for the location between Baltimore and Washington, and for some of the military law practiced, including some of the My Lai cases.<sup>93</sup>

By January 1972, MG Gray was reassigned to the Office of The Judge Advocate General, Personnel, Plans and Training Office (PP&TO), located in the Pentagon. This office managed most personnel issues for the Army Judge Advocate General's Corps including assignments, personnel policy, and manpower structure. The Army leadership at the time recognized growing dissatisfaction among some African-American Soldiers with pending criminal or adverse administrative actions due to the paucity of black Judge Advocates to represent them.<sup>94</sup> It was Gray's view that the problem was not that Soldiers believed that white defense counsel weren't competent or committed to their clients,<sup>95</sup> but that "[the African-American Soldiers] could not relate to the officers, or at least they felt in their minds they would be better represented by someone of their own race."<sup>96</sup>

In response, the Department of Defense looked for initiatives that would increase minority representation within the military legal services.<sup>97</sup> Major General Gray, still a relatively junior officer, was hand-selected to spearhead the program initiatives for the Army. He recalls, "We had about 1600 lawyers at the time, and we only had about sixteen or seventeen black lawyers, and so that is why I was brought in to

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<sup>92</sup> *Id.* at 47.

<sup>93</sup> *Id.* at 50. See generally MICHAEL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY (2002); JOSEPH GOLDSTEIN, BURKE MARSHALL, & JACK SCHWARTZ, THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF LAW? THE PEERS REPORT WITH A SUPPLEMENT AND INTRODUCTORY ESSAY ON THE LIMITS OF LAW (1976); Doug Linder, Univ. of Missouri-Kansas City, *An Account of the My Lai Courts Martial*, available at <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/mylai.htm> (last visited Apr. 24, 2008).

<sup>94</sup> Oral History, *supra* note 12, at 51.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> ALLISON, *supra* note 58, at 170–71 (citing U.S. DEP'T OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 2:81–82 (1972)).

recruit more black lawyers for the JAG Corps.”<sup>98</sup> His principal duty during this assignment, which lasted until May 1974, was to develop and implement the Army JAG Corps minority recruiting program and find ways to expand the role and recruitment of women.<sup>99</sup> The program he ultimately advanced had five principal objectives:

1. Visit all law schools with large black or minority enrollment. Gray personally traveled to these schools, and others, interviewing students and advocating on behalf of the Army JAG Corps.<sup>100</sup>
2. Establish a JAG Corps-paid summer internship program for one hundred first year and second year law students (fifty of each), and place them within JAG offices worldwide to expose them to the people and practice of Army legal services.<sup>101</sup>
3. Enlist the support and cooperation of the National Bar Association (NBA) in recruiting black attorneys into the JAGC.<sup>102</sup> The NBA is a professional organization for African-American lawyers, organized in Des Moines, Iowa on 1 August 1925.<sup>103</sup>
4. Leverage the professional and community outreach potential of reserve component Judge Advocates to identify and recruit black attorneys into the Army.<sup>104</sup>
5. Develop, fund, and execute a professional national media effort targeting minority and female lawyers and law students.<sup>105</sup>

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<sup>98</sup> *Id.*; Oral History, *supra* note 12, at 51.

<sup>99</sup> Oral History, *supra* note 12, at 51. It is worth noting that PP&TO at the time was populated by future leaders of the JAGC, including MG Hugh Overholt, The Judge Advocate General (1984–1988), and MG William Suter, Acting The Judge Advocate General (1989–91).

<sup>100</sup> *Id.* at 52.

<sup>101</sup> *Id.* at 53.

<sup>102</sup> *Id.*

<sup>103</sup> The National Bar Association, <http://www.nationalbar.org/about/#history> (last visited Apr. 24, 2008).

<sup>104</sup> Oral History, *supra* note 12, at 53.

<sup>105</sup> *Id.*

In all, the initiative to broaden the minority and female composition of the Army JAG Corps was well-received, but not without challenges. Gray recalls that “[i]t was tough to convince [minority law students] that it was a good life and something they would enjoy doing.”<sup>106</sup> He personally traveled throughout the country to law schools, minority law conferences, and job fairs, and encouraged young attorneys to consider the enormous value of military service and the professional opportunities resident in Army legal practice.

True to the words of European Unity architect Jean Monnet, who once wrote that “individuals make things happen, but for those things to survive institutions are required,”<sup>107</sup> the Army JAG Corps continues to actively resource the minority recruiting initiatives begun by Gray nearly thirty years after they began. The fruits of this initiative have been rich indeed. At the end of fiscal year 2007, the Army JAG Corps had 241 minority officers (15%) and 414 women (25%).

Among minorities, 121 are African American (7%), forty-five Hispanic (3%), and seventy-five are Asians and Native American (5%).<sup>108</sup> African Americans include half a dozen senior leaders serving in the rank of colonel, among them Colonel Robert Burrell, Dean of The Judge Advocate General’s School; Colonel Musetta “Tia” Johnson, assigned to the Office of the General Counsel for the Department of Defense (and the first female Army African-American Judge Advocate colonel); and Colonel Gregory Coe, Staff Judge Advocate (SJA) for Fort Jackson, South Carolina.<sup>109</sup>

A particular lesson for MG Gray, one he would take with him, was the peculiar dynamic by which policy programs are developed at the Pentagon and within the Army. In the case of the internship program, for example, which he personally conceived and developed, he recalls:

The thing that surprised me about being in the Pentagon was that it wasn’t the person sitting in the big office that really made decisions. The power within the Pentagon

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<sup>106</sup> *Id.*

<sup>107</sup> ALISTER MCGRATH, *CHRISTIANITY’S DANGEROUS IDEA—THE PROTESTANT REVOLUTION* 277 (2007).

<sup>108</sup> ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2006 TO SEPTEMBER 30, 2007, at 20 (2008).

<sup>109</sup> U.S. DEP’T OF ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL, JAG PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES (2007).

were the guys sitting back in the rooms in a little cubicle, maybe no more space than a desk and a chair, who really had the power of the pen [to] sign off on programs to get them started . . . . I remember walking the halls of the Pentagon and getting people to sign off on various aspects of [the internship program], and then we brought in that first class [in 1974].<sup>110</sup>

The Summer Intern Program was designed to be selective, and required applicants to submit applications that were reviewed by a board that made recommendations based on merit and demonstrated potential for military service. There were no specific targets for minorities, although they were clearly a focus of the program.

We did not have any quotas *per se*, but we did want to get [minorities] involved in the program so they could see what [the Army JAG Corps] was like. If you go back and look at it historically, I don't think anyone was excluded or discriminated against; everyone had an opportunity to participate. We got some, and we didn't get some. [T]he program has been highly successful over the years [for recruiting] because [participants] get a chance to do some real work [in an Army law office].<sup>111</sup>

For both the internships and the greater minority recruiting program, the target audience for Gray were those "individuals willing to serve

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<sup>110</sup> Oral History, *supra* note 12, at 54.

<sup>111</sup> *Id.* at 61. Major General Gray believed strongly that what the Army JAG Corps needed was a mix of motivated young officers with varied backgrounds, both black and white, military and non-military:

My view is that a good blend is the right way to go because officers with varied backgrounds have something to contribute to the Corps. Officers with prior experience obviously have a slight advantage because of their experience and knowledge of the Army—especially those entering from line units and their familiarity with how they function. It is still important for the Corps to have a combination of prior experienced officers and those who come in directly from law school. That will provide different perspectives on the practice of law and their approach to resolv[ing] issues.



their country [and who] really wanted to be in the JAG Corps.”<sup>112</sup> The aim was to identify and reach out to civic-minded lawyers and law students with the desire and ability to assume immediate responsibility for casework and clients, with special emphasis on targeting those with a clear interest in the military.<sup>113</sup> A central pitch, which continues in varying degrees to this day, is the special opportunity that young Judge Advocates have to rapidly immerse themselves in the practice of law rather than spend time supporting senior attorneys in a law firm or corporate setting. “In the JAG Corps, we [get] thrown in right away and do real legal work right off the bat. . . . A lot of these law students wanted to get in and do trial work. They wanted to get into the courtroom, and we could offer that.”<sup>114</sup>

But despite the opportunities offered by the Army JAG Corps, not all universities were willing to grant the military access to their campuses. The reasons varied, but in most cases these universities cited the federal government’s policy on homosexuals in the military, or general objections to military service. Indeed, MG Gray’s alma mater, West Virginia University, barred Judge Advocate recruiters—including Gray.<sup>115</sup> The question of military recruiter access was largely resolved decades later in the 2006 U.S. Supreme Court decision in *Rumsfeld v. Forum for Academic Institutional Rights (FAIR)*,<sup>116</sup> in which a unanimous Court upheld the 1994 Solomon Act allowing federal agencies to limit grants to universities that barred military recruiters.<sup>117</sup>

Finally, it is worth noting that the remarkable experience MG Gray had at the Pentagon—developing a wide-ranging and successful minority recruiting program and working at an institutionally “strategic” level with and for the leaders of the JAG Corps—had the collateral benefit of enfranchising Gray in the Army. “If I had gone to Hawaii, for example, out of Vietnam, instead of going back to Fort Meade, none of this would have happened for me. . . . The assignment at PP&TO and the knowledge, understanding, and the experience were the main reasons I

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<sup>112</sup> *Id.* at 58.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 59. In the case of West Virginia University, he later took personal action to open the doors to young law students, recalling that “[o]ne of the things I talked to the dean about when I got to be on the [university’s] Visiting Committee was changing that policy. They promised me they would and they did.” *Id.*

<sup>116</sup> *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006).

<sup>117</sup> *Id.*

decided to stay in the Army.”<sup>118</sup> It also influenced the way he thought of the relationship between officers and the military.

That first assignment at PP&TO gave me a different perspective. My philosophy was that the JAG Corps really does not owe you anything. *You cannot go along believing that you are owed something from the JAG Corps because that is just not the case at all. You are a master of your own fate.* You have to do the jobs well to put yourself in the position to be considered for a particular assignment as you compete with other people for particular jobs.<sup>119</sup>

But the PP&TO experience was only part of it. The Army has always been about growing and developing people, and the remarkable collection of JAG Corps mentors Gray found at PP&TO and elsewhere was the reason he ultimately decided to remain on active duty.<sup>120</sup> He recalls: “[At PP&TO] I had Hugh Overholt [and] Del O’Roark.<sup>121</sup> I had Bill Suter who always used to tell me that he was giving me opportunities to fail . . . [l]ike the Summer Intern Program—an opportunity to fail. It was a running joke with us. General Larry Williams was in the Pentagon as a one-star. These were mentors for me.”<sup>122</sup> They made the difference for Gray at a crucial decision point in his life and career, demonstrating the significant personal and institutional relevance of leaders who take the time to identify and invest themselves in subordinates. The dividends of that personal investment were tremendous.

#### E. Judge Advocate Officer Advanced Course and assignment to the Faculty of The Judge Advocate General’s School, 1974–1978

Having made the decision to remain on active duty, in August 1974 MG Gray entered the 23rd Judge Advocate Advanced Course at The Judge Advocate General’s School, Charlottesville. There were thirty-

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<sup>118</sup> Oral History, *supra* note 12, at 57.

<sup>119</sup> *Id.* at 78 (emphasis added).

<sup>120</sup> *Id.* at 57.

<sup>121</sup> Brigadier General (Retired) Dulaney Lee “Del” O’Roark, Jr. (1961–1989), Judge Advocate, United States Army Europe and Seventh Army, Germany (1987–1989).

<sup>122</sup> Oral History, *supra* note 12, at 57.

seven officers in the class, including nominal representation by the Navy, Marine Corps, and a Japanese military legal services officer.<sup>123</sup> Gray was the only black officer; there were no women.<sup>124</sup> The year-long course is designed for “career” officers to prepare them for advanced positions of leadership and responsibility.<sup>125</sup> The school currently issues a congressionally-authorized Masters of Law (LL.M.) in Military Law, and conducts extensive continuing legal education programs accredited by the American Bar Association.<sup>126</sup>

The academic atmosphere of the Judge Advocate General’s School suited Gray so much that he sought and received a follow-on position on the faculty in the School’s Criminal Law Department. His portfolio there included courses in military criminal procedure, non-judicial punishment, pre-trial agreements, and extraordinary writs, and participation in a host of seminars and moot courts.<sup>127</sup> Gray found the new role of law instructor a struggle at first; he later recalled that despite a week of podium and instructor training at Fort Monmouth,

[t]he challenge for me was just improving my skills as an instructor because I was not very good, in my own estimation, during the first [Judge Advocate Officers]

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<sup>123</sup> *Id.* at 62.

<sup>124</sup> Correspondence with Major Michael S. Devine, Assistant Dean, Academics & Training, The Judge Advocate General’s School, Charlottesville, Va. (Dec. 10, 2007) (on file with author).

<sup>125</sup> Oral History, *supra* note 12, at 64.

A lot of emphasis there was on preparing us to go out and be good managers in [a Staff Judge Advocate] office . . . . There was a good balance. We had international law, contract law, and all those things to really prepare us and expand our backgrounds to meet the challenges of the field.

*Id.*

<sup>126</sup> 10 U.S.C. § 4315 (2000).

Under regulations prescribed by the Secretary of the Army, the Commandant of the Judge Advocate General’s School of the Army may, upon recommendation by the faculty of such school, confer the degree of master of laws (LL.M.) in military law upon graduates of the school who have fulfilled the requirements for that degree.

For more on The Judge Advocate General’s Legal Center and School, see <https://www.jagcnet.army.mil/TJAGLCS>.

<sup>127</sup> Oral History, *supra* note 12, at 71.

Basic Course I taught. Everyone has a learning curve when they first start to teach at the JAG School. Most officers were able to adapt to it, but it took me that first Basic Course to adapt to it. Another challenge is that you have to have a thick skin because the students do not hesitate to criticize you on the critiques when you don't do a good job and you deserve to be criticized. You have to take those and learn from them and try to correct anything that you need to improve on. You have to read them critically and not take them too personally.<sup>128</sup>

In typical fashion, Gray identified his perceived shortcomings and worked to overcome them. The following year he was elevated to "senior instructor" status, responsible for teaching criminal procedure.<sup>129</sup>

Like so many other young military attorneys, at the end of his three-year assignment to the school Gray again found himself at the decision point of whether to remain on active duty or seek opportunities elsewhere; he was not alone. The decision to remain on active duty can be complex, and naturally competes with a host of interests and concerns—personal and professional.

In MG Gray's mind, there are two key considerations for young military officers. The first is that the decision of whether to stay or go should be theirs, not someone else's. "The one thing I would say to [young officers] right from the beginning is that they have to put themselves in a position so that they can make the decision. . . . You have to do all the things you need to do in the JAG Corps to make yourself competitive for promotion . . . so that when the time comes it is your decision to make."<sup>130</sup> Gray also urged young officers to thoughtfully assess their family situation.<sup>131</sup> "What are their desires? You have to make sure you have their support because if you don't . . . and they are not happy, it is going to be a very difficult time."<sup>132</sup>

I had an offer from the U.S. Attorney in Charleston, West Virginia, to be a part of that office [and] I . . . was

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<sup>128</sup> *Id.* at 72.

<sup>129</sup> *Id.* About this time, Gray was also promoted to the rank of major—12 December 1976.

<sup>130</sup> *Id.* at 76–77.

<sup>131</sup> *Id.* at 77.

<sup>132</sup> *Id.*

poised to actually take the job when I was told that my assignment in Europe would either be a military judge or the [Deputy Staff Judge Advocate] at 1st Armored Division. . . . I decided to take the deputy job and the rest is history—that was the decision that caused me to stay in the Army for a career.<sup>133</sup>

Gray remembers that he and his wife worked through the decision together and that there was an “excitement” to the prospect of going to Europe as opposed to the “permanency” of returning to West Virginia.<sup>134</sup> “Could I have been successful? I believe I could have been very successful. . . . [But] you have to weigh what you really want to do and what you really want out of life . . . [Y]ou have to put yourself in a position to really feel that you could be successful anywhere you choose. You have to have control of that decision.”<sup>135</sup>

#### IV. 1978–1984

##### A. Deputy Staff Judge Advocate, 1st Armored Division, Germany, 1978–1980

The Grays arrived in Germany in the late spring of 1978 and almost immediately found the romance of a European assignment compromised by the considerable challenges posed by the 37,000-strong and widely dispersed 1st Armored Division.<sup>136</sup> Gray recalls: “I think we had ten branch offices . . . stretching all the way from Grafenwoehr to Nuremburg [including] . . . Montieth Barracks, Nuremburg, Zirndorf, Illisheim, Crailsheim, Ansbach, Katterbach, Bliedorn, and Bamberg. We had ten separate branch offices with Judge Advocates assigned to each.”<sup>137</sup> His immediate supervisor was Lieutenant Colonel (LTC) Robert E. Murray, who later served as The Assistant Judge Advocate General of the Army.<sup>138</sup> The Division Artillery (DIVARTY), located at

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<sup>133</sup> *Id.* at 74.

<sup>134</sup> *Id.* at 77.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 92.

<sup>137</sup> *Id.* at 80.

<sup>138</sup> Major General (Retired) Robert E. Murray (1962–1993), The Assistant Judge Advocate General of the Army (1991–1993).

Pinder Barracks, was commanded by then LTC John M. Shalikashvili, the future Chairman of the Joint Chiefs of Staff.<sup>139</sup>

Almost immediately, Gray came to appreciate his training and experience as an instructor at the JAG School for the presence and expertise it afforded him in all manner of public speaking. In particular, he found that his comfort at the briefing podium before senior officers helped distinguish him from other officers. “I just presented with total confidence . . . [t]he confidence to appear in front of General Officers and other high-ranking officials and talk to them about whatever. . . . I think the JAG School experience gave me the foundation for success as a deputy.”<sup>140</sup>

As in any large organization, there were plenty of leadership challenges for Gray who, as the deputy, had an integral role in the management of subordinate officers and non-commissioned officers for an organization with roughly 100 personnel.<sup>141</sup> While he was eminently impressed by most of his junior Judge Advocates, he still recalls memorable exceptions, noting that “our best prosecutor . . . had a drinking problem. [And] one of our officers in charge was caught with the sergeant major of the command in a pornography ring.”<sup>142</sup>

Those challenges, and others, led Gray to quickly appreciate the importance of maintaining situational awareness over the organization where so many officers and Soldiers were cast about the German countryside separate and apart from the office leadership. As the Deputy Staff Judge Advocate, “[t]he Staff Judge Advocate would look [to me] to solve problems so you had to know what was going on. [Y]ou had to work closely with your boss . . . [and] adapt to that person’s style. [I]f they liked to work long hours then as a deputy you must understand and adapt.”<sup>143</sup> Gray wanted the best out of the various officers in charge of local legal centers, and emphasized the importance of office management, the administration of military justice, and communication with the headquarters office.<sup>144</sup> “We did not want surprises.”<sup>145</sup>

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<sup>139</sup> General John M. Shalikashvili (Retired) (1966–1997), Chairman of the Joint Chiefs of Staff (1993–1997).

<sup>140</sup> Oral History, *supra* note 12, at 81.

<sup>141</sup> *Id.* at 82.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 83.

<sup>144</sup> *Id.* at 84.

<sup>145</sup> *Id.*

Working for LTC Murray had its own challenges—none of them particularly onerous, but challenging still. Imagine an organization spread across ten different locations in an age before computers, email, or fax, and a senior supervising attorney who expected perfection in nearly every item of office work product.

We didn't have "white-outs" or pen and ink corrections—all of our work had to be perfectly done. Lieutenant Colonel Murray always insisted that our documents be error-free. The rationale was that documents reflected on how well the office was run and that we took pride in our work. He had an administrative law background and was trained to proofread documents from the top left corner down to the bottom right corner of the page. If necessary, I read it backwards just to make sure there were no typos or errors. I learned that one had to be very meticulous. I discovered that officers trained in administrative law were more meticulous than those trained in criminal law. *Your work reflects the type of office that you manage, the kind of leader that you are, and the kind of office that you run.*<sup>146</sup>

The days were long,<sup>147</sup> but Gray remembers he enjoyed "the intensity of the action, the responsibility and the sense of accomplishment . . . . About anything that you could imagine that could happen during the course of a career probably happened there. It prepared me for the challenges that I faced in the future."<sup>148</sup>

That future began early when Gray's three-year tour was cut short by his selection for the year-long course of instruction at resident Command and General Staff College, Fort Leavenworth, Kansas.<sup>149</sup> He relocated his family from Germany to Kansas in 1980, and recalls that although he did not particularly enjoy the classes at Leavenworth (despite graduating

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<sup>146</sup> Oral History, *supra* note 12, at 84–85 (emphasis added). It was a philosophy adopted by MG Gray.

<sup>147</sup> *Id.* at 85. "At the 2nd Armored Division, we arrived very early in the morning and stayed very late. Fifteen-hour days were not unheard of because of all the different cases and all of the things we were involved in." *Id.* at 85–86.

<sup>148</sup> *Id.* at 87.

<sup>149</sup> *Id.* at 89. "Most individuals served three or four years in Germany, and some could even extend another year." Lieutenant Colonel Murray was also selected for Senior Service College, and so the two departed Germany at the same time. *Id.*

with honors), he understood and appreciated their value in his continued professional development.<sup>150</sup> “It was another piece of the puzzle . . . to the foundation of my background training to help me understand the Army, and also to help me understand the significance of the role I [would later have] as the Staff Judge Advocate at the 2nd Armored Division.”<sup>151</sup>

B. Staff Judge Advocate, 2nd Armored Division, Fort Hood, Texas, 1981–1984

In 1981, MG Gray became the principal legal advisor to the Commanding General of the 2nd Armored Division—a complex, sprawling organization of over 10,000 Soldiers located in the heart of Texas.<sup>152</sup> The legal office was comprised of several dozen military attorneys and paralegals,<sup>153</sup> and one of Gray’s essential priorities as the SJA was the proper care and development of his people. He remembers enjoying the responsibility of leading his own team of legal professionals:

I enjoyed . . . running an efficient office and helping to develop the Judge Advocates who worked for me. I made sure that they all got their promotions either early or on time and [that] they got to the right schools. I helped them manage their careers and the overall mentoring, managing, and leading that take place in a Staff Judge Advocate Office.<sup>154</sup>

As elsewhere during his career, Gray encountered many remarkable officers who would serve the JAG Corps and the Army with distinction. These included Colonel Dulaney “Del” O’Roark, who served as the SJA for III Corps & Fort Hood;<sup>155</sup> Captain Thomas Romig, who served under Gray as a criminal litigator and chief of military justice and who later

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<sup>150</sup> *Id.* at 93.

<sup>151</sup> *Id.*

<sup>152</sup> The 2nd Armored Division was first formed at Fort Benning, Georgia, in 1940 and later re-designated as the 4th Infantry Division (Mechanized) in 1995. *See generally* <http://www.globalsecurity.org/military/agency/army/2ad.htm> (last visited Apr. 24, 2008).

<sup>153</sup> Gray Interview, *supra* note 14. Gray was promoted to the rank of lieutenant colonel on 5 July 1981.

<sup>154</sup> Oral History, *supra* note 12, at 100.

<sup>155</sup> *Id.* at 98.



became The Judge Advocate General of the Army;<sup>156</sup> and Captain Robert Burrell, whom Gray commissioned and who later served in top positions as the SJA at Fort Sill, Oklahoma and the Chief of PP&TO.<sup>157</sup>

Importantly, the opportunity to lead his own team at the 2nd Armored Division afforded MG Gray the chance to further consider the elements of leadership that would characterize his tenure as one of the JAG Corps' finest senior officers. More often than not, his focus came down to growing and developing young officers and noncommissioned officers. "Taking care of subordinates was very important to me. Taking care of the enlisted Soldiers and recognizing that they were and are the backbone of the organization."<sup>158</sup> He recalled that

[e]veryone is not on the same level of expertise or ability to [get things done]. You really had to juggle what you gave people to bring out the best in them because you did not want [them] to fail. I wanted them to have a great experience, to do well, to get promoted, to get the follow-on assignment [they wanted], and to get the schools they needed. . . . As an SJA . . . you need to push your people and try to get for them the things they want.<sup>159</sup>

A lasting lesson that Gray himself learned, and tried to emulate, was the leadership notion of "powering down" endorsed by his division commander, Lieutenant General (LTG) John W. Woodmansee, Jr., and the III Corps Commander, LTG Walter F. Ulmer, Jr.<sup>160</sup> "In other words, you push down to the lowest level in an organization the authority to do and perform certain missions and actions."<sup>161</sup> Gray took the principle of powering down and delegated to junior personnel wherever and whenever he could as a means to "develop their managerial and leadership skills."<sup>162</sup>

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<sup>156</sup> *Id.* at 97, 99. Major General (Retired) Thomas J. Romig (1972–2005), The Judge Advocate General (2001–2005).

<sup>157</sup> *Id.* at 97.

<sup>158</sup> *Id.* at 101.

<sup>159</sup> *Id.* at 102.

<sup>160</sup> *Id.* at 101.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 103.

His achievements as an SJA in developing and cultivating subordinates to be their best—to move them from good to great—was easily recognized by senior JAG Corps leaders, and contributed to his selection as the Chief of PP&TO following completion of his three-year tour at Fort Hood. Certainly, the chief of personnel and policy for the Army's uniformed attorneys wasn't a position he had sought out, recalling only that he "received a telephone call informing [him] that [he] would be the next chief. It was simple as that . . . but I was thrilled for the opportunity."<sup>163</sup>

#### V. 1984–1991

##### A. Chief of Personnel, Plans and Training, Office of The Judge Advocate General, Pentagon, 1984–1987

The Chief of Personnel, Plans & Training has a surprisingly broad scope of responsibility for Army legal services.<sup>164</sup> Central to everything is the recruitment, development, policy and management for over 1600 active duty Judge Advocates, with additional responsibility for approximately 2500 Judge Advocates in the United States Army Reserve and Army National Guard. It is one of the most mission critical, challenging, and politically sensitive positions in the JAG Corps.<sup>165</sup>

The scope of responsibility of PP&TO includes personnel assignments, promotion/selection board members, manpower and strength management, and long-range planning for the institutional development of Army legal services.<sup>166</sup> Of his new position, Gray recalls,

People look at the Chief of PP&TO and say he has it made. [But, you] have an opportunity in that job to fail every day. How many jobs are there that get scrutinized by TJAG and TAJAG, all of the other general officers, and the Executive Officer on everything you do? It is so

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<sup>163</sup> *Id.* at 104.

<sup>164</sup> The author was assigned to PP&TO as a Plans Officer from 2001–2004.

<sup>165</sup> Interview with Colonel David Diner, Chief, Personnel, Plans and Training Office, Office of The Judge Advocate General, Rosslyn, Va. (Dec. 12, 2007).

<sup>166</sup> Oral History, *supra* note 12, at 106, 108–09. “PP&TO was a good job and it was a challenging job, but it was also a job where your career was on the line each and every day.” *Id.* at 106.

key to the survival of the JAG Corps and how the Corps is run. It is like your career flashing in front of your eyes almost every day.<sup>167</sup>

To complicate matters, the top two senior officers in the JAG Corps at the time—Major General Hugh J. Clausen and Major General Hugh R. Overholt—had previously served in the same position, understood the job and had quite naturally developed notions of what the Chief of PP&TO could and should do.<sup>168</sup> Against this backdrop, MG Gray focused on the opportunities and priorities at hand, remembering that “it is like any other job you approach in the JAG Corps or [elsewhere]. You [simply] learn the job . . . and do it to the best of your ability and let the rest take care of itself.”<sup>169</sup>

Assisting him was a group of remarkable officers including key future leaders of the Corps, such as John Altenburg,<sup>170</sup> Plans Officer; Walter B. Huffman,<sup>171</sup> Company Grade Assignments Officer; Michael Marchand,<sup>172</sup> Plans Officer; and Joseph Ross,<sup>173</sup> who handled reserve component issues and planning. It was important to Gray to build the right kind of team to deal with the unique portfolio of issues handled by PP&TO, and he remembers the criteria he used: “I brought in as many smart guys as I could, and clearly Walt Huffman was one of those guys who were capable of doing the things that were right for the Corps. *I needed guys who had integrity, who were committed, and had compassion.*”<sup>174</sup>

Under Gray’s leadership every effort was made to bring fairness to the assignment process for hundreds of officers (and by association their

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<sup>167</sup> *Id.* at 127.

<sup>168</sup> *Id.* at 106.

<sup>169</sup> *Id.* Gray was promoted to the rank of colonel on 1 March 1986.

<sup>170</sup> *Id.* at 107. Major General (Retired) John D. Altenburg (1974–2001), The Assistant Judge Advocate General (1997–2001).

<sup>171</sup> *Id.* Major General (Retired) Walter B. Huffman (1968–2001), The Judge Advocate General (1997–2001).

<sup>172</sup> *Id.* Major General (Retired) Michael J. Marchand (1974–2005), The Assistant Judge Advocate General (2001–2005).

<sup>173</sup> *Id.* Colonel (Retired) Joseph A. Ross (1975–2002), Executive Officer, Office of The Judge Advocate General (July 1999 to Sept. 2001). Colonel Ross worked with MG Gray twice during his career, first in 1984 when he was the assistant plans officer when MG Gray was the Chief of PP&TO, and then again from 1995 to 1997, when Ross served as the Chief of PP&TO, and Gray was The Assistant Judge Advocate General.

<sup>174</sup> Oral History, *supra* note 12, at 107 (emphasis added).

families) in a process with abundant egos, individual agendas, and the over-arching needs of the Army.<sup>175</sup> It is a process that may also involve a degree of advocacy on the part of senior officers on behalf of subordinates with whom they have worked and mentored.<sup>176</sup> But in the JAG Corps and elsewhere, from a personnel officer's perspective there are, despite often contrary perceptions, serious limits on how far a personal patron can carry a subordinate. As Gray experienced,

You cannot do the job for the people out there. . . . If someone got a job based on a recommendation or because they had the support of a mentor over someone else, it still had to be a choice between the two and it still had to be based on the file . . . I don't care what you do or what you say, if you're in the job and you can't [do it], you are not going to get promoted.<sup>177</sup>

In July 1987, after three years of influencing a generation of JAG Corps officers through assignments and institutional policy and program leadership, MG Gray was selected for attendance at the Army's Industrial College of the Armed Forces (ICAF), located at Fort McNair, Washington, D.C.<sup>178</sup> He chose ICAF because of the experience and education it afforded other senior leaders he had worked for and respected.<sup>179</sup> Of the curriculum, he recalls: "We studied national defense issues, transportation [and] international relations issues. It was intense training on strategic issues [to] enhance our understanding of strategic planning and gave us an understanding of global issues."<sup>180</sup>

The strategic studies perspective offered at ICAF, and his previous experience as the 2nd Armored Division SJA, were the ideal preparation

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<sup>175</sup> *Id.* at 114–15. "[A] person's reputation about how well they do a job is out there. One of the things we strived to do was to be fair and focus on the individual and the individual's [personnel] file to make assignments." *Id.* at 114.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 117.

<sup>178</sup> *Id.* at 123. According to its website, "The Industrial College of the Armed Forces mission is to prepare selected military and civilians for strategic leadership and success in developing our national security strategy and in evaluating, marshalling, and managing resources in the execution of that strategy." Industrial College of the Armed Forces, available at <http://www.ndu.edu/ICAF/> (last visited Apr. 16, 2008).

<sup>179</sup> Oral History, *supra* note 12, at 123 ("All of my mentors had gone to ICAF, and that is where I wanted to [attend] . . . General Overholt had gone there . . . General Suter . . . , General O'Roark . . . Holdaway went to ICAF. All of [them] were my mentors.").

<sup>180</sup> *Id.* at 124.

for MG Gray's follow-on assignment as the SJA for III Corps and Fort Hood, Texas—America's largest military installation.<sup>181</sup>

B. Staff Judge Advocate, III Corps and Fort Hood, Texas, 1988–1989

Major General Gray credits his successful three-year tour as the SJA for 2nd Armored Division as the principal key to his selection in 1988 as the III Corps and Fort Hood SJA.<sup>182</sup> It was a senior level position he actively sought, recalling:

I wanted to be a Corps SJA. I thought the best job for me would either be VII Corps in Europe or III Corps [at Fort Hood]—I couldn't go to XVIII Airborne Corps because I am not Airborne qualified and I had no plans to become Airborne qualified. . . . I liked Fort Hood. It was a great place to serve.<sup>183</sup>

His leadership and legal practice as a Corps SJA were inherently broad in scope, implicating a full spectrum of installation law, civilian personnel management, community relations, and the standard core competencies of military justice, legal assistance, claims, and so forth.<sup>184</sup> But as great a place as Fort Hood was to serve, MG Gray's tenure there would be brief—cut short by his selection for promotion to brigadier general in 1989, and subsequent reassignment to the Pentagon. On his selection for general officer, Gray reflects back:

Whenever you are in that group [of senior colonels holding key positions] there is a chance that lightning could strike. If you've done everything that you need to do, you can put yourself in that position. There was a chance—I didn't think it would happen—but there was a chance that it could.<sup>185</sup>

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<sup>181</sup> *Id.* at 129–31; *see also* Public Affairs Office, Fort Hood, <http://pao.hood.army.mil> (last visited Apr. 16, 2008).

<sup>182</sup> Oral History, *supra* note 12, at 98.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 132.

<sup>185</sup> *Id.* at 139.

C. Special Assistant to The Judge Advocate General, 1989–1990

From September 1989 to March 1990, MG Gray was assigned as a Special Assistant to MG William Suter, the Acting The Judge Advocate General.<sup>186</sup> The position was essentially a placeholder until Gray's own confirmation for promotion to general officer.<sup>187</sup> The other officers nominated and pending confirmation were COL Thomas Crean and COL John Bozeman.<sup>188</sup> But shortly after Gray arrived at the Pentagon, a great discord arose regarding the integrity of the general officer board that recommended the three colonels for promotion to brigadier general.

The controversy originated, in large measure, from courts-martial at the 3rd Armored Division in 1982–1983 that were later found tainted by unlawful command influence during the period that COL Bozeman was the SJA.<sup>189</sup> Colonel Bozeman's role in the command influence and the advice he provided the Commanding General, MG Thurman E. Anderson, were identified to the Vice Chief of Staff of the Army and others as part of the general officer pre-board screening, selection board notification, and confirmation staffing process arising from Bozeman's selection for promotion to brigadier general. This disclosure was found insufficient. The Senate Committee on the Armed Services determined that, among other things, COL Bozeman's role had been withheld from the Army leadership and the Senate.<sup>190</sup>

The Senate Committee also concluded that the Judge Advocate general officer selection board was tainted by the perception of an improper selection of its members.<sup>191</sup> To make matters worse, there were other, unassociated allegations that remarks by COL Crean during a

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<sup>186</sup> See 10 U.S.C. § 3037, establishing the positions of The Judge Advocate General and The Assistant Judge Advocate General. No officer may serve in the position of TJAG without Senate confirmation; therefore, an officer acting in the position is referred to as Acting The Judge Advocate General. In 1989, MG Suter was The Assistant Judge Advocate General and Acting The Judge Advocate General. 10 U.S.C. § 3037 (2000).

<sup>187</sup> Oral History, *supra* note 12, at 134.

<sup>188</sup> *Id.* at 135. Major General Gray had worked for COL Bozeman in PP&TO, and remembers him as “[a]n outstanding officer . . . Probably one of the best that we had in the JAG Corps.” *Id.* at 141.

<sup>189</sup> See *United States v. Thomas*, 22 M.J. 388 (1986); *United States v. Treakle*, 18 M.J. 646 (1984); see also Oral History, *supra* note 12, at 136, 142–44.

<sup>190</sup> S. COMM. ON ARMED SERVS., REPORT ON THE INVESTIGATION OF ISSUES CONCERNING NOMINATIONS FOR GENERAL OFFICER POSITIONS IN THE JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, S. REP. NO. 102-1, at 16–22 (1991) [hereinafter SENATE REPORT].

<sup>191</sup> *Id.* at 15–16.

(non-attribution) presentation at The Judge Advocate General's School may have contradicted a Department of Defense policy.<sup>192</sup> Consequently, the results of the original board were vacated and a new brigadier general selection board was convened.<sup>193</sup>

Major General Suter, who was serving as The Assistant Judge Advocate General and Acting The Judge Advocate General and who had been selected to serve as the next TJAG, became involved in the controversy when he personally advocated on behalf of the merits of the brigadier-selects and the process of their selection.<sup>194</sup> Gray recalls that Suter "was supportive of that list. He was supportive of all of us."<sup>195</sup> Despite the regrettable circumstances of the confirmation process, Suter served honorably for nearly two years as the Acting The Judge Advocate General until his retirement in 1991. By all measures, Suter contributed greatly to the JAG Corps and the Army, and his legacy remains

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<sup>192</sup> Oral History, *supra* note 12, at 142–44.

<sup>193</sup> SENATE REPORT, *supra* note 190, at 1–2. In relevant part, the Senate Committee on Armed Services reported:

After these nominations were referred to the Committee on the Armed Services, the Committee received information concerning the promotion selection process which raised serious questions about the leadership and management of the Judge Advocate General's Corps in the Army. At the request of the Committee, the Department of Defense ordered an investigation into these matters. The investigation, which was conducted by the Deputy Inspector General of the Department of Defense, confirmed that there were serious irregularities in the promotion selection process.

The Committee's inquiry and the Department's investigation led to the following actions on these nominations: (1) as a result of information provided to the Committee, and at the request of the Department of the Army, one of the nominations for promotion to brigadier general [Bozeman] was returned to the President by the Senate at the end of the 1st Session of the 101st Congress; . . . (2) as a result of flaws in the selection process documented in the Inspector General's report, the remaining two nominations for brigadier general [Gray, Crean] were withdrawn by the President in September 1990; as a result of the issues raised in the Inspector General's report, the nomination for the position of [T]he Judge Advocate General [Suter] was returned to the President by the Senate at the end of the 101st Congress . . . .

*Id.*

<sup>194</sup> Oral History, *supra* note 12, at 145.

<sup>195</sup> *Id.*

characterized by boundless energy, innovative leadership and an accomplished career in law and military service.

For Gray, this was an extraordinarily difficult period, personally and professionally:

It was a traumatic time. I came out on the list in 1989 when I was the SJA at III Corps, and I left that job because it was a [colonel's] billet and I was about to be promoted to brigadier general. I could no longer occupy that job . . . . I returned to the Pentagon in 1989 and I was very disappointed when the list was pulled back because I had done nothing wrong. The focus was on John Bozeman because of the command influence cases . . . . Later, Tom Crean was the subject of an investigation that, in my opinion, was unfair. . . . My father passed away in December 1989. Although he knew I had been selected for promotion to brigadier general he never got to see me [as a general] and that was very disappointing to me. . . . When the list was pulled back and another board convened and the list released, I wasn't on it.<sup>196</sup> That was a tremendous disappointment.<sup>197</sup>

In March 1990, MG Gray assumed duties as the Acting Commander of the United States Army Legal Services Agency (USALSA),<sup>198</sup> an organization that oversees Army litigation, the Army trial and appellate judiciary, and related activities. He originally assumed the position in anticipation of his promotion to general officer, and in the wake of the second board result was reassigned to make way for one of the officers on the recently announced selection list.<sup>199</sup> But then lightning struck.

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<sup>196</sup> The second list recommended COL Thomas R. Cuthbert, COL Malcolm "Scott" Magers, COL Robert E. Murray, and COL Fredrick Green for promotion to brigadier general. Oral History, *supra* note 12, at 155.

<sup>197</sup> *Id.* at 143-44. "Those of us who were on the [original] list when it was pulled back were not selected when they convened the new board. None of us got selected on the second list, including me. When that board was announced there were three other officers who were selected for promotion." *Id.* at 145-46.

<sup>198</sup> *Id.* at 135.

<sup>199</sup> *Id.*



Before a list is moved on from one level [of the government] to the next, one of the first reviews is in the GOMO, the General Officer Management Office at the Pentagon. . . . I was told that during the course of that review they discovered something about one of the officers that caused them to pull his name off the list. I was the next in line and received a telephone call telling me that I was going to be promoted . . . .<sup>200</sup>

Following this remarkable news, The Judge Advocate General, MG John Fugh<sup>201</sup> required Gray to participate once again in the Army's institutional courses for guidance and instruction to its new brigadier generals. Gray recalls joking that he had been "recycled," and having the sense that MG Fugh did this to demonstrate and "to underscore *his* belief that the first list that included COL Crean and COL Bozeman was not legitimate."<sup>202</sup> Gray regretted the treatment of the other two, particularly Crean, whom he felt had been unfairly treated.<sup>203</sup>

"Recycled" though he may have been, he came away from the process with a profound appreciation for the honors and responsibilities of his selection for general officer.

You are under constant scrutiny. It is almost like being a celebrity and people are going to watch what you do. If you think about something you would like to have done, it might get done. . . . It was important for us to understand that we were ascending to a different level in our careers. Every action had to withstand scrutiny and be above suspicion. *They stressed the importance of adhering to our values.*<sup>204</sup>

In the final analysis, very little good came from this tumultuous period for the Army JAG Corps. The one principal change that came out of this period was the decision by the JAG Corps and the Army leadership to realign the promotion and selection process for JAG Corps

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<sup>200</sup> *Id.* at 146. Colonel Fredrick Green's name was withdrawn from the promotion selection list. *Id.* at 155.

<sup>201</sup> Major General (Retired) John L. Fugh (1961–1993), The Judge Advocate General (1991–1993).

<sup>202</sup> Oral History, *supra* note 12, at 147.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 137.

general officers. In the future, the Chief of Staff of the Army notified officers selected for TJAG and TAJAG that their terms were limited to four years apiece.<sup>205</sup> Never again would TAJAG be permitted to move up to the TJAG position and thereby occupy one of the JAG Corps' only two major general billets for up to eight years. In the future, TJAG and TAJAG would come and go together, starting with Gray<sup>206</sup> and MG Michael Nardotti.<sup>207</sup>

#### VI. 1991–1997 (Commander USALSA, TAJAG)

##### A. Commanding General of the U.S. Army Legal Services Agency and Chief Judge of the Army Court of Military Review, Washington, D.C. 1991–1993

Army Chief of Staff Gordon Sullivan presided over MG Gray's promotion to brigadier general on 1 April 1991. Brigadier General Magers<sup>208</sup> was promoted the same day; BG Cuthbert<sup>209</sup> and BG Murray<sup>210</sup> one month earlier.<sup>211</sup> Gray had assumed formal command of USALSA on 1 March of that year. Despite its significance, Gray's selection was not the highly celebrated affair one might imagine. It is of perhaps great credit to the Army, and the nation, that by 1991 the idea of a black officer at the general officer ranks was, while notable, no longer

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<sup>205</sup> *Id.* at 151–54.

<sup>206</sup> Gray Interview, *supra* note 14. See Memorandum from the Secretary of the Army, subject: Tenure of JAGC General Officers (2 Mar. 1992) (on file with author) (“[MG Nardotti and MG Gray], even though not appointed simultaneously, should expect to retire at the same time (i.e., simultaneously), not later than four years from the date of the earlier of the two appointments.”).

<sup>207</sup> Oral History, *supra* note 12, at 152 (Major General (Retired) Michael J. Nardotti, Jr. (1969–1997), The Judge Advocate General (1993–1997)). See generally George R. Smawley, *The Soldier-Lawyer: A Summary and Analysis of An Oral History of Major General Michael J. Nardotti, Jr. United States Army (Retired) (1969–1997)*, 168 MIL. L. REV. 1 (2001).

<sup>208</sup> Brigadier General (Retired) Malcolm “Scott” Magers (1966–1995), Judge Advocate, United States Army Europe and Seventh Army (1991–1993); the Assistant Judge Advocate General for Civil Law and Litigation (1991, 1993–1995).

<sup>209</sup> Brigadier General (Retired) Thomas R. Cuthbert (1961–1996), Assistant Judge Advocate General for Military Law (1991–1993); Commander, United States Army Legal Services Agency/Chief Judge, United States Army Court of Military Review (1993–1995); Special Assistant to The Judge Advocate General (1995–1996).

<sup>210</sup> Major General (Retired) Robert E. Murray (1962–1993), Special Assistant to The Judge Advocate General (1991); The Assistant Judge Advocate General (TAJAG) (1991–1993); Acting The Judge Advocate General (1993).

<sup>211</sup> Oral History, *supra* note 12, at 168.

extraordinary.<sup>212</sup> Gray's promotion was a critical moment in the long history of African-American service in the Army's Judge Advocate General's Corps dating back to the first black Judge Advocate, Major A.E. Patterson, who served in the Judge Advocate General's Department during World War I.<sup>213</sup>

But at a certain and important level, the accomplishment of Kenneth Gray is simply greater because of the fact that he was not only an officer, but also an Army Judge Advocate.<sup>214</sup> He had succeeded in undergraduate school and law school at a time when African Americans were woefully under-represented in higher education and the legal profession. From that origin, he rose to the top of his profession as an attorney and an officer by the content of his character and a relentless commitment to steady values, hard work, and personal accomplishment. Indeed, in oral histories and the personal interviews and research of the author, the very mention of his race is virtually absent. In this, it could be said, that Martin Luther King's dream for his children was realized for MG Gray in the U.S. Army and the Judge Advocate General's Corps.<sup>215</sup> Gray recalls of that day:

When I was promoted to brigadier general, I commented at the ceremony that I stood on the shoulders of many officers who had gone before me and it was an honor to be promoted to general officer. I had the opportunity to reach a high level of potential and rise to a level beyond my expectations. That makes our Army great because it gives people of all races, backgrounds, and cultures an opportunity to excel and reach their potential. I also feel

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<sup>212</sup> Brigadier General (Retired) Benjamin O. Davis, Sr. was the first African American general officer in the regular Army and U.S. Armed Forces. He was promoted on 20 October 1940. Brigadier General Davis served in numerous key positions, including brigade command, Assistant Army Inspector General, and Special Assistant to the Commanding General, Communications Zone, European Theater of Operations. United States Army History—The First African American General Officer in the Regular Army and in the U.S. Armed Forces, [http://strategyandwar.com/united\\_states\\_army/benjamin\\_oliver\\_davis.html](http://strategyandwar.com/united_states_army/benjamin_oliver_davis.html) (last visited Apr. 14, 2008); see also MARVIN E. FLETCHER, AMERICA'S FIRST BLACK GENERAL: BENJAMIN O. DAVIS, SR. 1880–1920 (1989).

<sup>213</sup> Frederic L. Borch, III, Notes from the Field, *Judge Advocate "Firsts"*, ARMY LAW., July 1997, at 37.

<sup>214</sup> As of April 2008, Gray remains the only African-American Judge Advocate to serve in the rank of general officer—among the military services, only the Army has promoted a black uniformed lawyer to this senior rank.

<sup>215</sup> See *supra* note 1.

that my service was based on a strong foundation of values. In fact, in many speeches that I give today I always stress what I call the five C's—Commitment, Competence, Candor, Courage, and Compassion. [They] have been important in helping me achieve success. Dedication, loyalty, selfless service to one's country, and love of family have also been important.<sup>216</sup>

Finally promoted to general officer, Gray formally assumed the position of Commander of USALSA and Chief Judge, U.S. Army Court of Military Review, in Falls Church, Virginia.<sup>217</sup> In this capacity he was the commanding officer of the military's largest legal services organization, responsible for the direction, management, and oversight of the Army JAG Corps' Contract Law Division, Litigation Division (with oversight of all lawsuits filed against the Army and Army officials), Environmental Law Division, Regulatory Law Division, and Trial Judiciary, including all administrative support to Government Appellate Division, Defense Appellate Division, Army Court of Military Review, Standards of Conduct Office, and Trial Defense Service. As Chief Judge of the Army's highest court, he maintained the integrity of the military justice system.

Gray deeply appreciated the people and the environment at USALSA, both as the Acting Commander, and later, as the fully vested leader of the organization. He remembers the respite the people there afforded him during the difficult period of the general officer selections.

It was a terrible time. I cannot begin to describe to you how bad it was. My salvation was moving to the Legal Services Agency because whenever I walked around the Pentagon, people would stop me in the hall and ask me "When are you getting promoted?" or "What is happening?" As soon as I went over to [USALSA] it was like a breath of fresh air . . . . If I had to look back

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<sup>216</sup> Oral History, *supra* note 12, at 194.

<sup>217</sup> The U.S. Army Court of Military Review was the Army's highest appellate court, and was renamed the Army Court of Criminal Appeals in 1994 to coincide with the renaming of the U.S. Court of Military Appeals to the U.S. Court of Appeals for the Armed Forces. USALSA moved from Falls Church, Va. to its current location in Arlington, Va. in 1990. *See generally* U.S. Army Legal Services Agency, [https://www.jagcnet.army.mil/Intranets/AC/USALSA/usalsa.nsf/\(JAGCNetDocID\)/USALSA+History?OpenDocument](https://www.jagcnet.army.mil/Intranets/AC/USALSA/usalsa.nsf/(JAGCNetDocID)/USALSA+History?OpenDocument) (last visited Apr. 24, 2008).

over my career, it was probably the most enjoyable assignment I had in the Army and the JAG Corps. Probably because of how I was received when I first went over there.<sup>218</sup>

While Gray appreciated the importance of his role as the Chief Judge of the Army's senior appellate court, including the hearing of several interesting death cases,<sup>219</sup> his real satisfaction came from the experience of handling the large and complex challenges faced by USALSA. "I enjoyed the command part more than I enjoyed anything else in my career. . . . being able to command the organization, to lead and manage, and . . . doing all of those things required of a CEO . . . ."<sup>220</sup>

At a professional level, the roles and responsibilities of a general officer were vastly different from his previous experience as a division or corps SJA. As responsibility grows, so can the distance from a leader from the people who daily run his organization. In response to the question of whether a brigadier general personally accomplishes more or less than a colonel,<sup>221</sup> Gray reflected:

If you have a philosophy of doing the best that you can in any job that you have, I don't know if there could ever be any kind of distinction between the job that you do as a colonel and the job that you do as a general . . . . The challenge of being a brigadier was unique because of the feeling of being alone. As a colonel, you could pick up the phone and call the other colonels and talk to them. But as a brigadier, there were a limited number of people I could really talk to if I had issues to discuss.<sup>222</sup>

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<sup>218</sup> Oral History, *supra* note 12, at 156.

<sup>219</sup> *Id.* at 157.

<sup>220</sup> *Id.* As a brigadier general, Gray also sat on promotion and selection boards including the brigadier general selection board that selected Michael J. Nardotti (1969–1997), a celebrated Vietnam combat veteran with whom Gray would later serve as The Assistant Judge Advocate General. The need for this board arose when MG Fugh was elevated to the position of TJAG, and an opening was created for TAJAG resulting in the selection of BG Murray to fill the slot only six months after his promotion to brigadier general. That, in turn, created an opening for a new brigadier general—filled by Nardotti. *Id.* at 166.

<sup>221</sup> *Id.* at 170.

<sup>222</sup> *Id.*

B. The Assistant Judge Advocate General of the Army, Washington D.C., 1993–1997

In the spring of 1993, Gray was selected by the Secretary of the Army, John W. Shannon,<sup>223</sup> from among the four active duty Judge Advocate brigadier generals to serve as The Assistant Judge Advocate General of the Army.<sup>224</sup> The position is statutory and graded in the rank of major general,<sup>225</sup> and Gray was promoted to fill it on 1 October 1993 making him the highest ranking African-American Judge Advocate to serve in the Department of Defense.<sup>226</sup> Despite what one might naturally imagine about the thought process of such a promotion, Gray recalls with characteristic modesty that he

was never nervous [about the prospect] because any of the officers could have been selected for promotion to two-star. I could not say that it was really a goal. . . . At the time, I think it could have gone either way. I could have been on the list and become TJAG or not been on the list at all. All the BGs were very well qualified and could have easily been selected.<sup>227</sup>

Unfortunately, Gray's selection as TAJAG was not without controversy. Brigadier General Cuthbert, one of the four brigadier generals under consideration for promotion, apparently felt that Secretary Shannon, a retired Army colonel who was then serving as the Pentagon's top ranking civilian African American, had made the decision to select Gray on the basis of his race. As MG Nardotti recalls, "[Cuthbert] believed somehow that he had been shortchanged in that process. I don't know whether he believed he should have been TJAG or he should have been TAJAG, but he believed that what happened was improper and

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<sup>223</sup> Hon. John W. Shannon, Secretary of the Army, Aug. 1989–Nov. 1993. *See generally* <http://www.army.mil/leaders/leaders/usa/former/shannon.html> (last visited Apr. 24, 2008).

<sup>224</sup> Oral History, *supra* note 12, at 167–68. The brigadier generals at the time (1991) were: BG Kenneth Gray, Commander & Chief Judge, USALSA; BG Michael Nardotti, Assistant Judge Advocate General for Civil Law; BG Thomas Cuthbert, Assistant Judge Advocate General for Military Law; and BG Malcolm "Scott" Magers, Judge Advocate, United States Army Europe and Seventh Army.

<sup>225</sup> 10 U.S.C. § 3037 (2000).

<sup>226</sup> Oral History, *supra* note 12, at 173. Major General Gray retains this distinction; no African-American Judge Advocates have been selected for general officer since.

<sup>227</sup> *Id.* at 172.

therefore had a basis to complain.”<sup>228</sup> The result was Cuthbert’s profound refusal to retire in accordance with institutional custom following his non-selection for promotion to major general.<sup>229</sup>

Title 10 U.S.C. § 635 requires brigadier generals who are not recommended for promotion to retire five years from the date of their promotion or upon completion of thirty years of active service, depending upon which event occurred later in time. Cuthbert had approximately three years in grade as a brigadier general when he was not selected for promotion. Army custom and (non-binding) policy was that Judge Advocate brigadier generals would retire at an appropriate time following their non-selection so that another officer might be promoted.<sup>230</sup> Since the JAG Corps promotes against vacancies, BG Cuthbert’s insistence on remaining on active duty the full statutorily authorized five years thus prevented brigadier general-select John Altenburg’s timely promotion and created notable discord within elements of the JAG Corps.

Major General Nardotti, for whom this was perhaps his greatest personnel challenge, remembers Cuthbert “laying out what he perceived to be the unfairness [of Gray’s promotion] and because of that he was not going to retire.” Referring to the controversy involving the brigadier general selection boards two years earlier, Nardotti told Cuthbert “that what he was doing was running dangerously close to plunging us back into the problems that we were just clawing our way out of.”<sup>231</sup>

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<sup>228</sup> Major Kevin M. Boyle & Major Michael J. McHugh, *An Oral History of Major General Michael J. Nardotti, Jr., United States Army (Retired) (1969–1997)*, at 212 (May 2000) (unpublished manuscript, on file with The Judge Advocate General’s Legal Center and School Library, U.S. Army, Charlottesville, Va.). Prior to 1994, the process for selecting TJAG and TAJAG (statutory positions) began with a non-binding advisory board. The results of the board helped inform the Army Chief of Staff, who used it at his discretion to advise the Secretary of the Army, who ultimately made the decision and forwarded the nomination to the President for action. The promotion requirements changed in 1994, removing Secretarial discretion and requiring TJAG and TAJAG be on an approved selection list under the provisions of Title 10 U.S.C. Chapter 36 (Promotion, Separation, and Involuntary Retirement of Officers on the Active-Duty List).

<sup>229</sup> *Id.* at 210–17.

<sup>230</sup> *Id.* 207–10.

<sup>231</sup> *Id.* at 213. Indeed, BG Cuthbert’s conduct ultimately led General Sullivan to relieve him of his duties as the Chief Judge of the Court of Military Review and assign him as a special assistant to MG Nardotti—an extraordinary admonishment for a Judge Advocate general officer.

Cuthbert's rejection of the fairness of the selection process had racial overtones which regrettably, but quite naturally, affected Gray. It called into question the very legitimacy of the promotion process and suggested his selection as TAJAG was based on race rather than merit—in striking contrast to everything Gray represented, stood for, and had worked long and hard to achieve. In truth, BG Cuthbert's notions of a race-tainted selection process were simply wrong.

Major General Nardotti recalls his conversation with Chief of Staff Gordon Sullivan regarding BG Cuthbert's refusal to retire:

When I took the issue to the Chief of Staff, he said, "Why in heaven's name is he refusing to retire?" and I went into the explanation, and he said, "John Shannon had nothing to do with it. I picked Ken Gray, because I knew he was a better man, and this proves it." General Gordon Sullivan was not carrying a minority agenda; he was making a call as the Chief. That was his recommendation. It went to [Secretary of the Army] Shannon that way based on his recommendation.<sup>232</sup>

There was an undeniable excitement surrounding Gray's selection as the Army's number-two ranking uniformed lawyer—and perhaps a bit of apprehension after all he had gone through with his brigadier general selection.<sup>233</sup> Had he not been selected for promotion to major general, Gray makes clear that he would have simply retired so that another officer would have the opportunity to be promoted:

We had general officers who stayed around for so long that it prevented other officers from getting selected for promotion to brigadier general. They occupied those slots for nine or ten years, and there were a number of outstanding officers who never had an opportunity to be a [general officer]. I would not have stayed.<sup>234</sup>

As TAJAG, Gray was in partnership with MG Nardotti as the senior leadership for uniformed Army legal services. TJAG's responsibilities are broad indeed, but can be reduced to two key elements: senior legal

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<sup>232</sup> *Id.* at 215.

<sup>233</sup> *Id.* at 173.

<sup>234</sup> *Id.*



advisor to the Chief of Staff of the Army and senior uniformed legal advisor to the Secretary of the Army and the Army staff; and branch chief of the Judge Advocate General's Corps with statutory responsibility for the management of Judge Advocates and the delivery of Army legal services to commanders, Soldiers, and authorized others including Family members and retirees.<sup>235</sup>

Although Nardotti and Gray were both Vietnam veterans and military lawyers with decorated military careers, they were nonetheless distinctive personalities with divergent backgrounds in their military experience and in life. Despite their differences—"Mike is a little more conservative than I am," recalls Gray, "and so he would read the Washington Times and I would read the Washington Post"<sup>236</sup>—MG Gray recounts a positive reminiscence of the type of leaders they were and what, together, they hoped to accomplish for the Army:

I think [MG Nardotti and I] complemented each other very well. He had a totally different background than mine. He came up through the line as an infantry officer. We had the same philosophy in terms of values and the fact that we didn't worry too much about who got the credit for something. We were really [just] focused on doing the best that we could for the JAG Corps.<sup>237</sup>

The two leaders set out to accomplish much during their approximately four-year tenure together. First and foremost, there was a sense that the JAG Corps, as an institution, needed the chance to heal from the sense of conflict and divisiveness that colored the previous

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<sup>235</sup> 10 U.S.C. § 3037(c) (2000).

The Judge Advocate General, in addition to other duties prescribed by law—

(1) is the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army;

(2) shall direct the members of the Judge Advocate General's Corps in the performance of their duties; and

(3) shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

<sup>236</sup> Oral History, *supra* note 12, at 176.

<sup>237</sup> *Id.*

years.<sup>238</sup> Gray reflects, “we did a number of things, but just for the JAG Corps itself we put an end to all of the acrimony that had gone on before. . . . [s]o the process and the JAG Corps could go forward.”<sup>239</sup> Part of the answer was principled leadership focused almost exclusively on the mission of the JAG Corps. “We wanted to make sure we had an organization that was based on values and that we were proficient in our core competencies, in the things that we had to do best. . . . We tried to instill that in the organization and push that philosophy down in the Corps . . . .”<sup>240</sup>

The post-Gulf War environment helped provide a second focus—the growing area of operational law. This included:<sup>241</sup>

1. Expansion of Operational Law as a focal point for officer basic and advanced training and instruction at the The Judge Advocate General’s School;
2. Integration of Judge Advocates in the combat training centers as observers and controllers for commanders and Judge Advocates participating in new, realistic training scenarios;
3. Creation of new training opportunities for reserve component Judge Advocates at The Judge Advocate General’s School to better prepare them for mobilizations and deployments;
4. Resourcing the Center for Law and Military Operations (CLAMO) with facilities, money, and talented officers who would catalogue lessons learned by Judge Advocates in training and real-world operations, and begin developing doctrine for legal support across the operational spectrum.

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<sup>238</sup> Gray Interview, *supra* note 14. Gray attributes part of the acrimony during this period to the fact that general officers—specifically the TAJAG—were able to remain on active duty for so long (up to eight years as a major general) that it prevented other highly qualified colonels from having the opportunity for promotion. This changed as a policy matter in 1993. “Mike Nardotti and I were the first [TJAG and TAJAG] to get the letters telling us that we would come and go together . . . that we would retire together. I kept the letter in the drawer of my desk the whole time.” *Id.*

<sup>239</sup> Oral History, *supra* note 12, at 186.

<sup>240</sup> *Id.* at 177.

<sup>241</sup> *Id.* at 183–84.

This institutional commitment by the JAG Corps to military operations was really more a recognition that the role of Army lawyers had changed in the 1990s as the military moved from the Cold War to smaller wars and expeditionary conflict. Gray observed:

One of the key changes as we went from the Gulf War through all of those conflicts, we see the Judge Advocate playing [an ever] prominent role. I think it just evolved. We were there all of the time before, but this really brought it to the forefront. [Colonel] Raymond Ruppert was the legal advisor to General Norman Schwarzkopf in Desert Storm, [MG] John Altenburg was the legal advisor in Haiti, and . . . [COL] John Bozeman was the legal advisor in Panama. These guys were at the top of their profession and they were outstanding SJAs advising their commanders in tough situations and did a superb job. . . . I tell people [at the University of West Virginia] . . . that most commanders are not going to go to war without taking their Judge Advocates with them because there are so many issues. It shocks them because they only think of us trying cases. They think of us as JAG on TV.<sup>242</sup>

Major General Nardotti and MG Gray also recognized that the dramatic military down-sizing following the Gulf War required a new and thoughtful look at how the Army Reserve and National Guard would integrate and work with the active Army in future conflicts. Accordingly, a third focus concerned the structure, quality, and training of Reserve and National Guard Judge Advocates, paralegals, and legal administrators. It was important that they have access to quality formal legal instruction, continuing legal education, leadership opportunities, and home-station training. Nardotti, in particular, realized that future wars would rely heavily upon the Reserve Component—and they have.<sup>243</sup> Gray summarized the objective this way:

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<sup>242</sup> *Id.* at 183.

<sup>243</sup> See generally James R. Helmly, *The Chief, Army Reserve Addresses "Courage to Change" in the Army Reserve*, ARMY RESERVE MAG., Mar. 22, 2005; EDWARD P. MCNAMEE, III, ARMY RESERVE COMPONENT ACCESSIBILITY DURING OPERATIONS OTHER THAN WAR: SOME IMPLICATIONS FOR THE CINC'S (Naval War Coll. 1994), available at <http://handle.dtic.mil/100.2/ADA283440>; OFFICE OF THE CHIEF, ARMY RESERVE, UNITED STATES ARMY RESERVE LONG-RANGE PLAN 1993–2023 (Washington D.C. 1993); U.S. Army Reserve Posture Statement 2007, available at <http://www.usarmyreserve2007>

[Our goal] was to create a seamless organization between the active . . . and Reserve component Judge Advocates, so you really couldn't tell the difference. . . . We knew at that time in order to win any conflict, we would have to use the Reserve Components. The Army itself, and the JAG Corps, were going to have to rely on the Reserve Component judge advocates to either backfill when our units moved out or . . . go when we had to deploy.<sup>244</sup>

A final focus was the rapidly developing nature and capability of technology to facilitate, expand, and bring efficiency to Army legal services. Major General Gray was responsible for the supervision of technology, and credits the contributions of others for helping move the JAG Corps forward in this critical area. "For someone who was not very computer literate at the time it was quite a challenge; but we had warrant officers [and officers] who were very smart in this regard, and [they] began to work with the Army to increase our ability with computers. . . . We worked really hard to set standards on software and hardware compatible throughout the Corps."<sup>245</sup>

By the end of his four-year tenure as The Assistant Judge Advocate General, MG Gray was ready to move onto the next phase of his personal and professional life. There were voices inside the Army suggesting he should remain to pursue a move to become The Judge Advocate General, just as MG Overholt and others before him had done.<sup>246</sup> Despite his initial agreement to retire after four years, the strong relationship Gray (and Nardotti) had with Secretary of the Army Togo West and the Chief of Staff of the Army suggested that perhaps it was possible.<sup>247</sup> But Gray was not interested. He had run long and hard enough for over thirty years, although he did recognize the disappointment of some that, despite the Army policy advising his retirement, he didn't attempt to stay longer to become the first African-American TJAG.

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posturestatement.org; UNITED STATES ARMY RESERVE COMMAND, ANNUAL COMMAND HISTORY, 1 JANUARY TO 31 DECEMBER 1995 (Kathryn Roe Coker & Edward P. Shanahan eds., 1997); Dave Moniz, *Reserves Chief Tells Troops to Enter Full War Mode*, USA TODAY, Sept. 15, 2003, [http://www.usatoday.com/news/world/iraq/2003-09-15-reserves-chief\\_x.htm](http://www.usatoday.com/news/world/iraq/2003-09-15-reserves-chief_x.htm) (last visited Apr. 27, 2008).

<sup>244</sup> Oral History, *supra* note 12, at 176.

<sup>245</sup> *Id.* at 177–78.

<sup>246</sup> *Id.* at 186–87.

<sup>247</sup> *Id.*

I was disappointed that other general officers, particularly African-American general officers, thought that I did not want to be The Judge Advocate General. That comment was made by several of them. I didn't respond. In a sense, sometimes I feel that I may have let the junior officers down in the Corps who looked at me as possibly becoming the first TJAG of my race. The question I raised was whether it was for the right reasons? Perhaps it was not my decision to make. I ultimately answered the question—no, it would not have been for the right reasons. It would have been very self-serving. It could have served my race, and it would have served the Army, but it would also have blocked others from ever getting the chance to be promoted . . . . It was just a matter of principle . . . I thought that the opportunity was there—perhaps for the wrong reasons. I do not think that anyone has a right to be promoted to general officer. For those officers who set that as a goal, I think it is a mistake.<sup>248</sup>

#### VII. 1997–2008

Major General Gray retired on 1 May 1997 with a heartfelt farewell, presided over by the Secretary of the Army, Togo West, in the courtyard of the Pentagon. After more than thirty years of military service, including his historic selection and successive promotions as a general officer, he sought to set out the way ahead for military retirement and the next phase of personal and professional life. Retirement can be a difficult time for senior military leaders. Should he pursue private or corporate practice for the pecuniary rewards that might bring? Or remain in executive-level government service and apply decades of understanding and experience elsewhere in service to the nation? He later recalled,

As I neared retirement [in the mid 1990s], I had lunch with one of my law school classmates, Marshall Jarrett, who works at the Justice Department as the Ethics Counsel for Attorney General Ashcroft, and we were discussing what I would do when I retired. He said to

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<sup>248</sup> *Id.* at 187.

me—“You ought to do something that warms your heart.” I thought [then] that being around young people and students and being in this type of environment would be something I would really enjoy.<sup>249</sup>

He was tempted, understandably, to look elsewhere, recalling, “I had always vowed that once I finished with my public service that I was going to get a job where I was going to make some money . . . .”<sup>250</sup> Instead, he was recruited by the President of West Virginia University to return to Morgantown, where he assumed his current position as the Vice President for Student Affairs on 5 May 1997.<sup>251</sup> It was a surprisingly easy transition.

[B]eing a Judge Advocate, we can do just about anything. We have the background and experience to take on any job that is out there that requires management and leadership. Those core values that we have, integrity, dedication, selfless service, and [the willingness] to roll up your sleeves and work hard are all present in most JAG officers . . . . [The decision to join the university] has turned out to be really good because I had the opportunity to continue working with young people, with students, leading an organization and working with a President who established a vision, goals and objectives, performance measures, and all of those things that fit into what I was used to and could just bring to this particular job. I thoroughly enjoy what I am doing.<sup>252</sup>

Initially, Gray found some among his university coworkers wary of his military background. Gray explains:

I am non-traditional . . . I didn’t come up through the ranks of university administration or academics. This may have contributed to some initial resistance to my

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<sup>249</sup> *Id.* at 73.

<sup>250</sup> *Id.* at 191. “JAG officers and those of us in public life don’t make much and don’t have much money.” *Id.*

<sup>251</sup> *Id.* Major General Gray is the recipient of the West Virginia University Law School’s *Justicia Officium* Award, and is a member of the Academy of Distinguished Alumni of the University.

<sup>252</sup> *Id.* at 191–92.

selection. But the same values apply here as in the Army: you transition them from one to the other, and lead the same way by emphasizing organizational values and getting others to buy-in to what you are trying to accomplish.<sup>253</sup>

Over time, and in small gestures such as dropping his much earned military title—insisting people call him by his first name without any reference to his status as a retired general officer—he earned broad and enthusiastic acceptance by university faculty.<sup>254</sup> In all, Gray’s transition to private life and service in the university setting was successful and highly satisfying. The skills he honed as a Soldier and officer found ready application at West Virginia University, and the leadership traits that made him so spectacularly accomplished in one found easy translation to the second. We turn now to those skills, and the lessons and considerations learned from his remarkable life and career.

#### VIII. Leadership Philosophy

*The good-to-great leaders never wanted to become larger-than-life heroes. They never aspired to be put on a pedestal or become unreachable icons. They were seemingly ordinary people quietly producing extraordinary results.*<sup>255</sup>

Leadership philosophies strive to provide consistent ways of thinking, contributing to an atmosphere, and a practical paradigm for decision making that recognizes sets of standards against which facts and circumstances are applied.<sup>256</sup> What gives MG Gray’s leadership style its distinctive and prescriptive character is the unbridled focus on leveraging human and organizational capital in the most effective way possible, while acknowledging clearly defined institutional goals and objectives.

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<sup>253</sup> Gray Interview, *supra* note 14.

<sup>254</sup> Gray, *supra* note 3, at 387. “I asked everyone to call me by my first name. They felt relieved when I dropped the title. It was a small thing for me, but huge for them.” *Id.* Gray has noted that “[t]he only thing a title can buy is a little time—either to increase your level of influence with others or erase it.” *Id.* (quoting JOHN C. MAXWELL & ZIG ZIGLAR, *THE 21 IRREFUTABLE LAWS OF LEADERSHIP* 14 (1998)).

<sup>255</sup> COLLINS, *supra* note 4, at 37.

<sup>256</sup> See generally U.S. DEP’T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP (12 Oct. 2006) [hereinafter FM 6-22].

Gray was willing to move beyond the convenient certainties of the past, for example, the way the JAG Corps looked at minority recruiting or the integration of the reserve component, and worked to identify and maximize people and policy to address current and future institutional requirements. His legacy in this regard is not exclusively defined by what he individually achieved professionally, but in the personal example he provided others.

In 2002, MG Gray was the guest lecturer for the Eighth Annual Hugh J. Clausen Lecture on leadership sponsored by The U.S. Army Judge Advocate General's School.<sup>257</sup> There, he presented a broad and thematic leadership vision for an audience of junior and mid-grade Army officers assembled at the U.S. military's premier center for legal education and training.<sup>258</sup> He told the group of young leaders that the ballast for his brand of leadership—the element that steadies the turbulence of all manner of conflict and interactions—is a core adherence to a set of fundamental values. Echoing the values that are the doctrinal cornerstone for the Army,<sup>259</sup> he told the group:

I believe it is . . . important to have a strong foundation underlying all we do. For me, that foundation is a set of values that guides my everyday life. I'm talking about duty, honor, selfless service, love and loyalty to family and country, personal responsibility, and absolute integrity; values that were instilled in me when I was growing up and during my service in the Army.<sup>260</sup>

He went on to emphasize the nexus between personal and institutional values; citing the work of James Kouzes and Barry Posner, he offered that

leaders must engage individuals in a discussion of what the values mean and how their personal beliefs and behaviors are influenced by what the organization stands for. I believe it is necessary to discuss values and expectations in recruiting and orienting new members to

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<sup>257</sup> Gray, *supra* note 3, at 385.

<sup>258</sup> *Id.*

<sup>259</sup> FM 6-22, *supra* note 256, at 2-2. The Army values are Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, and Personal Courage.

<sup>260</sup> Gray, *supra* note 3, at 395.



your staff; it is always good to let people know what is expected of them.<sup>261</sup>

This emphasis on values is the foundational antecedent to Gray's leadership philosophy, fostering personal and institutional conduct conditioned by what he refers to as the "qualities of professionalism"—commitment, competence, candor, courage, and compassion.<sup>262</sup> These qualities, integrated into Army literature and highly emphasized by leaders like General Gordon Sullivan, former Chief of Staff of the Army,<sup>263</sup> condition and define almost every other aspect of professional life. In his 1996 book, *Hope is Not a Method*, Sullivan writes that, "One of the most important lessons we learned during the rebuilding of the Army after Vietnam was the importance of values—a commitment by all [S]oldiers to something larger than themselves."<sup>264</sup> The importance of personal commitment to institutional success is directly tied to shared values, which Sullivan observes

express the essence of an organization. They bind expectations, provide alignment, and establish a foundation for transformation and growth. By emphasizing values, the leader signals what will not change, providing an anchor for people drifting in a sea of uncertainty and a strategic context for decisions and actions that will grow the organization. Leadership begins with values.<sup>265</sup>

Value-driven leadership implicates many nuanced considerations and individual expressions of personal experience, understanding, and perspective which contribute to—and ultimately become an expression of—the content of one's character, and the work ethic that motivates it. They alone are not prognosticators of success in the military or elsewhere; they are, however, preconditional for most and endow leaders with the potential to achieve greatness. Values and hard work are the mortar by which the bulwark of successful leadership is built, facilitating success over adversity and mediocrity by appealing to the nobler side of human nature through action and initiative. Major General Hugh

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<sup>261</sup> *Id.* at 390 (citing JAMES M. KOUZES & BARRY Z. POSNER, *ENCOURAGING THE HEART: A LEADER'S GUIDE TO REWARDING AND RECOGNIZING OTHERS* (1998)).

<sup>262</sup> *Id.* at 395.

<sup>263</sup> See GORDON R. SULLIVAN & MICHAEL V. HARPER, *HOPE IS NOT A METHOD* (1996).

<sup>264</sup> *Id.* at 57.

<sup>265</sup> *Id.* at 64.

Overholt, whom Gray cites as an early mentor, made specific observations of both:

Ken clearly demonstrated a caring nature for nearly everyone, and always strove to do right by people and the Army without any of the careerism I saw in some others. He had an instinctive leadership quality you could just feel; a very special kind of leader. He was also an enormously hard worker. Whereas I might take something new and kind of fake it, Ken would focus on things, take the time that was needed and master them. He was successful because of his personal commitment and effort.<sup>266</sup>

Gray, in addition to his emphasis on shared values and hard work, commends leaders to focus on specific traits, attitudes, and considerations for moving people and organizations from merely good to truly great. If values are a binding material of great leadership, then individual priorities and the lessons of others are among the stone that provides its structure. In his 2002 lecture, he offered the following considerations for leaders at both the personal and institutional level:<sup>267</sup>

Personal conduct: How to relate to others.

- Be yourself and continue to learn.
- Don't worry about who gets the credit.
- Be humble (manage your ego).
- Remember your family.

Institutional conduct: moving your organization forward.

- Establish Mission, Vision, Goals, and Objectives.
- Set realistic goals.
- Develop shared values.
- Create a cohesive and balanced team.

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<sup>266</sup> Telephone Interview with Major General (Retired) Hugh S. Overholt, Partner, Ward & Smith P.A.; TJAG (1985–1989); TAJAG (1981–1985) (Mar. 5, 2008) (notes on file with the author). General Overholt is currently counsel with Ward & Smith, P.A., New Bern, N.C. See generally [www.WardandSmith.com/Pages/attorneys/Overholt.html](http://www.WardandSmith.com/Pages/attorneys/Overholt.html) (last visited Apr. 24, 2008).

<sup>267</sup> Gray, *supra* note 3, at 387–94.

- Be innovative, creative, and think outside the box.
- Be a mentor and take care of subordinates.
- Celebrate and reward success.
- Communicate, Listen, Communicate.

To highlight a few key aspects of this, one need only begin with MG Gray's focus upon people and relationships when touring and inspecting Army legal offices under the provisions of UCMJ Article 6:<sup>268</sup>

I really wanted to see how well the SJA office was operating and functioning. How it fit in to the command structure, in other words, whether it was an integral part of what was going on at the installation. I wanted to see how the SJA's relationship was with the [commanding general]. I wanted to check the morale within the offices, the civilians, enlisted, and officers.<sup>269</sup>

Mentoring, in particular, was a key question Gray considered as he evaluated uniformed attorneys and paralegals—asking about leaders' relationships with subordinates, and the efforts being made to grow and develop junior officers and non-commissioned officers. He notes, "I think mentoring is really just guiding people. I think it is an obligation that we have as senior officers to mentor those who are junior to us."<sup>270</sup>

One of the key leaders Gray mentored during his career was MG Walter Huffman, currently the Dean of Texas Tech Law School, who succeeded MG Nardotti as The Judge Advocate General of the Army in 1997. When asked about Gray's leadership style, Huffman recalls, first and foremost, the special ability to listen and communicate with subordinates and his patient and studied evaluation of people and problems. As Huffman describes it:

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<sup>268</sup> UCMJ art. 6 (2008) ("The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.").

<sup>269</sup> Oral History, *supra* note 12, at 179.

<sup>270</sup> *Id.* at 117. Major General Gray cites numerous past and future leaders of the JAG Corps among those he has mentored and worked with. He specifically mentions the following in his oral history, many previously mentioned in this article: MG Thomas Romig, MG Walt Huffman, MG John Altenburg, MG Michael Marchard, COL Paul Snyders, COL Robert McFetridge, COL Robert Burrell, COL Calvin Lewis, COL Tia Johnson, and COL Michelle Miller. *Id.* at 188–89.

Perhaps as a function of his life experience, and all the challenges Gray may have encountered, he was very slow to judge people. He always took a hard look and never prejudged anyone. I learned from Ken Gray the importance of understanding a person before you conclude anything about them . . . always knowing more than an initial impression before concluding the measure of a person.<sup>271</sup>

This patient approach to evaluating people also found practical expression in Gray's method for dealing with problems. His calm demeanor and dedication to the leadership contributed to his ability to always remain focused on the things that matter most, to never get overly excited, and to reinforce organizational goals, missions, and objectives. Of this, General Huffman further recalls: "I learned from MG Gray that sometimes the best reaction is no reaction. It is amazing how a crisis of the moment can resolve when left alone; over-reaction can become a crisis in itself."<sup>272</sup>

Huffman, who worked for Gray at the Office of The Judge Advocate General, Personnel, Plans & Training Office, also extends great credit to Gray for his exemplary role as the consummate team player who consistently did great things without any concern for personal reward or recognition, and who adopted the priorities of people like MG Mike Nardotti with passion and unrestricted commitment. "He was the perfect deputy, who was loyal to [MG Mike Nardotti] and wholly dedicated himself to [Nardotti's] goals, objectives, and policies. . . . Gray had no private agendas, sought little personal recognition, and genuinely cared about everyone."<sup>273</sup>

Gray also cared about the institution of the Judge Advocate General's Corps, and his success with programs like the minority recruiting initiative are a lasting credit to his ability to visualize, develop, and achieve goals and accomplish missions while thinking "outside the box." Major General William Suter, the former Acting The Judge Advocate General of the Army and the current Clerk of the U.S.

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<sup>271</sup> Interview with Major General (Retired) Walter B. Huffman, Texas Tech University Law School, in Lubbock, Tex. (Feb. 15, 2008) (notes on file with author).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

Supreme Court, worked with Gray directly in the 1970s. He echoes this and remembers Gray as an officer of great foresight and ingenuity:

First, [Gray] is a fine gentlemen. Second, he is an excellent lawyer. Sometimes I called him the “DLJO.” That means “Dirty Little Jobs Officer.” I was taught that the best officers are those who do everything well, especially those things that are unpleasant or unrewarding. Ken was the man that could and would do anything and do it well. He never complained. He always took it with a smile. Our TJAG at the time was MG George Prugh.<sup>274</sup> He was a man of great foresight. He inundated us with “Prugh-grams.” Do this, do that, try this, try that. The bad news was that a lot of his ideas were unworkable. The good news is that many of his ideas were brilliant.

One of the Prugh-grams told [PP&TO] to start a JAG law student summer intern program. He accurately thought the program would attract women and minorities, some of whom might enter the JAG Corps on active duty or the Reserve Components. Ken was assigned the task of making it happen. He had to get the funding and field support, advertise, select, etc. He had no staff. Ken pulled off a miracle and that summer we had 100 law students working as interns in [the United States] and Europe. The program that Ken hatched is alive today. The JAG Corps and our Nation benefitted greatly from this program because it made thousands of law students aware of how the Army legal system works.<sup>275</sup>

Finally, the former The Judge Advocate General, MG Mike Nardotti, reiterates the sentiments of MG Huffman in his feelings for Gray as the consummate team-player who never worried about who got the credit and who steadfastly put the institution first, helping facilitate an enormously productive partnership from 1993–1997. As his principal deputy in the leadership of the JAG Corps, Nardotti “relied upon Gray

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<sup>274</sup> See generally Smawley, *supra* note 72.

<sup>275</sup> Correspondence from Major General William Suter, to Lieutenant Colonel George Smawley (13 Feb. 2008) (on file with the author).

for his superb judgment, and felt that Gray set the highest possible standard as a Soldier, a gentleman, and an officer."<sup>276</sup>

#### IX. Summary

Kenneth Gray was one of those exceptional military leaders who mastered not only the complexities of his profession, but did so with a certain memorable and very human touch that influenced senior officers and subordinates alike in ways that almost transcended traditional notions of leadership. Even now, a decade after his retirement from active duty, people speak of Gray with a special enthusiasm and affection bestowed on very few; he remains a part of the conscience of the Army JAG Corps for the quality of character he demonstrated throughout his career. Colonel Joe Ross, who served with him twice in the 1980s and mid 1990s, remembers him as a trusted mentor, the sort of man who young men and women seek to follow.

[Gray's] quiet, inspirational style of leadership was a model for me. Always a gentleman, always humble, and always a professional, he was a man I would choose to raise my children if, God forbid, something happened to my wife and me (that is actually a statement first expressed by Walt Huffman; I fully endorse it). . . . He is now, as he has always been, totally selfless, dedicated to helping others, and a mentor of mentors.<sup>277</sup>

It is the author's view that Kenneth Gray's life experience in West Virginia, and on through his education and early career, contributed to each and every success and carried him over and across each and every disappointment on the road to becoming America's senior ranking African-American military jurist. Major General Gray is a leader steeped in the values of a great family, fortified by the adversity and spotlight of being among the first black lawyers to make the military a career, and remains tempered by the studied understanding and appreciation for the inherent worth of others. His legacy is the example he set as a leader and the role he played as mentor, seeing in people what they often could not see in themselves. He demonstrates an innate ability to visualize the potential in individuals and institutions and to move them

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<sup>276</sup> Smawley, *supra* note 207, at 37.

<sup>277</sup> Correspondence with Colonel Joseph Ross (Feb. 25, 2008) (on file with author).

to their truest potential. His life and career are a worthy lesson and example, for the current generation and the next.

**THIRTY-SIXTH KENNETH J. HODSON LECTURE ON  
CRIMINAL LAW\***

*Today's Military Advocates: The Challenge of Fulfilling  
Our Nation's Expectations for a  
Military Justice System that is Fair and Just*<sup>1</sup>

BRIGADIER GENERAL PATRICK FINNEGAN<sup>2</sup>

Ralph Waldo Emerson said, "Our life is an apprenticeship to the truth that around every circle another can be drawn; that there is no end in nature but every end is a beginning." For me, today could be viewed

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\* Established at The Judge Advocate General's School on 24 June 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

<sup>1</sup> This lecture is an edited version of remarks made on 19 March 2008 by Brigadier General Patrick Finnegan to members of the staff and faculty, distinguished guests, and officers attending the 56th Graduate Course at the Army's Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Citations to authorities have been added.

<sup>2</sup> Dean of the Academic Board, United States Military Academy, West Point, N.Y. 31st Graduate Course, 1983, The Judge Advocate General's School, U.S. Army, Charlottesville, Va.; J.D., 1979, University of Virginia Law School; M.P.A., 1973, Harvard University Kennedy School of Government; B.S., 1971, United States Military Academy. Previous assignments include Professor and Head, Department of Law, United States Military Academy, 1999–2005; Staff Judge Advocate, United States Military Academy, 1998–1999; Legal Advisor, United States European Command, 1996–1998; Staff Judge Advocate, U.S. Special Operations Command, 1994–1996; Legal Advisor, Joint Special Operations Command, 1991–1993; Deputy Staff Judge Advocate (1989–1991) & Chief, Administrative and Civil Law (1988–1989), XVIII Airborne Corps, Fort Bragg, N.C.; Deputy Director, Academic Department (1985–1987) and Criminal Law Instructor (1983–1985), The Judge Advocate General's School; Chief, Military Justice (1981–1982), Chief, Administrative Law (1980–1981), and Trial Counsel (1979–1980), 8th Infantry Division (Mechanized), Bad Kreuznach, Germany. Brigadier General Finnegan's assignments as an Infantry Officer and Military Intelligence Officer prior to attending the Judge Advocate General's Funded Legal Education Program include the 9th Infantry Division, Fort Lewis, Wa., and Company Commander, U.S. Army Security Agency Materiel Support Command, Vint Hill Farms Station, Va. Member of the Virginia Bar and admitted to practice before the U.S. Supreme Court.



as the drawing of more circles, both beginnings and endings. I am particularly pleased that attending this lecture in criminal law is Dean John Jeffries of the University of Virginia School of Law, because in my first year of law school in 1976, Professor John Jeffries taught my course in criminal law. And when I reviewed the list of distinguished Hodson lecturers over the years, I noted that four of those individuals taught me law, either at UVa or at the JAG School. Another circle is completed in returning to Charlottesville and to the JAG school—I spent eight years of my military career here on the North Grounds, much of that time devoted to criminal law. Of course, the first criminal law lecture in this series was delivered by Major General Kenneth Hodson himself, a true gentleman and the single individual most responsible for shaping today's well respected military justice system. It's an honor to deliver a lecture named after him. And to begin this circle, General Hodson presented that initial criminal law lecture during my first year of active duty in the Army.

A few years prior to that, at age seventeen, I went to my West Point interview. After some preliminaries, the major conducting the interview asked, "So what do you want to do with your life?" I replied, "Well, sir, I really want to be a lawyer." To which he responded, "Then you probably shouldn't go to West Point." I disregarded his advice and am very happy that I did. I knew from an early age that I wanted to be a lawyer—and a lawyer who specialized in criminal law in particular. I was an avid fan of the Perry Mason books (and the TV show as well) and read every other book I could find, both fiction and non-fiction, about criminal law. And, as a practicing military lawyer for twenty years, I was fortunate to be involved with criminal law on many occasions and most assignments. As we talk today, I hope you will be able to see how those experiences have shaped my thoughts and ideas about what we do in practice and what we should aspire to in the military justice system.

In fact, when I was at this school in the 90th Basic Course in 1979, I received a letter from my sponsor in the 8th Infantry Division in Germany. As the Chief of Military Justice, he was also to be my boss. In his welcome letter, he enclosed the front page of the *Stars and Stripes*, the military newspaper in Europe. The top headline read "23 arrested in Dexheim for heroin sales." My future boss had written across that story, "These will be your cases." So, six months after graduating from law school, I was prosecuting major felony cases. One drug sale case had an interesting sentencing phase to the trial. While the trial was pending, the Soldier decided to go AWOL so when he had run out of money and was

rounded up a few days later, he went to pretrial confinement, where he remained until his guilty plea at trial. When it was time for extenuation and mitigation, the defense counsel asked if the accused could take the stand, guitar in hand, to sing a song he'd written while in pretrial confinement about how sorry he was. As the prosecutor I had no objection, so the accused performed his soulful ballad for the court members. They sentenced him to a dishonorable discharge and three years. I always thought it was two years for the crimes and one for the song! The significant responsibilities that you are given early on can be an exhilarating and sometimes intimidating aspect of our system—from the start, you must understand the underlying principles and be prepared to fulfill your crucial role in ensuring fairness, discipline, and ultimately justice. Just over two years later, still in my first assignment out of law school, I was the Chief of Military Justice for the 8th Infantry Division and prosecuted a Soldier in a capital murder case in which he received the death penalty. Those can be daunting circumstances for everyone involved and that's why it is crucial for our military justice system, of which we can be justifiably proud, to be efficient, effective, and most of all, just.

History shows that our system has not always been that way, or perceived to be a system of "justice," but the changes and significant improvements wrought by General Hodson and his successors have brought the practice of military criminal law to a place where we compare very favorably with criminal law systems throughout the United States and around the world.

The significant changes began after sixteen million citizens served in uniform during World War II and returned to their cities and towns with the correct perception that the military criminal law system may have been related to discipline—arbitrary, swift, and kangaroo-court like at times—but it was not concerned particularly with either fairness or justice. Their concerns ultimately resulted in the Uniform Code of Military Justice (UCMJ), the first major step toward a system based on principles of fairness and justice crucial to our nation and its citizens.<sup>3</sup> As Justice Oliver Wendell Holmes said, "A system of justice must not only be good, but it must be seen to be good."

The UCMJ was a crucial step, but it was only the first step, and the history of our system since 1951 has been one of change as military

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<sup>3</sup> 10 U.S.C. §§ 801–946 (1950).

justice and military legal practice adapted to a different armed force and to evolving ideas concerning criminal law procedures. General Hodson was at the forefront of many of those improvements—it's enlightening to read his initial Hodson lecture from 1972 to see how many of the changes he urged, from separate and independent defense counsel, to a trial judiciary with military judges who actually ensured proper proceedings at courts-martial, to writs of certiorari to the Supreme Court, have come into being, first through the Military Justice Act of 1968,<sup>4</sup> later with the Military Justice Act of 1983,<sup>5</sup> and then subsequent advancements.

When I was assigned to the criminal law faculty in the early 1980s, I actually played a small role as the armed forces implemented the changes dictated by the Military Justice Act of 1983, which among other steps forward led to the promulgation of the Military Rules of Evidence, patterned on the Federal Rules of Evidence. That was back in the days of C-rations, so those were truly the first MREs. At any rate, the significant changes in the Act of 83 resulted in a complete rewrite of the Manual for Courts-Martial (*Manual*) in 1984.<sup>6</sup> That effort was led by then Major, later Brigadier General John Cooke, the Hodson lecturer ten years ago. After the *Manual* was written, and about to go to press, the people responsible for the re-write realized that they had neglected to include an index for the *Manual*. After considering what to do, they said, "Ah ha, we have that criminal law faculty down at the JAG School in Charlottesville, let's task them to compile the index." One of my additional duties in the department was publications officer, so I was given the lead in this unenviable task. We quickly realized that a committee of nine—the entire criminal law faculty—was not workable for this project. So, one other officer and I locked ourselves into one of the practice courtrooms for two weeks and did nothing but compile an index for the *Manual*. It was truly mind-numbing work. Near the end of that two weeks, in our near-delirium, we decided that, if we had to do this, we were going to put our own personal stamp on the index. So we created an entry for "aircraft carrier" that said "see boat." When you went to "boat," the entry said "see vessel," and when you looked up "vessel," it completed the circle by saying "see aircraft carrier." Now you may know that the Navy is particular about calling those big gray things that float on the water "ships" and not "boats" so we were

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<sup>4</sup> Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

<sup>5</sup> Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

<sup>6</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984).

particularly proud of this entry. And it just got better because the criminal law faculty was later tasked to go around the country to brief joint audiences about the Military Justice Act of 1983 and the 1984 *Manual*. We would always make sure to use a case or hypothetical in these classes that included an aircraft carrier and of course referred to it as a “boat.” Invariably a naval officer in the class would raise his or her hand and say, “Excuse me, but aircraft carriers are ships, not boats.” At which point, we would point out the entry in the index and say that, apparently according to President Reagan’s executive order, they were in fact boats.

I want to return to a fundamental issue—why are these changes and improvements to our system so important and essential, other than to properly classify naval vessels? For that answer, I think you must go back to first principles, and for Americans, those are found in the Constitution. And how does that Constitution begin? The first three words—the beginning of the preamble—are “We the People.”<sup>7</sup> This government, this country, is for the people. This is a Constitution and a form of government that wasn’t handed down by a sovereign or king or other government, it emerged from the people. And who are those people, where are they? Are they in this room? Maybe to some extent, because our Army has always come from a cross section of America, but in our role as officers, we are actually servants of the people. We are sworn to support and defend their rights. There’s an important reason that constitutional law has been a required course at the Military Academy since the 1820s—those young officers will swear to support and defend the ideals embodied in this historic document, and they need to know what that means.

If you really want to know who We the People are, go to the Barracks Road shopping center or Fashion Square Mall and sit and watch the people go by. There you will see, in all their glory and diversity, the people the Constitution is for. They will be White, Hispanic, African-American, Asian-American, male and female, and some of undetermined genders. Senior citizens, teenagers cruising the mall, infants and toddlers, people with strange clothes, stranger hair, and maybe even strange lifestyles. The military is not an end in itself; it exists to protect the American way of life, including those who may never fully understand, appreciate, or value how the lives of those in uniform are dedicated to protecting the freedom they enjoy every day. It’s an

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<sup>7</sup> U.S. CONST. pmbl.

interesting paradox—you are part of a regimented, authoritarian military that protects a diverse, democratic society so that its members—from Whoopi Goldberg to Rush Limbaugh—can enjoy great personal liberties. As George Orwell once said, “We sleep safe in our beds because rough men stand ready in the night to visit violence on those who would do us harm.” Those rough men—and women—are us, who swear an oath designed to keep this country and its people safe from harm.

And what’s more, it’s from those “People,” with their aspirations, beliefs, and ideals, that our Soldiers, Sailors, Marines, and Airmen come. Together we protect liberty and freedom for all Americans, but we must exemplify those ideals in the ways we deal with the citizens who elect to serve their country in uniform. Of course, there are some differences that are required by the demands of military discipline, but they should not generally override the basic constitutional principles that we believe in and aspire to as individuals and as a nation.

Remember some of the other words of that preamble “to form a more perfect Union” and to “establish Justice.”<sup>8</sup> That is what we ought to be about. If you need a reminder of that, just recall the oath that each of us takes as an officer, to support and defend the Constitution. That oath promises defense and support of the moral values that the Constitution expresses concerning the relation between individuals and the government—values like equality, inalienable rights, the democratic process, sovereignty of the people, and supremacy of the law.

We swear an oath—not of allegiance to any particular sovereign or political party, but of protection for the ideas and system that are the heart of our nation. That promise glues the country together and holds this awesome military power in check. We swear to serve a government that is structured to serve the ends of justice, that relies on principles of fair play, that clings to moral restraint in the exercise of military might.

To support and defend the Constitution and the nation with the force of arms, that’s a given. To support and defend the Constitution in the way we deal with each other, with our subordinates—America’s sons and daughters—in observing their rights and our duties. To support and defend the Constitution so that we preserve and protect the rights and liberties of all Americans, including those parts of “We the People” who may not look like us, or behave as we do, or even think like us. And

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<sup>8</sup> *Id.*

certainly those same principles must apply in a criminal law system, a military justice system, for an armed force composed of volunteer members of We the People.

Often in discussing military justice, people will debate whether the system is more about discipline or justice. Certainly in the days prior to the UCMJ, the focus seemed to be primarily on iron discipline, often at the expense of true justice. But I think that's a false dichotomy. The system is, and should be, about both discipline and justice, and in fact, the two are mutually reinforcing. In my first week of law school, one of our instructors told the class that the real work of lawyers should be to stop injustice, and that is part of what any good criminal law system does. When the military justice system works properly to punish offenders, it not only enforces discipline for the commander, it provides justice to all Soldiers in the unit, who should know that they will be treated fairly and who will retain their faith in the value of doing the right thing. Justice, in fact, promotes discipline.

George Washington said, "Discipline is the soul of an army." General Cooke summarized this very well in his Hodson address ten years ago. He said that the ultimate success of any military mission depends on young men and women doing their jobs under difficult, demanding, and dangerous circumstances. That success is a product of a military system of training and education, standards and customs, ethics and values. Military justice is central to that system—it inculcates and reinforces morale and discipline. And it does so by consistent adherence to two principles: each person, regardless of rank, is responsible and accountable for his or her actions; and each person, regardless of circumstance, is entitled to be treated fairly and with dignity and respect. We say, and I hope we believe, that the Army is people, and we must always remember that every case involves people, from the Soldier accused of wrongdoing to a family member like Barbara Allen, who has been attending the pretrial proceedings for the Soldier accused of killing her husband, a first lieutenant, in a fragging incident in Iraq. We owe it to them to have, in Justice Holmes's words, a good system that is also seen as good.

We should be proud of the fact that our system has adapted and changed over time. Thomas Jefferson's words, which are affixed to a wall in this school, explain why. He said "Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new

truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.” General Eric Shinseki, former Army Chief of Staff stated it more succinctly if less elegantly: “If you don’t like change, you’re going to like irrelevance even less.” The military justice system must continue to evolve and change—but how, and who drives that change will be key. The changes that have been made over the years since 1951 have led to increased faith in the fairness of the system, both within the armed forces and from an outside perspective, and that is what future changes need to do as well.

One of the interesting aspects of past changes in our system is that many have come about from our experiences in wartime, from World War II to Korea to Vietnam. Those periods tend to highlight issues and potential problem areas, and today’s circumstances do the same. We are facing significant challenges in the current fight. This is the information age, from embedded reporters to ubiquitous CNN cameras, and individual difficult cases take on even greater significance in the light and heat of publicity. Our cases tried are on the increase, particularly in complex and often notorious cases related to sexual abuse and child pornography. As we continue to try to grow the force in a protracted conflict, the number of enlistment waivers for prior felonies is increasing. Working the difficult justice cases that overlap between deployed units and rear detachments is a growing problem. And from Abu Ghraib and other war crimes allegations to Guantanamo and the fits and starts of military commissions, we are involved in an increasing number of high profile cases that all focus increased attention on the military justice system. Since the Goldwater-Nichols Act in 1986,<sup>9</sup> we fight and operate as joint forces but we have yet to embrace that fact in military justice. And while all this is occurring, the Army has changed to a modular system that adds significant operational responsibilities for attorneys assigned to brigade combat teams (BCTs) who are also largely responsible for advising the commander on military justice and prosecuting cases. It does not appear that the operational tempo will lessen significantly anytime soon. Left unchecked, these factors and challenges are likely to have a significant impact on the fair administration of military justice—both as it is practiced and perceived. Left untended, that will leave the Army vulnerable to forced changes

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<sup>9</sup> Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified in scattered sections of 10 U.S.C.).

from the outside, possibly from those who do not fully understand or appreciate how the system works.

So what changes should we explore? Certainly we need to take a close look at the effects of modularity and OPTEMPO on our ability to provide quality military justice at the BCT level. We may well need to make adjustments in areas ranging from physical location of the trial counsel to the number of organic criminal law positions in the Office of the Staff Judge Advocate to training and selection of personnel for key military justice assignments. In a way, we are victims of our own success in operational law. Every commander wants their lawyers close by to assist with complex issues that face deployed units. But if that comes at the expense of quality military justice, which has always been and should always be our primary core competency, we simply must re-think how we are accomplishing the mission. It may be time, particularly for high profile cases, to devise specialized trial teams, much as General Tate did in prosecuting some of the cases that arose from Abu Ghraib.

As the armed forces have shrunk but the missions and requirements have not, we have increasingly used contractors to fulfill what were previously considered military responsibilities. They are in the area of operations, they are on the battlefield, they are intimately involved in what the military is doing—and in many cases, the perception is that they are part of the military. Yet we have no good method for prosecuting even serious offenses by those “accompanying the force.” The Military Extraterritorial Jurisdiction Act<sup>10</sup> was a needed first step, but in practice it is largely ineffective. Circumstances like the uncontrolled Blackwater operatives focus this issue. And yes, I know they were State Department contractors, but does that really matter? Certainly it does not from a perception standpoint, both in other countries and in our own. What’s interesting is that General Hodson highlighted this issue as a potential problem in his initial lecture in 1972—the exercise of jurisdiction over civilians accompanying the force. In the intervening decades, we have not moved forward. In fact, with the increased number of contractors, the problem has worsened. When I was the Staff Judge Advocate at European Command (EUCOM) in 1996 and we had just put our first forces into Bosnia, we discovered a U.S. contractor who was running a black market and drug sale ring on the side—and our only recourse was

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<sup>10</sup> 18 U.S.C. §§ 3261–3267 (2000).



to tell his company to fire him and send him home. No criminal prosecution was possible—and that is not justice.

Joint justice is another issue we have not really confronted or tried to solve. I think the Army is just hoping that Goldwater-Nichols will go away. It won't. And justice issues are certainly present in joint commands, as I discovered a couple times. When I was at the U.S. Special Operations command in Tampa (where General Chipman later served as one of my successors), General Shelton, then the XVIII Corps commander at Fort Bragg, was named as the new SOCOM commander. Along with other staff members, I traveled to Fort Bragg to brief him on his new responsibilities. I blithely informed him that one thing he wouldn't have to worry about was military justice, we really didn't have these issues. So, of course, immediately after he arrived in Tampa, while he was still on leave moving into his house, I had to go see him to tell him that we had a significant case involving a senior officer. And that was just the start of the flood because for the next three or four months, a new high profile case seemed to pop up every week. As I would tell General Shelton about the latest developments, I could tell he was thinking back to my assurances that he wouldn't be involved in military justice issues. It's a good thing I had LTC Tate to handle all those cases. After that assignment I headed to the European Command where our clear focus was operational law, with little attention paid to criminal law. But then, a decade ago, in February 1998, you may recall the tragedy at Cavalese, Italy, where a U.S. Marine aircraft flew through and severed the cable of a ski resort gondola, sending twenty people crashing to their deaths. This tragedy and the attendant events were under the overall jurisdiction of General Wesley Clark, the SACEUR<sup>11</sup> and an Army officer. The pilots were Marines assigned to Camp Lejeune but attached to an Air Force base in Italy, which fell under the U.S. admiral in London for claims purposes and decisions on whether to allow the Italians to prosecute. The twenty victims were from six different countries, and this had been a NATO operation. In addition, there was intense interest from the State Department and the DOD General Counsel. And there was no playbook on how to handle this, particularly from a military justice perspective. The case involved all four services and several foreign countries, and we were making it up on the fly. I don't think we've done much better since then. In fact, at Camp Bucca, Iraq, the Army brigadier general who is in charge of force protection has Sailors and Airmen working directly for him, under his control, but no

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<sup>11</sup> Supreme Allied Commander Europe.

military justice authority over them. If justice and discipline of a unit are related, and I'm convinced that they are, and one of our stated purposes for a commander-centered separate military justice system is to allow the commander to control all aspects of the unit and its members, then we must update our justice system to reflect the realities of the joint world.

There is one other change that we ought to consider, although it is not directly related to the current fight. Because of concerns over disparate sentencing, many [civilian] jurisdictions have adopted systems where judges decide sentences. That would be a significant change to our current system that allows court members to adjudge a sentence if they were the fact finders, but there is some merit to allowing this responsibility to devolve to military judges in all non-capital cases. I realize there are arguments on both sides and am not fully convinced of the right answer, but as the military justice system continues to strive for fairness and to some extent reflect the civilian justice system when appropriate, this topic deserves detailed study.

I'd like to return to the key issue of why we must have a military justice system, a criminal law system that is both fair and just. We should go back to the Constitution, the purpose of having a standing army, and our obligations to the Soldiers who make up that army.

We have endured as a nation because of the special relationship America has with its armed forces that protect and believe in constitutional freedoms. Consider this: when George Washington was sworn in as President of the United States on 30 April 1789, an emperor ruled China, a tsarina ruled Russia, a kaiser ruled Germany, a shah ruled Iran, a shogun ruled Japan, a sultan ruled Egypt, kings ruled in France and Spain; but the only one of these forms of leadership and government that is left today is the Presidency of the United States.

In large measure, the relationship that our armed forces and our nation enjoys has come about because our Army was never imposed on us from the outside; it came up from our people just like our Constitution and law came up from our people. Our Army has in the long history of America been, in many ways, ourselves. Our Army has not had a hereditary leadership caste born to rank and privilege and position. Our Army has leaders that have earned their way to the front of troops. Our Army looks like us. It is our sons and daughters; our brothers and sisters; our aunts, uncles, mothers, and fathers.

In recent years those brothers and sisters and sons and daughters fought their way over hundreds of miles of desert, stormed Baghdad, and defeated the Republican Guard, but they also handed over food to hungry Iraqis, gave their own medical supplies to Iraqi doctors, and brought water to the thirsty. No other army—no other soldiers—in the world are capable of such fierce fighting while retaining such compassion for their fellow human beings. No society except America could have produced them.

In closing, I would like to tell you about one young Soldier and his platoon. Second Lieutenant Scott Cassidy, West Point Class of 2005, joined his platoon in the 101st Airborne Division several months into their deployment in Iraq. Within three months of being the platoon leader, he had earned three Purple Hearts, but, as he put it, that made him part of the majority in the platoon because almost every Soldier had a Purple Heart. A little more than a year ago, he wrote this email:

If you watch the news, you know that the Baghdad area is in turmoil. We are spread thin but we are getting the job done. The television highlights every explosion and loss of life, but you miss what we do. You miss my Soldiers giving the little kids high-fives and soccer balls. You miss my Soldiers giving food and water to local nationals. You miss my Soldiers emplacing sewer systems and rebuilding roads. You miss my medic treating the villagers for injuries. The news shows death, murder, and violence, but daily I see smiles, hard work, and hope. Is the area in turmoil? Yes. Is it lost? No, and every day American Soldiers bring hope to these people. You won't see it in the morning paper or on the evening news, but I am telling you it's here. I know, I am seeing it and doing it. I miss everyone and look forward to coming home. Know that your Army is making you proud to be an American.<sup>12</sup>

I am proud to be an American and proud to be a Soldier in this Army. These brave and dedicated young Americans, raised in liberty and believing in constitutional principles, are still the best hope of free men and women around the world. They deserve our complete support,

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<sup>12</sup> E-mail from Second Lieutenant Scott Cassidy, to Brigadier General Patrick Finnegan and others (August 3, 2006) (on file with lecturer).

including the very best military justice system that we can provide. It will only aid in our overall success in demonstrating the strength of the rule of law and the ideal of liberty and justice for all.

**THE LOOMING TOWER:  
AL-QAEDA AND THE ROAD TO 9/11<sup>1</sup>**

REVIEWED BY MAJOR JEFFREY S. THURNHER<sup>2</sup>

*If you know the enemy and know yourself, you need not fear the result of  
a hundred battles.<sup>3</sup>*

In many respects, America knew neither its enemy nor itself on the morning of 11 September 2001 (9/11).<sup>4</sup> The United States had enjoyed a false sense of security that was shattered in an instant. In his groundbreaking narrative, *The Looming Tower*, Lawrence Wright gives unprecedented insight into the background, motivation, and deadly plans of the al-Qaeda leaders who organized the attacks on the World Trade Center and the Pentagon. He also uncovers critical mistakes and missteps of this country's intelligence and law enforcement agencies which left America vulnerable. Americans have come to realize that they must recognize the warning signs of terrorism.<sup>5</sup> The public now has a general idea of *what* terrorism is; Wright's main objective is to explain *how* terrorism came to be.<sup>6</sup>

I wholeheartedly recommend Wright's Pulitzer Prize-winning work.<sup>7</sup> *The Looming Tower* provides a true "education"<sup>8</sup> for the reader on the beginnings of modern terrorism and what we could have done to prevent

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<sup>1</sup> LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2006).

<sup>2</sup> U.S. Army. Written while assigned as a Student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Va.

<sup>3</sup> SUN TZU, *THE ART OF WAR* 51 (Lionel Giles, trans., Military Service Publishing 1944) (circa sixth century B.C.).

<sup>4</sup> See generally NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE TERRORIST ATTACKS UPON THE UNITED STATES* xv-xvi (2004) [hereinafter *THE 9/11 COMMISSION REPORT*] ("The nation was unprepared.").

<sup>5</sup> See generally *id.* at xvi (discussing the need for Americans to rethink how they approach terrorism in the future).

<sup>6</sup> See generally *The Looming Tower* by Lawrence Wright, Author Q&A, <http://www.randomhouse.com/knopf/catalog/display.pperl?isbn=9780375414862&view=qa> (last visited Apr. 14, 2008) [hereinafter *Wright Q&A*] ("[The book] examines [the al-Qaeda leaders'] backgrounds and explores the evolution of their decisions to attack America and to murder innocent people.").

<sup>7</sup> See Katherine Q. Seelye & James Barron, *Wall Street Journal Wins 2 Pulitzer Prizes; History of Civil Rights Reporting Also Wins*, N.Y. TIMES, Apr. 17, 2007, at B8.

<sup>8</sup> Dexter Filkins, *The Plot Against America*, N.Y. TIMES, Aug. 6, 2006, § 7, at 1.

it. This education serves as an important resource for Judge Advocates who continue to support the fight against a determined al-Qaeda enemy. Today's leaders must not only examine the essence of the enemy they are fighting but also reflect upon the errors that put America at risk for being attacked.<sup>9</sup> Wright distinguishes his work from other 9/11 accounts with four main strengths: an engaging writing style, clever organization, an unparalleled commitment to research, and uncompromising objectivity.

### **Wright's Engaging Writing Style Draws the Reader into the Story**

What truly elevates Wright's work is his ability to pull the reader into his story. Wright was already well regarded by many as a "superb literary stylist,"<sup>10</sup> and he advances that reputation in *The Looming Tower*. Principally, Wright's book is a detailed narrative of the years preceding the 9/11 attacks, but in reality, it is much more. Instead of simply stringing together cold, hard facts, the author uses extraordinary detail to breathe life into the people, places, and events that he describes. Wright also delivers his tale in an exciting, fast-paced, storytelling style that leaves the reader on the edge of her seat.

Wright takes a masterful approach to describing his main characters and events. One example is Wright's introduction of FBI Agent Dan Coleman, one of the first government agents to track Osama bin Laden as a threat. Wright describes Coleman as "overweight and disheveled, with a brushy moustache and hair that refused to stay combed. He was as cantankerous as a porcupine (his FBI colleagues called him 'Grumpy Santa' behind his back) . . . ."<sup>11</sup> Wright's vivid words immediately call to mind a vital image of a rather ill-tempered man.

In other chapters, Wright introduces the reader to another FBI agent, the larger-than-life John O'Neill. O'Neill, who would "become the man most identified with the pursuit of Osama bin Laden,"<sup>12</sup> is described

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<sup>9</sup> See generally THE 9/11 COMMISSION REPORT, *supra* note 4, at xviii ("We learned that the institutions charged with protecting our borders, civil aviation, and national security did not understand how grave this threat could be, and did not adjust their policies, plans, and practices to deter or defeat it.").

<sup>10</sup> Steve Weinberg, "Tower" Provides New Understanding of 9/11, BOSTON GLOBE, Aug. 15, 2006, at E6.

<sup>11</sup> See WRIGHT, *supra* note 1, at 241–42.

<sup>12</sup> *Id.* at 207.

wearing “Burberry pinstripes and . . . Bruno Magli loafers”<sup>13</sup> and being “fascinated by gadgetry and always [having] the latest electronic organizer or mobile phone in his pocket . . . .”<sup>14</sup> While the colorful descriptions are important, it is the depth to which Wright explores these characters that is his true genius. For instance, Wright exposes not only O’Neill’s actions in the FBI workplace, but also dives headfirst into many of his personal shortcomings, such as secretly dating three women—despite being a married father—and incurring heavy debts in order to cover his extravagant lifestyle.<sup>15</sup> By providing a richly-detailed look into the foibles and quirks of these key figures, Wright “introduces” them to the reader in such a tangible manner, it feels like a real-life introduction.

In particular, Wright excels in personalizing the major figures of the modern Islamic movement: Sayyid Qutb, the influential Egyptian writer who advocated the “complete rejection of rationalism and Western values”<sup>16</sup> to save Islam; Ayman al-Zawahiri, the Egyptian doctor who helped direct al-Qaeda “to put Qutb’s vision into action”;<sup>17</sup> and Osama bin Laden, the Saudi from a wealthy family who used his influence and money to create al-Qaeda in part to serve as “an Arab legion that could wage war anywhere.”<sup>18</sup> Wright focuses heavily on providing as complete a description as possible of these individuals’ lives and backgrounds.<sup>19</sup> Whether it was learning that bin Laden’s favorite childhood television show was *Bonanza*,<sup>20</sup> or that bin Laden felt betrayed when his fourth wife asked for a divorce and some of his children decided to go with her,<sup>21</sup> Wright’s realistic portrayals provide a depth to these individuals, without which the reader would be left with an easily-confused litany of two-dimensional characters.

Wright also has the rare ability to describe events in a dramatic storytelling fashion that keeps the reader constantly enthralled. It is this style that has led some commentators to accurately describe the work more as a “thriller”<sup>22</sup> than a piece of nonfiction. This exciting style helps

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<sup>13</sup> *Id.* at 237.

<sup>14</sup> *Id.*

<sup>15</sup> *See id.* at 292–95.

<sup>16</sup> *Id.* at 30.

<sup>17</sup> *Id.* at 37.

<sup>18</sup> *Id.* at 111–12.

<sup>19</sup> *See generally* Wright Q&A, *supra* note 6 (“No book has gotten such rich and intimate detail about the primary figures in this immense tragedy.”).

<sup>20</sup> *See* WRIGHT, *supra* note 1, at 75.

<sup>21</sup> *See id.* at 194.

<sup>22</sup> Filkins, *supra* note 8.

make the work a true page-turner, rather than a dry history lesson. To showcase his storytelling abilities, the author includes hundreds of anecdotes that are seamlessly woven into the fabric of the narrative. Two examples stand out as the most telling of Wright's gifted abilities and style. The first is the description of the death of Abu Ubaydah, a chief al-Qaeda lieutenant, in a freak ferry accident on his way to Tanzania in May 1996.<sup>23</sup> Wright brilliantly describes the chaotic final moments aboard the sinking vessel in these terms:

Passengers were screaming, luggage and mattresses were falling on top of them, and they clawed at each other in order to reach the door, their only escape. [Abu Ubaydah's brother-in-law] grabbed at Abu Ubaydah's hand and pulled him halfway out of the room, but suddenly the door was ripped from its hinges and al-Qaeda's military chief was pulled back into the cabin by his doomed companions.<sup>24</sup>

The second gripping example occurs when Wright provides a macabre description of the massacre of fifty-eight tourists in the Egyptian attraction of Luxor in 1997:

Six young men dressed in black police uniforms and carrying vinyl bags entered the temple precinct shortly before nine in the morning. One of the men shot a guard, and then they all put on red headbands identifying themselves as members of the Islamic Group. . . . The other men crisscrossed the terraced temple grounds, mowing down tourists by shooting their legs, then methodically finishing them off with close shots to the head. They paused to mutilate some of the bodies with butcher knives. . . . The ornamented walls were splattered with brains and bits of hair.<sup>25</sup>

With such graphic accounts, *The Looming Tower* at times reads like an adventure novel. I continually found myself eager to read the next "tale" as told in Wright's flawless and dramatic style.

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<sup>23</sup> See WRIGHT, *supra* note 1, at 232.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 257.



### Wright Utilizes Clever Organization

Obviously, Lawrence Wright expresses a great deal of creativity through his literary style in *The Looming Tower*, but he also gets creative with his organization. Wright's original formatting choices enhance the work significantly. In general, he follows a fairly chronological order of events. In the beginning, the narrative follows the major characters from childhood to adulthood.<sup>26</sup> Wright organizes his ideas and descriptions in a cohesive manner so that the reader obtains a clear understanding of each of the key players, chiefly Qutb, Zawahiri, bin Laden, and O'Neill.

Throughout the work, however, Wright skillfully switches perspectives between the al-Qaeda preparations for attacks and the American attempts to defeat al-Qaeda. Early in the work, the transitions occur infrequently.<sup>27</sup> As the story moves closer to the 9/11 attacks, Wright jumps more rapidly between the al-Qaeda and the American points of view.<sup>28</sup> This method of intertwining both perspectives creates a palpable suspense for the reader, as well as an illusion of chaos which mirrors the chaos of the terrorist attacks themselves.

In particular, Wright brilliantly organizes his description of the events of 9/11. The author repeatedly interrupts his narrative about each of the planes crashing and the ensuing chaos, with tales of bin Laden and his supporters trying to follow the news broadcasts of the attacks.<sup>29</sup> After the first plane strikes, Wright launches into a tale of the terrorists trying in vain to set up a satellite dish from their cave headquarters in Afghanistan to watch the events unfold, and being forced instead to listen to the broadcast on the radio.<sup>30</sup> As the following planes strike, Wright repeatedly transitions back to bin Laden telling his followers "Wait, wait"<sup>31</sup> and holding up fingers as each of the new strikes is announced on the news.<sup>32</sup> Reading those passages and thinking of the simultaneous shock and fear in America juxtaposed with the celebrating and cheering in a cave in Afghanistan is eerie and a bit horrifying. Of course, it is also an extremely effective method of grabbing and holding the reader's

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<sup>26</sup> See *id.* at 32–83 (describing the backgrounds of Zawahiri and bin Laden).

<sup>27</sup> See *id.* at 7–83 (detailing basically without interruption the lives of Qutb, Zawahiri, and bin Laden).

<sup>28</sup> See *id.* at 333–61.

<sup>29</sup> See *id.* at 356–59.

<sup>30</sup> See *id.*

<sup>31</sup> *Id.* at 357.

<sup>32</sup> See *id.*

attention, which is exactly why the author chose this method of organization.

### Wright's Research is Meticulous and Extensive

One of the most admirable aspects of this work is how the author fully committed himself to providing the reader a complete picture of the terrorist attacks. He dedicated nearly five years to researching the events that led to the attacks on America.<sup>33</sup> Wright sought to provide one of the most comprehensive texts ever written on the subject, even going so far as to take a position in Saudi Arabia assisting young writers when his journalist visa request was repeatedly denied.<sup>34</sup> During that time, he conducted hundreds of interviews with individuals who had direct knowledge of the major players and events of the terrorist movement.<sup>35</sup> He spoke with key figures across the Muslim world, in America and in other countries.<sup>36</sup> As a result of talking with people who intimately knew bin Laden, Zawahiri and others, Wright was able to obtain very personal information about them, which makes his work an invaluable resource.

For instance, one anecdote cites Issam al-Turabi, a friend of bin Laden's and the son of the leader of Sudan, regarding the expulsion in 1995 of Zawahiri and much of the Egyptian core of bin Laden's organization from Sudan.<sup>37</sup> Drawing from a personal interview with al-Turabi, the author describes bin Laden as "crippled by the loss," remarking how "depressed" bin Laden appeared and stating that "the relaxed and playful character Issam [al Turabi] had known was gone."<sup>38</sup> This commentary provides valuable insight into the important relationship between bin Laden and Zawahiri. First hand accounts, such as this one, lend a great deal of credibility to the narrative.

While Wright's extensive research pays off in his unsurpassed knowledge of the shadowy dealings of the al-Qaeda organization, it is not without its flaws. The author's knowledge of conversations between key players in the Islamic movement borders on unbelievable. Other commentators have complained that he relies too heavily on potentially

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<sup>33</sup> See Wright Q&A, *supra* note 6.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See WRIGHT, *supra* note 1, at 219.

<sup>38</sup> See *id.*

faded memories, saying, “Wright has drawn up verbatim reconstructions of entire conversations, some of which took place more than a decade ago. . . . [I]t’s hard to believe that memories are that good.”<sup>39</sup> I concur.

There is one section where I find it particularly difficult to understand how Wright can rely on the story he was told. The author describes a secret meeting, held in Pakistan in 1988, of the organization that would later morph into al-Qaeda.<sup>40</sup> His source for this information, a person who had attended the meeting, refused to speak directly with him.<sup>41</sup> Instead, Wright relied on information relayed to him through an “intermediary.”<sup>42</sup> Wright’s heavy reliance on the accuracy of a middle man’s information seems suspect.<sup>43</sup> Luckily, skeptical sources such as these are the exception in the work, not the norm.

### Wright Remains Objective in His Work

Wright’s extensive research helped him create a well-balanced work that provides a thorough analysis of the 9/11 attacks. Wright is remarkably able to remain objective in his work despite, like most Americans, being devastated by al-Qaeda’s actions.<sup>44</sup>

Wright attempts to portray bin Laden and Zawahiri as real people, rather than images on Most Wanted posters.<sup>45</sup> As discussed previously, Wright expends great effort to reveal the al-Qaeda leaders’ family and personal lives in detail. He does not, however, shy away from their violent actions. Wright’s strength is being able to expose those events without personally commenting on them. For instance, while discussing a situation in which Zawahiri orders the violent execution of two thirteen-year-old boys who were drugged and blackmailed by Egyptian

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<sup>39</sup> Filkins, *supra* note 8.

<sup>40</sup> See WRIGHT, *supra* note 1, at 131–32.

<sup>41</sup> See *id.* at 448.

<sup>42</sup> See *id.*

<sup>43</sup> But see generally *id.* (attempting to address the issue by stating, “I believe the reader can begin to appreciate . . . the imperfect means I have sometimes employed in order to gain information.”).

<sup>44</sup> See Wright Q&A, *supra* note 6 (“I was very fond of the time I spent [in the Middle East in the 1970s], which added to the heartbreak I experienced on 9/11.”).

<sup>45</sup> See Most Wanted Terrorist—Usama Bin Laden, <http://www.fbi.gov/wanted/terrorists/terbinladen.htm> (last visited Apr. 14, 2008); Most Wanted Terrorist—Ayman Al-Zawahiri, <http://www.fbi.gov/wanted/terrorists/teralzawahiri.htm> (last visited Apr. 14, 2008).

intelligence into spying on Zawahiri, Wright refrains from criticizing Zawahiri for being ruthless.<sup>46</sup> By doing so, he enables the reader to form her own opinions based on facts.

The only area in which Wright's objectivity might be called into question is in his handling of the CIA's refusal to share information with the FBI. While he abstains from lambasting the CIA directly, he personally believes the agency is to blame.<sup>47</sup> Further, he emphasizes heavily the negative effects of many of their decisions to withhold information.<sup>48</sup> Generally, however, Wright counters any such accusations of bias by routinely offering possible alternative explanations for the withholding of the intelligence.<sup>49</sup>

### Conclusion

*The Looming Tower* is a must-read for every person who wishes to understand the beginnings of modern terrorism—hatred, fear, and the desire for revenge—and to listen to the lessons that tragedy has to teach. Judge Advocates will particularly benefit from the work, as it educates them about their determined al-Qaeda enemy and forces them to explore the ways 9/11 could have possibly been prevented. These vital lessons are especially easy to absorb because Wright uses a skillful, engaging style and organization. In the end, it would be hard to find a better written or more thorough and objective description of the events leading up to the terrorist attacks of 9/11 than *The Looming Tower*.

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<sup>46</sup> See WRIGHT, *supra* note 1, at 215–16.

<sup>47</sup> See Wright Q&A, *supra* note 6 (“9/11 could have been prevented if the CIA and the NSA had cooperated with the FBI . . .”).

<sup>48</sup> See, e.g., WRIGHT, *supra* note 1, at 268–69 (discussing the CIA's refusal to turn over al-Qaeda information retrieved from a computer in Europe), 311–13 (highlighting the CIA failure to alert others to the presence of al-Qaeda in the United States), 362 (discussing an FBI agent vomiting in disgust upon learning that the CIA had known that two of the 9/11 hijackers were in the United States for over a year and a half).

<sup>49</sup> See *id.* at 312–15 (explaining alternate theories, such as the CIA had too many threats to deal with and the CIA was attempting to recruit the al-Qaeda members as double agents).

**THE FALL OF CARTHAGE: THE PUNIC WARS 265–146 BC<sup>1</sup>**REVIEWED BY MAJOR BRIAN HARLAN<sup>2</sup>

*If we are to learn from the past then history must first be understood on its own terms.*<sup>3</sup>

## I. Introduction

*The Fall of Carthage: The Punic Wars 265–146 BC (The Fall of Carthage)* is Dr. Adrian Goldsworthy's endeavor to "provide an accessible account and analysis" of the entire span of the Punic Wars in a single volume.<sup>4</sup> Goldsworthy succeeds, and his work provides an enjoyable read that blends in equal measures insightful scholarship and captivating prose.

This review will focus on the book's relevance for the Soldier, to whom an understanding of military history is as vital now<sup>5</sup> as it has ever been.<sup>6</sup> Current Army doctrine reminds us that "warfare in the 21st century retains many of the characteristics it has exhibited since ancient times."<sup>7</sup> Any exploration of those "retained characteristics" would be well-served to begin with an examination of the seminal period in Western history, and the greatest factor in its development and expansion—the Punic Wars.<sup>8</sup> *The Fall of Carthage* provides an ideal vehicle for understanding that period in its own context.<sup>9</sup>

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<sup>1</sup> ADRIAN GOLDSWORTHY, *THE FALL OF CARTHAGE: THE PUNIC WARS 265–146 BC* (Phoenix 2006) (2000).

<sup>2</sup> U.S. Army. Written while assigned as a Student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

<sup>3</sup> GOLDSWORTHY, *supra* note 1, at 368.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> "This is a game of wits and will. You've got to be learning and adapting constantly to survive." U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY ix (15 Dec. 2006) [hereinafter FM 3-24] (quoting General Peter J. Schoomaker, U.S. Army).

<sup>6</sup> "One means currently employed to assist in preparing for and planning for war is the study and analysis of military history." AMERICA'S FIRST BATTLES: 1776–1965, at ix (Charles E. Heller & William A. Stofft eds., 1986).

<sup>7</sup> FM 3-24, *supra* note 5, at 1-1.

<sup>8</sup> See GOLDSWORTHY, *supra* note 1, at 13. "Had the Romans lost the Punic Wars then the history of the world would have been very different." *Id.* At the same time, "Roman imperialism . . . was greatly accelerated by the struggle with Carthage." *Id.* at 12–13.

<sup>9</sup> *Id.* at 18.

## II. Why *This* Study of the Punic Wars?

Goldsworthy's thesis is that "each society and culture tends to have a unique view of warfare which affects how they fight and as a result how they may be beaten," and that the Punic Wars are among the best historical example of that principle.<sup>10</sup> Several themes emerge as principal components of the divergent Roman and Punic views of warfare, and much of Goldsworthy's analysis is devoted to examining key decisions and battles in relation to the distinct views of the respective sides of the conflict.<sup>11</sup> Goldsworthy's methodology, combined with the clarity and brevity of his presentation, make *The Fall of Carthage* a particularly valuable exploration of the Punic Wars.

Goldsworthy hints at his motive in writing on the subject by lamenting that "the Punic Wars have disappeared from the wider consciousness in Europe and North America."<sup>12</sup> Goldsworthy's retelling of this seminal period in the history of Western civilization<sup>13</sup> in an accessible and compact format can only help to reverse this trend. Nevertheless, the author acknowledges that "it might well be asked what more can be added" to the body of writings on the Punic Wars.<sup>14</sup>

Goldsworthy responds by noting that although the wars are the subject of substantial scholarly writing, "in some respects the wars have not been properly treated," and although a few books have dealt with the entire period in one volume, they are not "entirely satisfactory."<sup>15</sup> He highlights areas where historians have, in his opinion, "fallen into the trap of judging events by modern standards," such as the causes of the

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<sup>10</sup> *Id.* at 368 ("[T]he difference between two philosophies of war has rarely been as clearly illustrated as it was during the Punic Wars.").

<sup>11</sup> *See, e.g., id.* at 36 (explaining that in the Hellenistic system, experienced armies were "a precious thing" and Carthaginian commanders were consequently less willing to commit them). This theme is revisited throughout the text. *See id. passim.* Similarly, Goldsworthy often returns to an analysis of booty and glory as primary components of morale in ancient armies. *See, e.g., id.* at 153 (Hannibal in Spain), 165 (perseverance in the Alps), 169 (Hannibal recruiting Gauls), 172–73 (effect of victories in skirmish).

<sup>12</sup> *Id.* at 9.

<sup>13</sup> *Id.* at 365; *see also id.* at 13 (discussion of long-term effects of Roman victory), 15 (Punic Wars as impetus for written history of Roman Empire), 16 (continuing applicability to military studies).

<sup>14</sup> *Id.* at 17.

<sup>15</sup> *Id.*

Second Punic War,<sup>16</sup> the nuances of the Roman political system,<sup>17</sup> and the exclusive use of modes of analysis that contradict primary sources.<sup>18</sup> The author is not immune to the temptation to draw parallels with modern military analogies.<sup>19</sup> He scrupulously avoids, however, the practice of “suggesting alternative and perhaps better courses of action” with the advantage of hindsight.<sup>20</sup> His goal, instead, is to “place the Punic Wars firmly within the context of the military theory and practice of the third to second centuries BC.”<sup>21</sup>

This answers the question of what more can be added to the body of work on the Punic Wars. The question remains, what relevance does a “satisfactory” and “proper treatment” of all three wars have for the modern reader? Goldsworthy answers with new analysis of old sources,<sup>22</sup> and with an organizational approach that is methodical and intellectually honest.<sup>23</sup> He also plainly states when a particular debate is beyond the scope of the book.<sup>24</sup> *The Fall of Carthage* also uses recent archaeological evidence<sup>25</sup> and experimentation<sup>26</sup> to illuminate ancient debates.

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<sup>16</sup> *Id.* at 143. Compare the “comparative narrative history” approach favored by Donald Kagan. DONALD KAGAN, *ON THE ORIGINS OF WAR* 9 (1995). This approach measures historical decisions in part on their outcome, including questions such as “what choices were available.” *Id.* at 10. Kagan’s comparative analysis faults the Romans for incurring the “price of a long, bloody, costly, devastating, and almost fatal war” because they were “unwilling to commit themselves clearly and firmly to the price of defending the peace.” *Id.* at 274.

<sup>17</sup> See GOLDSWORTHY, *supra* note 1, at 183 (“It is important not to confuse modern concepts of ‘popular support’ with Roman.”).

<sup>18</sup> Goldsworthy notes that “[a]ncient authors continually explain major wars as inspired by the lust for glory of kings, emperors, and princes, and we would be rash to wholly ignore this view.” *Id.* at 150. However, “historians are generally reluctant to attribute important events to the moods and actions of individual leaders, preferring to seek explanation in more general trends.” *Id.* at 147.

<sup>19</sup> See, e.g., *id.* at 113 (explaining the difficulty of successful navies adapting to novel tactics by comparing the introduction of the Roman *corvus* in the First Punic War to the emergence of the aircraft carrier circa World War II).

<sup>20</sup> *Id.* at 19.

<sup>21</sup> *Id.* at 18.

<sup>22</sup> See, e.g., *id.* at 48 (ascribing faulty assumptions as to the composition and introduction of Roman *velites*, or light infantry, to the “dubious interpretation of a single passage in Livy”).

<sup>23</sup> See, e.g., *id.* at 104 (addressing the ongoing debate regarding fleet composition and acknowledging that his choice of data is speculative).

<sup>24</sup> See, e.g., *id.* at 158 (specific route of Hannibal’s army through the Alps).

<sup>25</sup> See, e.g., *id.* at 104 (analyzing debate over skill of Roman shipwrights in light of recent shipwreck discovery).

*The Fall of Carthage* relies most heavily on the best ancient sources available: Polybius, Livy, and other Greek and Roman historians in that order of precedence.<sup>27</sup> The lay historian will benefit from the author's detailed examination and critique of these sources, as Goldsworthy specifically references the difficulties associated with his sources throughout the text, and examines them in fine detail in relation to contentious issues.<sup>28</sup> He regularly explains why he chooses one interpretation over another.<sup>29</sup> By doing so, Goldsworthy illustrates how the differing interpretations may affect the reader's understanding of events, without interrupting the course of the narrative.<sup>30</sup> In addition, Goldsworthy routinely provides secondary sources on both sides of an issue when a contestable fact or assumption is presented.<sup>31</sup>

Goldsworthy's style impressively re-creates and maintains the suspense of the campaigns despite the reader's knowledge of the outcome.<sup>32</sup> He answers how the factors he identified in the introduction influenced the outcome of key events, returning the reader to the academic thesis while satisfying the reader's curiosity as to why potential outcomes were not realized.<sup>33</sup>

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<sup>26</sup> See, e.g., *id.* at 98 (archaeological evidence tested by recent reconstruction of a period Trireme).

<sup>27</sup> See *id.* at 20–22.

<sup>28</sup> See, e.g., *id.* at 199 (examining views on the roles of Varro and Paullus in the Cannae defeat).

<sup>29</sup> See, e.g., *id.* at 201 (discussing varying viewpoints on the positioning of forces at Cannae).

<sup>30</sup> See, e.g., *id.* “Such a positioning makes the movements of both armies more intelligible and will be followed here.” *Id.*

<sup>31</sup> See, e.g., *id.* at 215–16 (discussing ongoing debate as to whether Rome would surrender if the city were besieged after Cannae). The debate began almost immediately after the battle, and Goldsworthy tells the story of Punic officer Maharbal offering to take the cavalry directly to Rome and when rebuffed, telling Hannibal “Truly the gods do not give everything to the same man: you know how to win a victory, Hannibal, but you do not know how to use one.” *Id.* at 215. The author's notes include multiple references for and against Livy's conclusion. See *id.* at 382 n.26.

<sup>32</sup> See, e.g., *id.* at 166 (“Hannibal had done what the Romans had not expected or believed impossible . . . [i]t now remained to be seen what his invading army could achieve now that it had reached its destination”), 339 (In 151 BC Rome demanded Punic submission, and “Carthage now appeared to be at their mercy, unprepared and unarmed. Yet the war was to last until 146 and prove far harder than the consuls expected.”).

<sup>33</sup> See, e.g., *id.* at 166. Hannibal, of course, “failed to win the war in Italy,” despite having “not been defeated in a single important battle” in sixteen years of campaigning in Italy. *Id.* at 244. Hannibal's strategy was doomed from the outset, for even though the “Romans were beaten and ought to have the sense to realize it,” the Roman view of warfare dictated that “the Senate refused even to see” the Punic delegation. *Id.* at 217.



Goldsworthy's use of sources is neither flawless,<sup>34</sup> nor exhaustive,<sup>35</sup> but provides ample basis for further research. Those who lack a passing familiarity with the chronology and personalities of the Punic Wars, and the form and function of the Roman government of the period, should start with a review of the useful chronology, glossary, index, and other reference materials.<sup>36</sup>

### III. Ancient Lessons for Modern Soldiers

Military scholars throughout history have sought to apply wisdom from the experiences of the Punic Wars to their time.<sup>37</sup> *The Fall of Carthage* adroitly explores areas of interest for the military reader that comprise the full spectrum of factors in twenty-first century warfare, including insurrection,<sup>38</sup> military discipline,<sup>39</sup> atrocities and their effects,<sup>40</sup> strategic and tactical initiative,<sup>41</sup> strategic intelligence,<sup>42</sup>

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<sup>34</sup> Perhaps the most glaring failure to identify a source is in his twice citing General Norman Schwarzkopf without reference. *See id.* at 16 ("as recently as the Gulf War in AD 1991, the UN commander claimed to have drawn inspiration for his swift and highly successful operation from Hannibal's campaigns"), 197 ("The UN Commander in the Gulf War, General Norman Schwarzkopf, claimed to have employed principles based on study of Hannibal's campaigns and Cannae in particular in the planning and control of his own brief and devastatingly effective campaign").

<sup>35</sup> *See id.* at 10 ("I have not attempted to provide references to the entire literature dealing in some way with aspects of these wars, nor have I included every theory or interpretation advanced by scholars . . .").

<sup>36</sup> *See id.* at 369–412. These materials include notes to the text, a chronology, appendices on the republican political system and the consular army, detailed index, and sixteen maps highlighting key battles and areas of operation included within corresponding chapters.

<sup>37</sup> *See id.* at 16.

<sup>38</sup> *See id.* at 249. Roman arrogance in small unit actions were seen by Spanish tribes as a "display of strength," and allowed the small Roman forces to forge alliances with strong tribal leaders who "were able to persuade more of the tribes to join them." *Id.* On the other hand, Punic commanders in Spain "tended to concentrate on the problems of the area under his immediate control" which "frequently prevented the effective coordination of and mutual support between the Punic forces." *Id.* at 251.

<sup>39</sup> *See, e.g., id.* at 50 (the punishment was death for sleeping sentries, camp thieves, and practicing homosexuals), 132 (Punic commanders were crucified after failures), 351 (Roman officers cut down routed Roman soldiers), 353 (those who plundered without permission were barred from division of spoils).

<sup>40</sup> *See, e.g., id.* at 168 (Hannibal's "calculated display of ruthlessness" with Gallic tribes), 186 (Hannibal "deliberately provoking Romans with the savagery of his depredations"). The effects of such policies varied, in some cases displaying "the inability of the enemy to oppose him." *Id.* at 192–93. In other cases, Romans were "desperate to fight and avenge the devastation Hannibal's progress had wrought on Italian fields." *Id.* at 200.

prisoners of war,<sup>43</sup> and myriad other areas applicable to the modern profession of arms.

In addition, the professional warrior and casual student of military history alike will find valuable context in Goldsworthy's recounting of numerous ancient figures and folkloric events.<sup>44</sup> Other events are of particular interest to the military professional, including well developed sketches of the "ideal of Hellenistic generalship."<sup>45</sup> Goldsworthy's narrative skill juxtaposes the heroic legends of such men with their sad fates.<sup>46</sup> Goldsworthy also captures the timeless and peculiar sense of morbid humor on the battlefield.<sup>47</sup> Perhaps most poignantly, he illustrates the tragedy of soldiers cast aside by their society.<sup>48</sup>

The thesis of *The Fall of Carthage* contrasts the distinct Roman and Punic views of warfare: the Roman view of warfare as a mortal struggle, and the Carthaginian view, reflecting the Hellenistic ideal of war as a

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<sup>41</sup> See, e.g., *id.* at 153 (description of difficulties of the Alpine crossing and the Romans' shock at Hannibal's success), 176 (Hannibal took bold risks, but only on his own terms).

<sup>42</sup> *Id.* at 163 ("[T]he poor strategic intelligence available to commanders . . . must always be borne in mind by modern historians attempting to analyse their decisions."). Goldsworthy supports this assertion with numerous examples. See, e.g., *id.* at 162 (Hannibal and the Romans' chance encounter on march to Italy), 163 (arriving in Po Valley, Hannibal assumed that Scipio's personal presence meant that another consular army was also present).

<sup>43</sup> See, e.g., *id.* at 186 (Roman volunteers brought chains to use for enslaving captured enemies), 189 (those few Romans who survived at Lake Trasimene became slaves themselves after their defeat).

<sup>44</sup> See, e.g., *id.* at 91 (moral play of Regulus dutifully facing cruel death by torture); *id.* at 122 (Claudia's aristocratic arrogance, wishing her brother would lose another naval battle so that she might have fewer poor citizens to deal with), 145 (Fabius' famous oratory to Carthage at the start of the Second War, in which he "carried in the folds of his toga both peace and war, and could let fall from it whichever the Carthaginians chose").

<sup>45</sup> *Id.* at 157. The best example is Hannibal, whose martial traits included diligence, boldness, and physical and moral courage. See *id.* These traits influenced generations of leaders, including Dwight Eisenhower, whose boyhood hero was Hannibal. See STEPHEN E. AMBROSE, *EISENHOWER: SOLDIER AND PRESIDENT* 19 (rev. ed. 1990).

<sup>46</sup> See GOLDSWORTHY, *supra* note 1, at 27 (Hannibal's fate), 324 (Scipio's fate).

<sup>47</sup> See, e.g., *id.* at 203. "[T]he size of the Roman army was daunting, and one of Hannibal's officers, a certain Gisco . . . commented on their superiority." *Id.* Hannibal "is said to have looked solemn and then quipped that whilst there may be a lot of Romans over there, there is not one called Gisco . . ." *Id.*

<sup>48</sup> See, e.g., *id.* at 218, 266-67, 288, 319-20. The survivors of Cannae were sent to Sicily, "not allowed discharge or return to Italy until the end of the war," and played a major role in several later battles. *Id.* at 218.

means to increase economic and political influence.<sup>49</sup> Goldsworthy does not compare either to later Western views,<sup>50</sup> but again restrains his focus to the context of the period.<sup>51</sup> The outcome of the Third Punic War was presaged as much by the Carthaginian view of the scope and purpose of warfare as it was by Rome's "customary stubbornness."<sup>52</sup> The destruction of Carthage as a physical and cultural entity may be somewhat exaggerated in the public consciousness,<sup>53</sup> but its destruction as a political and military entity was complete and final.<sup>54</sup>

Goldsworthy identifies the willingness of Roman civilians in all levels of society to bear the burdens of war as a key element of Roman resilience.<sup>55</sup> Goldsworthy contrasts the uninterested attitudes of the Punic aristocracy and citizens.<sup>56</sup> This element of the thesis is supported

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<sup>49</sup> See *id.* at 315. The "fundamental difference in the behaviour of Rome and Carthage when under threat" was that "the Carthaginians expected a war to end in negotiated peace," whereas "[t]he Romans expected a war to end in total victory or their own annihilation." *Id.*

<sup>50</sup> The U.S. view is that "[w]arfare remains a violent clash of interests between organized groups characterized by the use of force. Achieving victory still depends on a group's ability to mobilize support for its political interests . . . and to generate enough violence to *achieve political consequences.*" FM 3-24, *supra* note 5, at 1-1 (emphasis added). The British view has been similar: none of Britain's wars between the late sixteenth century and the Second World War ended in unconditional surrender. See RICK ATKINSON, *AN ARMY AT DAWN: THE WAR IN NORTH AFRICA, 1942-1943*, at 294 (2002).

<sup>51</sup> See GOLDSWORTHY, *supra* note 1, at 18 (discussing analysis of decisions "within the context of the military theory and practice of the third to second centuries BC").

<sup>52</sup> M. ROSTOVITZ, *ROME 64* (Elias Bickerman, ed., Oxford University Press 1960) (1927).

<sup>53</sup> See GOLDSWORTHY, *supra* note 1, at 354 ("The oft repeated story of the ground being ploughed up and the earth sown with salt to prevent future cultivation is a much later invention."). For an example of the exaggerated view, see PAUL SEABURY & ANGELO CODEVILLA, *WAR: ENDS AND MEANS* 10 (1989) ("Whereas the first target of nuclear weapons, Hiroshima, is today a thriving city, Carthage was erased forever by fire, sword, and Roman plows followed by men spreading salt.").

<sup>54</sup> See GOLDSWORTHY, *supra* note 1, at 357 ("Carthage the political entity . . . was utterly destroyed in 146," but "[a]spects of its culture persisted in the region.").

<sup>55</sup> See *id.* at 123. "The Roman elite clearly identified themselves very strongly with the state in a way which modern cynicism should not make us doubt." *Id.* The citizenry shared this commitment: "On the whole this expansion [of the army] was made possible by the willingness of ordinary citizens to submit to years of harsh military discipline and extremely dangerous campaigning." *Id.* at 315.

<sup>56</sup> See, e.g., *id.* at 126 ("The Punic aristocracy . . . made no attempt to follow the example of the Roman elite and put their private wealth at the disposal of the state"). Punic armies were generally comprised of mercenaries and foreign soldiers, while "[c]itizens were only obliged to undergo military service to face a direct threat to the city itself." *Id.* at 31-32.

by analysis of the Roman resistance, that stiffened despite tremendous losses of citizen-soldiers.<sup>57</sup>

The Hellenistic model of warfare usually involved negotiated peace after a single decisive engagement.<sup>58</sup> The Punic Wars generated numerous major battles and, in turn, carnage on a scale “rivaling even the industrialized slaughter of the twentieth century.”<sup>59</sup> Goldsworthy compellingly describes how the above-average casualty figure for Hannibal’s victorious army at Cannae was produced partly by the “long and ghastly struggle fought to destroy the surrounded Roman host.”<sup>60</sup> Although “[t]his phase of the battle is passed over briefly by our sources,” he describes in detail the struggle not “of tactical brilliance, but of prolonged butchery,” during which “Punic soldiers had to overcome their exhaustion . . . the edges of their swords blunted by so much killing.”<sup>61</sup>

*The Fall of Carthage* returns here to the peculiar Roman view of war, demonstrating how the crises caused by Hannibal’s victories drove Rome to “obsessive adherence to obscure religious rites,”<sup>62</sup> even to the “rare recourse to human sacrifice,”<sup>63</sup> yet never to concede defeat and end the conflict.<sup>64</sup> Indeed, at no time “did the Roman Senate or any Roman commander seriously consider conceding defeat and negotiating with the enemy.”<sup>65</sup>

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<sup>57</sup> *Id.* at 217. “In the first two years of [the Second Punic War], the Romans and their allies had suffered at least 100,000 casualties, over 10 per cent of population eligible for military service” *Id.* The elite were not excluded, as “at least one third of the Roman Senate had been killed in battle.” *Id.* Goldsworthy’s deft comparison of Cannae’s approximately 50,000 Roman dead “heaped up in a few square miles of open plain” to the Somme’s estimated 19,000 killed “along a 16 mile front” is particularly effective. *Id.* at 213.

<sup>58</sup> *See id.* at 259 (“Like any other Hellenistic state, they expected wars to be concluded by a negotiated settlement.”).

<sup>59</sup> *Id.* at 197.

<sup>60</sup> *Id.* at 213.

<sup>61</sup> *Id.* at 212–13.

<sup>62</sup> *Id.* at 220.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 217 (“[B]y the standards of the day [Hannibal] had very clearly won the war.”). Pyrrhus and Hannibal, after “inflict[ing] a string of disasters . . . [b]oth sent ambassadors to Rome and could not understand when the Senate refused even to speak to them unless they, the victors, conceded defeat.” *Id.* at 92.

<sup>65</sup> *Id.* at 315.

By contrast, defeats routinely motivated Carthage to seek peace.<sup>66</sup> Goldsworthy convincingly argues that even Hannibal, who so readily adapted to an aggressive posture, thrusting in the Roman style at his enemy's strategic center of gravity,<sup>67</sup> never intended to destroy or subjugate Rome.<sup>68</sup> The notable exception is the fierce Punic resistance in the Third War, and even then only "[w]hen the very existence of their city was under threat."<sup>69</sup> Goldsworthy summarizes his thesis by noting that Rome had been fighting that way from the beginning.<sup>70</sup>

#### IV. Conclusion

*The Fall of Carthage* has tremendous value as an accessible study of the Punic Wars. It is sufficiently reliable, well-referenced, and concise to be used as a primer by the military professional seeking a greater understanding of classical warfare. Whether for the purpose of illuminating the characteristics of ancient warfare common to modern conflicts, or providing professional development as an entertaining entrée into a general study of military history, *The Fall of Carthage* merits a place in any military professional's reading list.

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<sup>66</sup> See *id.* at 315.

<sup>67</sup> See *id.* at 145. "In the First War the Carthaginians had invariably responded to Roman moves . . . . From the beginning the Second War was to be very different and the main reason for this was the influence of one man, Hannibal Barca." *Id.* at 152.

<sup>68</sup> See *id.* at 217. Hannibal fought not "to destroy Rome, but for 'honour and power,' desiring to remove the limitations imposed on Carthage after the First War and reassert her dominance in the western Mediterranean." *Id.*

<sup>69</sup> *Id.* at 355.

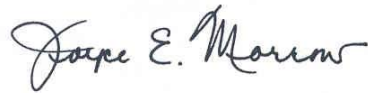
<sup>70</sup> See *id.* at 356. Roman efforts from the outset relied on "brute force (*bia*) in all their activities, throwing massive resources into a project and expecting success through effort alone." *Id.* at 116. Goldsworthy notes, however, that by the time of the Third Punic War, this virtue had turned to a liability as inexperienced soldiers "believed . . . that success was their due simply because they were Roman." *Id.* at 334.



By Order of the Secretary of the Army:

GEORGE W. CASEY, JR.  
*General, United States Army*  
*Chief of Staff*

Official:

A handwritten signature in cursive script that reads "Joyce E. Morrow".

JOYCE E. MORROW  
*Administrative Assistant to the*  
*Secretary of the Army*  
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