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

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As the civil judiciary is free from the control of the executive, so the military [*judiciary*] *must be untrammeled 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.*[1]

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.*[2]

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[1] 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).

[2] 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[3] 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.[4]

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).

[3] 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).").

[4] *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).[5] 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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[5] 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.[6] 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.[7] 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.[8] The court's action coupled with the President's inaction creates an unintended defect in the system. Other capital courts-martial[9] 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.[10] Consequently,

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[6] Loving v. United States, 64 M.J.132, 135 (2006) (providing appellate history).
[7] 517 U.S. 748 (1996).
[8] *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).
[9] *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.
[10] *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

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.[11]

This article advocates a reform to military capital litigation. Military offenders face a constitutionally[12] 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.

[11] *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.

[12] 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.
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> [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.[13] 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.[14] 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.[15] 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.[16]

> 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).

[13] 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 Conners, *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).

[14] *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.").

[15] 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.

[16] 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.[17] 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.[18] Consequently, cases affirmed on appeal have fallen into a "legal vacuum"; other capital courts-martial and military commissions are sure to follow.[19]

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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[17] 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).

[18] 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/bal md.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).

[19] 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[20] even though some criticisms of the military justice system exist.[21] 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."[22] 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.[23] Legally, these capital courts-

[20] *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.

[21] *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* Lindsy 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.").

[22] 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*.

[23] 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.[24]

A. Federal Military Death Penalty[25]

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."[26] 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."[27]

The UCMJ establishes a separate system that fully meets legal requirements, especially in capital courts-martial.[28] 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."[29] 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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[24] Loving v. United States, 517 U.S. 748 (1996).
[25] 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).
[26] ROBERT D. PECKHAM & EDWARD F. SHERMAN, THE MILITARY IN AMERICAN SOCIETY 1–3 (1978) (citation omitted).
[27] COLONEL EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURES OF COURTS-MARTIAL 171 (1908).
[28] Rives, *supra* note 20, at 233.
[29] *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."[30]

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."[31] The military capital offenses[32] are mutiny or sedition, misbehavior before the enemy, subordinate compelling surrender, forcing a safeguard, aiding the enemy, espionage, and improperly hazarding a vessel.[33] The non-military capital offenses are premeditated murder, felony murder, and rape, all of which have civilian counterparts.[34] 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.[35]

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[30] 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)).

[31] 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).

[32] "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.

[33] 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).

[34] *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* 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).

[35] 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).[36] First, a commissioned officer conducts a mandatory pretrial investigation, known as an Article 32 investigation,[37] 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.[38] Next, the general court-martial convening authority (GCMCA)[39] determines if a case should be referred as capital[40] after obtaining the legal advice of his staff judge advocate (SJA).[41] 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.

[36] 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).

[37] 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).

[38] MCM, *supra* note 5, R.C.M. 405. Charges in the military are preferred by a commander. *Id.* R.C.M. 307.

[39] *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.

[40] 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.*

[41] 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,[42] with the assistance of a capital mitigation expert,[43] to present materials and evidence in support of a non-capital referral.[44] If referred as a capital court-martial, a military judge will oversee the remaining pre-trial procedures and administer the trial.[45]

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.

[42] 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.*

[43] 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).

[44] 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.*

[45] *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.[46] Most of these factors are military in nature,[47] but none of the Soldiers currently on death row were convicted solely for military aggravating factors.[48] The non-military aggravating factors were formulated after "the examination of aggravating circumstances for murder in various states"[49] 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."[50]

At trial, following the conclusion of all evidence, "four gates must be passed" to impose the death penalty.[51] First, the panel must find unanimously that the accused is guilty of a death eligible offense.[52] 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.[53] Third, "[a]ll members [must] concur that any

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[46] MCM, *supra* note 5, R.C.M. 1004(b)(1).

[47] *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).

[48] *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.*

[49] 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*.

[50] *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).

[51] 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").

[52] *Id.* R.C.M. 1004(a)(2).

[53] *Id.* R.C.M. 1004(b)(7).

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

B. Federal Civilian Death Penalty

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

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

[55] *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 . . . .").

[56] UCMJ art. 66 (2008) (Review by Court of Criminal Appeals); *id.* art. 67 (review by the CAAF).

[57] U.S. CONST art. III, § 1.

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

[59] 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. §§ 2331–2239D); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

[60] *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).

[61] 18 U.S.C. § 3592; 21 U.S.C. § 848(m).

[62] 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."[63] United States Attorneys must submit cases through the Capital Case Unit (CCU) to the Attorney General's Review Committee on Capital Cases (AGRCCC).[64] The AGRCCC reviews the "Death Penalty Evaluation"[65] form, a prosecution memorandum with all available evidence, the aggravating or mitigating factors, and the suspect's criminal record and background.[66] 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.[67] The Attorney General makes the final decision after receiving the AGRCCC's recommendation and must provide written authorization to seek the death penalty.[68] 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.[69]

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[63] *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).

[64] U.S. Dep't of Justice, Criminal Division, http://www.usdoj.gov/criminal/ccu.html (last visited May 1, 2008).

[65] 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.

[66] *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.

[67] Novak, *supra* note 62, at 651.

[68] 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.

[69] 18 U.S.C.S. § 3593(a) (LexisNexis 2008); 21 U.S.C.S. § 848(h) (LexisNexis 2008).

When seeking the death penalty, [70] the jury must find "one of the 'gateway' *mens rea* aggravating factors."[71] The jury will then have to determine if the prosecution has proven beyond a reasonable doubt one other statutory aggravating factor,[72] thereby making the defendant "eligible for the death penalty."[73] The court imposes the death sentence[74] upon a recommendation[75] 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."[76] If the sentence is upheld, a "Petition for Executive Clemency" can be filed with the Pardon Attorney at the Department of Justice.[77]

"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] [78] have terminated [and] no later than 30 days after [notice] of the scheduled date of execution."[79] The Pardon Attorney investigates the reports or services of the appropriate government

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[70] 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_fiels/docs/1_overview_of_fed_death_process.asp.

[71] 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).

[72] 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).

[73] Novak, *supra* note 62, at 657.

[74] 18 U.S.C. § 3594.

[75] *Id.* § 3593(e).

[76] *Id.* § 3595.

[77] *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.

[78] 23 C.F.R. § 1.10(b) (referencing 28 U.S.C. § 2255).

[79] *Id.* Any supporting papers for the petition must be submitted within fifteen days of filing the petition.

officials or agencies.[80] 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.[81] 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.[82] Commutation is "an extraordinary relief that is rarely granted"[83] and the power to commute is vested in the President alone.[84] "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.[85] 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."[86]

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

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

[81] *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).

[82] *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).

[83] *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.*

[84] *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.*

[85] *Id.* § 1.10(e).

[86] 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.

[87] *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[88] and disadvantages, must continue to be separate because they serve different functions.[89] 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.[90] 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,[91] the court must sentence the defendant to death if the jury determines that the defendant is a "continuing threat to society."[92] The defendant's case is automatically reviewed on appeal at the Texas

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[88] 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.").

[89] *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.

[90] *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).

[91] 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.).

[92] *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,[93] followed by federal habeas access.[94] After the sentence is affirmed,[95] 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.[96] The governor is advised of any death sentence, but does not have to approve the sentence.[97] 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."[98]

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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[93] 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).
[94] 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.
[95] TEX. CODE CRIM. PROC. ANN. art 43.141(b).
[96] *Id.* art. 43.15.
[97] 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).
[98] 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.[99] If the jury finds the defendant guilty of a capital offense,[100] "the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death."[101] A death sentence is automatically reviewed on appeal by the Supreme Court of the State of Florida.[102] 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.[103] Once the governor issues the warrant, only a federal appeal or the governor can stay the execution.[104] Upon certification that the stay is lifted or dissolved, the governor must set a new date for execution within ten days.[105] If there is an "unjustified failure of the governor to issue a warrant, or for any other unjustifiable reason,"[106] the Supreme Court shall issue the warrant.[107] Florida's governor "has unfettered discretion to deny clemency at any time, for any reason."[108] He can grant a reprieve up to sixty days,[109] 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).

100 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).

101 *Id.* § 921.141(3).

102 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).

103 FLA. STAT § 922.052(1).

104 *Id.* § 922.095(1).

105 *Id.* § 922.095(2)(a)–(b).

106 *Id.* § 922.14.

107 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).

108 FLA. R. EXEC. CLEMENCY 4 (Dec. 12, 2004).

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

members of the Florida cabinet[110] to grant pardons or commute punishments.[111]

Of note for the military justice system is the criticism[112] of Florida's clemency process, because moratorium advocates propose a sweeping series of changes.[113] 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.[114] 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."[115]

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,[116] the Pennsylvania Supreme

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110 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.*

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

112 *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.

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

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

115 *Id.*

116 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[117] and if affirms the case, forwards it to the governor within thirty days.[118] Upon review, the governor shall sign the warrant of execution within ninety days.[119] If the governor fails to sign it, the Secretary of Corrections will carry out the execution anyway.[120] The condemned may continue to file for a stay of execution under the Post Conviction Relief Act,[121] or seek federal court habeas review.[122] 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.[123] 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."[124]

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.[125] A district

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[117] 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).
[118] *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.
[119] 61 PA. CONS. STAT. § 3002(a) (2006).
[120] *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)).
[121] 42 PA. CONS. STAT. § 9545(c); Post Conviction Relief Act, 42 PA. CONS. STAT. §§ 9541–9546.
[122] *See* 28 U.S.C.S. § 2254 (LexisNexis 2008).
[123] 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.*
[124] Commonwealth of Pennsylvania-Board of Pardons, Function of the Board, *available at* 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.*
[125] *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.[126] 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.[127]

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."[128] 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."[129] 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."[130] 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."[131] The state legislature quickly resolved the void, and determined a specification of ninety days was feasible.[132]

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

[126] *Id.* at 677.
[127] *Id.* at 676.
[128] *Id.* at 678.
[129] *Id.*
[130] *Id.* (referencing state constitution's grant of pardon power to executive under Article IV, § 9(a)).
[131] *Id.*
[132] 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.[133] 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.[134]

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."[135] 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.[136] 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."[137] A decade later, President Thomas

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[133] *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).

[134] *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.*

[135] Wiener, *supra* note 133, at 5.

[136] *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).

[137] 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."[138] Thus, Jefferson urged Congress "that we should at every session continue to amend the defects . . . in the laws regulating the militia."[139] A large federal force was never intended, even as potential problems with controlling militias were apparent.[140]

The armed services were therefore a "mere handful of individuals . . . [who] were soldiers by choice."[141] Nevertheless, "[t]he American military's authority to decree capital punishment is as old as the military itself."[142] 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."[143] The Commander in Chief supports military law by establishing rules and regulations for the administration of the military services[144] 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."[145]

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[138] *Id.* at 329; President Thomas Jefferson, *First Annual Message*, Dec. 8, 1801, *in* PRESIDENTIAL PAPERS.
[139] *Id.*
[140] *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)).
[141] Wiener, *supra* note 133, at 8.
[142] Simon, *supra* note 29, at 103.
[143] MCM, *supra* note 5, Pt. I, ¶ 3.
[144] U.S. CONST. art. III, § 2.
[145] 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."[146] Clearly, presidential leadership sometimes demands intrusion into military affairs to "ensure that the nation's political objectives remain paramount."[147] Equally significant is the trait that "wartime leadership [sometimes demands] consistency and determination in the face of inevitable and sometimes popular opposition."[148] Capital punishment obviously ignites strong feelings[149] 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."[150] 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?"[151]

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[146] 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).

[147] Victor Davis Hanson, *Presidential Leadership during Wartime*, *in* PRESIDENTIAL LEADERSHIP, *supra* note 146, at 227.

[148] *Id.* at 231.

[149] *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).

[150] 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).

[151] 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[152] did not address approval of capital sentences.[153] It was limited in scope to offenses not usually punishable by the common law[154] with a further requirement that those common law offenses be handled by the civil system.[155] Following several disastrous defeats, General George Washington implored the Continental Congress to recognize that freedom would require a disciplined regular force,[156] which could only be achieved by strong enforcement of military discipline mechanisms.[157] Rather than another selective compilation, almost the entire British Articles of War of 1765 were adopted[158] because they had "carried two empires to the head of mankind."[159] Thereafter, the number of capital offenses grew,[160] and the authority to approve such sentences was likewise expanded to the generals[161] because as the military grew in size, Congress was too slow to respond.[162]

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[152] 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.*

[153] *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 hall full power of pardoning, or mitigating any of the punishments ordered to be inflicted . . . ." *Id.* at 958–59.

[154] Simon, *supra* note 29, at 103.

[155] Weiner, *supra* note 133, at 10 (referencing WINTHROP, *supra* note 146, at 964 (Articles of 1776, § 10, art. I)).

[156] 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.

[157] 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).

[158] MCCULLOUGH, *supra* note 156, at 160 (accepting John Adams's proposal).

[159] *Id.* at 141. The British system was modeled on the Roman system of military rules.

[160] *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).

[161] *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.[163] 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."[164] 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."[165] The offenses charged, the sentence imposed, and the orders of execution were read aloud; after the execution, the troops were marched past the corpse.[166]

Commanders had authority to approve capital sentences until after the war, when approval authority reverted to the Congress.[167] 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).

[162] *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.

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

[164] 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.

[165] DUDLEY, *supra* note 27, at 157 (citations omitted).

[166] DEHART, *supra* note 164, at 248–49.

[167] 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[168] until 1796 when approval was reserved to the President,[169] to include in time of war in 1802.[170]

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.[171] This is not to say that commanders always used this authority wisely,[172] and President Lincoln retained most of the approval authority over execution of Soldiers[173] and civilians subject to courts-martial, martial law, and federal law.[174] Historically, however, commanders of armies enjoyed

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[168] *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.").

[169] 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).

[170] 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).

[171] 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).

[172] *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.

[173] 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).

[174] *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.[175] 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*.

[175] 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[176] 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.[177] 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.[178] 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.[179]

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

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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.*

[176] 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).

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

[178] *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 marital 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.*

[179] Hanson, *supra* note 147, at 230.

[180] 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.

[181] Morgan, *supra* note 1, at 67.

> To maintain this principle, military command dominate[d] and control[led] 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.[182] 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."[183] 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."[184] It was not corrected and was even further exacerbated during World War II. Under the Articles of War, approval of death sentences was delegated,[185] resulting in thirty-five executions during World War I[186] and another 141 executions during World War II.[187]

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

Id. at 66.

182 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].").

183 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.

184 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*.

185 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.*

186 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.*

187 *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[188] aroused strong opposition. Public condemnation was not limited to capital courts-martial, for the public denounced the conduct of military justice in general.[189] The primary faults were an inadequate number of attorneys and no independent legal review process[190] to mitigate commanders' ability to exert undue influence over the proceedings.[191] Americans demanded greater civilian control[192] 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.

[188] 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.).

[189] *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.

[190] *See generally* Colonel Samuel T. Ansell, *Military Justice*, 5 CORNELL L.Q. 1 (1919).

[191] *Id.* at 16 (noting "vices of the present system, which Congress ought to at once remedy").

[192] 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[193] and as such enacted the UCMJ[194] akin to federal and state criminal procedures,[195] thereby instituting significant protections.[196] The primary changes expanded the Judge Advocate General's Corps, established two legal review systems, one of which is composed entirely of civilian judges,[197] and eliminated commander approval of death sentences to allow the President an opportunity to correct perceived injustices.[198]

> 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.

[193] 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).

[194] 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).

[195] 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.

[196] *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.

[197] *See* LURIE, *supra* note 163, at 214–57.

[198] *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.[199] 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),[200] who *may*, at his *discretion*, make a written recommendation to the President.[201] The case is then forwarded to the Secretary of Defense (SecDef)[202] to do likewise. This part of the process is a recent amendment to the Rules for Courts-Martial.[203] The case is then sent to the President.[204]

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[199] UCMJ art. 71(c)(1) (2008).

[200] *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).

[201] *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).

[202] 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].

[203] *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[205] used to serve an important function, to give Americans confidence that the American military was subject to the rule of law.[206] 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.[207] 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."[208]

> 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.

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

[205] UCMJ art. 71(a) (2008).

[206] "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].

[207] *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).

[208] 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 in-boxes of at least two political appointees.[209] 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).

[209] *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.[210] 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?[211] The intent behind adding these political appointees may be to ensure that review remains with those responsible for overseeing and employing the military,[212] even if they have no particular expertise on the matter.[213] Nonetheless, adding open-ended,[214] non-judicial[215]

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[210] LURIE, *supra* note 163, at 193.
[211] *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.
[212] *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.
[213] 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.*
[214] 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).
[215] 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.[216] 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.[217] In 1996, the Army forwarded PVT Loving's case through the DA General Counsel (GC) to the SecArmy.[218] The GC is the chief legal officer of the DA and the legal counsel to the SecArmy.[219] 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.[220] 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.[221] The TJAG was not informed why the SecArmy did not take action on the case; however, several defense motions to CAAF

> 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).

[216] *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].

[217] 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].

[218] 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).

[219] *See* DA Responsibilities, *supra* not 217, ¶ 10.

[220] *Id.* ¶ 10m.

[221] Altenburg Interview, *supra* note 218.

may have caused officials to delay action that might have been affected by pending CAAF opinions.[222]

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)[223] 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.[224] 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.[225] 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.[226] Another issue was that legal counsel within the DA had differing opinions on capital punishment; some opposed the death penalty in principle.[227]

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.[228] The Soldiers were members of a white supremacist group; a North Carolina court sentenced them to life in prison on 12 May 1997.[229] The slayings led the SecArmy to undertake a service-wide investigation into racism in the military.[230] Nonetheless, regardless of the reasons for inaction by the politically appointed civilian

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[222] *Id.*
[223] *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.*
[224] Altenburg Interview, *supra* note 218.
[225] *Id.*
[226] *Id.*
[227] *Id*.
[228] *See* State v. Burmeister, 506 S.E.2d 278 (N.C. Ct. App. 1998).
[229] *Id.*
[230] *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.[231]

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.[232] The SecArmy retained PVT Loving's case file after the CAAF opinion on 26 February 1998.[233] The SecArmy returned the case file to the Army without a recommendation after the Supreme Court denial of certiorari on 7 December 1998.[234] 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.[235] The Army TJAG simply wanted a recommendation one way or the other so the case could be forwarded to the President for decision.[236]

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.[237] 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.[238] 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.[239]

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[231] *See* Loving v. Hart, 46 M.J. 180 (1996).
[232] Military History, *supra* note 216.
[233] Altenburg Interview, *supra* note 218.
[234] *Id*.
[235] *Id*.
[236] *Id*.
[237] 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.*
[238] *Id.*
[239] *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.[240] He was replaced by Joseph Westphal as acting SecArmy until 31 May 2001, when he was replaced by the Honorable Thomas E. White.[241] On 20 January 2001, the Honorable Donald H. Rumsfeld became the SecDef.[242] Under the direction of the President, the SecDef exercises authority, direction, and control over the DOD.[243] Secretary Rumsfeld wanted to insert the DOD into the death sentence approval loop prior to DOJ review.[244] 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.[245] 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.[246]

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[240] *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).

[241] *Id.*

[242] *See* DefenseLink, Special Reports, 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].

[243] *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).

[244] Altenburg Interview, *supra* note 218.

[245] *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).

[246] 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.[247] 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.[248] 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.[249]

B. Continuing Subject Matter Jurisdiction Is Unjustified

Before the presidential approval process, an accused is entitled to unique[250] direct and unitary[251] 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.[252] Therefore, in addition to the obvious

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[247] *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).

[248] 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.

[249] *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.

[250] *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)).

[251] *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.

[252] *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).[253] The unique jurisdiction of the service courts of criminal appeals includes fact-finding powers.[254] 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."[255] Jurisdiction continues until the accused petitions the CAAF.[256]

The CAAF has jurisdiction to review all death sentences affirmed by the court of criminal appeals.[257] The CAAF does not have fact-finding powers and can only examine matters of law.[258] Furthermore, it may not reassess the sentence, but may direct the service courts to reassess an improper sentence.[259] 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.[260]

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.[261] 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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[253] 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.
[254] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 1068 nn.16–18 (6th ed. 2005) (referencing RCM 1203(b) discussion).
[255] UCMJ art. 66(c).
[256] SCHLUETER, *supra* note 254, at 1067 n.15 (referencing RCM 1203(d)(2) discussion).
[257] *See* UCMJ art. 67(a)(1); *see also* MCM, *supra* note 5, R.C.M. 1204.
[258] SCHLUETER, *supra* note 254, at 1078 n.16 (referencing UCMJ art. 67(d)).
[259] *Id.* at 1078 nn.20, 23.
[260] 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)).
[261] *See* GILLIGAN, *supra* note 260**,** at 180 n.5.

reviewed by the CAAF.[262] 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."[263] 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.[264]

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."[265] When habeas relief will not result in prompt release, the petition is premature.[266] 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.[267] 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.[268] For an accused facing a capital sentence, inability to waive post-trial review

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[262] *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).

[263] *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.

[264] MCM, *supra* note 5, R.C.M. 1205(b).

[265] *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)).

[266] GILLIGAN, *supra* note 260, at 193.

[267] *Id.* at 193 n.82.

[268] *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."[269] This opinion creates a distinction between "finality" under Article 76[270] 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.[271]

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.[272] 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.[273] 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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[269] Loving v. United States, 62 M.J. 235, 240 (2005).

[270] 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.

[271] *Loving*, 62 M.J. at 242.

[272] United States v. Moreno, 63 M.J. 129 (2006) (due process implications for excessive delays).

[273] 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."[274] The ACCA and the CAAF are courts established by Congress that have authority to review a Soldier's post-conviction challenges.[275]

Although he has not undergone the longest imprisonment pending execution,[276] 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.[277] 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.[278] 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."[279] 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."[280]

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[274] *See* Ponder v. Stone, 54 M.J. 613, 615 (N-M. Ct. Crim. App. 2000) (citing 28 U.S.C. § 1651(a) (2000)).
[275] *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).
[276] *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)).
[277] 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).
[278] *Loving*, 64 M.J. at 162–63 (discussing AEDPA and doctrines of finality and law of the case).
[279] *Id.* at 163 (Crawford, J., dissenting) (referencing United States v. Stoneman, 870 F.2d 102, 103 (3d Cir. 1989)).
[280] 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."[281] 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."[282] 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."[283] American civil society generally evaluates sentencing along two principles—proportionality[284] and justification.[285] Examination of where capital punishment fits within those justifications reveals diverse and often contentious political culture perspectives.[286] In the military, the

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[281] ALYEA, *supra* note 22, at 95.

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

[283] 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).

[284] LEVINSON, *supra* note 282, at 333 (proportionality considers "the nature and amount or punishment . . . compared to the type and severity of crime committed.").

[285] *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.*

[286] *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."[287] 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.[288]

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.[289] 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.[290] 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."[291] 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."[292]

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

[287] 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.*

[288] *See* UCMJ arts. 94, 99, 100, 102, 104, 106a, 118(1), (4), 120 (2008).

[289] 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).

[290] PECKHAM & SHERMAN, *supra* note 26, at 1–2.

[291] *Id.* at 1–3.

[292] 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."[293] 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.[294] "Various forms of official and/or executive (royal, presidential, gubernatorial, etc.) mercy for criminal offenders have existed since antiquity."[295] The President's pardon power is replicated in most state constitutions and state statutes.[296] 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 . . . ."[297] Failure to diligently resolve military death sentences may perform a valued "shielding function" that exists as a "political cushion" for the President.[298] Nevertheless, "[t]he power to remit or commute sentences of death . . . remains with the President,"[299] yet the President does not entertain Soldiers seeking clemency on other military sentences.[300] It is into this

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[293] 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.*

[294] 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)).

[295] 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).

[296] *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.

[297] *Id.* at 418.

[298] *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 . . . .").

[299] 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.*

[300] 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"[301] are not applied.

President Lincoln signed numerous executive clemency actions, but also approved execution of over a hundred Union Army deserters.[302] 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.[303] 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.[304] States in which the governor, or a specified

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[301] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

[302] PRESIDENTIAL REPORT, *supra* note 289, at 361 (referencing JONATHAN TRUMAN DORRISS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON (1953)).

[303] 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.

[304] 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.[305] 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.[306]

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."[307] 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?"[308] Capital punishment ignites strong feelings within American society.[309] Previous attempts to abolish capital punishment were driven largely by religious organizations that attacked the sentence on moral grounds,[310] 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.

[305] Gershowitz, *supra* note 304, at 680.

[306] *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.").

[307] 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.").

[308] Steiker, *supra* note 151, at 1871.

[309] *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).

[310] *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.[311]

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.[312] 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,"[313] 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.[314] "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."[315] 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."[316] 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).

[311] *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).

[312] *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.

[313] U.S. CONST. art. II, § 2.

[314] 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).

[315] EVERETT, *supra* note 189, at 279.

[316] PRESIDENTIAL REPORT, *supra* note 289, at 176.

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

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.[320] "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."[321] 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,"[322] or even the U.S. Department of Justice Pardons Office following investigation by the Federal Bureau of Investigation.[323] 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.'"[324] When the President reaches a determination he is only

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[317] *Id.* at 178.
[318] *See* Codification of Presidential Proclamations and Executive Orders: 13 April 1945–20 January 1989, Ch. 2, Truman, Proclamation No. 2676, dated Dec. 24, 1945.
[319] 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)).
[320] *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).
[321] Major Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals*, ARMY LAW., May 2000, at 103, 105 n.17.
[322] *Id.* at n.17.
[323] *Id.* (citing David E. Rovella, *Closing Ranks on Executions, Military Nears First Death Penalty Since JFK, Policy Assailed*, NAT'L L. J. 3 (1999)).
[324] *Id.* (citing United States v. Murphy 50 M.J. 4, 14 (1998)).

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

IV. Private Loving's Pyrrhic Victory and the Existing Crisis[327]

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,[328] the Army's strategy relies on numerical superiority and hope.[329] On 3 April 1989, at Fort Hood, Texas, a general court-martial

[325] GILLIGAN, *supra* note 260, at 569 n.365 (referencing UCMJ art. 71(a)).

[326] *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).

[327] *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).

[328] 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).

[329] 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[330] convicted PVT Loving of premeditated murder, felony murder, attempted murder, and five specifications of robbery.[331] Following a sentencing hearing, the court-martial found three aggravating factors and sentenced PVT Loving to a dishonorable discharge, total forfeitures, and death.[332] His case was reviewed on direct appeal and affirmed twice by the Court of Military Review,[333] the CAAF,[334] and in 1996 by the Supreme Court.[335] His case should have

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[330] 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.

[331] *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*.

[332] *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.*

[333] United States v. Loving, 34 M.J. 956, *on recon.*, 34 M.J. 1065 (A.C.M.R. 1992).

[334] *Loving*, 41 M.J. 213.

[335] *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.[336]

Five years of military review and two more Supreme Court visits did not vacate the death sentence.[337] 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.[338] After oral argument in December 1996, the CAAF took fourteen months to deny his petition.[339] Private Loving's next petition alleged that the military trial judge erred, but it too was denied,[340] followed by unanimous denial of his certiorari petition in December 1998.[341] A third petition in 2001, asserting that the CAAF incorrectly evaluated his ineffective assistance claim under recent Supreme Court cases,[342] was denied by the CAAF and

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[336] *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.*

[337] 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).

[338] *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).

[339] 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.*

[340] *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.

[341] Loving v. Hart, 525 U.S. 1040 (1998), *cert. denied*, Loving v. Hart, 49 M.J. 387.

[342] *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.[343] 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*.[344] Following the Supreme Court's June 2002 decision in *Ring v. Arizona*,[345] he drafted a variation of his original 1992 petitions.[346] 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,[347] relying again on a Supreme Court decision from the previous June, *Wiggins v. Smith*.[348] After oral argument on 8 December 2004, the CAAF dismissed both petitions for procedural error on 20 December 2005.[349] Significant in this decision is the pronouncement of continuing jurisdiction to avoid a "legal vacuum,"[350] 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).

[343] United States v. Loving, 54 M.J. 459 (summary disposition), *cert. denied*, 534 U.S. 949 (2001).

[344] *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)).

[345] 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).

[346] *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.

[347] Loving v. United States, 62 M.J. 235, 239–40 (2005).

[348] 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.

[349] 62 M.J. 235, 240 (2005) (dismissing without prejudice, only a petition for a writ of habeas corpus available).

[350] *Id.* at 239–46.

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

The *DuBay*[359] 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."[360] 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.[361] The judge has to reweigh the trial evidence, such as PVT Loving's undisputed videotaped confession,[362] against the *DuBay*

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[351] 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.
[352] Loving v. United States 64 M.J. 132, 136 (2006).
[353] *Id.* at 140 (noting procedural rules do not generally apply retroactively).
[354] Ring v. Arizona, 536 U.S. 584 (2002).
[355] Wiggins v. Smith, 539 U.S. 510 (2003).
[356] 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.
[357] *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).
[358] *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)).
[359] 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.
[360] *Loving*, 64 M.J. at 152 (emphasis added).
[361] *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.*
[362] 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[363] that he grew up in a bad neighborhood with alcoholic parents.[364] The court must then decide whether "at least one member would have struck a different balance thereby not voting for a death sentence."[365] 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.[366]

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

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[363] *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)).
[364] *Id.*
[365] *Id.* at 153 (Effron, J., concurring) (referencing *Wiggins*, 539 U.S. at 537).
[366] *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.
[367] *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).
[368] It is unclear if the President will take action while the case is remanded.
[369] No. 06-8006/AR, 69 M.J. 367 (Dec. 16, 2006) (unpublished).
[370] 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.[371] 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,[372] of kidnapping and murdering a female Airman.[373] The jury sentenced him to death upon finding two aggravating circumstances.[374] By 1999,

[371] *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).

[372] *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.*

[373] *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.

[374] 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.[375] 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,[376] certiorari denied on 12 November 2002,[377] and clemency denied on 17 March 2003.[378] Jones was executed on 18 March 2003,[379] 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)).

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

[376] 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).

[377] Jones v. United States, 537 U.S. 1018 (2002), *cert. denied*, 287 F. 3d 325 (2002).

[378] 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.

[379] *Id.*

month-old baby.[380] 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.[381] 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.[382] "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."[383] Sergeant Hasan Akbar is pending appellate review of his court-martial death sentence for the 2003 premeditated murder of two American Soldiers in Kuwait.[384] Sergeant Akbar was convicted of using grenades and his military rifle to assault his fellow Soldiers as they slept in their tents, killing two.[385] 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.[386] 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.[387]

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[380] *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.*
[381] *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/Jun 2005/20050616_1749.html. Both officers were married and each had several children.
[382] 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/. 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.
[383] State v. Hennis, 323 N.C. 279, 281 (1988).
[384] *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).
[385] *Id.*
[386] *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).
[387] *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[388] and juveniles.[389] The confluence of the executive approval requirement and executive inaction appears to create a de facto exclusion for servicemembers sentenced at court-martial.[390] For Soldiers sentenced to death in state courts, neither executive inaction nor direct clemency could stay the execution.[391] Likewise, if a Soldier were sentenced to death in federal court, executive inaction would not stay the execution.[392] 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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[388] *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).

[389] *See* Roper v. Simmons, 543 U.S. 551 (2005).

[390] 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.*

[391] *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.

[392] 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."[393] When revising or reforming military justice, we must begin by determining which institution is best equipped to initiate change.[394] 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.[395] 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."[396] 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.[397] 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.[398] In light of this legacy, it is time for Congress to remove the last vestiges of non-judicial approval.[399]

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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[393] Royall, *supra* note 189, at 288 (discussing changes under Elston Bill, the legislation that became the UCMJ).
[394] 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.
[395] Sullivan, *supra* note 161, at 182.
[396] MOYER, *supra* note 395, at 407.
[397] 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).
[398] *See generally* Sullivan, *supra* note 14 (providing statistical analysis showing that UCMJ capital sentence reversal rate is comparable to state and federal systems).
[399] 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.[400] 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.[401] 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.[402] Another simple resolution

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[400] UCMJ art. 56 (2008) (Punishment at court-martial cannot exceed limits prescribed by the President.).

[401] *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.

[402] 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.[403] Even though Article 71(a) does not require mandatory written approval or issuance of a warrant, as seen in *Morganelli v. Casey*,[404] 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."[405] 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.[406] 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.[407]

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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).

[403] 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.

[404] 641 A.2d 675 (Pa. Cmwlth. 1994).

[405] *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.

[406] 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.*

[407] *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."[408] 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.[409] Under those criteria, the guilt prong can be satisfied by reviewing PVT Loving's undisputed videotaped confession.[410] As to the access prong, review of PVT Loving's numerous motions and hearings satisfies this prong.[411] 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.[412] 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.[413] 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).

[408] Royall, *supra* note 189, at 279–80.

[409] 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).

[410] 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.*

[411] *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).

[412] "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).

[413] *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.[414]

Our President's duties as Commander in Chief "require him to take responsible and continuing action to superintend the military, including the courts-martial."[415] 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."[416] 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"[417]

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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.*

[414] *See* Morgan, *supra* note 1.

[415] 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. 18,7333 (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).

[416] INVESTIGATIONS, *supra* note 206, at 53.

[417] *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.[418]

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."[419] Accepting the premise that military society is unique,[420] the President could delegate approval[421] 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;[422] 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.[423] Delegating this power to commanders, as was a past practice, is not without cost to the military leadership.[424] The cost-benefit analysis supports a deadline for

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[418] 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).

[419] *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)).

[420] *See* Parker v. Levy, 417 U.S. 733, 743 (1974).

[421] "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).

[422] UCMJ INDEX, *supra* note 192 (delegation to Undersecretary Royall and to commanders).

[423] 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).

[424] 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.[425]

Drawing on the constitutional executive duty to "take Care that the Laws be faithfully executed,"[426] the President must also "supervise and guide executive officers [to secure] unitary and uniform execution of the laws."[427] 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.[428]

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.

[425] WILLIAM GARDNER BELL, SECRETARIES OF WAR AND SECRETARIES OF THE ARMY: PORTRAITS & BIOGRAPHICAL SKETCHES app. A (1992).

[426] U.S. CONST. art. II, § 3.

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

[428] 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.[429]

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[430] would still exist until the President takes action, which has not occurred since receipt of PVT Loving's case nearly three years ago.[431] 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.[432] Thus, executions shall be deemed approved ninety days[433] after completion of direct appellate review unless action to the contrary is taken by the President.[434]

> 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.

[429] *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.*

[430] Loving v. United States, 62 M.J. 235, 250 (2005).

[431] *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.*

[432] 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.*

[433] 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.

[434] 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."[435] Efficient processing of death sentence cases should never take priority over accurate and confident results.[436] Eliminating executive approval does not disadvantage a condemned Soldier by denying him a chance for executive clemency.[437] The Constitution is clear that the President "shall have the Power to grant Reprieves and Pardons for Offences against the United States."[438] The President's power to pardon includes "the power to commute sentences on conditions . . . not specifically provided for by statute."[439] The Supreme Court agrees, and has clarified that clemency has not traditionally been the business of the courts.[440] Presidents even have the power to make politically unpopular clemency decisions.[441] So, if the President has unfettered discretion in granting clemency, should it be administered arbitrarily through executive inaction?[442]

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[435] Heise, *supra* note 294 (citation omitted).
[436] 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).
[437] *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).
[438] U.S. CONST. art. II, § 2.
[439] *Schick*, 419 U.S. at 264.
[440] Ohio v. Woodward, 523 U.S. 272, 284 (1998) (citations omitted).
[441] *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.
[442] *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.[443] 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.[444] This prerogative is no longer absolute and has been limited by some state constitutions that require the approval of clemency boards.[445] 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.[446] 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.[447] 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.[448] 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.

[443] 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.

[444] 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.*

[445] *See supra* Pt. III.

[446] *See* Gershowitz, *supra* note 304, at 680.

[447] THE FEDERALIST NO. 74 (Alexander Hamilton).

[448] *Id.* at 445.

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

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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[449] 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.").

[450] 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.[451] 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."[452] 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."[453]

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]."[454] Traditionally, wars galvanize Congress into action, as seen by the development and evolution of the UCMJ.[455] The current military operations in Iraq and Afghanistan make "the administration of [military justice] a major theme"[456] for our civilian leadership. Likewise, PVT

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[451] SUN-TZU, *supra* note 213, at 76. "What is essential in war is victory, not prolonged operations."
[452] Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).
[453] *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.
[454] Fidell, *supra* note 21, at 366.
[455] *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).
[456] *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"[457] 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?[458]

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."[459] 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.[460] "No legal system can or should operate in a vacuum, disregarding the changing norms of society."[461] 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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[457] Loving v. Hart, 47 M.J. 428, 454 (1998) (Sullivan, J., concurring in part and in result).
[458] *See supra* note 2.
[459] ALYEA, *supra* note 22, at 95.
[460] 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).
[461] 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 filed, 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.[462]

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[462] 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[463]

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.

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[463] *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."[464]

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.[465] 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.[466] 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."[467] 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."[468] 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."[469]

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[464] 28 U.S.C.S. § 2241(c)(3) (LexisNexis 2008); *see also* Clinton v. Goldsmith, 526 U.S. 529 (1999).
[465] 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.").
[466] 346 U.S. 137, 142 (1953).
[467] *Id.*
[468] *Id*. at 142
[469] *Id*. at 144.

The scope of review in the Tenth Federal Circuit[470] is initially limited to determining whether the claim raised by the petitioner was given full and fair consideration by the military courts.[471] 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.[472] Thus, where military courts have given full and fair consideration to the allegations raised by a petitioner, the inquiry is at an end.[473] Moreover, "[t]he doctrine of deliberate bypass or waiver . . . as well as that of exhaustion . . . limits collateral review of military convictions."[474] 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.'"[475] Generally, federal courts are not to entertain habeas petitions by military prisoners until all available military remedies have been exhausted.[476] If a petitioner failed to present a claim to the military courts at trial or on direct appeal, it is

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[470] 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.

[471] *See, e.g*., Fernandez v. Nickles, 106 F. Supp. 2d 1214, 1216 (D. Kan. 2000).

[472] *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.

[473] *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)).

[474] Angle v. Laird, 429 F.2d 892, 894 (10th Cir. 1970).

[475] *Id.* at 894 (citing Watkins v. Crouse, 344 F.2d 927, 929 (10th Cir. 1965)).

[476] 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.[477] Therefore, a Soldier cannot collaterally attack his conviction absent a showing of cause for the waiver and actual prejudice resulting from a constitutional violation.[478] 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.[479] 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."[480]

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.[481] 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.[482] The Tenth Circuit permits habeas review when the claim was raised before the military courts and military

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[477] 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).

[478] 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).

[479] Sawyer v. Whitley, 505 U.S. 333, 339 (1992).

[480] Wink v. England, 327 F.3d 1296, 1304 (11th Cir. 2003).

[481] 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).

[482] 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.[483] 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.[484] 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.[485] The Chief of Legislative Liaison will notify Congress, and conduct any necessary briefings.[486] 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.[487] "Once the prisoner has been formally notified of the pending execution, the prisoner's status will be changed to that of 'condemned prisoner.'"[488] He shall have access to a chaplain and be discharged from the Army prior to execution.[489] After the lethal injection, the condemned prisoner's remains will be buried in the USDB cemetery if not claimed by the next of kin.[490]

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[483] 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).

[484] AR 190-55, *supra* note 206, ¶ 1-4c(1)–(2).

[485] *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.

[486] *Id*. ¶ 1–4e.

[487] *Id*. ¶ 2–7b. The prisoner is also provided medical assistance and counseling as needed. *Id*. at ¶ 2–7c.

[488] *Id.* ¶ 2–1i; 2–1k.

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

[490] *Id.* ¶ 2–3.