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## It's Time to Put the Military's Death Penalty to Sleep

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# IT'S TIME TO PUT THE MILITARY'S DEATH PENALTY TO SLEEP

MICHAEL I. SPAK<sup>1</sup>

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#### I. INTRODUCTION

The debate surrounding the death penalty has always been at the forefront of American politics. To some, the death penalty stands for the proposition that a person that has committed a capital murder should be equally punished. Others believe that the death penalty is a deterrent to would-be murderers. On the other hand, opponents of the death penalty argue that the death penalty is not a deterrent, is not a proper punishment, is overly expensive, and even promotes violence in a society that is already known for its overly violent nature. Regardless of the arguments for and against the death penalty, the death penalty is innately unjust. Recently, Illinois, for example, issued a moratorium on capital punishment after 13 innocent men had been set free after having spent years on death row. The death penalty cannot be administered fairly, and there is no room for errors when human life is at stake.

Just as fairness and justice are the main reasons to abolish the death penalty in the civilian sector, capital punishment should be abolished in today's military. Recently, the Commission on the 50th Anniversary of the Uniform Code of Military Justice<sup>2</sup> ("Commission") proposed several issues that require congressional review. Among the long list of issues recommended for review, the Commission posed the following question: "*Should capital punishment be eliminated for peacetime offenses?*"<sup>3</sup> This article will answer the question in the affirmative and take it one step farther: *the death penalty should be completely removed from the military's jurisdiction.*

Part I will focus on the death penalty in the civilian sector of the United States. It begins with a brief history of and an introduction to death penalty laws in the United States. A critical examination of the primary arguments used to justify the death penalty follows this history and introduction. Part I next offers a brief overview of other independent reasons for the abolition of the death penalty. The conclusion of Part I re-emphasizes that the death penalty is ineffective, inappropriate, inefficient, and immoral and should therefore be abolished. After having concluded that the application of the death penalty is unfair in the civilian sector and should thus be abolished, the article will then shift its focus to the death penalty in the military sector.

The nexus in arguing that the death penalty should be abolished in the civilian sector and then in the military sector is both simple and logical: if the administration of the death penalty in the civilian sector is unfair and unjust, it is even more so in the military sector because of its inherent unfairness.

Part II of the article will first provide a brief synopsis of the military court-martial system and will then highlight the major differences between the military and

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<sup>2</sup>Nat'l Inst. of Military Just., *Commission on the 50th Anniversary of the Uniform Code of Military Justice, Topics for Consideration*, MILITARY JUSTICE GAZETTE, No. 86, Nov. 2000, at 1.

<sup>3</sup>*Id.* at V.A.

civilian justice systems. These major differences will lead to the inevitable conclusion that the military justice system is inherently unfair and therefore leaves no room for possible mistakes when the life of a service member is at stake. Because the military system is innately unfair, this article recommends that Congress abolish the death penalty in the military.

## II. THE DEATH PENALTY IN THE CIVILIAN SECTOR

### A. *Early Death Penalty Law in American History*

The history of the death penalty in the United States of America is longer than the country is old. In 1608, the first recorded death sentence in the British American colonies occurred when George Kendall of the colony of Virginia was executed for suspicions of treason.<sup>4</sup> Since that time, there have been variations in the methods of capital punishment and the definitions of capital crimes, but one constant has remained: capital punishment has continued to spur debate among religious, political, and social activists.

Soon after their formation, the British American colonies began to enact laws regulating imposition of the death penalty. In 1612, for example, Virginia enacted the Divine, Moral, and Martial Laws, permitting infliction of the death penalty for various minor crimes, such as stealing grapes, killing chickens, and killing livestock without permission.<sup>5</sup> The Duke's Laws of New York allowed capital punishment for premeditated murder, killing someone who had no weapon of defense, killing by lying in wait or by poisoning, sodomy, buggery, kidnapping, perjury in a capital trial, traitorous denial of the king's rights or raising arms to resist his authority, conspiracy to invade towns or forts in the colony, and striking one's mother or father (upon complaint of both).<sup>6</sup> Throughout the colonial period, the death penalty continued, but limits were continually imposed as to which crimes constituted capital offenses. By 1780, Massachusetts had limited imposition of the death penalty to seven crimes: murder, sodomy, burglary, buggery, arson, rape, and treason.<sup>7</sup>

Today, the limits defining capital crimes are even narrower than they were in the early days of this country's history. Currently, 38 states have statutes authorizing the death penalty.<sup>8</sup> The most common crime for which states authorize the death penalty

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<sup>4</sup>Michael H. Reggio, *The Execution: History of the Death Penalty*, reprinted in SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY (Laura E. Randa ed., 1997), available at <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html> (last visited Oct. 23, 2001).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>CAPITAL PUNISHMENT PROJECT, NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW USA: DEATH ROW STATISTICS, at <http://www.deathpenaltyinfo.org/DRUSA-Stats.html> (last modified July 1, 2001). These states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia,

is first-degree murder with one or more statutorily defined aggravating circumstances.<sup>9</sup> As of January 1, 2001, 3,694 prisoners were on death row in these 38 states.<sup>10</sup>

Capital punishment is not limited to conviction only under state law, but may also be ordered for certain violations of federal law. On June 25, 1790, Thomas Bird became the first man executed under the federal death penalty.<sup>11</sup> He was hanged for murder.<sup>12</sup> Since that time, the federal government has used its authority to execute 336 men and four women for violations of federal law.<sup>13</sup> The federal government has not carried out any executions since 1963,<sup>14</sup> in large part because federal death sentencing procedures in effect in the 1970s were declared unconstitutional.<sup>15</sup>

In 1988, Congress enacted new death penalty legislation.<sup>16</sup> That year, the Anti-Drug Abuse Act reinstated the federal death penalty as a potential punishment when any person engaging in certain drug trafficking offenses<sup>17</sup> “intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results” and when any person engaging in those crimes “intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer” either in furtherance of the crime or in any attempt to avoid apprehension, prosecution, or

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Washington, and Wyoming. *Id.* New Hampshire is the only state that authorizes the death penalty that has never actually sentenced anyone to death. *Id.*

<sup>9</sup>*See* COURT TV, A LOOK AT THE DEATH PENALTY BY JURISDICTION, at <http://www.courtstv.com/legaldocs/capital/map/penalty.html> (last visited Oct. 23, 2001) (state-by-state summary of crimes for which the death penalty is authorized).

<sup>10</sup>CAPITAL PUNISHMENT PROJECT, NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW USA: SUMMARY OF STATE LISTS OF PRISONERS ON DEATH ROW, at <http://www.deathpenaltyinfo.org/DRUSA-StateSumm.html> (last modified July 1, 2001). Eight of these prisoners have been sentenced to death in more than one state. *Id.*

<sup>11</sup>DEATH PENALTY INFORMATION CTR., FEDERAL DEATH PENALTY, at <http://www.deathpenaltyinfo.org/feddp.html#statutes> (last modified July 31, 2001) [hereinafter FEDERAL DEATH PENALTY].

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* These death sentences were imposed after convictions for murder and crimes resulting in murder, piracy, rape, rioting, kidnapping, and spying and espionage. *Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Furman v. Georgia*, 408 U.S. 238 (1972) (holding that statutes authorizing the death penalty and giving unlimited and uncontrolled discretion to the sentencing body are unconstitutional). *See* *United States v. Woolard*, 981 F.2d 756 (5th Cir. 1993) (holding that the federal statute authorizing the death penalty for the killing or attempted killing of an employee of the National Park Service was unconstitutional under *Furman*); *United States v. Cheely*, 21 F.3d 914 (9th Cir. 1994) (holding that a federal statute authorizing the death penalty for the use of mail bombs with the intent to cause harm or damage was unconstitutional under *Furman*).

<sup>16</sup>*See* Dick Burr et al., *An Overview of the Federal Death Penalty Process*, at [http://www.capdefnet.org/fdprc/contents/shared\\_files/docs/1\\_\\_overview\\_of\\_fed\\_death\\_process.htm](http://www.capdefnet.org/fdprc/contents/shared_files/docs/1__overview_of_fed_death_process.htm) (last visited Oct. 23, 2001).

<sup>17</sup>*See* 21 U.S.C. § 841(b)(1)(A) (2001); 21 U.S.C. § 960(b)(1) (2001).

service of a prison sentence.<sup>18</sup> In 1994, Congress, as part of an omnibus crime bill, extended the range of crimes for which capital punishment could be imposed.<sup>19</sup> Approximately 60 federal offenses are now punishable by the death penalty,<sup>20</sup> including first-degree murder,<sup>21</sup> genocide,<sup>22</sup> civil rights offenses resulting in death,<sup>23</sup> espionage,<sup>24</sup> treason,<sup>25</sup> and trafficking in large quantities of drugs.<sup>26</sup> Before the death penalty can be sought in any of these cases, the U.S. Attorney General must authorize such action.<sup>27</sup> Between 1994 and 1997, 475 defendants were charged with federal crimes punishable by death; the Attorney General authorized seeking the death penalty in 75 of these cases.<sup>28</sup>

### B. Justifications for the Death Penalty with Rebuttals

There have been three general justifications for the death penalty throughout its history in this country: religion, retribution, and deterrence. With more than half of the population supporting the death penalty,<sup>29</sup> these justifications appear to be very convincing. A closer examination of each, however, will reveal just how misleading they are.

#### 1. Religion

Justification for the death penalty has been extracted from the Bible. According to Abounding Love Ministries, a nonprofit ministry with the self-stated purpose of “shar[ing] the Truth” and “taking the Gospel of Jesus Christ around the world,”<sup>30</sup> the

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<sup>18</sup>21 U.S.C. § 848(e)(1) (2001).

<sup>19</sup>DEATH PENALTY INFORMATION CTR., FEDERAL LAWS PROVIDING FOR THE DEATH PENALTY, at <http://www.deathpenaltyinfo.org/fedoffenses.html> (last visited Oct. 23, 2001) [hereinafter FEDERAL LAWS PROVIDING FOR THE DEATH PENALTY] (citing BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1995 REPORT AND FEDERAL DEATH PENALTY RESOURCE COUNSEL PROJECT).

<sup>20</sup>*Id.*

<sup>21</sup>18 U.S.C. § 1111 (2001).

<sup>22</sup>18 U.S.C. § 1091 (2001).

<sup>23</sup>18 U.S.C. §§ 241, 242, 245, 247 (2001).

<sup>24</sup>18 U.S.C. § 794 (2001).

<sup>25</sup>18 U.S.C. § 2381 (2001).

<sup>26</sup>18 U.S.C. § 3591(b) (2001).

<sup>27</sup>Burr, *supra* note 16.

<sup>28</sup>FEDERAL DEATH PENALTY, *supra* note 11.

<sup>29</sup>A Feb. 8-9, 2000, Gallup Poll found that 71 percent of persons polled favored the death penalty. Mark Gillespie, *Public Opinion Supports Death Penalty*, GALLUP NEWS SERVICE, Feb. 24, 1999, at <http://www.gallup.com/poll/releases/p990224.asp>.

<sup>30</sup>ABOUNDING LOVE MINISTRIES, INC., WELCOME, at <http://www.aboundinglove.org/index.html> (last visited Oct. 23, 2001).

Old Testament of the Bible defines 42 “death-penalty sins.”<sup>31</sup> These sins include not only murder, but also failing to circumcise, eating leavened bread during a feast of unleavened bread, putting holy anointing oil on strangers, failing to keep Passover, stubbornness and rebelliousness, and false dreams and visions.<sup>32</sup> Even more surprising is the ministry’s statement in response to its discovery of these 42 death-penalty sins:

China executed 4,200 people last year, verses [sic] 74 in the USA. China executes bandits, thieves, unsavory businessmen, and political diviants [sic]. We have a long way to go to catch up, but by implementing all the Old Testament sins, executing criminals as young as 13, and eliminating certain legal procedures and appeals, we should be on our way to catching up.<sup>33</sup>

Certainly what the ministry advocates is an extremist view, but many others have also found support for the death penalty in the Holy Scriptures. Some religious leaders and followers contend that the Bible not only justifies the death penalty, but also even requires it in the case of deliberate murder.<sup>34</sup> They find support for this contention in that Christ himself was put to death, man was created in the image of God, and God himself instituted the death penalty.<sup>35</sup> Further, according to the Old Testament, “And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.”<sup>36</sup> In the New Testament, this “sacrificial expiation of guilt for murder” is abolished by the teachings of Jesus and by his own death on the cross,<sup>37</sup> where it is written:

You have heard that it was said, “Eye for eye, and tooth for tooth.” But I tell you, Do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also. . . . You have heard that it was said, “Love your neighbor and hate your enemy.” But I tell you: Love your enemies and pray for those who persecute you, that you may be sons of your Father in heaven.<sup>38</sup>

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<sup>31</sup>ABOUNDING LOVE MINISTRIES, INC., DEATH PENALTY, at <http://www.aboundinglove.org/deathpen.htm> (last visited Oct. 23, 2001).

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>Dudley Sharp, *Death Penalty and Sentencing Information in the United States* (1997), at <http://www.prodeathpenalty.com/dp.html> (citing CHARLES CALDWELL RYRIE, *BIBLICAL ANSWERS TO CONTEMPORARY ISSUES* (1991); CHARLES CALDWELL RYRIE, *RYRIE STUDY BIBLE, KING JAMES VERSION* (1994); *Exodus* 20:13 (King James)).

<sup>35</sup>*Id.*

<sup>36</sup>*Exodus* 21:23-25 (King James).

<sup>37</sup>U.S. Peace Section, Mennonite Central Committee U.S., *Death Penalty* (adopted Dec. 4, 1982), available at <http://www.deathpenalty.net/religion.html#T19> (last visited March 2001) (on file with the author).

<sup>38</sup>*Matthew* 5:38-45 (King James).

A large number of Judeo-Christian religious organizations have denounced the death penalty, including the American Friends Service Committee, the American Baptist Churches in the U.S.A., the American Jewish Committee, the Christian Church (Disciples of Christ), Church Women United, the Episcopal Church, the Fellowship of Reconciliation, the Lutheran Church in America, the Mennonite Church, the Moravian Church, the Orthodox Church in America, the Presbyterian Church (U.S.A.), the Reformed Church in America, the United Church of Christ, the United Methodist Church, and the U.S. Catholic Conference.<sup>39</sup> These churches and organizations oppose the death penalty because they believe it is inconsistent with their religious convictions. For example, the Fellowship of Reconciliation centers its opposition to the death penalty on its Judeo-Christian heritage, which “affirms that for the state to assume the power of absolute judgment is to assume a power that belongs only to God.”<sup>40</sup> On July 21, 1960, Friends United adopted the following statement regarding capital punishment:

Friends accept the Biblical teachings that every human life is valuable in the sight of God, that man need not remain in his sinful state but can repent and be saved, that God loves the sinner and takes “no pleasure in the death of the wicked,” but longs “that the wicked turn from his way and live.”<sup>41</sup>

The Orthodox Church in America rests its opposition to capital punishment in large part on respect for all human life and the redemptive nature of the Gospel of Jesus Christ.<sup>42</sup> The Reformed Church in America opposes the death penalty because it is “incompatible with the spirit of Christ and the ethic of love.”<sup>43</sup> The United Church of Christ’s opposition is based on its “understanding of the Christian Faith and the New Testament call to redemptive love, mercy, and sanctity of life.”<sup>44</sup>

These Judeo-Christian religions are not alone in their opposition to the death penalty. Buddhism, for example, teaches that all sentient beings are fundamentally

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<sup>39</sup>DEATHPENALTY.NET, RELIGION: STATEMENTS ON CAPITAL PUNISHMENT BY RELIGIOUS ORGANIZATIONS, at <http://www.deathpenalty.net/religion.html> (last visited March 2001) (on file with the author).

<sup>40</sup>FELLOWSHIP OF RECONCILIATION, AN APPEAL TO END ALL EXECUTION, at <http://www.deathpenalty.net/religion.html> (last visited March 2001) (on file with the author).

<sup>41</sup>FRIENDS UNITED MEETING, STATEMENT OF CAPITAL PUNISHMENT (adopted July 21, 1960), at <http://www.deathpenalty.net/religion.html> (last visited March 2001) (on file with the author).

<sup>42</sup>THE ORTHODOX CHURCH IN AMERICA, RESOLUTION ON THE DEATH PENALTY (adopted Aug. 1989), at <http://www.deathpenalty.net/religion.html> (last visited March 2001) (on file with the author).

<sup>43</sup>REFORMED CHURCH IN AMERICA, RESOLUTION ON CAPITAL PUNISHMENT (adopted 1965), at <http://www.deathpenalty.net/religion.html> (last visited March 2001) (on file with the author).

<sup>44</sup>UNITED CHURCH OF CHRIST, DEATH PENALTY (adopted 1979), at <http://www.deathpenalty.net/religion.html> (last visited March 2001) (on file with the author).

good and that one should abstain from the taking of life.<sup>45</sup> Buddhism fosters “an abolitionist stance on capital punishment” stemming from “a deep respect for the dignity of all forms of life.”<sup>46</sup>

## 2. Retribution

Another justification often offered for capital punishment is retribution. Retribution is one of the traditional theories behind punishment. Retribution is a theory of punishment that seeks to justify punishment “in terms of [a] cluster of moral concepts: rights, desert, merit, moral responsibility, and justice.”<sup>47</sup> The goal of retribution is to deliver “the *just* punishment, the punishment that the criminal (given his wrongdoing) *deserves* or *merits*, the punishment that the society has a *right* to inflict and the criminal a *right* to demand.”<sup>48</sup> As one writer has noted, retribution is, perhaps, the best argument in favor of the death penalty if for no other reason than that the desire for retribution is understandable:

The human community is saddened by violence, and angered by the injustice involved. We want to hold accountable those who violate life, who violate society. Our sadness and anger, however, make us vulnerable to feelings of revenge. Our frustration with the complex problems contributing to violence may make us long for simple solutions.<sup>49</sup>

Retribution is voiced as a desire to make the punishment fit the crime; to make the punishment proportional to the gravity of the crime.<sup>50</sup> In the case of murder, the theory seems to support capital punishment. In order for the punishment to fit the crime, however, “the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months.”<sup>51</sup> If this understanding of retribution were adopted, it would likely never be served. Instead, retribution might best be served simply by the use of extended imprisonment, basing the term on the gravity of the crime.<sup>52</sup>

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<sup>45</sup>Damien P. Horigan, *A Buddhist Perspective on the Death Penalty of Compassion and Capital Punishment*, 41 AM. J. JURIS. 271, 275 (1996).

<sup>46</sup>*Id.* at 288.

<sup>47</sup>Jeffrie Murphy & Jules Coleman, *Crime and Punishment*, in THE PHILOSOPHY OF LAW 109-24, 129-30 (1990), in LAW AND JUSTICE: CASES AND READINGS ON THE AMERICAN LEGAL SYSTEM 532-50, 545 (Dale A. Nance ed., 1999).

<sup>48</sup>*Id.* (emphasis added).

<sup>49</sup>DIVISION FOR CHURCH IN SOCIETY, EVANGELICAL LUTHERAN CHURCH IN AMERICA, A SOCIAL STATEMENT ON THE DEATH PENALTY (adopted Sept. 4, 1991), at <http://www.elca.org/dcs/death.html> (last visited Oct. 23, 2001).

<sup>50</sup>Hugo Adam Bedau, *The Case Against the Death Penalty*, at [http://www.aclu.org/library/case\\_against\\_death.html#retribution](http://www.aclu.org/library/case_against_death.html#retribution) (last modified Jan. 24, 2000).

<sup>51</sup>*Id.* (citing Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH (1960)).

<sup>52</sup>*Id.*

The retribution justification for the death penalty presents two problems. The first problem is that, in action, retribution frequently becomes a cry for vengeance. It is often emotional and simply “a desire for vengeance masked as a principle of justice.”<sup>53</sup> The death penalty has, in many cases, become the government’s answer to cries of vengeance by creating the legal means for inflicting “personal payback.”<sup>54</sup> Capital punishment, in this sense, is reminiscent of lynching,<sup>55</sup> which cannot be acceptable, for “so long as we have courts of vengeance, we will never have courts of justice.”<sup>56</sup>

The second problem with the retribution justification is its unintended revictimization of victims’ families and friends. By focusing attention on the murderer, capital punishment provides little support for victims’ families and others affected by the crime.<sup>57</sup> In fact, capital punishment often makes healing more difficult for families and friends of victims,<sup>58</sup> which would seem to be contrary to the goals of retribution. The lengthy judicial proceedings that constantly draw victims’ families’ attention again to the murderer compound their loss and prolong their suffering.<sup>59</sup> In this way, the murderer has not received just punishment for his crime. Instead, his punishment has caused him, whether of his own desire or not, to again injure those from whom he took when he committed his crime. Certainly, we must avoid again making victims of these people. We could accomplish this goal by imposing alternative punishments, such as prison sentences, that could be implemented more quickly and that would allow victims’ families to begin the healing process sooner.<sup>60</sup>

### 3. Deterrence

Deterrence is another justification often suggested for imposition of the death penalty. Deterrence can be specific or general. Specific or special deterrence involves affecting the punished in a way that seeks to prevent future violations by the punished.<sup>61</sup> General deterrence involves affecting others and seeking to prevent their possible future violation of the law by threatening them with serious consequences.<sup>62</sup>

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<sup>53</sup>Elan Goff, *Retribution and the Death Penalty: Barbaric or Just Desserts*, at <http://www.elanworks.com/retribution.html> (last visited Oct. 23, 2001).

<sup>54</sup>*The Unjust Death Penalty of an Unjust System*, REVOLUTIONARY WORKER #990 (Jan. 17, 1999), at <http://www.rwor.org/a/v20/990-99/990/death.htm>.

<sup>55</sup>See Stephen B. Bright, Keynote Address, *Capital Punishment and the Criminal Justice System: Courts of Vengeance or Courts of Justice at Conference: The Death Penalty in the Twenty-First Century*, 45 AM. U.L. REV. 239, 281 (1995).

<sup>56</sup>*Id.* at 299.

<sup>57</sup>*Id.*

<sup>58</sup>AMERICAN CIVIL LIBERTIES UNION, THE DEATH PENALTY, at <http://www.aclu.org/library/pbp8.html> (last visited October 23, 2001).

<sup>59</sup>AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RIGHTS FOR ALL, at <http://www.rightsforall-usa.org/info/report/r06.htm#> (last visited October 23, 2001).

<sup>60</sup>*See id.*

<sup>61</sup>MURPHY & COLEMAN, *supra* note 47, at 542.

<sup>62</sup>*Id.*

Deterrence requires that the punishment be a “kind of price system of conduct,” setting prices that most persons would find “too high to pay.”<sup>63</sup> The argument in relation to the death penalty is that “we need the death penalty to encourage potential murderers to avoid engaging in criminal homicide.”<sup>64</sup> At first glance, the death penalty appears to be the ideal deterrent punishment. Clearly, execution prevents future criminal activity by those who are executed. A closer look at deterrence and the death penalty, however, reveals that the death penalty may not be the only means of achieving this specific deterrent effect. Furthermore, the general deterrent effect that seems by common sense to follow from imposition of the death penalty has not manifested itself: murders continue.

Once a person has been executed, there is no possibility that the person will commit future violence in that embodiment. Of that fact, we can be certain. The concern, however, is that perhaps the death penalty is too drastic a means for achieving this specific deterrent effect. At one time, the death penalty was believed to be the only means for achieving this specific deterrent effect, “[b]ut nowadays first-degree murderers can look forward to life without parole if caught, which should in theory deter them as much as the death penalty.”<sup>65</sup>

Popular opinion regarding the death penalty supports this proposition that the death penalty is an unnecessary means to obtaining specific deterrence when life imprisonment without the possibility of parole is an available alternative punishment. A 1999 Gallup poll finding that 71 percent of the surveyed population supported capital punishment revealed that this support declined significantly when the option of life imprisonment without the possibility of parole was offered as an alternative to the death penalty.<sup>66</sup> Support for the death penalty dwindled to 56 percent when this option was presented.<sup>67</sup> An attorney at the Baltimore Defender’s Office summed up the reasons for this change in opinion: “[Life without parole] satisfies the need for protection of the community, as well as guaranteeing severe punishment.”<sup>68</sup>

In jury rooms around the country, the tendency has been to avoid infliction of the death penalty when life imprisonment without the possibility of parole is offered as an alternative sentence. In 1995, in Virginia, for instance, the law was changed to allow this alternative sentencing.<sup>69</sup> That year, death sentences almost halved, falling from 10 death sentences in 1994 to only six in 1995.<sup>70</sup> Similar results have been seen

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<sup>63</sup>*Id.*

<sup>64</sup>Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 2 (1996), available at <http://www.philosophy.niu.edu/~critcrim/dp/dppapers/mike.deterrence>.

<sup>65</sup>Jonathan Alter et al., *The Death Penalty on Trial*, NEWSWEEK, June 12, 2000, at 24.

<sup>66</sup>Gillespie, *supra* note 29.

<sup>67</sup>*Id.*

<sup>68</sup>Peter Finn, *Given Choice, Va. Juries Vote for Life, Death Sentences Fall Sharply When Parole Is Not an Option*, WASH. POST, Feb. 3, 1997, at A01, available at <http://www.uncp.edu/home/vanderhoof/dp-news/dp-parole.html>.

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

in Georgia, Indiana, and Maryland.<sup>71</sup> The goal for jurors in these cases is to prevent the convicted person from inflicting more violence on society; and life imprisonment without the possibility of parole gives them the opportunity to achieve this goal without imposing a death sentence.<sup>72</sup>

The issues are not so clearly defined with the general deterrence argument as it relates to capital punishment. It seems logical that the threat of punishment by death would deter activity resulting in that punishment. This logic, however, apparently does not prevail in the world of crime. A recent survey of the top criminologists in the United States found consensus that the death penalty is ineffective as a means of reducing violent criminal behavior in the United States.<sup>73</sup>

One of the main reasons that the general deterrent effect of the death penalty is, at the very least, questionable is that murder and other crimes carrying possible death sentences are frequently crimes of passion, crimes often lacking premeditation and design, or crimes committed under the influence of drugs and alcohol.<sup>74</sup> Further, those who commit crimes in general and such crimes in particular often fail to consider the consequences of their actions because the general plan is to avoid detection, arrest, and conviction.<sup>75</sup> Thus, it is unlikely that one considering committing a capital crime weighs the consequences, saying something like “Well, since I might get the death penalty for this crime, I won’t do it. But if it were only life in prison, I’d go ahead.”<sup>76</sup>

Statistics support the notion that the death penalty is ineffective as a means of general deterrence. In 1999, for instance, the Bureau of Justice Statistics reported that once again the south was the region with the highest murder rate.<sup>77</sup> Eighty percent of all executions occur in the south, but as these statistics show, these executions have little deterrent effect.<sup>78</sup> According to the Federal Bureau of Investigation (“FBI”) Uniform Crime Reports for 1995-1999, states with capital punishment laws have higher murder rates than states without the option.<sup>79</sup> For the five-year period, the average murder rate for states allowing capital punishment was 5.5, while the rate among states that do not have the death penalty was 3.6.<sup>80</sup> A recent study of the death penalty in Texas also concluded that the death penalty had

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<sup>71</sup>*Id.*

<sup>72</sup>*See id.*

<sup>73</sup>Radelet & Akers, *supra* note 64, at 7.

<sup>74</sup>Bedau, *supra* note 50.

<sup>75</sup>*Id.*

<sup>76</sup>Alter, *supra* note 65.

<sup>77</sup>DEATH PENALTY INFORMATION CENTER, FACTS ABOUT DETERRENCE AND THE DEATH PENALTY, at <http://www.deathpenaltyinfo.org/deter.html> (last visited Oct. 23, 2001) [hereinafter DETERRENCE].

<sup>78</sup>*See id.*

<sup>79</sup>DEATH PENALTY INFORMATION CENTER, FBI UNIFORM CRIME REPORTS: MURDER RATES PER 100,000 POPULATION, at <http://www.deathpenaltyinfo.org/murderrates.html> (last visited Oct. 23, 2001).

<sup>80</sup>*Id.*

no deterrent effect in the state.<sup>81</sup> In fact, the study concluded that “the number of executions was unrelated to murder rates in general, and that the number of executions was unrelated to felony rates.”<sup>82</sup>

Some studies indicate that the death penalty actually increases the murder rate because of what is known as the “brutality effect.” The following is one author’s explanation of and his proposed solution to this phenomenon:

By killing a criminal, we are stooping to their [sic] level. We solve a problem by killing it. Then the average Joe sees killing as a way to solve his problems. We are resorting to greater amounts of violence with our system. . . . When the state shows more respect for human life by abolishing the death penalty, the average citizen will also want to show more respect for his fellow man and killing will be a less likely option. . . . “So, as they say, an eye for an eye policy will leave us all blind.”<sup>83</sup>

A 1995 study comparing homicide rates in California for the periods 1952–67, when an execution occurred about every two months, and 1968–91, when there were no executions in California, found that the average annual increase in homicides was twice as high during the period when executions were carried out regularly.<sup>84</sup>

A 1998 study took a unique approach to examining deterrence and brutality issues.<sup>85</sup> The aim of the study was to determine the effects of capital punishment on rates of various types of murder, particularly stranger killings and stranger homicides, rather than on homicide generally.<sup>86</sup> Although the study was inconclusive on the issues of brutality and deterrence, it did show “a significant increase in total stranger killings and stranger homicides not involving other felonies,” following the execution of Charles Troy Coleman on September 10, 1990, closing Oklahoma’s twenty-five-year moratorium on the death penalty.<sup>87</sup>

Some people argue that these and other similar studies lead only to the conclusion that the death penalty has no deterrent effect and, in fact, has the effect of increasing homicide rates. Whether such is the case or not, these studies show, at the very least, that the evidence is inconclusive, indicating the possibility that there is no

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<sup>81</sup>DETERRENCE, *supra* note 77 (citing John Sorenson et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481 (1999)).

<sup>82</sup>*Id.*

<sup>83</sup>Jake Ortman, *The Death Penalty*, at <http://www.orty.com/ubws/infohell/essay.html> (last visited Nov. 3, 2001) (citing Jimmy Dunne, *How Executions Boost the Murder Rate*, DEATH PENALTY EDUCATION CENTER, at [http://www.abolition-now.com/executionsboostmurder\\_rate.html](http://www.abolition-now.com/executionsboostmurder_rate.html)).

<sup>84</sup>DETERRENCE, *supra* note 77 (citing CENTER ON JUVENILE AND CRIMINAL JUSTICE, *HOW HAVE HOMICIDE RATES BEEN AFFECTED BY CALIFORNIA’S DEATH PENALTY* 2-3 (1995)).

<sup>85</sup>William C. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma’s Return to Capital Punishment*, 36 CRIMINOLOGY 711-33 (1994).

<sup>86</sup>*Id.*

<sup>87</sup>*Id.*

correlation between rates of homicide and the death penalty. Thus, the deterrence justification for the death penalty loses all meaning.

### C. Additional Reasons to Abolish the Death Penalty

Not only do the traditional justifications for the death penalty not support continued use of this irreversible penalty, but other reasons also support abolishing the death penalty. The following is a brief list of some of the other arguments against imposition of the death penalty.

#### 1. Expense of the Death Penalty

Capital punishment costs taxpayers substantially more than life imprisonment without the possibility of parole. A recent survey by the Palm Beach Post found that Florida spent \$51 million more on death penalty cases than it would have had to spend to prosecute all first-degree murder cases and seek life imprisonment without the possibility of parole.<sup>88</sup> The study also found that Florida has spent about \$24 million for each of forty-four executions since 1976.<sup>89</sup> According to a 1999 report from the Joint Legislative Budget Committee of the California Legislature, “[e]limination of the death penalty would result in a net savings to the state of at least several tens of millions of dollars annually, and a net savings to local governments in the millions to tens of millions of dollars on a statewide basis.”<sup>90</sup> The most serious problem caused by these excessive but necessary costs of the death penalty is the unavailability of these funds for other important social needs. One rural Washington county, for example, recently reported that because of anticipated death penalty trial costs, raises for county employees would be delayed, the number of public health nurses would be reduced by half, and efforts to update computers and county vehicles would be halted.<sup>91</sup> Loss of funding for these and other important government programs is an unacceptable and unnecessary side effect of the death penalty. The cure is simple: instead of imposing death sentences, impose life imprisonment without the possibility of parole. The money saved could then be allocated to other important government programs.

#### 2. The Death Penalty Is Applied in a Racially Biased Manner

In one of its earliest decisions regarding the constitutionality of the death penalty, the U.S. Supreme Court entertained arguments that the death penalty was applied unfairly and in a racially biased manner.<sup>92</sup> The Court ultimately held that death penalty statutes, which grant juries and judges wide discretion in imposing the sentence, were unconstitutional.<sup>93</sup> Despite the adoption of new, less discretionary

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<sup>88</sup>S.V. Date, *The High Price of Killing Killers*, PALM BEACH POST, Jan. 4, 2000, at 4-5 (on file with the author).

<sup>89</sup>*Id.*

<sup>90</sup>DEATH PENALTY INFORMATION CENTER, COSTS OF THE DEATH PENALTY, at <http://www.deathpenaltyinfo.org/costs2.html> (last visited Oct. 23, 2001) (citing THE CATALYST, Feb. 22, 2000).

<sup>91</sup>*Id.* (citing ASSOCIATED PRESS, Apr. 2, 1999).

<sup>92</sup>*Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>93</sup>*Id.*

death penalty statutes, race continues to play a role in the imposition of the death penalty. It is, however, the race of the victim rather than the race of the accused that generally plays a role in this determination. In Texas, for example, one who murders a white person is five times more likely to receive a death sentence than one who murders a black person.<sup>94</sup> Further, between 1980 and 1988, Texas prosecutors had never charged with capital murder or convicted a white offender who had allegedly killed a black offender.<sup>95</sup> On the national level, recently released statistics reveal an even more “racially lop-sided death sentencing record.”<sup>96</sup> The statistics show, for example, that since 1955, 55 percent of 177 defendants facing the death penalty for having allegedly killed a victim of another race were black.<sup>97</sup> Another 25 percent were Hispanic, but only 11 percent were white.<sup>98</sup> Even in cases in which determinations of guilt and innocence are accurate, inequalities in administration of the death penalty are unfair and immoral. They prolong the racism that has long colored the history of this country.

### 3. The Death Penalty Has Sacrificed Many Innocent Lives

The gravest problem with the death penalty is its infliction on innocent people that have become victims of political and judicial systems that pay little attention to their rights. In Illinois, for example, this problem has resulted in the exoneration of more death row inmates than executions of death row inmates since 1977.<sup>99</sup> As a result, Illinois Governor George Ryan issued a moratorium on the death penalty early last year.<sup>100</sup> A *Chicago Tribune* investigation into the death penalty in Illinois found the following:

At least 33 times, a defendant sentenced to die was represented at trial by an attorney who ha[d] been disbarred or suspended—sanctions reserved for conduct so incompetent, unethical or even criminal the lawyer’s license is taken away.

In at least 46 cases where a defendant was sentenced to die, the prosecution’s evidence included a jailhouse informant—a form of evidence so historically unreliable that some states have begun warning jurors to treat it with special skepticism.

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<sup>94</sup>Richard C. Dieter, *The Future of the Death Penalty in the U.S.*, at <http://www.deathpenaltyinfo.org/dpic.r04.html#> (last visited Oct. 23, 2001).

<sup>95</sup>*Id.*

<sup>96</sup>Marc Lacey & Raymond Bonner, *Reno Troubled by Death Penalty Statistics*, NY TIMES, Sept. 13, 2000, at A17.

<sup>97</sup>*Id.*

<sup>98</sup>*Id.*

<sup>99</sup>Cora Thompson, *The Illinois Death Penalty*, at <http://chicagonorth.about.com/citiestowns/midwestus/chicagonorth/library/weekly/aa032600a.htm> (last visited Mar. 26, 2000).

<sup>100</sup>*Id.*

In at least 20 cases where a defendant was sentenced to die, the prosecution's case included a crime lab employee's visual comparison of hairs—a type of forensic evidence that dates to the 19th Century and has proved so notoriously unreliable that its use is now restricted or even barred in some jurisdictions outside Illinois.

At least 35 times, a defendant sent to Death Row was black and the jury that determined guilt or sentence all white—a racial composition that prosecutors consider such an advantage that they have removed as many as 20 African-Americans from a single trial's jury pool to achieve it. The U.S. Constitution forbids racial discrimination during jury selection, but courts have enforced that prohibition haltingly.

Forty percent of Illinois' death-penalty cases are characterized by at least one of the above elements.<sup>101</sup>

The death penalty is the most severe, most irreversible punishment available. The use of DNA evidence in the exoneration of death row inmates in Illinois and other states has saved the lives of many innocent people, often after years of unjustified imprisonment. These innocents who had given years of their lives for crimes they did not commit were the lucky ones. What we cannot and do not know is how many unlucky ones there have been, how many innocent lives were taken by the death penalty before the availability of DNA evidence. Even one is too many. Even one is enough to require abolition of the death penalty.

#### *D. Time to Kill the Death Penalty in America's Civilian Sector*

Despite its long history in this country, the death penalty is an ineffective, inappropriate, inefficient, and immoral method of punishment. It cannot be justified through religion nor can it be justified through vengeance disguised as retribution. The deterrent effect of the death penalty is minor, an effect that could most likely be increased with the use of mandatory life sentences without the possibility of parole. Regardless of these historical justifications, the death penalty is still unjust. It is a lengthy and expensive process that also draws out the processes of healing and closure. Further, its application is often motivated by racial biases. Most importantly, however, the death penalty fosters the risk of killing of innocents. If the death penalty should be abolished in the civilian sector because of its many deficiencies and inherent unfairness, the argument for abolishing the death penalty in the military is significantly stronger because the military system is inherently unfair, and there should be no room for gambling with a service member's life.

### III. THE MILITARY JUSTICE SYSTEM AND THE DEATH PENALTY IN THE MILITARY

#### *A. Brief History of U.S. Military Law*

In 1775, the American Continental Congress, under the advisement of a committee that included John Adams and Thomas Jefferson, revised the original

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<sup>101</sup>Ken Armstrong & Steve Mills, *Death Row Justice Derailed: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshest Punishment Into Its Least Credible*, CHI. TRIB., Nov. 14, 1999, at 1.

Articles of War to more closely parallel the British Articles of War.<sup>102</sup> The new American Articles of War were enacted on September 20, 1776.<sup>103</sup> The American Articles of War would ultimately be revised four times before Congress, under public pressure,<sup>104</sup> enacted the Uniform Code of Military Justice (“UCMJ”) on May 5, 1950.<sup>105</sup>

The UCMJ was drafted with the following three primary goals: “(1) [to] integrate the military justice system of the three services; (2) [to] modernize the system to promote public confidence and protect the rights of the service member without impeding the military function; and (3) [to] improve the arrangement and draftsmanship of the articles.”<sup>106</sup> The newly enacted UCMJ provisions were especially important because they accomplished the following goals: created the position of the “law officer”<sup>107</sup> (the predecessor of today’s military judge); mandated that attorneys prosecute and defend service members accused of serious crimes<sup>108</sup> (established the right to counsel); criminalized illegal command influence;<sup>109</sup> created the U.S. Court of Military Appeals<sup>110</sup> (now called the Court of Appeals for the Armed Forces); and provided the accused the right to remain silent.<sup>111</sup> Public outrage, stemming from the controversial Vietnam War, ultimately forced Congress to revise the UCMJ once again under the Military Justice Act of 1968.

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<sup>102</sup>EDWARD M. BYRNE, *MILITARY LAW* 8 (3rd ed. 1981).

<sup>103</sup>*Id.*

<sup>104</sup>Walter T. Cox III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 *MIL. L. REV.* 1, 5 (1987). After the world wars, when millions of civilians had become service members, either voluntarily or involuntarily, the American public pressured Congress to reform the military justice system, whose punishments would hardly pass today’s 8th Amendment prohibition on cruel and unusual punishment. *Id.* at 10-11.

<sup>105</sup>Although Congress revised the 1776 Articles of War in 1786, they remained in effect until 1806. BYRNE, *supra* note 102, at 8. The 1806 Articles remained in effect until 1874, and those, in turn, were effective until World War I. Congress replaced the 1874 Articles in 1920. *Id.*

<sup>106</sup>Cox, *supra* note 104, at 13 (citing Letter from James Forrestal to the Committee on a Uniform Code of Military Justice (Aug. 18, 1948)).

<sup>107</sup>U.C.M.J. ch. 169, 64 Stat. 117 (1950).

<sup>108</sup>*Id.* The current version is at Article 38, U.C.M.J., 10 U.S.C. § 837.

<sup>109</sup>U.C.M.J. ch. 169, 64 Stat. 117 (1950). The current version is at Article 37, U.C.M.J., 10 U.S.C. § 837.

<sup>110</sup>U.C.M.J. ch. 169, 64 Stat. 117 (1950). The current version is at Article 67(a)(1) U.C.M.J., 10 U.S.C. § 867. The Court of Appeals for the Armed Forces (C.A.A.F.) consists of five judges appointed from civilian life for 15-year terms. The court is an Article I court, not an Article III, court. *See* Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178-79.

<sup>111</sup>U.C.M.J. ch. 169, 64 Stat. 117 (1950). The current version is at Article 31, U.C.M.J., 10 U.S.C. § 831.

*B. The Military Justice System Is Inherently Unfair*

As delineated above, the military justice system has different origins and purposes from those of the civilian justice system. Because of these origins and purposes, the system has also developed several unjust aspects that can affect an accused service member, especially if the accused is on trial for a capital offense. The following weaknesses in the military justice system support abolishing the death penalty in the military.

1. Article I Courts Grant Convening Authorities Too Much Power

At first glance, the most obvious difference between the civilian and military justice systems is the manner in which their respective courts are created. Military court-martials are created under Article I of the U.S. Constitution, whereas civilian courts are created under Article III.<sup>112</sup> This difference in creation has an important implication because, under Article I, courts of military justice are only temporary courts. Courts-martial are created by order of the convening authority under Article 22 of the UCMJ.<sup>113</sup> In effect, a court-martial is an ad hoc tribunal to which commanders may refer one or a number of cases for trial.<sup>114</sup> This ad hoc nature of military trials gives the convening authority arguably unbridled powers and, in turn, permits injustice.

In the military, commanders, not police officers or judges, order an accused service member into pretrial confinement based upon a finding of probable cause.<sup>115</sup> Unlike the civilian counterparts, however, a commander has probably never been to law school or had other significant legal training to understand the concept of probable cause. This lack of knowledge leaves room for a commander's personal opinions and/or influence by the commander's superior(s) to be factored into the

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<sup>112</sup>In the federal system, Article III of the U.S. Constitution establishes the U.S. Supreme Court and empowers Congress to ordain and establish inferior courts. U.S. CONST. art. III, § 1. Congress promptly passed the Judiciary Act of 1789, thereby establishing such courts. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. Likewise, state courts are established by statute. For example, Illinois established its circuit courts via the Circuit Court Act, 705 ILCS 35/0.01.

<sup>113</sup>10 U.S.C. § 822 (2001). Articles 23 and 24, U.C.M.J., 10 U.S.C. §§ 823, 824, specify who may convene special and summary courts-martial. General courts-martial convening authorities are usually general or flag officers but may be colonels or their Navy equivalent, captains, who are in command of a separate brigade, fleet, wing, station, or larger unit. Special courts-martial convening authorities are usually colonels or captains in the Navy, but may be lieutenant colonels or commanders in command of detached battalions, separate squadrons, naval vessels, or larger units. Summary courts-martial, on the other hand, may be convened by lieutenant colonels or commanders, but also by majors or lieutenant commanders in command of a detached company, squadron, or larger unit. Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 125 (1992).

<sup>114</sup>"Referral" is "the order of a convening authority that charges against an accused will be tried by a specified court-martial." R.C.M. 601(a) (2000).

<sup>115</sup>R.C.M. 305(h)(2)(B)(iii)(a) (2000). The grounds for probable cause for ordering a service member into confinement are probable cause that the confinee committed a crime, that confinement is necessary to ensure the confinee's presence at trial, or that the confinee will engage in serious misconduct if not confined, and that less severe forms of restraint are inadequate. *Id.*

decision to arrest a service member. Nevertheless, because military commanders are expected to exhibit the traits of honor, courage, and commitment, they have the benefit of the doubt in making probable cause determinations. Even the mere possibility, however, of having less than probable cause in making confinement determinations is detrimental because this first determination is the proverbial snowball that careens down the military system's mountain of unfairness. From this point on, the military system has the upper hand: for example; a pretrial confinee in the military, unlike one in the civilian system, has no chance to make bail.<sup>116</sup>

In the military, it is the commander, not the law-schooled prosecutor, who decides whether to refer charges to a court-martial. The commander, called the convening authority when deciding whether to refer charges to a court-martial, has several options: dispose of the charges by dismissal, forward them to a court-martial, or forward them to higher authority for disposition.<sup>117</sup> If the convening authority decides to refer the charges to a court-martial, the convening authority must first conduct an Article 32 investigation.<sup>118</sup> An Article 32 investigation is the military's version of a civilian's 5th Amendment right to a presentment or indictment by a grand jury in prosecutions for capital or infamous crimes. Some commentators opine that the Article 32 investigation is a better safeguard of an accused's interests than the grand jury indictment is of a defendant's interests because the accused and the accused's counsel are allowed to be present during the proceedings and may even cross-examine witnesses and present matters on behalf of the accused.<sup>119</sup> This advantage, however, does not outweigh the fact that Article 32 determinations are only advisory recommendations. Unlike the prosecution's lack of choice in a civilian context, the convening authority can ignore a recommendation to dismiss the case and pursue the case in a general or another court-martial.<sup>120</sup> Once the convening authority has decided to refer a case to a court-martial, the snowball of injustice really begins to gain size and speed, for at this point, the convening authority exercises the greatest power: the ability to select the military jury.

Despite the explicit exception language found in the 5th Amendment, the 6th Amendment's right to a jury trial does not apply to cases "arising in the land or naval

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<sup>116</sup>Francis A. Gilligan & Michael D. Wims, *Civilian Justice v. Military Justice: In Many Instances, Service Members Accused of Crime Are Granted More Rights Than Civilians*, 5 SUM. CRIM. JUST. 2, 5 (1990). Nevertheless, the author acknowledges that, unlike his or her civilian counterparts, a service member enjoys certain benefits by the mere status of being in the military—the confinee continues to be paid, receive benefits, and so forth. *Id.*

<sup>117</sup>R.C.M. 401(c) (2000).

<sup>118</sup>10 U.S.C. § 832 (2001). The investigation must include an inquiry as to the truth of the charges, consideration of the form of the charges, and a recommendation for the disposition of the charges. *Id.* § 832(a).

<sup>119</sup>*Id.* § 832(b).

<sup>120</sup>Gilligan & Wims, *supra* note 116, at 34. *Cf.* Meredith L. Robinson, Comment, *Volunteers for the Death Penalty? The Application of Solorio v. United States to Military Capital Litigation*, 6 GEO. MASON L. REV. 1049 (1998) (suggesting that grand juries, unlike Article 32 investigations, are the conscience of the community). Despite the fact that grand juries are often viewed as "rubber stamps" for prosecutors, the fact remains that service members are not afforded this constitutional right.

forces.”<sup>121</sup> The random selection of jurors “from a fair cross sections of the community” in the civilian sector<sup>122</sup> is completely absent in the military. Apart from the limitations placed by Article 25 of the UCMJ,<sup>123</sup> which details who may serve on courts-martial, the convening authority basically handpicks the court-members. In determining which jurors to pick, the convening authority is supposed to “detail as members thereof such members of the armed forces as, *in his opinion*, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”<sup>124</sup> Ultimately, the convening authority’s “opinion” is given wide latitude and discretion.

“Court-packing” a court-martial jury to bias the outcome of the case is considered unlawful command influence.<sup>125</sup> In order to prove unlawful command influence based on “court-packing,” the defendant must prove at trial (1) that the facts, if true, are tantamount to unlawful command influence and (2) that the alleged influence has a “logical connection to the court-martial in terms of its potential to cause unfairness to the proceedings.”<sup>126</sup> Once the defendant has satisfied this two-pronged requirement, the burden shifts to the government to prove otherwise.<sup>127</sup> As long as the government disproves the presence of unlawful command influence or, in the alternative, proves that the unlawful influence will not affect the proceedings, the jury will continue to deliberate the case.<sup>128</sup> In addition to the power to personally select prospective jurors, the convening authority can also remove jurors without a showing a good cause.<sup>129</sup> Further, even after actual assembly, the convening authority can still remove jurors with a showing of good cause.<sup>130</sup>

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<sup>121</sup>*Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). See also *O’Callahan v. Parker*, 395 U.S. 258, 262 (1969); *Reid v. Covert*, 354 U.S. 1, 37 (1957).

<sup>122</sup>28 U.S.C. § 1863 (1964) (amended in 1968, 1972, 1978, 1988).

<sup>123</sup>10 U.S.C. § 825 (2001). A commissioned officer may serve on any court-martial, where as a warrant officer (ranking below all commissioned officers and above all enlisted personnel) may serve on any court-martial except those in which a commissioned officer is on trial. If an enlisted member on trial requests a trial by enlisted members, the convening authority must select enlisted members from a different unit. *Id.* Moreover, if the accused does request enlisted members, he or she may not be tried by a general or special court-martial unless the enlisted members constitute at least one-third of the court members. *Id.*; 10 U.S.C. § 825(c).

<sup>124</sup>10 U.S.C. § 825(d)(2) (*emphasis added*).

<sup>125</sup>*United States v. White*, 48 M.J. 251, 254 (1998).

<sup>126</sup>*United States v. Biagase*, 50 M.J. 143, 150 (1999).

<sup>127</sup>*Id.* See also *United States v. Gerlich*, 45 M.J. 309, 310 (1996).

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

<sup>129</sup>R.C.M. 505(c)(1) (2001).

<sup>130</sup>Under R.C.M. 505(f), the MANUAL defines “good cause” as including the following: “physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time. ‘Good cause’ does not include temporary inconveniences which are incident to normal conditions of military life.” R.C.M. 505(f) (2001).

Ultimately, convening authorities enjoy broad powers that their civilian counterparts do not enjoy. In addition, the convening authority is often the commanding officer of many of the people involved in a court-martial (the staff judge advocate, the court members, and many of the witnesses). This type of authoritative influence over many of the service members allows for the possibility of “illegal command influence” as defined under Article 37 of the UCMJ.<sup>131</sup> Yet, despite the Article 37 prohibitions, convening authorities continue to find innovative ways to influence courts-martial.<sup>132</sup>

Interestingly enough, service members that allege illegal command influence seldom prevail. In fact, the Court of Appeals for the Armed Forces has set a high hurdle for any service member wishing to successfully assert a charge of illegal command influence,<sup>133</sup> but the service member must also “(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness.”<sup>134</sup>

Moreover, military defense counsel may be reluctant to accuse the convening authority of illegal command influence. If the civilian world is sometimes referred to as a “small place,” the military is an incredibly smaller place. In the military, it is highly likely that the convening authority may later be sitting on the defense counsel’s selection board. It is no surprise that, to date, no convening authority has been prosecuted for committing illegal command influence.

In summary, the *ad hoc* characteristic of courts-martial grants the convening authority (1) the power to refer cases to a court-martial based on an arguably subjective notion of “probable cause,” (2) the ability to deny Article 32 recommendations not to prosecute, (3) the ability to select jurors using a highly subjective standard, and (4) an assorted array of other powers.<sup>135</sup> One might want to

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<sup>131</sup>Command influence in and of itself is not necessarily a bad thing. When commanders and convening authorities, however, try to influence decisions that should be independent of command and convening authority prerogatives, it becomes “illegal” or “unlawful” command influence as provided for under Article 37, U.C.M.J., 10 U.S.C. § 837.

<sup>132</sup>*See generally*, United States v. Newbold, 45 M.J. 109 (C.A.A.F. 1996); United States v. Youngblood, 47 M.J. 338 (C.A.A.F. 1997); United States v. Bartley, 47 M.J. 182 (C.A.A.F. 1997), United States v. Levite, 25 M.J. 334 (C.M.A. 1987), United States v. Sullivan, 26 M.J. 442, 442-43 (C.M.A. 1988).

<sup>133</sup>*Biagase*, 50 M.J. at 150, *citing* United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994).

<sup>134</sup>United States v. Richter, 51 M.J. 213, 224 (C.A.A.F. 1999).

<sup>135</sup>The convening authority has the following pretrial and posttrial powers: the ability to limit the defendant’s military-provided expert witnesses (R.C.M. 703(c)(2)), the power to grant immunity to witnesses (R.C.M. 704(c)), the power to order an inquiry into the mental capacity or mental responsibility of the accused (R.C.M. 706(b)(1)), the ability to enter into a binding plea bargain with the accused (R.C.M. 705(a)), the power to withdraw a case from a court-martial to which he referred it for any reason before the announcement of findings (R.C.M. 604(a)), the power to disapprove a sentence in whole or in part, and the power to change a punishment as long as the change does not increase the severity (R.C.M. 1107(b)(1),(c), & (d)).

go as far as to say that, if the convening authority wants to bury the accused, these broad powers give the convening authority a broader choice of weapons and ammunition than are available to a team of Navy SEALs.

### 2. Inadequate Defense Counsel

In addition to the convening authority's ample powers, the military justice system is plagued with another form of unfairness: military defense counsel are generally inexperienced, especially in representing clients that are facing the death penalty or life imprisonment. Because of constant rotations, especially early in their military careers, military defense counsels are generally inexperienced.<sup>136</sup> Nevertheless, even experienced military defense counsel may be hesitant to zealously represent their clients for fear that overly zealous representation of an accused could adversely affect their military career, especially if counsel believes that they will have to someday serve under the very convening authority that had brought the charges against the accused.

### 3. Military Judges: Pawns of Authoritative Hierarchy

Military judges are also susceptible to the pressures of serving in an authoritative, hierarchical institution. Unlike civilian judges, military judges serve at the pleasure of the Judge Advocate General and are subject to constant review by senior officers.<sup>137</sup> Moreover, promotions and reassignments depend on these evaluations.<sup>138</sup> There have been several recorded instances in which senior officers have attempted to influence military judges.<sup>139</sup> Whether or not improper influence actually occurs is irrelevant. The fact that military judges, without the protection of tenure, know that they must do well on their efficiency reports to be promoted and that those reports are inevitably issued by their superiors, who in turn have a stake in the very cases that the judges hear, presents a grave possibility of improper influence.

Ultimately, the weaknesses in the military justice system have not gone unnoticed. The Commission of the UCMJ has suggested a review of each weakness

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<sup>136</sup>Professor Spak argues that military defense counsel are inexperienced because most of them are fresh out of law school. After three years as defense counsel, the Judge Advocate General's Corps of their service rotates them out of their positions to be trial counsel or to fill some other legal position, such as legal assistance, and claims or administrative law, or promotes them to fill supervisory roles, such as deputy staff judge advocate. Thus, Professor Spak maintains that military defense counsel have always been of a lower standard than their civilian counterparts because of their youth and inexperience. Karen A Ruzic, Note & Comment, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT L. REV 265, 295 n.238 (1994), citing interview with Michael I. Spak, Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology, in Chicago, IL (Jan. 14, 1994).

<sup>137</sup>Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 653 (1994).

<sup>138</sup>*Id.* at 629-30.

<sup>139</sup>*See generally* United States v. Ledbetter, 1 M.J. 746 (A.F.C.M.R. 1975), *rev'd*, 2 M.J. 37 (C.M.A. 1976); United States v. Carlucci, 26 M.J. 328 (C.M.A. 1988) (en banc); United States v. Mabe, 30 M.J. 1254 (N.M.C.M.R. 1990) (en banc).

listed above. In summary, the military justice system is inherently unfair because (1) the convening authority is granted unbridled powers in involvement with the military justice system,<sup>140</sup> (2) most military defense counsel are inexperienced,<sup>141</sup> and (3) military judges are subject to an authoritative regime.<sup>142</sup> These sources of military injustice provide strong arguments to abolish the death penalty in the military; there is too much room for error when the life of a service member is at stake. Although these weaknesses are good reasons to abolish the death penalty in the military, there are even stronger grounds to do so. The next section will explain the military's expanded notion of subject matter jurisdiction and the lack of proportionality review in capital cases and how these two factors severely prejudice a capital defendant. Before addressing those two concerns, a brief history of the death penalty in the military is in order.

### C. Death Penalty in the Military

#### 1. Historical Background of the Military Death Penalty

The history of the death penalty in the court-martial system predates the creation of the American court system as we know it today. Before the American Revolution, American colonists had incorporated Great Britain's Articles of War, which governed the use of courts-martial and the death penalty. Under the Articles of War of 1775, American colonists created a court-martial system free from British control.<sup>143</sup> Like British court-martials, however, the Articles of War of 1775 authorized the use of the death penalty. Under the Articles of War of 1775, the death penalty was permitted for only three military offenses: shamefully abandoning one's post, disclosing the watch-word or giving a false watch-word, and compelling a senior officer to surrender his command to the enemy.<sup>144</sup>

Whereas the Articles of War of 1775 permitted the death penalty for only three military offenses, however, the Articles of War of 1776 greatly expanded that

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<sup>140</sup>*Id.* The Commission has delineated for review the following questions with regard to the power of the convening authority: (1) Should the role of the convening authority be changed in the following ways? (2) Should the court members be selected by a jury commission or by a random computer selection process? (3) Should Congress create an independent Courts-Martial Command and provide that decisions to prosecute be made by a legal officer serving as the equivalent of a "district attorney"? (4) Should funding for courts-martial, including expenses for experts, witnesses, and so forth, be centralized in each service rather than treated as a budget item for convening authorities? (5) Should the convening authority retain clemency powers, both with respect to findings and sentences, or should the convening authority's powers be limited?

<sup>141</sup>*Id.* The Commission has questioned whether there should be minimum standards for defense counsel in capital cases.

<sup>142</sup>*Id.* The Commission has questioned whether military judges should serve for a fixed term and be subject to a separate pay and allowance scale not fixed by military rank or grade.

<sup>143</sup>See 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 (1997).

<sup>144</sup>*Id.* at 184 n.51-53 (citing Articles of War of 1775, art. 25, 26, and 31 respectively).

number to sixteen different offenses in which the death penalty was applicable.<sup>145</sup> These sixteen offenses included such military offenses as mutiny, desertion, aiding the enemy, and sleeping on the post, while at the same time incorporating crimes that were both military and civilian, such as striking an officer (assault and battery) or committing a violent act against any person attempting to bring provision into camp (assault, battery, or homicide).<sup>146</sup> Even though these offenses could be brought both in civilian court or in a court-martial, however, the “Articles followed the British example of ensuring the supremacy of civil court jurisdiction over ordinary capital crimes that were punishable by the law of the land and were not special military offenses.”<sup>147</sup>

For almost ninety years, courts-martial were limited in their ability to hear civilian crimes,<sup>148</sup> but with the passage of the 1863 revision of the Articles of War of 1776, court-martial jurisdiction expanded. In the midst of fighting a civil war, Congress feared that civil courts could not hear every case brought before it during wartime. Thus, with the passage of the 1863 revision, courts-martial were able to hear, in times of war, the following kinds of cases involving soldiers: murder, assault and battery with an intent to commit murder, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny.<sup>149</sup> The force of this revision gave military courts-martial concurrent jurisdiction over capital crimes with civil courts.<sup>150</sup> This change in turn allowed commanding officers to bring military criminals before a court-martial quickly and quietly without having to wait for or deal with civilian tribunals.

By 1916, Article 92 granted military courts-martial jurisdiction to hear murder and rape cases not only in times of war, but also in times of peace if the criminal offense took place outside of the continental United States.<sup>151</sup> For thirty-six years, court-martial jurisdiction remained the same. With the inception of the Uniform Code of Military Justice, however, court-martial jurisdiction saw its biggest expansion.

Whereas the 1916 Articles had not given court-martial jurisdiction over rape and murder during peacetime, the UCMJ removed this restriction, thus allowing courts-

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<sup>145</sup>*Id.* at 185.

<sup>146</sup>*Id.* (citing Article of War of 1776, art. 5 and 11 respectively).

<sup>147</sup>*Loving v. United States*, 517 U.S. 748, 752 (1996).

<sup>148</sup>Court-martials were only limited if a petition was made by a civilian to remove the case from military jurisdiction and to try the case in a civilian court. Under the Articles of War of 1776, the commanding officer was required to turn over military personnel in violation of a civilian crime. If, however, no petition was made on behalf of the injured party, then the military court-martial could proceed with action against the individual.

<sup>149</sup>*O'Connor*, *supra* note 143, at 190-91 (citing Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 731, 736).

<sup>150</sup>*See Coleman v. Tennessee*, 97 U.S. 509, 513 (1878) (holding that the 1863 revision did not give military courts-martial exclusive jurisdiction but rather created concurrent jurisdiction with federal and state courts).

<sup>151</sup>*See* Articles of War of 1916, ch. 418, § 3, Arts. 92-93, 39 Stat. 664.

martial to hear all capital crimes regardless of peacetime or wartime.<sup>152</sup> Further, the UCMJ required that all murder offenses be tried as capital offenses if the underlying felony was actual or attempted burglary, sodomy, rape, robbery, or aggravated arson.<sup>153</sup> In addition, the UCMJ allowed for the expansion of personal jurisdiction in a court-martial. Before the UCMJ, military courts-martial had been able to reach only active duty service members, but the UCMJ permitted personal jurisdiction over “dependents accompanying an armed force” outside of the United States and also “discharged service members for serious crimes” in cases in which those crimes could not be argued, for one reason or another, in civilian court.<sup>154</sup> The U.S. Supreme Court, however, narrowed the ability of Congress to expand court-martial personal jurisdiction.<sup>155</sup>

Following the same desire to limit the ability of Congress to expand court-martial personal jurisdiction, in *O’Callahan v. Parker*,<sup>156</sup> the U.S. Supreme Court held that Congress lacked the constitutional power under Article I to create personal jurisdiction regardless of the accused’s military service.<sup>157</sup> Military courts, however, had difficulty applying the reasoning behind *O’Callahan*, and the case was highly criticized.<sup>158</sup> Eighteen years later, the U.S. Supreme Court overruled *O’Callahan*.<sup>159</sup>

In *Solorio v. United States*, a member of the coastguard was charged with sexually molesting two young girls who were the daughters of two fellow guardsmen.<sup>160</sup> The offenses occurred in a civilian community where Solorio lived and not in the course of his military duty.<sup>161</sup> Nevertheless, Solorio was brought before a court-martial, where he questioned the jurisdiction of the proceeding.<sup>162</sup> The case went to the U.S. Supreme Court, where the Court pointed to the military courts’ difficulty in applying the service-connection standard set forth in *O’Callahan* as a primary reasoning for overturning the case.<sup>163</sup> Thus, the Court returned to the pre-*O’Callahan* status-based test and dismissed the notion of the service-connection.<sup>164</sup>

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<sup>152</sup>See O’Connor, *supra* note 143, at 196 (citing Act of May 5, 1950, ch. 169, arts. 118, 120, 64 Stat. 107, 140).

<sup>153</sup>*Id.* (citing art. 118 (4)).

<sup>154</sup>*Id.* at 197.

<sup>155</sup>See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 284, (1960); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960).

<sup>156</sup>395 U.S. 258 (1969).

<sup>157</sup>See O’Connor, *supra* note 143, at 198.

<sup>158</sup>*Id.* at 199. Although *O’Callahan* attempted to create a service-connection standard to limit personal jurisdiction, courts-martial used a very low standard of the service-connection test that, in its application, appeared to go against *O’Callahan*’s holding.

<sup>159</sup>See *Solorio v. United States*, 483 U.S. 435 (1987).

<sup>160</sup>*Id.* at 436.

<sup>161</sup>*Id.* at 437.

<sup>162</sup>*Id.*

<sup>163</sup>Robinson, *supra* note 120, at 1053.

<sup>164</sup>See O’Connor, *supra* note 143, at 200.

The result of *Solorio* created jurisdiction over the accused based only on the status of the accused as an active service member.<sup>165</sup> After *Solorio*, however, the question of whether this status-based test applied to capital crimes remained unanswered.<sup>166</sup> The Court in *Solorio* had not addressed the issue because the case before the Court did not involve a capital crime.

The dissent in *Solorio* focused on the rights of the individuals regardless of their status as service members.<sup>167</sup> Although Congress had the power under Article I to extend jurisdiction to courts-martial, according to the dissent, Congress did not have the power to deprive individuals of their safeguards under the Bill of Rights.<sup>168</sup> Nevertheless, the question of military status versus service-connection in capital crimes remained unanswered, and the Court did not address another military capital case for nine years.<sup>169</sup>

In *Loving*, petitioner Dwight Loving, an Army private, had allegedly murdered two taxicab drivers.<sup>170</sup> Loving had also apparently attempted to murder a third taxicab driver, but the driver escaped.<sup>171</sup> The next day, Loving was arrested and confessed to the murders.<sup>172</sup> After trial, a court-martial found Loving guilty of premeditated murder and felony murder and sentenced him to death.<sup>173</sup> The U.S. Army Court of Military Review and the U.S. Court of Appeals for the Armed Forces affirmed.<sup>174</sup>

On hearing the case, the U.S. Supreme Court in *Loving* did not directly address the status-based test versus the service-connection test, but rather the issue dealt with whether the President, under the Constitution, had the authority to prescribe aggravating factors for capital offenses.<sup>175</sup> Justice Stevens, however, in concurrence, raised the question as to whether a service-connection test should apply in capital cases.<sup>176</sup> Without even arguing whether a service-connection test should apply, Stevens merely stated that, “[o]n these facts, this does not appear to be a case in which the petitioner could appropriately have raised the question whether the holding in *Solorio v. United States* should be extended to reach imposition of the death

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<sup>165</sup>*Id.*

<sup>166</sup>The Court never directly addressed whether the status-based test applied to capital crimes although the authorities cited in *Solorio* differentiated between capital and noncapital offenses.

<sup>167</sup>*Solorio*, 483 U.S. at 453 (Marshall, J., dissenting).

<sup>168</sup>*Id.*

<sup>169</sup>*Loving*, 517 U.S. at 748.

<sup>170</sup>*Id.* at 751.

<sup>171</sup>*Id.*

<sup>172</sup>*Id.*

<sup>173</sup>*Id.*

<sup>174</sup>*Loving*, 517 U.S. at 751.

<sup>175</sup>*Id.*

<sup>176</sup>*Id.* at 774 (Stevens, J., concurring).

penalty for an offense that did not have the ‘service-connection’ required.”<sup>177</sup> Justice Stevens appears, however, to favor overruling *Solorio* because “*Solorio*’s review of the historical materials would seem to undermine any contention that military tribunal’s power to try capital offense must be as broad as its power to try noncapital ones.”<sup>178</sup> Although Justice Stevens joined in the majority’s decision, the concurrence rested on the “proposition that our decision in *Solorio* must be understood [not] to apply to capital offenses.”<sup>179</sup>

Thus, the exact extent of the death penalty in the military court-martial system is still unknown. The question of whether there should even be a death penalty remains buried, but the question of whether the service-connection test or active status-based test applies to capital cases remains in the forefront and unanswered. History has shown the willingness on the part of Congress to expand personal and subject matter jurisdiction to courts-martial so much that it does not appear inconceivable that a court-martial could reach service members solely on their status of being in the military.

## 2. Subject Matter Jurisdiction

Since the inception of the American court-martial system, the use of the death penalty has remained constant. The lengths to which the court-martial system could reach, however, to bring an individual before it have been the topic of great debate as the evolution of the system has turned toward an expansive notion.<sup>180</sup> Thus, the use of the death penalty in the court-martial system has not been an issue of direct debate, outside of typical 8th Amendment violations argued in the civil systems, but rather the concern is the issue of subject matter jurisdiction in the court-martial system. Primarily, the focus has been on the distinction of crimes committed during peacetime versus during wartime, military versus civilian offenses, and active status versus service-connection.<sup>181</sup>

The first example of congressional expansion in the subject matter jurisdiction of the court-martial system appears in the distinction between capital offenses committed during peacetime and those during wartime. Until 1950, court-martial jurisdiction was limited only to those capital crimes committed during wartime.<sup>182</sup> The understanding behind pre-1950 jurisdiction was that, in time of war, criminal conduct by a soldier needed immediate attention and the military system should not have to wait for a civilian tribunal to address the offense.<sup>183</sup> On the other hand, in times of peace, access to the civilian courts was accomplished easily, and the argument of swift action needed during war did not apply.<sup>184</sup> With the passage of the

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<sup>177</sup>*Id.*

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

<sup>179</sup>*Loving*, 517 U.S. at 775.

<sup>180</sup>*Id.* at 752.

<sup>181</sup>See Robinson, *supra* note 120, at 1050 (citing Enrollment Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 731, 736 (1863) (current version at 10 U.S.C. § 1342 (1994))).

<sup>182</sup>See *id.*

<sup>183</sup>See *Loving*, 517 U.S. at 750.

<sup>184</sup>See *id.*

UCMJ in 1950, however, Congress expanded the jurisdiction of military courts-martial, enabling the courts-martial system to hear capital cases regardless of the nation's status of being at war or at peace.<sup>185</sup>

Disregarding the distinction between peacetime and wartime brought with it disregarding the distinction between military crimes and civilian offenses. Before the UCMJ, military courts-martial were to adhere to "turnover provisions" brought by civilian victims.<sup>186</sup> The turnover provisions, enacted in the Articles of War of 1776, required a commanding officer to turnover or deliver a soldier upon the application of the victim or a party representing the victim.<sup>187</sup> The assumed reasoning behind the "turnover provisions" was not the belief that the civilian court system was better than the military court-martial system or that the rights of the accused would be better represented in the civilian court system, but rather, the fear was the use of a military tribunal as a shield to protect soldiers.<sup>188</sup> Nevertheless, Congress, with the adoption of the UCMJ, disregarded the "turnover provisions" and permitted courts-martial to hear cases regardless of where or when the criminal act occurred.<sup>189</sup>

Before 1950, a court-martial could hear capital offenses only in times of war, but the passage of the UCMJ gave the court-martial system an expanded notion of subject matter jurisdiction, allowing the system to hear capital crimes in times of peace without interference from civilians or civilian tribunals. The only question that remains is who can be brought before the court-martial? Although the question, for all intents and purposes, remains unanswered, the U.S. Supreme Court appears to have an expanded notion of jurisdiction to allow a service member to be brought before a military court-martial based only on the accused's status as a member of the Armed Forces.<sup>190</sup> After the inception of the UCMJ, the U.S. Supreme Court did address the subject matter jurisdiction of a military court-martial.<sup>191</sup> The Court favored a narrow interpretation of subject matter jurisdiction in a court-martial system.<sup>192</sup> The Court continued its narrow application by requiring that status as a military member alone did not give a court-martial jurisdiction.<sup>193</sup> Rather, before any courts-martial could establish jurisdiction, there needed to be a service-connection between the accused and the accused's duty with the military.<sup>194</sup> The narrow

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<sup>185</sup>See Robinson, *supra* note 120, at 1051.

<sup>186</sup>O'Connor, *supra* note 143, at 197.

<sup>187</sup>*Id.* at 187.

<sup>188</sup>See *id.* at 188.

<sup>189</sup>See *Loving*, 517 U.S. at 753.

<sup>190</sup>*Id.* at 753.

<sup>191</sup>See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955).

<sup>192</sup>See *Toth*, 350 U.S. at 22 (holding that a court-martial lacked jurisdiction over a discharged service member who had committed the offense during active duty). In addressing the question, the *Toth* majority believed that court-martial jurisdiction should be limited to "the least possible power adequate to the end proposed." *Id.* at 23 (quoting *Anderson v. Dunn*, 519 U.S. 204, 230 (1821)).

<sup>193</sup>See *O'Callahan*, 395 U.S. at 267.

<sup>194</sup>See *id.*

interpretation of court-martial subject matter jurisdiction did not last, however, and eighteen years later, the interpretation expanded.<sup>195</sup>

Although the U.S. Supreme Court did not directly address the issue of capital crimes and subject matter jurisdiction, *Solorio* can be read as a warning that, if the issue comes before the Court, *Solorio* will apply.<sup>196</sup> In *Solorio*, the Court focused on the accused's status as an active duty service member and did not focus on whether the accused had performed the criminal act while performing a service for the Armed Forces.<sup>197</sup> The majority further focused on congressional plenary power to give Article I courts, such as courts-martial, expansive subject matter jurisdiction.<sup>198</sup> Thus, although *Solorio* did not directly deal with a capital case, the Court's expanded interpretation of subject matter jurisdiction and its use of the status-based test, made it appear as though the same application would occur in a capital case.<sup>199</sup>

The only other opportunity for the U.S. Supreme Court to hear a military capital case did not involve an issue in which the question of status versus service could be addressed.<sup>200</sup> In *Loving*, the issue did not address court-martial subject matter jurisdiction, but rather whether the President had authority under the Constitution to prescribe aggravating factors so that a service member could be sentenced to death.<sup>201</sup> In fact, the majority did not even mention the terms "status-based test" or "service-connection test."<sup>202</sup> The terms "status" and "service-connection" first appeared only in a concurring opinion.<sup>203</sup> Justice Stevens, in concurrence, questioned whether a service-connection requirement should be used in capital cases because the question still remained answered after *Solorio*.<sup>204</sup> Even though Justice Stevens concurred in *Loving*,<sup>205</sup> it is clear that Stevens would require a service-connection standard for death penalty cases because "men and women of the Armed Forces do not by reasoning of serving their country receive less protection that the Constitution provides."<sup>206</sup>

Thus, until the U.S. Supreme Court directly addresses the issue of status versus service-connection, the extent of jurisdictional reach of the court-martial system will

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<sup>195</sup>*Solorio*, 483 U.S. at 436.

<sup>196</sup>See Robinson, *supra* note 120, at 1053.

<sup>197</sup>*Solorio*, 483 U.S. at 439.

<sup>198</sup>*Id.* at 441.

<sup>199</sup>See O'Connor, *supra* note 143, at 198.

<sup>200</sup>See *Loving*, 517 U.S. at 756.

<sup>201</sup>*Id.* at 751.

<sup>202</sup>*Id.* at 748-74.

<sup>203</sup>*Id.* at 774.

<sup>204</sup>See *id.*

<sup>205</sup>The concurrence by Justice Stevens is based on his belief that, even if the status-based versus the service-connection test were to be argued in the instant case, the criminal defendant would lose because his actions would nevertheless fit under the service-connection test, and the court-martial system would still have jurisdiction to hear the case. *Loving*, 517 U.S. at 774.

<sup>206</sup>*Id.*

be unknown. If history is a key to the future, however, then the willingness of Congress to expand jurisdiction under Article I and the U.S. Supreme Court's willingness to uphold such expansion leave little doubt that court-martial jurisdiction will reach to individuals merely because they are in the military.

### 3. Lack of Proportionality Review

In the civilian sector, courts review the death penalty sentence using a standard of proportionality review. This proportionality review, imposed by statute in some states and in others by case law, is a safeguard mechanism that allows the reviewing court to determine "whether the sentence is generally proportional to those imposed by other jurisdictions in similar situations."<sup>207</sup> In the military, "Congress has not mandated a proportionality review in the UCMJ much less legislated the scope of such a review. Nor has the President provided for such a review in the Manual for Courts-Martial."<sup>208</sup> The lack of proportionality review in courts-martial capital cases is all the more reason to abolish courts-martial jurisdiction in capital cases.

## IV. CONCLUSION: CONGRESS SHOULD ABOLISH THE DEATH PENALTY IN THE MILITARY

This article has set forth the arguments against the death penalty in the civilian sector, a sector that by its very nature has more protections. This article suggests that the justifications for the death penalty in the civilian sector are both arcane and unrealistic. Religion is not a good justification for the death penalty: several Judeo-Christian religious institutions have denounced the death penalty altogether. Similarly, the idea of retribution as a justification for the death penalty falls short of its intended goal: the same goal can be achieved via life imprisonment. Moreover, retribution is plagued with two problems; it is a cry for vengeance based purely on emotion, and it has the unintended effect of re-victimizing the families and friends of the victims. Deterrence as a justification has a similar fate; the death penalty has little, if any, deterrent effect, and the general sentiment is that life imprisonment without parole satisfies the deterrent effect. Moreover, the overwhelming expense of the death penalty, the racially biased application of the death penalty, and the high rate of innocent persons convicted and sentenced to death lead to the conclusion that the death penalty is ineffective in the civilian sector, despite the precautions and safety provisions built into state statutes and the U.S. Constitution.

If the death penalty is ineffective and unjust in the civilian sector, it is even more so in the military. In the military, the protections afforded to service members are minimal. The effectiveness of these protections is further reduced by the inherent unfairness of the military justice system. Because courts-martial are not permanent courts like their Article III counterparts, convening authorities, who normally lack legal training, are granted unbridled powers. In addition to the power to order pretrial confinement and the power to refer charges to a court-martial despite Article 32 recommendations to the contrary, the convening authority also has the ability to personally select and remove the military jury which is sufficient enough to taint the military justice process altogether. Moreover, a service member is usually disadvantaged because military defense counsel is inexperienced. Further, military

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<sup>207</sup>United States v. Curtis, 38 M.J. 530, 541 (N.M.C.M. 1996).

<sup>208</sup>*Id.* at 542.

judges cannot be completely trusted either, not because they are not honorable, but because they must deal in every case with real or perceived illegal command influence. Despite the aforementioned factors of unfairness, service personnel face a greater enemy: the mere fact that they are service members means that they are automatically eligible for the death penalty, whereas a similarly situated civilian defendant would not be. Further, Congress has not established a proportionality standard of review for military death penalty sentences. Without this standard of review, a court-martial need not compare the sentence at bar to those imposed by other jurisdictions in similar situations, thereby allowing the possibility of capricious application of the death penalty.

The bottom line is simple: there is too much room for error in the application of the death penalty in today's military. The fact that various presidents have commuted the death sentences of fourteen service members (since the last military execution) is a strong indicator that the military death penalty is not only unjust, but also expendable and unnecessary. For all the aforementioned reasons, this article recommends that Congress abolish the death penalty in the military.