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# Capital Punishment and the Courts-Martial: Questions Surface Following *Loving v. United States*

Christine Daniels\*

## I. Introduction

On June 3, 1996, the United States Supreme Court upheld the death sentence of Dwight J. Loving.<sup>1</sup> As to this ultimate conclusion, all nine Justices agreed.<sup>2</sup> However, the inclusion of several concurring opinions indicated a lack of consensus among the members of the Court concerning the foundation of the decision.<sup>3</sup> Throughout the four separate opinions suggestions emerged that counsel neglected two issues<sup>4</sup> that might have altered the outcome of the case.<sup>5</sup> The first neglected issue concerns the constitutionality of court-martial jurisdiction over common-law capital crimes committed during times of peace.<sup>6</sup> The second issue questions the legitimacy of the conclusion that courts-martial should be bound by the same Eighth Amendment proce-

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\* I wish to express my appreciation to Professor Roger D. Groot for his patience and guidance in the development of this Note.

1. See *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996) (declaring "Loving's sentence was lawful").

2. See *id.* at 1740 (detailing vote).

3. See *id.* (detailing vote). Although no Justice dissented from the majority opinion, *Loving* produced a number of concurrences. *Id.* Justices Stevens, Souter, Ginsberg, Breyer, and Chief Justice Rehnquist joined Justice Kennedy's majority opinion. *Id.* Justice Scalia, joined by Justice O'Connor, generally concurred with the majority, taking exception only with Part IV.A. *Id.* Additionally, Justice Stevens wrote a separate concurrence that Justices Breyer, Souter, and Ginsberg joined. *Id.* Justice Thomas wrote separately to concur with the judgment. *Id.*

4. See *infra* Parts III-IV (discussing two alternative issues not considered by Court).

5. See *Loving*, 116 S. Ct. at 1742 (indicating that "[a] preliminary question in this case is whether the Constitution requires the aggravating factors that Loving challenges"); *id.* at 1752 (Stevens, J., concurring) (reserving question of status of peacetime capital prosecutions by military); *id.* at 1753 (Thomas, J., concurring) (indicating that "[i]t is not clear to me that the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military").

6. See *id.* at 1752 (Stevens, J., concurring) (reserving question of status of peacetime capital prosecutions by military).

dural restrictions that bind civilian courts addressing capital punishment issues.<sup>7</sup> Failure to raise either issue sealed Loving's fate, but, by providing a forum for highlighting these issues, *Loving* presented two alternative avenues ripe for exploration by future litigants.

Dwight J. Loving deserves neither more nor less sympathy than the average death row inmate. In a crime spree spanning two days in December 1988, Loving robbed two convenience stores and three taxicab drivers.<sup>8</sup> During the course of those robberies, two cab drivers suffered fatal gun shot wounds to the head;<sup>9</sup> the third struggled and escaped.<sup>10</sup> Convicted of both premeditated and felony murder, as well as attempted murder and robbery,<sup>11</sup> Loving awaits execution at the United States Disciplinary Barracks at Fort Leavenworth, Kansas.<sup>12</sup>

Loving's status as a private in the United States Army at the time of his crimes makes his story somewhat unusual.<sup>13</sup> He is among the few servicemen sentenced to death by the military justice system since the enactment of the

7. See *id.* at 1742 (declaring necessity of aggravators "preliminary question"); *id.* at 1753 (Thomas, J., concurring) (questioning application of civilian capital punishment procedures to courts-martial).

8. See Brief for United States at 4-5, *Loving v. United States*, 116 S. Ct. 1737 (1996) (No. 94-1966) (detailing incidents); see also *Army Private Gets Death in Cabdrivers' Slayings*, HOUS. CHRON., Apr. 4, 1989, at 18 [hereinafter *Army Private*] (discussing Loving's crimes); *Soldier Gets Death Verdict: 2 Cabdrivers' Killer Faces Military Appeals*, DALLAS MORNING NEWS, Apr. 5, 1989, at 21A [hereinafter *Soldier*] (same).

9. See Brief for United States at 5, *Loving* (No. 94-1966) (detailing incidents); see also *Army Private*, *supra* note 8, at 18 (identifying victims as 20-year-old Christopher Fay and 44-year-old Bobby Sharbino); *Soldier*, *supra* note 8, at 21A (same). Both men were cabdrivers with connections to Fort Hood. *Army Private*, *supra* note 8, at 18 (identifying Faye as private and Sharbino as retired from army); *Soldier*, *supra* note 8, at 21A (same).

10. See Brief for United States at 5, *Loving* (No. 94-1966) (detailing incident); see also *Army Private*, *supra* note 8, at 18 (identifying third man as 28-year-old Howard Harrison); *Soldier*, *supra* note 8, at 21A (same). Officials indicated that Loving bit Harrison several times before the cabdriver was able to escape. *Army Private*, *supra* note 8, at 18 (discussing bites "on the head, hand and back"); *Soldier*, *supra* note 8, at 21A (same).

11. See *Loving*, 116 S. Ct. at 1740 (discussing Loving's conviction and sentencing); Brief for Petitioner at 3, *Loving* (No. 94-1966) (same); Brief for United States at 6, *Loving* (No. 94-1966) (same); see also *Army Private*, *supra* note 8, at 18 (same); *Soldier*, *supra* note 8, at 21A (same).

12. Telephone Interview with Janet Wray, Public Information Officer, United States Disciplinary Barracks, in Fort Leavenworth, Kansas (April 13, 1998) [hereinafter *Wray*]. See, e.g., *Army Private Given Death Sentence/Judge: 'I hope God has mercy on you for what you did'*, HOUS. CHRON., Apr. 4, 1989, at 17 (same); *Soldier*, *supra* note 8, at 21A (discussing Army's intentions to send Loving to Fort Leavenworth as soon as administratively possible); *Soldier Sentenced to Die for Killing 2 Killeen Cabbies*, AUSTIN AM.-STATESMAN, Apr. 4, 1989, at A1 (same).

13. See *Loving*, 116 S. Ct. at 1740 (identifying Loving as "Army private stationed at Fort Hood, Texas").

Uniform Code of Military Justice (U.C.M.J.) in 1950.<sup>14</sup> The U.C.M.J. authorizes capital punishment for those crimes particular to the military,<sup>15</sup> along with certain classes of murder.<sup>16</sup> The military has not executed anyone under the U.C.M.J. since April 13, 1961.<sup>17</sup>

Nevertheless, Private Loving may be one of the first servicemen executed by order of a court-martial since 1961.<sup>18</sup> After finding him guilty of premeditated murder and felony murder under the U.C.M.J.,<sup>19</sup> the court-martial also found three aggravators under Rule for Courts-Martial (R.C.M.) 1004.<sup>20</sup>

14. See Cynthia Swarthout Conners, Comment, *The Death Penalty in Military Courts: Constitutionally Imposed?*, 30 UCLA L. REV. 366, 367-69 (1982) (presenting military death penalty under U.C.M.J. in its historical context and noting that since its enactment only 37 servicemen received death sentences, and of those 37, military executed 10). *But see* Death Sentence Ledger (on file with the *Washington and Lee Law Review*) (indicating 47 military death sentences between 1950 and 1979); *but see also* Wray, *supra* note 12 (identifying 10 military executions between 1954 and 1961). These statistics suggest that the military commutes the majority of capital sentences adjudged under the U.C.M.J. before final execution takes place. See Conners, *supra*, at 369 n.20 (discussing instances of such commutations from 1955 to 1965). Attempts to locate a current version of the Death Sentence Ledger either at the Court of Appeals for the Armed Forces or at the United States Disciplinary Barracks in Fort Leavenworth, Kansas, proved unsuccessful.

15. See Conners, *supra* note 14, at 367 & n.13 (discussing "eleven purely 'military' crimes" for which capital punishment is available); *see infra* notes 252-59, 279-83 and accompanying text (discussing military crimes).

16. See Conners, *supra* note 14, at 367 n.12 (noting specifically capital punishment provisions for premeditated and felony murder). Either premeditated or felony crime may independently warrant a death sentence. U.C.M.J. art. 118 (1), (4), 10 U.S.C. § 918(1), (4) (1994); Brief for Petitioner at 3, *Loving v. United States*, 116 S. Ct. 1737 (1996) (No. 94-1966). Private Dwight Loving was convicted of both. See *supra* note 11 and accompanying text (discussing conviction).

17. Wray, *supra* note 12; *see* Conners, *supra* note 14, at 369 & n.19 (identifying Private First Class John Bennett as executed prisoner). Currently, eight prisoners, including Loving, await execution on Fort Leavenworth's death row. Wray, *supra* note 12. Four were Army personnel, one was a member of the Air Force, and three were Marines. *Id.* All eight received death sentences following murder convictions. *Id.*

18. Loving's execution depends on President Clinton's approval. Following completion of all appeals, up to and including resolution of any petition to the Supreme Court, U.C.M.J. art. 71(a) mandates that all military death sentences be approved by the President. See 2 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE, § 25-100.00, at 174 & nn.323, 327 (1991) (explaining appeal procedure); *see also* U.C.M.J. art. 71(c), 10 U.S.C. § 871(c) (defining point at which all appeals are complete).

19. See U.C.M.J. arts. 118(1), (4), 10 U.S.C. § 918(1), (4) (prohibiting premeditated and felony murder respectively).

20. *Loving v. United States*, 116 S. Ct. 1737, 1740 (1996). The Court stated:

In the sentencing phase of the trial, the court-martial found three aggravating factors: (1) that the premeditated murder of the second driver was committed during the course of a robbery, Rule for Courts-Martial (RCM) 1004(c)(7)(B); (2) that Loving acted as the triggerman in the felony murder of the first driver, RCM 1004(c)(8); and (3) that Loving, having been found guilty of the premeditated

Pursuant to these findings, Private Loving received the death penalty.<sup>21</sup>

In light of the facts, it seems surprising that the decision in *Loving v. United States*<sup>22</sup> appears more relevant to administrative law than to criminal or military law. Throughout the opinion, the Supreme Court expounds on the tried and true wisdom of separation of powers<sup>23</sup> and grounds its holding on an interpretation of the delegation doctrine.<sup>24</sup> Part II of this Note briefly considers this aspect of the decision. Parts III and IV, however, explore two entirely different issues that the majority and concurring opinions suggest might have altered the findings in this case.<sup>25</sup> Herein lies the true significance of *Loving*. Part III suggests that military tribunals lack jurisdiction during peacetime to hear common-law capital cases such as Private Loving's. Part IV considers whether civilian precedent concerning restrictions on the implementation of capital punishment applies to death penalty cases within the military justice system. Both of these issues could have far reaching implications in future capital cases involving military personnel. The resolution of these issues will be particularly significant with respect to choice of forum for the disposition of capital cases where the death penalty is the desired result. Furthermore, changes in capital punishment within the military justice system may provide an avenue for the more conservative members of the Court to seek to diminish current procedural requirements for civilian application of the death penalty. Part V discusses these possible implications.

## II. The Role of the Delegation Doctrine

By the time Private Loving's case reached the Supreme Court,<sup>26</sup> his issue

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murder, had committed a second murder, also proven at the single trial, RCM 1004(c)(7)(J).

*Id.*; see also Brief for Petitioner at 3, *Loving* (No. 94-1966) (listing these R.C.M. provisions).

21. See *Loving*, 116 S. Ct. at 1740 (noting that "[t]he court-martial sentenced Loving to death").

22. 116 S. Ct. 1737 (1996).

23. See *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996) (portraying delegation doctrine not only as "[d]eterrence of arbitrary or tyrannical rule," but also as resulting in "a National Government that is both effective and accountable").

24. See *id.* at 1749 (holding that Congress may delegate to President power to prescribe aggravating factors to be used in implementing capital punishment within military court system).

25. See *id.* at 1742 (noting failure of Government to contest issue concerning applicability of civilian precedent); *id.* at 1751 (Stevens, J., concurring) (noting that as "Justice Scalia correctly points out, petitioner has not challenged the power of the tribunal to try him for a capital offense").

26. *United States v. Loving*, 34 M.J. 956 (A.C.M.R.), *reh'g denied*, 34 M.J. 1065 (A.C.M.R. 1992), *aff'd*, 41 M.J. 213 (C.A.A.F. 1994), *opinion modified on reh'g*, 42 M.J. 109 (C.A.A.F. 1995), and *aff'd*, 116 S. Ct. 1737 (1996); see also Brief for the Petitioner at 1, *Loving* (No. 94-1966) (listing these opinions); Brief for the United States at 1, *Loving* (No. 94-1966) (same).

lacked the emotional appeal of some death penalty cases.<sup>27</sup> Loving challenged the constitutionality of the military justice system's procedure for instituting capital punishment.<sup>28</sup> Using both the separation of powers doctrine and the Eighth Amendment, Loving argued that the military's death penalty procedure involved an unconstitutional congressional delegation.<sup>29</sup> The contested delegation concerned the power granted by Congress to the President to establish aggravating factors for consideration in military capital cases.<sup>30</sup>

Exercising this power, President Ronald Reagan promulgated R.C.M. 1004 by Executive Order in 1984.<sup>31</sup> He did so in response to the United States Court of Military Appeals' mandate in *United States v. Matthews*.<sup>32</sup> *Matthews* gave Congress or, in the alternative, the President ninety days to rectify what the Court of Military Appeals identified as the constitutional defects in courts-martial capital punishment procedure.<sup>33</sup>

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27. See generally *Riggins v. Nevada*, 504 U.S. 127 (1992) (considering constitutionality of State's administration of anti-psychotic drugs against the will of defendant in capital murder trial); *Payne v. Tennessee*, 501 U.S. 808 (1991) (considering constitutionality of testimony by victim's family and argument by prosecution at sentencing phase of capital murder trial that focused on effects of crime on three year old boy whose mother and sister were killed).

28. See *Loving*, 116 S. Ct. at 1742 (describing "the scheme [that] Loving attacks as unconstitutional").

29. See *id.* (setting out argument).

30. See *id.* (describing Loving's contention "that the Eighth Amendment and the doctrine of separation of powers require that Congress, and not the President, make the fundamental policy determination respecting the factors that warrant the death penalty").

31. See *id.* (designating R.C.M. 1004 as response to *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983)).

32. 16 M.J. 354 (C.M.A. 1983).

33. *United States v. Matthews*, 16 M.J. 354, 382 (C.M.A. 1983) (finding death penalty wrongly imposed where procedures followed in its imposition were deemed unconstitutional). In *Matthews*, the United States Court of Military Appeals considered the constitutionality of the procedures followed by the military court system for imposing capital punishment. *Id.* at 377-80. A general court-martial convicted Private First Class Wyatt L. Matthews of the premeditated murder and rape of Phyllis Jean Villanueva, an Army librarian, on an American military base in the Federal Republic of Germany and sentenced Matthews to death. *Id.* at 359-61. After dispensing with several claims of error in the trial's presentencing phases and affirming its own authority to rule on the constitutionality of the U.C.M.J. despite its status as an Article I court, the Court of Military Appeals undertook an analysis of Supreme Court capital punishment precedent beginning with *Furman v. Georgia*, 408 U.S. 238 (1972). *Id.* at 362-68. While it found that many aspects of the military's system offer as much and in some cases more protection than *Furman* required, the court concluded the system was deficient in its failure to require stipulation of specific aggravators. *Id.* at 377-79. Based on that finding, the court held Matthew's death sentence "improperly adjudged," but provided for the reinstatement of that sentence pursuant to a rehearing to be held within 90 days in accordance with a new, constitutionally acceptable procedure should Congress or the President institute one within that period of time. *Id.* at 382.

R.C.M. 1004 requires a court-martial to make three distinct unanimous findings before sentencing an individual to death.<sup>34</sup> First, a court-martial must identify guilt with respect to a capital offense.<sup>35</sup> Next, it must find the existence of at least one or more specific aggravators.<sup>36</sup> Finally, it must balance the aggravating factor or factors against any mitigation that substantially weighs against the aggravator.<sup>37</sup> R.C.M. 1004 provides the list of potential aggravators that a court-martial contemplating imposition of the death penalty must consider.<sup>38</sup> Additionally, R.C.M. 1004 authorizes courts-martial to consider a wide range of evidence of extenuating and mitigating circumstances<sup>39</sup> and provides instruction concerning the weight that the court-martial must give such evidence.<sup>40</sup>

According to the Court, Loving based his claim regarding the unconstitutionality of the military's capital punishment scheme on three arguments.<sup>41</sup> First, Loving contended that allowing the President to establish the aggravators to be used in implementing military capital punishment constituted an

34. See *Loving v. United States*, 116 S. Ct. 1737, 1742 (1996) (listing required findings).

35. See R.C.M. 1004(a)(2) (requiring that "[t]he accused [be] convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken"); *Loving*, 116 S. Ct. at 1742 (citing R.C.M. 1004(a)(2)).

36. See R.C.M. 1004(b)(4)(A) (requiring that "members find at least one of the aggravating factors under subsection (c) existed"); *Loving*, 116 S. Ct. at 1742 (citing R.C.M. 1004(b)).

37. See R.C.M. 1004(b)(4)(C) (requiring that "[a]ll members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1004(b)(4), including the factors under subsection (c) of this rule"); *Loving*, 116 S. Ct. at 1742 (citing R.C.M. 1004(b)).

38. See R.C.M. 1004(c) (listing 11 aggravating factors); *Loving*, 116 S. Ct. at 1742 (noting that "R.C.M. 1004(c) enumerates 11 categories of aggravating factors sufficient for imposition of the death penalty").

39. See R.C.M. 1004(b)(3) (requiring that "accused shall be given broad latitude to present evidence in extenuation and mitigation"); *Loving*, 116 S. Ct. at 1742 (quoting R.C.M. 1004(b)(3)).

40. See R.C.M. 1004(b)(6) (requiring that "military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge the death penalty"); *Loving v. United States*, 116 S. Ct. 1737, 1742 (1996) (citing R.C.M. 1004(b)(6)).

41. See *Loving*, 116 S. Ct. at 1744 (setting out Loving's arguments). While in essence the same as those arguments detailed by the Court, Loving's brief actually sets forth his argument somewhat differently. Brief for Petitioner at ii, *Loving* (No. 94-1966). His version is a four pronged claim: (1) that explicit action is necessary for delegations that implicate a person's Fifth and Eighth Amendment liberty interests; (2) that history and precedent run contrary to the recognition of an implicit delegation; (3) that, if there is an implicit delegation, it lacks a sufficient, intelligible principle; and (4) that this decision is simply beyond delegation. *Id.* at ii-v. The Court in this instance appears to have better formulated the essence of Loving's own argument.

impermissible delegation of legislative authority.<sup>42</sup> Next, Loving argued that if the Constitution does permit such a delegation of authority, Congress failed to effectuate a delegation in this instance.<sup>43</sup> Finally, Loving argued that, if the Court found that Congress did effectuate a delegation by statute, the Court should nevertheless strike it down based on lack of a sufficient intelligible principle to curb presidential discretion.<sup>44</sup>

The Government countered, arguing that the Constitution does not mandate that Congress participate in decision making with respect to the scope of military capital punishment.<sup>45</sup> Consequently, the congressional delegation at issue must be constitutional.<sup>46</sup> Furthermore, the Government contended that Congress did delegate the authority for the President to promulgate R.C.M. 1004 through U.C.M.J. Articles 18 and 56.<sup>47</sup> Finally, the Government offered evidence that the delegation involved sufficient guidance to the President in his exercise of that power.<sup>48</sup>

With the exception of Justice Thomas, the Court held that Congress could and did delegate its authority to delineate aggravating factors.<sup>49</sup> In support of the first part of the Court's holding, Justice Kennedy engaged in a fairly detailed review of the history of the death penalty in the military context.<sup>50</sup> In the end, he concluded that neither the Constitution nor tradition prevented this delegation.<sup>51</sup>

42. See *Loving*, 116 S. Ct. at 1744 (presenting Loving's impermissible delegation argument).

43. See *id.* (presenting Loving's failure to effectuate argument).

44. See *id.* (presenting Loving's lack of intelligible principle argument).

45. See Brief for United States at 13-34, *Loving* (No. 94-1966) (devoting entire section to assertion).

46. See *id.* at 8 (stating affirmatively that "[i]t does not violate the separation-of-powers doctrine or the Eighth Amendment").

47. See *id.* at 8-9 (attributing Articles 18 and 56 with notion "that the President may limit the punishment that courts-martial may impose").

48. See *id.* at 10 (discussing Congress's presumed knowledge of "considerations that traditionally have controlled similar exercises of his discretion" when passing those sections of Code and reference in U.C.M.J. art. 36(a) to "principles of law . . . generally recognized" by federal district courts"). The Government asserted that these principles of law would include Supreme Court rulings concerning the Eighth Amendment's prohibition of cruel and unusual punishment as well as other capital punishment statutes that had passed constitutional muster. *Id.*

49. See *Loving v. United States*, 116 S. Ct. 1737, 1749 (1996) (holding that (1) "Congress has the power of delegation" and that (2) "it exercised the power in . . . the U.C.M.J.").

50. See *id.* at 1744-49 (considering historical background of military capital punishment).

51. See *id.* at 1749 (concluding that "[t]here is nothing in the constitutional scheme or our traditions to prohibit Congress from delegating the prudent and proper implementation of the capital murder statute to the President acting as Commander in Chief"). Justices Scalia and O'Connor opted not to join in this historical review. *Id.* at 1752 (Scalia, J., concurring) (character-



With respect to the Court's determination that delegation took place in this instance, Justice Kennedy first considered evidence of Congress's intent to delegate.<sup>52</sup> Next, he discussed the existence of the intelligible principle that must accompany a constitutional delegation of legislative authority.<sup>53</sup> The Court identified the necessary congressional intent in three articles of the U.C.M.J.<sup>54</sup> The first two, U.C.M.J. Articles 18 and 56, provide the President with the authority to raise criminal penalties under certain circumstances.<sup>55</sup> The Court treated this authority as evidence of a comparable authority on the part of the President to narrow, through aggravators, the field of murderers eligible for capital punishment.<sup>56</sup>

The Court found that the third article, U.C.M.J. Article 36, also lends support to the finding of congressional intent to delegate its power to promulgate aggravating factors for the consideration of death sentences under the U.C.M.J.<sup>57</sup> Article 36 provides the President with the authority to establish court-martial procedures.<sup>58</sup> Furthermore, Congress cited Article 36 as a subsequent justification for this delegation.<sup>59</sup> *Loving* emphasized that a later

izing it as irrelevant in light of lack of limitation placed on congressional delegation with respect to this issue in Article 1, section 8, Clause 14, which governs congressional power in this area).

52. See *id.* at 1749 (asserting that, "[h]aving held that Congress has the power of delegation, we further hold that it exercised the power").

53. See *id.* at 1750 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (finding that Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform").

54. *Loving*, 116 S. Ct. at 1749 (citing U.C.M.J. art. 18, 10 U.S.C. § 818 (1994); U.C.M.J. art. 36, 10 U.S.C. § 836(a); U.C.M.J. art. 56, 10 U.S.C. § 856).

55. See *Loving v. United States*, 116 S. Ct. 1737, 1749 (1996) (discussing presidential practice of using "[a]rticles to increase the penalties for certain noncapital offenses if aggravating circumstances are present" and suggesting parallel to present situation). In light of these statutes, the Court determined that "[t]he President has thus provided more precision in sentencing than is provided by the statute, while remaining within statutory bounds." *Id.*; see U.C.M.J. art. 18, 10 U.S.C. § 818 (1994) (authorizing courts-martial "under such limitations as the President may prescribe, [to] adjudge any punishment not forbidden by [the U.C.M.J.], including the penalty of death when specifically authorized" (emphasis added)); U.C.M.J. art. 56, 10 U.S.C. § 856 (stating that "punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense").

56. See *Loving*, 116 S. Ct. at 1749 (discussing analogy).

57. See *id.* (discussing Article 36 as "indicative of congressional intent to delegate").

58. See *id.* (quoting U.C.M.J. art. 36(a), 10 U.S.C. § 836(a)); U.C.M.J. art. 36(a), 10 U.S.C. § 836(a) (providing President with authority to establish court-martial procedures).

59. See *Loving*, 116 S. Ct. at 1749 (noting that Article 36 "is the provision that a later Congress identified as the source of Presidential authority to prescribe these factors"). After passing Article 36, Congress passed U.C.M.J. Article 106(a), which authorizes capital punishment for espionage. U.C.M.J. art. 106(a)(1), 10 U.S.C. § 906(a)(1); *Loving*, 116 S. Ct. at 1749. The statute makes reference to presidential authority under Article 36 to proscribe aggravating factors authorizing capital punishment. U.C.M.J. art. 106(a)(3)(C)(4), 10 U.S.C.

statute purporting to set forth the intent of preceding legislation warrants significant consideration.<sup>60</sup>

As to the existence of an appropriate intelligible principle to guide the President in exercising the delegated power, the Court rejected the notion that it must find an "explicit principle" to do so in the context of determining aggravators for the military.<sup>61</sup> The majority questioned the necessity of specific guidelines in light of the destination as well as the character of the delegation involved.<sup>62</sup> In finding specific guidelines unnecessary, the Court noted that the nature of the presidential power pursuant to this delegation did have particular limits.<sup>63</sup> More importantly, the president serves as Commander in Chief of the armed forces.<sup>64</sup> This role necessarily implies a unique familiarity with the situations involved in military discipline.<sup>65</sup> This experience qualifies him to develop aggravating factors for consideration in capital cases.<sup>66</sup>

In light of these findings, *Loving* fits comfortably within the Court's jurisprudence concerning the delegation doctrine. Overbreadth served to strike down only two delegations of congressional power in the history of the Court,<sup>67</sup> and both instances occurred within a unique historical context – the New Deal.<sup>68</sup> Since that time, the Court has upheld delegations far more broadly based than the one at issue in *Loving*.<sup>69</sup> Explaining the effect of congressional delegations, Justice Kennedy asserted that "[s]eparation-of-

§ 906(a)(3)(C)(4); *Loving*, 116 S. Ct. at 1749.

60. *Loving*, 116 S. Ct. at 1749 (quoting *Consumer Product Safety Comm'n v. GTE Sylvannia, Inc.*, 447 U.S. 102, 118 n.13 (1980) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969))).

61. *Loving v. United States*, 116 S. Ct. 1737, 1750 (1996) (recasting question from "whether there was any explicit principle telling the President how to select aggravating factors" to "whether any such guidance was needed").

62. *See id.* (qualifying necessity of specific guidelines).

63. *See id.* (noting that "delegation is set within boundaries the President may not exceed").

64. *See id.* (emphasizing that "delegation here was to the President in his role as Commander in Chief").

65. *See id.* (discussing requirement that President "take responsible and continuing action to superintend the military").

66. *See id.* at 1750 (referring to President's "undoubted competency to prescribe those factors"). The opinion also emphasized the historical power Congress authorized and the President exercised to intervene in military capital cases. *Id.* at 1751. The Court reasoned that the President's structured involvement in military death penalty jurisprudence as a whole could hardly be more offensive than his involvement on a case-by-case basis. *Id.*

67. *See id.* (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

68. *See* PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW CASES AND COMMENTS* 84-88 (1995) (discussing decisions in their historical context).

69. *See* *Loving v. United States*, 116 S. Ct. 1737, 1750 (1996) (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943)).

powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes."<sup>70</sup>

### *III. Court-Martial Jurisdiction over Capital Cases in Times of Peace*

Settling the delegation question determined the fate of *Private Loving*. The Court's attention to two additional issues, however, prevented *Loving* from closing the book on capital punishment and the courts-martial. Depending on their resolution, these issues may radically alter the outcome of future cases.

The first issue presents a threshold question: Is court-martial jurisdiction over capital crimes that occur during peacetime legitimate? Speaking for the *Loving* majority, Justice Kennedy failed to address directly the legitimacy of the courts-martial's jurisdiction.<sup>71</sup> However, Justice Stevens, in a concurrence joined by three of his colleagues, expressly reserved the question of the status of peacetime capital prosecutions by the military.<sup>72</sup> Arguably, though, the majority opinion's historical review implicitly addressed this question.<sup>73</sup> Justice Scalia, joined by Justice O'Connor, took issue with the majority's review on the grounds that *Private Loving* failed to raise the question of the legitimacy of court-martial jurisdiction for the Court's consideration.<sup>74</sup> No consensus emerged on the issue. Nevertheless, in the minds of several of the Justices – perhaps even a majority – the scope of military jurisdiction with respect to peacetime capital crimes appears to remain open for consideration.

#### *A. The History of Court-Martial Jurisdiction in the United States*

Jurisdiction of courts-martial in the United States has undergone significant evolution since the inception of American military justice.<sup>75</sup> The First

70. *Id.* at 1751.

71. *See id.* at 1740-51 (containing no direct reference to legitimacy of courts-martial jurisdiction).

72. *See id.* at 1751-52 (Stevens, J., concurring) (raising issue and indicating that it "remains to be decided").

73. *See id.* at 1741 (tracing capital jurisdiction of courts-martial in American history); *id.* at 1744-49 (reviewing history of military capital punishment in England and its effect on similar practices in United States); *id.* at 1752 (Scalia, J., concurring) (linking historical discussion to jurisdiction question).

74. *See id.* (Scalia, J., concurring) (noting that "[p]etitioner does not assert that tradition establishes his offense to be, in its nature, beyond the jurisdiction of military courts, or that courts-martial are historically incapable of adjudicating capital offenses").

75. *See* Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 441 (1960) (discussing evolution as evidence of lack of intent on part of framers that military tribunals should super-

Congress officially legislated the Articles of War in 1789, taking them directly from those adopted by the Continental Congress in 1776.<sup>76</sup> Unaffected by the adoption of the Constitution, legislators designed American courts-martial jurisdiction to achieve the aims of a disciplined military and nothing more.<sup>77</sup> In addition to provisions "earnestly recommend[ing] to all officers and soldiers diligently to attend divine service"<sup>78</sup> and prohibiting drunkenness on the part of a "commissioned officer . . . on his guard, party, or other duty under arms,"<sup>79</sup> the 1776 Articles of War limited courts-martial jurisdiction to two areas – (1) noncapital crimes that endangered good order and discipline and (2) purely military capital crimes.<sup>80</sup> At the request of the aggrieved party, the superiors of military personnel accused of crimes unrelated to their military service were to deliver the accused to civilian courts.<sup>81</sup> Arguably, the First Congress intended such provisions to limit courts-martial to situations involving military matters "and in other respects to give precedence to the civil authorities."<sup>82</sup>

The first significant development in the evolution of courts-martial jurisdiction occurred in the midst of one of the most turbulent periods in United States history, the War Between the States.<sup>83</sup> Pursuant to an 1863 statute,<sup>84</sup> Congress empowered courts-martial to rule on a variety of civil crimes "in

cede civilian justice with respect to crimes unrelated to military).

76. See *Loving v. United States*, 1737, 1741 (1996) (citing Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96).

77. See Brief of United States Navy-Marine Corps Appellate Defense Division at 22, *Loving* (No. 94-1966) (discussing Articles of War of 1775).

78. American Articles of War of 1776, § I, art. 2, reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 961 (2d ed. 1920).

79. *Id.* at § XIII, art. 5., reprinted in WINTHROP, *supra* note 78, at 966.

80. See Brief of the United States Navy-Marine Corps Appellate Defense Division at 22, *Loving* (No. 94-1966) (discussing courts-martial jurisdiction); see also *Loving*, 116 S. Ct. at 1741 (indicating 14 such military capital offenses).

81. See American Articles of War of 1776, § X, art. 1, reprinted in WINTHROP, *supra* note 78, at 964 (providing for this); see also Duke & Vogel, *supra* note 75, at 445 n.48 (quoting British Articles of War, 1765, § 11, art. 1, reprinted in WINTHROP, *supra* note 78, at 931, 937) (noting its similarity to Section 10, Article 1 of American Articles).

82. Duke & Vogel, *supra* note 75, at 445 (attributing this purpose to British Articles of War and drawing parallel between like provisions in both British and American versions); see also *Loving v. United States*, 116 S. Ct. 1737, 1741 (1996) (noting "supremacy of civil court jurisdiction over ordinary capital crimes that were punishable by the law of the land and were not special military offenses").

83. See Brief for the Petitioner at 14, *Loving* (No. 94-1966) (noting that Civil War was "first time that Congress permitted the military to try a servicemember for the civilian capital offense of murder").

84. Act of Mar. 3, 1863, § 30, 12 Stat. 736, Rev. Stat § 1342, art. 58 (1875).

time of war, insurrection or rebellion.<sup>85</sup> Admittedly, the extended jurisdiction included authority over capital crimes with no direct relationship to the military.<sup>86</sup> This jurisdiction's temporal restrictions, however, warrant careful consideration. Purely an emergency measure,<sup>87</sup> Congress did not intend courts-martial to exercise jurisdiction over civilian offenses "when 'the civil courts were open and in the undisturbed exercise of their jurisdiction.'<sup>88</sup> Along with a provision abandoning the practice of relinquishing offenders to civil courts<sup>89</sup> during periods of instability, Congress incorporated the essence of the 1863 statute in the Articles of War of 1874.<sup>90</sup>

Congress took one step further in the Articles of War of 1916 by extending the domestic jurisdiction of courts-martial to include peacetime violations of noncapital common-law crimes by military personnel.<sup>91</sup> Rape and murder, the capital crimes, remained a part of civilian jurisdiction<sup>92</sup> when committed on American soil. As before, the 1916 Articles required that the

85. Duke & Vogel, *supra* note 75, at 449-50 (quoting Act of March 3, 1863, ch. 75, § 30; 12 Stat. 736, Rev. Stat. § 1342, art. 58 (1875)); *see also* Brief for the Petitioner at 14, *Loving* (No. 94-1966) (citing *Coleman v. Tennessee*, 97 U.S. 509, 513 (1878)).

86. *See Loving*, 116 S. Ct. at 1741 (specifying "common-law capital crimes"); Duke & Vogel, *supra* note 75, at 449-50 (referring to "various civil crimes"); Brief for the Petitioner at 14, *Loving* (No. 94-1966) (specifying "the civilian capital offense of murder").

87. *See Duke & Vogel, supra* note 75, at 450 (noting statute provided for death penalty only during war and similar situations). It appears the statute was intended

not merely to insure order and discipline among the men composing those forces, but to protect the citizens not in the military service from the violence of soldiers. It is a matter well known that the march even of an army not hostile is often accompanied with acts of violence and pillage by straggling parties of soldiers, which the most rigid discipline is hardly able to prevent. The offenses mentioned are those of the most common occurrence, and the swift and summary justice of a military court was deemed necessary to restrain their commission.

*Id.* at 450 (quoting *Coleman*, 97 U.S. at 513).

88. *See* Brief for Petitioner at 15, *Loving v. United States*, 116 S. Ct. 1737 (1996) (No. 94-1966) (quoting *Caldwell v. Parker*, 252 U.S. 376, 386 (1920) (quoting *Coleman*, 97 U.S. at 515)).

89. *See supra* note 81 and accompanying text (discussing practice of relinquishing attenders to civil courts).

90. *See Duke & Vogel, supra* note 75, at 450-51 nn.81-82 (citing Act of Mar. 3, 1863, § 30, 12 Stat. 736, Rev. Stat. § 1342, art. 58 (1875) (respecting essence of 1863 statute) and Act of Mar. 3, 1863, § 30, 12 Stat. 736, Rev. Stat. § 1342, art. 58 (1875) (respecting necessity of turning over offenders to civil courts)).

91. Articles of War of 1916, ch. 418, § 3, arts. 92-93, 30 Stat. 664, *construed in Loving*, 116 S. Ct. at 1741; *see Duke & Vogel, supra* note 75, at 451 (noting that extension was one of several significant changes).

92. Articles of War of 1916, art. 74, 39 Stat. 662, *construed in Loving*, 116 S. Ct. at 1741; *see Duke & Vogel, supra* note 75, at 452 (indicating rejection of notion that court-martial jurisdiction should extend to domestic rape and murder cases as well).

commanding officers of military personnel accused of those capital crimes relinquish them to civil authorities.<sup>93</sup> Courts-martial, however, still lacked jurisdiction over those offenders charged with murder or rape outside of the nation's borders.<sup>94</sup> The final move towards courts-martial's peacetime jurisdiction over all crimes perpetrated by members of the armed forces came on May 31, 1951, when the U.C.M.J. took effect.<sup>95</sup> Under the U.C.M.J., Congress gave the courts-martial the power to prescribe the punishment of death for those military personnel found guilty of premeditated murder, felony murder, and rape,<sup>96</sup> regardless of the locus of the crime or the state of the union at the time of its commission. Despite more than one hundred years of unwillingness on the part of Congress to approve courts-martial jurisdiction over peacetime common-law capital crimes, legislators engaged in little discussion of the matter prior to the enactment of the U.C.M.J.<sup>97</sup>

Considered independently, conclusions drawn from this historical evolution may appear insignificant.<sup>98</sup> However, evaluating historical changes in the nature and scope of courts-martial jurisdiction in conjunction with current legal trends is a sound approach.<sup>99</sup>

93. Articles of War of 1916, art. 74, 39 Stat. 662, *construed in Loving*, 116 S. Ct. at 1741; see Duke & Vogel, *supra* note 75, at 452 (reiterating principle).

94. Articles of War of 1916, art. 92, 39 Stat. 664, *construed in Loving*, 116 S. Ct. at 1741; see Duke & Vogel, *supra* note 75, at 452 (discussing controversy over court-martial jurisdiction).

95. See WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* at Preface (1955) (noting date for U.C.M.J.'s relevance to "new and significant changes . . . in the field of military justice"). Actually, the process was somewhat more complicated than that. For a review of the events leading up to promulgation of the U.C.M.J. and the individuals involved, see generally 1 JONATHAN LURIE, *ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950* (1992).

96. See U.C.M.J., arts. 118, 120, 10 U.S.C. §§ 918, 920 (1994) (bestowing this authority); *Loving*, 116 S. Ct. at 1741 (quoting Article 118); AYCOCK & WURFEL, *supra* note 95, at 292-96, 425 (discussing contents of articles 118 & 120); Duke & Vogel, *supra* note 75, at 453 (same).

97. See Duke & Vogel, *supra* note 75, at 453 & n.107 (citing *Hearings on the Uniform Code of Military Justice Before the House Subcommittee of the Committee on Armed Services*, 81st Cong. 644 (1949) (statement of Richard H. Wells, Chairman, Special Committee on Military Justice of the New York County Lawyers' Association) (noting only one objection throughout "prolonged congressional hearings on the Uniform Code")).

98. See *id.* at 455-56 (noting that "[h]istory is not the controlling, much less the sole, guide to constitutional interpretation" and "[a]n inquiry directed exclusively to the question of whether or not the Constitutional Convention believed that courts-martial should exercise jurisdiction over civil crimes misses the mark by a wide margin").

99. See *id.* at 456 (indicating relevance of historical consideration – extended back in Duke & Vogel to English common law – with respect to courts-martial jurisdiction to modern notions of democracy and right to jury trial).

*B. Support for Court-Martial Jurisdiction in Times of Peace*

Authority for the existence and powers of the courts-martial, and consequently their jurisdiction, emanates from Article I, Clause 14 of the United States Constitution. Clause 14 grants Congress the power to "make all Rules for the Government and Regulation of the land and naval forces."<sup>100</sup> Through the first half of the twentieth century, a single element – an individual's military status – became the key factor in determining the constitutionality of court-martial jurisdiction in a given case.<sup>101</sup> This purely textual approach focused on the "natural meaning" of the constitutional language.<sup>102</sup> The status of the accused drove the inquiry.<sup>103</sup> Therefore, court-martial jurisdiction encompassed any individual fairly considered part of the "land and naval Forces."<sup>104</sup>

100. See *id.* (framing issue as "whether clause 14, either alone or in conjunction with the necessary and proper clause, gives to Congress the power to entrust courts-martial with jurisdiction over both capital and non-capital civil crimes . . . committed by servicemen in time of peace within the United States"); Andrew M. Ferris, Comment, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 442-43 (1994) (quoting Clause 14 and noting its implications for allocation of power concerning military); see also *Solorio v. United States*, 483 U.S. 435, 441 (1987) (discussing power of Congress with respect to military in conjunction with other constitutional powers located in that section and determining that "[o]n its face there is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section").

101. See *Solorio*, 483 U.S. at 439 (citing *Gosa v. Mayden*, 413 U.S. 665, 673 (1973) (plurality opinion); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-41, 243 (1960); *Reid v. Covert*, 354 U.S. 1, 22-23 (1957) (plurality opinion); *Grafton v. United States*, 206 U.S. 333, 348 (1907); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); and *Smith v. Whitney*, 116 U.S. 167, 183-85 (1886); and *Coleman v. Tennessee*, 97 U.S. (4 Wall.) 509, 513-14 (1879), *Ex parte Milligan*, 71 U.S. 123 (1866) and cross referencing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955); *Kahn v. Anderson*, 255 U.S. 1, 6-9 (1921); and *Givens v. Zerbst*, 255 U.S. 11, 20-21 (1921)).

102. *Solorio*, 483 U.S. at 439 (quoting *Reid v. Covert*, 354 U.S. 1, 19 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955)).

103. See *id.* at 439-40 (quoting passage from *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-41 (1960) for explanation of Court's textual approach).

104. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-41 (1960) (quoting U.S. CONST. art. I, § 8, cl. 14), quoted in *Solorio*, 483 U.S. at 439. The Court asserted that "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense." *Kinsella*, 361 U.S. at 243, quoted in *Solorio*, 483 U.S. at 339; see AYCOCK & WURFEL, *supra* note 95, at 38 (comparing civilian to military law and finding that "[u]nder the civilian rule usually the locus of the offense is all important, the status of the accused not at all. Under military law quite the reverse is true"). The Code contains extensive guidance as to when an individual qualifies for military status. *Id.* at 39 n.107 (quoting Art. 2, 50 U.S.C. § 552 (Supp. 1952)). Those individuals include:

all on active federal armed forces service regardless of component or assigned duty;  
cadets and midshipmen; reserves on voluntary inactive duty training under an order

The strictly textual approach held significant implications for Congress's role in the military justice process.<sup>105</sup> The Constitution, after all, states: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."<sup>106</sup> It follows, therefore, that the power to define the jurisdiction of the courts maintained by those forces should rest with Congress as well.<sup>107</sup>

Thus, the constitutional parameters of courts-martial jurisdiction appeared well established.<sup>108</sup> In *O'Callahan v. Parker*,<sup>109</sup> however, the Supreme Court abandoned the strict, status-based, textual approach.<sup>110</sup> Instead, it

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expressly so stating; retired regular personnel entitled to receive pay; retired reserve personnel receiving armed force hospitalization; Fleet Reserve and Fleet Marine Corps Reserve personnel; prisoners sentenced by courts-martial and in armed forces custody; prisoners of war in armed forces custody; Coast and Geodetic Survey, Public Health Service and other organization personnel when assigned to and serving with the armed forces; without the continental limits of the United States, Alaska, Puerto Rico, Canal Zone and the Hawaiian and Virgin Islands all persons serving with, employed by, or accompanying the armed forces, or within an area under the control of the Secretary of a Department; and, in time of war, all persons serving with or accompanying an armed force in the field.

*Id.* at 40.

105. See *Solorio*, 483 U.S. at 440 (defining Congress's role).

106. U.S. CONST. art. I, § 8, cl. 14 (emphasis added).

107. See *Solorio v. United States*, 483 U.S. 435, 440 (1987) (asserting that "[i]mplicit in the military status test was the principle that determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen was a matter reserved for Congress"); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion), quoted in *Solorio*, 483 U.S. at 440 (observing existence of delicate balance between rights of servicemen and unique demands of military and noting that "civil courts are not the agencies which must determine the precise balance to be struck . . . . The framers entrusted that task to Congress").

108. See *supra* notes 100-04 and accompanying text (discussing constitutional parameters).

109. 395 U.S. 258 (1969).

110. See *O'Callahan v. Parker*, 395 U.S. 258 (1969), overruled by *Solorio v. United States*, 483 U.S. 435 (1987) (abandoning military status requirement). In *O'Callahan*, the Supreme Court considered whether an individual's military status was enough to subject him to court-martial jurisdiction for crimes that were unrelated to his military service. *Id.* at 261-62. The case involved a sergeant who, while stationed with the Army in Hawaii, entered a hotel room unlawfully and attempted to commit rape therein. *Id.* at 259-60. At the time of the crime, the sergeant was off duty and was not in uniform. *Id.* at 259. His victim was a female child. *Id.* at 260. Civilian authorities took the sergeant into custody, but relinquished him shortly thereafter to their military counterparts. *Id.* A court-martial tried and convicted him for his crimes, and he challenged those convictions in federal court by filing a writ of habeas corpus. *Id.* at 260-61. In its decision on the matter, the Supreme Court focused on the importance of an accused's constitutional right to a jury trial and demonstrated how trial by court-martial fails to live up to a similar standard. *Id.* at 262-64. The Court affirmed the existence of military courts, but asserted that "the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain



adopted a new requirement for court-martial jurisdiction.<sup>111</sup> Pursuant to *O'Callahan*, court-martial jurisdiction in a given case depended on some connection between the offense and the accused's military service.<sup>112</sup> Thus, the court-martial lacked the authority to try *O'Callahan*,<sup>113</sup> because his offense did not occur on a military base or victimize another member of the military.<sup>114</sup> Following further clarification,<sup>115</sup> this constitutional approach to court-martial jurisdiction reigned for almost twenty years. In 1987, the Supreme Court reconsidered its position.<sup>116</sup> *Solorio v. United States*<sup>117</sup> overruled *O'Callahan* and restored a status based approach to court-martial jurisdiction.<sup>118</sup>

Not to overrule precedent lightly,<sup>119</sup> the *Solorio* majority made three primary arguments in support of *O'Callahan*'s reversal. The Court based its first argument on an interpretation of framers' intent.<sup>120</sup> The Court's second argument challenged *O'Callahan*'s use of historical evidence.<sup>121</sup> The Court's

carries with it a threat to liberty." *Id.* at 265. A review of the history of courts-martial in both England and the United States, in which the dangers implicit in the military adjudication of civil crimes were highlighted, followed. *Id.* at 268-72. Finally, the Court determined that there must be a service connection implicit in the crime for courts-martial to have jurisdiction. *Id.* at 272.

111. See *Solorio*, 483 U.S. at 440 (discussing *O'Callahan* and citing *Gosa v. Mayden*, 361 U.S. 664, 673 (1973), calling jurisdictional requirement "new constitutional principle").

112. See *id.* at 440 (defining new jurisdictional principle).

113. See *id.* (discussing *O'Callahan*'s holding).

114. See *id.* (discussing *O'Callahan*'s holding).

115. See *id.* at 448 (citing *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971), following *O'Callahan*, which established factors for determining whether crime maintained sufficient service connection for inclusion in military jurisdiction).

116. See *id.* at 436 (overruling *O'Callahan*).

117. 483 U.S. 435 (1987).

118. See *Solorio v. United States*, 483 U.S. 435 (1987). In *Solorio*, the Supreme Court reconsidered the service connection requirement for court-martial jurisdiction that it had adopted in *O'Callahan*. *Id.* at 436. While stationed in two different locations with the Coast Guard over a period of years, *Solorio* sexually molested several of his colleague's children. *Id.* at 436-37. A court-martial was convened, but some of the charges against him were dismissed on the basis that, having occurred at a private residence, the incidents involved did not meet the service connection requirement. *Id.* at 437. For the reasons discussed *infra* notes 119-37 and accompanying text, the Court overruled *O'Callahan* and rejected the service connection requirement. *Id.* at 440-41.

119. *But see id.* at 451 (Stevens, J., concurring) (characterizing Court's decision to overrule *O'Callahan* as "unwise"). Justice Stevens asserted that "such drastic action is only appropriate when essential to the disposition of a case or controversy before the Court." *Id.* at 451-52 (Stevens, J., concurring). He claimed that this case did not require such action. *Id.* (Stevens, J., concurring).

120. See *id.* at 441 (setting out framers' argument).

121. See *id.* at 442-47 (setting out historical argument).

final argument relied on subsequent practical experience.<sup>122</sup> The Court revisited the constitutional power of Congress via Clause 14.<sup>123</sup> As with the natural meaning theory followed prior to *O'Callahan*,<sup>124</sup> *Solorio* favored a simple textual approach.<sup>125</sup> The Court quoted Alexander Hamilton in support of the congressional powers pertaining to defense, arguing that "[t]hese powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."<sup>126</sup>

Next, the Court took issue with the accuracy of *O'Callahan's* portrayal of both English and American history.<sup>127</sup> Contrary to the conclusion in *O'Callahan*, the *Solorio* Court asserted that pursuant to the British Articles of War Section XIV, Article XVI, courts-martial in England possessed some measure of jurisdiction concerning infraction of civil law.<sup>128</sup> More importantly, *Solorio* pointed to evidence that American military tribunals exercised similar jurisdiction around the same time.<sup>129</sup> That evidence led to two possible theories.<sup>130</sup> The first theory contended that Section X, Article 1 of the American Articles of War of 1776, which provided for the delivery of offenders to civil authorities "upon application by or on behalf of an injured party," implicitly allowed the military to retain and try defendants in the absence of a

122. See *id.* at 448-50 (setting out subsequent experience argument).

123. See *id.* at 441 (discussing Clause 14).

124. See *supra* notes 101-04 and accompanying text (discussing natural meaning theory).

125. See *Solorio v. United States*, 483 U.S. 435, 441 & n.4 (1987) (citing *O'Callahan v. Parker*, 395 U.S. 258, 277 (1969) (Harlan, J., dissenting); 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 329-30 (1911); 5 J. ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 443, 545 (1876)) (declaring that "there is no evidence in the debates over the adoption of the Constitution that the framers intended the language of Clause 14 to be accorded anything other than its plain meaning").

126. *Id.* at 441 (quoting *THE FEDERALIST* No. 23, at 152-54 (Alexander Hamilton) (E. Bourne ed., 1947)).

127. See *id.* at 442-44 (characterizing *O'Callahan's* consideration of British history as "less than accurate" and its consideration of American history as providing "even less support").

128. See *id.* at 443-44 (citing British Articles of War of 1774, reprinted in G. DAVIS, *MILITARY LAW OF THE UNITED STATES* 581, 593 (3d rev. ed. 1915); Grant S. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 *MINN. L. REV.* 1, 11 (1969); *O'Callahan*, 395 U.S. at 269 & n.11)).

129. See *id.* at 444 & n.8 (noting that "American military records reflect trials by court-martial during the late 18th century for offenses . . . such as theft and assault").

130. See *infra* notes 131-33 and accompanying text (describing theories on exercise of jurisdiction).

request for civilian proceedings.<sup>131</sup> The second theory entertained the possibility that the general article of the Articles of War, referring to courts-martial those offenses related "to the prejudice of good order and military discipline,"<sup>132</sup> included any civilian crime not calling for capital punishment.<sup>133</sup>

Finally, *Solorio* relied on subsequent experience as a basis for overturning *O'Callahan*.<sup>134</sup> In practice, the service connection requirement proved inefficient.<sup>135</sup> In determining whether there was a sufficient connection, too many factors warranted consideration.<sup>136</sup> The result was time and resources wasted on excessive litigation before either court system could consider the offense at hand.<sup>137</sup>

### *C. Arguments Against Court-Martial Jurisdiction in Times of Peace*

The Supreme Court's literal interpretation of the constitutional grant of power to Congress in Clause 14,<sup>138</sup> in conjunction with its return to the status test for determining jurisdiction,<sup>139</sup> appears to favor broad court-martial jurisdiction. Consequently, pursuant to Congress's authorization through the U.C.M.J., a court-martial may try an offender who meets the requirements associated with the status test. Although logical, this conclusion is far from foregone. Concurring in *Loving*, Justice Stevens recognized two distinctions between capital and noncapital crimes and reserved the question of peacetime

131. *Solorio v. United States*, 483 U.S. 435, 444 & n.7 (1987) (attributing idea to various scholars).

132. *Id.* at 444 (quoting American Articles of War of 1776, § XVIII, art. 5, reprinted in WINTHROP, *supra* note 78, at 971).

133. *See id.* at 445 & n.10 (attributing this view to variety of authorities).

134. *See id.* at 448 (pointing to Justice Harlan's dissent in *O'Callahan* which anticipated that "infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the [court-martial] jurisdiction issue" (quoting *O'Callahan v. Parker*, 395 U.S. 258, 284 (1969) (Harlan, J., dissenting))).

135. *See id.* at 448 (noting that "[t]he notion that civil courts are 'ill equipped' to establish policies regarding matters of military concern is substantiated by experience under the service connection approach" (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 (1983))).

136. *See supra* note 134 (discussing Justice Harlan's prediction in *O'Callahan*).

137. *See Solorio v. United States*, 483 U.S. 435, 448-49 & n.13 (1987) (indicating that despite attempt by Court in *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971), to clarify service connection requirement, problems remained). Aspects of offenses that were noted for particular complexity included proximity to base, "status of the victim," and drug use. *Id.* at 449-50 & nn.14-17.

138. *See id.* at 446 (noting precedence given to Congress over President to govern military).

139. *Id.* at 450-51 (holding that "requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged").

jurisdiction over common law capital crimes on two bases.<sup>140</sup> First, he pointed out that "*Solorio* was not a capital case."<sup>141</sup> He then contended that the history presented in the *Solorio* case argues against the notion that capital and noncapital jurisdiction require the same treatment.<sup>142</sup>

While not necessarily facially determinative of the common-law capital peacetime jurisdiction issue, Justice Stevens's first distinction is at the very least an obvious one. The Government charged Richard Solorio with twenty-one violations of the U.C.M.J. for various indecencies and assaults as well as attempted rape.<sup>143</sup> None of the applicable provisions calls for capital punishment.<sup>144</sup> Stare decisis requires courts to follow precedent when the facts are identical or closely analogous.<sup>145</sup> However, the distinction between capital and noncapital crimes makes precedent relating to noncapital crimes, although potentially relevant, nonbinding with respect to capital crimes. Justice Stevens appears to agree.<sup>146</sup>

The Supreme Court previously observed that participation in the Revolutionary War influenced the perspective of the men who contributed to the development of the Constitution.<sup>147</sup> Those experiences brought a clear understanding of the distinctive requirements demanded of military personnel in the facilitation of an effective military.<sup>148</sup> Some of the most influential leaders

140. *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996) (Stevens, J., concurring). Justice Stevens indicated that

[t]he question whether a "service connection" requirement should obtain in capital cases is an open one *both* because *Solorio* was not a capital case, and because *Solorio*'s review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try non-capital ones.

*Id.* (emphasis added).

141. *Id.*

142. *See id.* (citing *Solorio*, 483 U.S. at 442-46).

143. *See Solorio v. United States*, 483 U.S. 435, 438 n.1 (1987) (detailing charges against *Solorio* under U.C.M.J., art. 80, 10 U.S.C. § 880 (1994); U.C.M.J., art. 128, 10 U.S.C. § 928; U.C.M.J., art. 134, 10 U.S.C. § 934, none of which were capital); *supra* note 118 (describing *Solorio*'s crime).

144. *See* U.C.M.J., art. 80, 10 U.S.C. § 880 (failing to mention capital punishment); U.C.M.J., art. 128, 10 U.S.C. § 928 (same); U.C.M.J., art. 134, 10 U.S.C. § 934 (disallowing capital punishment).

145. *See* BLACK'S LAW DICTIONARY 1406, 1176 (6th ed. 1990) (defining stare decisis and precedent, respectively).

146. *See* *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996) (Stevens, J., concurring) (noting significance of distinction between capital and noncapital crimes).

147. *See* *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (noting that "[m]any of the framers of the Constitution had recently experienced the rigors of military life").

148. *See id.* (noting that framers "were well aware of the differences between it and civilian life").

associated with the earliest days of the United States possessed considerable expertise with respect to military affairs.<sup>149</sup> In 1775, George Washington sat on a committee charged with the task of establishing rules for the operation of America's military.<sup>150</sup> That same year he became Commander in Chief of those forces.<sup>151</sup> When the Articles of War advocated by his committee proved insufficient, Washington pushed the Continental Congress for change.<sup>152</sup> John Adams prepared the revisions with the support of a committee that included Thomas Jefferson.<sup>153</sup> Many of these same men were instrumental in the adoption of the Constitution and also participated in drafting the Bill of Rights.<sup>154</sup> They too embarked on these tasks with a wealth of personal military experience.<sup>155</sup>

Consequently, the framers possessed a working knowledge of the influential and the controlling military texts of the time.<sup>156</sup> These men understood the British Articles of War of 1765, the Massachusetts Articles of War, the American Articles of 1775, and the American Articles of 1776.<sup>157</sup> Many similarities existed between these documents, including the fate of soldiers accused of capital crimes.<sup>158</sup> Two of the four texts, the British Articles of 1765 and the American Articles of 1776, incorporated provisions requiring superior officers to relinquish such soldiers to the appropriate civilian authority.<sup>159</sup> Of the remaining two, the Massachusetts regulations provided courts-

149. See *infra* notes 150-55 and accompanying text (discussing influential leaders).

150. See Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 297-98 (1957) (discussing Washington's participation in creation of Articles of War).

151. *Id.*

152. *Id.*

153. See *id.* (discussing participation of Adams and Jefferson in revision of Articles of War).

154. See *id.* at 299 (citing John Marshall as example of individual who participated both in Virginia convention for ratification of Constitution and development of Virginia's suggestions for Bill of Rights).

155. See *id.* (noting Marshall's service in Revolutionary Army).

156. See *supra* notes 150-55 and accompanying text (describing some of framers' direct involvement in drafting of texts).

157. See Henderson, *supra* note 150, at 298 (describing involvement of Washington, Adams, and Jefferson in drafting of American Articles and relation of those rules to Massachusetts and British documents).

158. See British Articles of War of 1765, § X, art. I, reprinted in WINTHROP, *supra* note 78, at 937; American Articles of War of 1776, § X, reprinted in WINTHROP, *supra* note 78, at 964; The Massachusetts Articles of War, art. 49, reprinted in WINTHROP, *supra* note 78, at 951; American Articles of War of 1775, art. LL, reprinted in WINTHROP, *supra* note 78, at 957.

159. See British Articles of War of 1765, § X, art. I, reprinted in WINTHROP, *supra* note 78, at 937 (providing for relinquishment); American Articles of War of 1776, § X, reprinted in WINTHROP, *supra* note 78, at 964 (same).

martial with general jurisdiction over *noncapital* offenses and those actions with the potential to compromise discipline,<sup>160</sup> while the American Articles of 1775 expressly prohibited courts-martial from sentencing anyone to death.<sup>161</sup>

Taken together, these provisions resulted in a prevailing belief that the court-martial should not put people to death for common-law capital crimes. If the duty to impose the death penalty belonged anywhere, it belonged within the province of the civilian system. That belief persevered for more than one hundred years.<sup>162</sup>

The Supreme Court's decision in *Solorio* provided support for Justice Stevens's second distinction between capital and noncapital crimes.<sup>163</sup> *Solorio*'s historical analysis included consideration of the British Articles of War which provided that "[w]henever any Officer or Soldier shall be accused of a Capital Crime . . . the Commanding Officer . . . [is] hereby required, upon Application duly made . . . to use . . . utmost Endeavors to deliver over such accused . . . to the Civil Magistrate."<sup>164</sup> In *Solorio*, the Court relied on exceptions to these Articles to establish military jurisdiction over civilian crimes.<sup>165</sup> Those exceptions, however, did not involve capital crimes.<sup>166</sup> *Solorio*'s historical analysis also discussed the general article of the American Articles of

160. See The Massachusetts Articles of War, art. 49, reprinted in WINTHROP, *supra* note 78, at 951 (providing court-martial jurisdiction over "[a]ll crimes not capital, and all disorders and neglects . . . to the prejudice of good order and military discipline").

161. See American Articles of War of 1775, art. LI, reprinted in WINTHROP, *supra* note 78, at 957 (stating that "no persons shall be sentenced by a court-martial to suffer death"). The Articles excluded from this ban those instances of potential capital punishment for crimes of a purely military nature mentioned elsewhere in the articles. *Id.*, reprinted in WINTHROP, *supra* note 78, at 957.

162. See WINTHROP, *supra* note 78, at 691 (noting "the further principle is uniformly asserted of the subordination, in time of peace and on common ground, of the military authority to the civil, and of the consequent amenability of military persons, in their civil capacity, to the civil jurisdiction, for breaches of the criminal law of the land"). Winthrop published America's first complete study of military law in 1886. *Id.* at 5. An early commentator whose influence perseveres, he encouraged practitioners to "discover . . . that there is a military code of greater age and dignity and of a more elevated tone than any existing American civil code, as also a military procedure . . . well worthy of respect and imitation." *Id.*; see also Loving v. United States, 116 S. Ct. 1737, 1741 (1996) (demonstrating Winthrop's continuing influence by citing WINTHROP, *supra* note 78); *Solorio v. United States*, 483 U.S. 435, 442 n.5 (1987) (same).

163. See *Solorio*, 483 U.S. at 443-46 (presenting historical discussion).

164. *Id.* at 443 (quoting *British Articles of War 1774*, reprinted in DAVIS, *supra* note 128, at 589).

165. See *supra* note 128 and accompanying text (discussing limited exceptions).

166. See *supra* note 128 and accompanying text (discussing limited exceptions). Instead, the exceptions included crimes such as destruction of property. *Solorio*, 483 U.S. at 443 (citing *British Articles of War of 1774*, § XIV, art. XVI, reprinted in DAVIS, *supra* note 128, at 593).

War of 1776.<sup>167</sup> The Court argued that contrary to those who would limit military justice to cases concerning military discipline, several scholars claim this article covered all noncapital crimes.<sup>168</sup> Finally, *Solorio* admits that the framers knew of Blackstone's opposition to court-martial jurisdiction in times of peace.<sup>169</sup> While unpersuasive in the context of considering the service connection doctrine,<sup>170</sup> Blackstone's views take on new significance in light of the historical disapproval of military intervention in common-law capital crime.

Concurring in *Loving*, Justice Stevens emphasized the importance of the question whether courts-martial have jurisdiction over capital crimes in times of peace.<sup>171</sup> In many respects, service personnel facing the ultimate penalty for their crimes mirror their civilian counterparts, and their lives deserve similar consideration.<sup>172</sup> To develop a distinction between capital and noncapital peacetime crimes appears to draw a line where, at the source of congressional power,<sup>173</sup> one does not exist. Nevertheless, strong historical evidence supports such a distinction.<sup>174</sup>

167. See *Solorio*, 483 U.S. at 444-45 (discussing general article).

168. See *id.* (meaning "all noncapital crimes proscribed by the civil law").

169. See *id.* at 446 n.12 (admitting framers' awareness of Blackstone's views, yet failing to be "persuaded that their relevance is sufficiently compelling to overcome the unqualified language of Art. I, §8, cl.14"). Blackstone expressed his concerns thus:

For martial law, which is built on no settled principles, but is entirely arbitrary in it's [sic] decisions, is . . . something indulged in rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open [for] all persons to receive justice according to the laws of the land.

*Solorio*, 483 U.S. at 446 n.12 (quoting 1 W. BLACKSTONE, COMMENTARIES \*413).

170. See *Solorio v. United States* 435, 446 n.12 (1987) (indicating Blackstone's views are insufficient to "overcome the unqualified language of Art. I, § 8, cl. 14").

171. See *Loving v. United States*, 116 S. Ct. 1737, 1751 (1996) (Stevens, J., concurring) (noting that "the question is a substantial one because, when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians"); see also *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955), quoted in *Solorio*, 483 U.S. at 440 n.3 (indicating that Congress's power is "the least possible power adequate to the end proposed"). The *Solorio* Court pointed out, however, that *Toth* addressed a more narrow issue and thus it could restrict the dictum to interpretation merely within the confines of that case. *Id.*

172. See *Loving*, 116 S. Ct. at 1751 (Stevens, J., concurring) (noting "importance of protecting service personnel").

173. See U.S. CONST. art. I, § 8, cl. 14. (delineating congressional power).

174. See *supra* notes 138-70 and accompanying text (arguing for distinction between capital and noncapital peacetime crimes).

#### IV. *The Applicability of Post-Furman Jurisprudence to Capital Punishment Within the Military*

If courts-martial do have jurisdiction over capital crimes committed by service personnel during peacetime, the question becomes whether the same constitutional requirements that govern the death penalty in civilian courts also constrain military tribunals. Even if courts-martial lack jurisdiction in this area, the applicability of those same requirements to situations that call for military tribunals to adjudge capital punishment for purely military crimes warrants consideration. Along with the jurisdictional issue,<sup>175</sup> the *Loving* Court alluded to this second issue as an alternative that might have altered the outcome of the case.<sup>176</sup> In his concurrence, Justice Thomas went so far as to remark that "the United States *surprisingly* makes no argument that the military is exempt from the *byzantine rules* that we have imposed upon the States in their administration of the death penalty."<sup>177</sup> In order to reach a decision on the delegation question that disposed of *Loving*, the Court qualified its opinion by assuming<sup>178</sup> the relevance of *Furman v. Georgia*<sup>179</sup> and the cases following that landmark decision.<sup>180</sup>

##### A. *Furman v. Georgia and its Legacy*

*Furman v. Georgia* revolutionized the way that states approached the death penalty.<sup>181</sup> A majority of the *Furman* Court failed to agree on reasoning

175. See *supra* Part III (discussing legitimacy of peacetime jurisdiction over capital crimes in military).

176. See *Loving*, 116 S. Ct. at 1742 ("A preliminary question in this case is whether the Constitution requires the aggravating factors that *Loving* challenges."); *id.* at 1753 (Thomas, J., concurring) ("It is not clear to me that the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military.").

177. *Id.* n.\* (Thomas, J., concurring) (emphasis added).

178. See *id.* at 1742 (noting Government's failure to raise issue and deciding to "assume that *Furman* and the case law resulting from it are applicable to the crime and sentence in question").

179. 408 U.S. 238 (1972).

180. See generally *Furman v. Georgia*, 408 U.S. 238 (1972) (striking down capital punishment provisions). In *Furman*, the Supreme Court considered whether capital punishment, as it was being adjudged, violated the Eighth Amendment prohibition against cruel and unusual punishment. *Id.* at 239. Three convicted felons, one standing convicted of murder and two standing convicted of rape, raised the question. *Id.* All three faced death sentences for their respective crimes. *Id.* Collectively, the Supreme Court endorsed no reasoning for its decision in the case. *Id.* at 240. Instead, the Justices in the majority filed separate opinions agreeing with the decision for their own reasons, while the rest of the Justices filed individual dissents. *Id.* Thus, in a five-to-four decision, the Supreme Court held capital punishment as administered by Texas and Georgia in the cases before it to be cruel and unusual. *Id.* at 239-40.

181. See *Conners*, *supra* note 14, at 378 (recognizing that *Furman*, while specifically



to support its decision.<sup>182</sup> Nevertheless, courts and scholars alike eventually designated Justice Stewart's conclusion "that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed" as *Furman's* holding.<sup>183</sup> Consequently, the Court did not eradicate capital punishment from the American justice system.<sup>184</sup> Instead, *Furman* sought to ensure that capital punishment would not be arbitrarily, capriciously, or irrationally imposed.<sup>185</sup>

States responded to *Furman* with an array of new death penalty legislation.<sup>186</sup> Inevitably, the Supreme Court tested the constitutionality of those statutes, at times, with mixed results.<sup>187</sup> In 1976, however, the Court delivered a series of opinions upholding variations by three states.<sup>188</sup> In the first case,

tailored to three specific statutes, invalidated most death penalty statutes of time). *Furman* invalidated all existing state capital punishment statutes. Kevin K. Spradling & Michael D. Murphy, *Capital Punishment, the Constitution, and the Uniform Code of Military Justice*, 32 A.F. L. REV. 415, 415 (1990). Following the decision, death penalty statutes in 35 or more states received legislative attention. *Gregg v. Georgia*, 428 U.S. 153, 180 n.23 (1976); see Spradling & Murphy, *supra*, at 416 & n.7 (1990) (citing statistics from *Gregg*).

182. See Conners, *supra* note 14, at 378 & n.74 (acknowledging nine independent decisions); *supra* note 180 (discussing split among Justices in *Furman*). However, three main schools of thought are identifiable: (1) those opposed to the death penalty entirely (Justices Brennan and Marshall); (2) those opposed to the death penalty as administered through these particular statutes in light of their lack of guidance to juries as to when it is appropriate (Justices Stewart, White, and Douglas); and (3) those who determined the death penalty, even as administered in the statutes under consideration, to be a constitutionally legitimate form of punishment (Chief Justice Burger and Justices Powell, Rehnquist, and Blackmun). Conners, *supra* note 14, at 378 n.74.

183. *Furman*, 408 U.S. at 310 (Stewart, J., concurring); see Gregory F. Intoccia, *Constitutionality of the Death Penalty Under the Uniform Code of Military Justice*, 32 A.F. L. REV. 395, 396 (1990) (attributing freakishness to imposition of capital punishment that is both arbitrary and capricious); Conners, *supra* note 14, at 378-79 (noting recognition of holding).

184. See Intoccia, *supra* note 183, at 396 (finding that Court "stopped short of ruling the death penalty unconstitutional in all circumstances"); Conners, *supra* note 14, at 378 (recognizing that *Furman* left open potential for constitutional capital punishment).

185. See Intoccia, *supra* note 183, at 396 (recognizing that capital punishment schemes must not result in "arbitrary and capricious" sentences); Conners, *supra* note 14, at 378 (same).

186. See *Gregg*, 428 U.S. at 79-80 n.23 (citing 35 post-*Furman* statutes); Spradling & Murphy, *supra* note 181, at 416 (identifying two primary approaches to problem).

187. See Intoccia, *supra* note 183, at 396-97 (providing examples of statutes that were upheld and statutes that were struck down). In *Woodson v. North Carolina*, the Supreme Court rejected a statute mandating the death penalty. *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Court claimed that such a plan inadequately addressed the issues of excessive discretion and particularized consideration. See Intoccia, *supra* note 183, at 396-97 (relaying Court's opinion).

188. See Conners, *supra* note 14, at 379 (attributing Court's action to statutes' provision of adequate direction to sentencer); *infra* notes 189-93 and accompanying text (discussing holdings in three cases).

*Gregg v. Georgia*,<sup>189</sup> the Court approved a death sentence imposed following a bifurcated proceeding that involved evidence of both aggravating and mitigating factors, as well as an automatic appeal.<sup>190</sup> On the very same day, the Court handed down decisions in two companion cases, *Proffitt v. Florida*<sup>191</sup> and *Jurek v. Texas*,<sup>192</sup> with similar results.<sup>193</sup> All three cases emphasized the

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189. 428 U.S. 153 (1976).

190. See *Gregg v. Georgia*, 428 U.S. 153 (1976). In *Gregg*, the Supreme Court considered whether capital punishment adjudged under Georgia's new law represented an unconstitutional violation of the Eighth Amendment prohibition against cruel and unusual punishment. *Id.* at 158. Petitioner, a hitchhiker, was sentenced to death according to the procedures adopted by Georgia, following the Supreme Court's decision in *Furman*, for the robbery and murder of two men who picked him up. *Id.* at 158-61. Those procedures included a bifurcated proceeding, the second part of which was to include evidence of both specific aggravating factors and any mitigating circumstances. *Id.* at 163-64. First, the Court settled the question of whether the death penalty is intrinsically cruel and unusual within the meaning of the Eighth Amendment and thus per se unconstitutional. *Id.* at 169. Determining it was not, the Court reviewed the history of Eighth Amendment claims, as well as contemporary feelings about the subject. *Id.* at 169-73. The Court then proceeded to consider the death penalty as specifically imposed in this case, which it approved, based on its belief that Georgia's new statute "require[d] the jury to consider the circumstances of the *crime and the criminal* before it recommends sentence." *Id.* at 197 (emphasis added); see also Intocchia, *supra* note 183, at 296-97 (discussing *Gregg*); Spradling & Murphy, *supra* note 181, at 416-17 (same).

191. 428 U.S. 242 (1976).

192. 428 U.S. 262 (1976).

193. See *Jurek v. Texas* 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). In *Proffitt*, the Supreme Court considered whether capital punishment adjudged under Florida's new law represented an unconstitutional violation of the Eighth Amendment prohibition against cruel and unusual punishment. *Id.* at 244. Petitioner received the death penalty, according to the procedures adopted by Florida following the Supreme Court's decision in *Furman*, for entering a man's bedroom and fatally stabbing him in his bed with a butcher knife. *Id.* at 244-46. Those procedures included a bifurcated proceeding, the second part of which involved weighing statutory aggravating factors against mitigating factors that were also statutorily provided. *Id.* at 246. Once again, the Court, referring to *Gregg*, dismissed the notion that the death penalty is per se unconstitutional. *Id.* at 247. It then proceeded to consider the death penalty as imposed in the case which, as in *Gregg*, it approved based on the notion that "the sentencing judge must focus on the *individual* circumstances of *each homicide* and *each defendant*." *Id.* at 252 (emphasis added). The Court noted that the essential distinction between the Georgia statute approved in *Gregg* and this statute lay in the fact that Florida placed the responsibility for sentencing in the hands of the judge rather than a jury. *Id.* Nevertheless, the Court found that distinction to be insignificant in light of the fact that the judge's experience level is likely to lead to greater consistency in sentencing. *Id.*

In *Jurek*, the Supreme Court considered whether capital punishment adjudged under Texas's new law represented an unconstitutional violation of the Eighth Amendment prohibition against cruel and unusual punishment. *Jurek*, 428 U.S. at 264. Petitioner received the death penalty according to the procedures adopted by Texas following the Supreme Court's decision in *Furman* for the murder by choking and drowning of the 10 year old girl he had abducted with the intention of raping. *Id.* at 264-68. Unlike the schemes approved in *Gregg* and *Proffitt*, Texas's procedures required that any individual convicted of one of five categories of capital murder be subject to a second sentencing proceeding. *Id.* at 267. If, following that proceeding,

importance of developing a system premised on serious consideration of the particular individuals and circumstances involved in each case.<sup>194</sup>

Considered together, these decisions answer the questions left by *Furman*.<sup>195</sup> They draw particular attention to five elements that play a central role in the constitutional analysis: (1) "Bifurcated Sentencing Procedure"; (2) "Specific Aggravating Circumstances Must Be Identified"; (3) "Sentencing Authority Must . . . Make Findings On the Particular Aggravating Circumstance Used"; (4) "Unrestricted Opportunity To Present Mitigating and Extenuating Evidence"; and (5) "Mandatory Appellate Review."<sup>196</sup> One of those elements, specified aggravating factors, provided the basis on which *Loving* reached the Supreme Court some twenty years later.<sup>197</sup>

### B. *Furman, the Military, and Peacetime Common-Law Capital Crimes*

*Loving* did not address the initial inquiry of whether post-*Furman* death penalty jurisprudence should even apply within the military context.<sup>198</sup> Apparently, the United States Court of Military Appeals (C.M.A.) settled that question in 1983 with its decision in *United States v. Matthews*.<sup>199</sup> Finding

the jury unanimously answered a series of statutorily proscribed questions in the affirmative, the judge was to sentence the individual to death. *Id.* at 268. Once again, the Court, referring to *Gregg*, dismissed the notion that the death penalty is per se unconstitutional. *Id.* The Court then proceeded to consider the death penalty as specifically imposed in the case, which it approved, despite the differences in the Texas statute, based on the notion that it "guides and focuses the jury's objective consideration of the particularized circumstances of the *individual offense* and the *individual offender*." *Id.* at 274 (emphasis added). Texas's system of narrowing the types of murder for which the death penalty is available made up for its lack of aggravating factors, and the questions posed to the jury following the sentencing proceeding encompassed sufficient opportunity for evidence of mitigating circumstances. *Id.* at 270-73.

See also Intocchia, *supra* note 183, at 397 & n.9 (discussing *Jurek* as well as other death penalty decisions handed down by Court on July 2, 1976); Spradling & Murphy, *supra* note 181, at 417-18 (discussing *Proffitt* and *Jurek*).

194. See *supra* notes 190, 193 (quoting pertinent passage of each case).

195. See Spradling & Murphy, *supra* note 181, at 418 (describing result of capital cases decided in 1976 as "a basic framework").

196. *United States v. Matthews*, 16 M.J. 354, 377 (C.M.A. 1983); see *id.* at 377-78 (discussing each element); Spradling & Murphy, *supra* note 181, at 419 (discussing *Matthews*'s characterization of these elements); see also Conners, *supra* note 14, at 380-85 (characterizing and discussing each element derived from *Furman* somewhat differently as (1) "Bifurcated trial"; (2) "Opportunity to present mitigating evidence"; (3) "Guidance to the jury"; (4) "Appellate review"; and (5) "Executive clemency").

197. See *Loving v. United States*, 116 S. Ct. 1737, 1740 (1996) (granting certiorari on issue of "authority to promulgate the aggravating factors").

198. See *supra* note 5 (citing Court's recognition of this in *Loving*).

199. *Matthews*, 16 M.J. 345 (1983); see *supra* notes 32-33 and accompanying text (discussing case and its results). Subsequent to *United States v. Matthews*, Congress reconstructed the United States Court of Military Appeals. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 1 (June

Matthews's death sentence improper, the C.M.A. determined that without elements comparable to those required by *Furman* and its progeny, the capital punishment procedures provided by the U.C.M.J. failed to satisfy constitutional requirements.<sup>200</sup>

The appropriate link between civilian precedent and military justice does not appear to elicit much consideration.<sup>201</sup> In twenty-four pages, *Matthews* devoted a mere three paragraphs to the question.<sup>202</sup> Despite this discussion's brevity, the C.M.A. concluded that, with respect to cruel and unusual punishment, service members are entitled to protection on two fronts.<sup>203</sup> Accordingly, not only does the Eighth Amendment govern in this area, but Article 55 of the U.C.M.J. plays a role as well.<sup>204</sup> Article 55 prevents courts-martial from sentencing an individual to "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment."<sup>205</sup>

Nevertheless, the C.M.A. in *Matthews* failed to present solid support for the proposition that the Eighth Amendment directly governs military courts.<sup>206</sup> In one reference to a prior holding, the C.M.A. asserted that Article 55 was designed by Congress to broaden the rights of service personnel rather than to limit them.<sup>207</sup> If Congress understood the Eighth Amendment to create hard and fast rules regardless of the context in which it is interpreted, then perhaps civilian precedent does bind courts-martial in death penalty cases. Alternatively, Congress may have passed Article 55 out of a recognition of the unique requirements of military justice, not in an attempt to absorb military justice into the civilian system. After all, if Congress expected the same Eighth Amendment capital punishment rules to control both the courts-martial and civilian courts, then Article 55 is redundant.

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1995). It increased the number of judges from three to five in 1990, and in 1994 it changed the court's name from the United States Court of Military Appeals to the Court of Appeals for the Armed Forces. *Id.* However, for the purposes of this Note, the United States Court of Military Appeals (C.M.A.) remains the appropriate name because it is the one that was in effect at the time *Matthews* was decided.

200. See *Matthews*, 16 M.J. at 380 (focusing on "lack of specific findings of identified aggravating circumstances" and impact that has on "meaningful appellate review").

201. See *id.* at 368-69 (discussing link between civilian precedent and military justice).

202. See *id.* (discussing link in three brief paragraphs).

203. See *id.* at 368 (concluding that service members are entitled to protection).

204. See *id.* (identifying both sources of protection).

205. U.C.M.J. art. 55, 10 U.S.C. § 855 (1994), quoted in *United States v. Matthews*, 16 M.J. 354, 368 (C.M.A. 1983). *United States v. Matthews*, 16 M.J. at 368. Note that Article 55 contains specific prohibitions, as well as a general reference to punishments deemed cruel or unusual. *Id.*

206. See *Matthews*, 16 M.J. at 368 (neglecting to assert specific support).

207. See *id.* (noting that "in enacting Article 55, Congress 'intended to grant protection covering even wider limits' than 'that afforded by the Eighth Amendment'" (quoting *United States v. Wappler*, 9 C.M.R. 23, 26 (C.M.A. 1953))).

Perhaps in *Matthews*, the C.M.A. recognized the potential distinction between the Eighth Amendment and Article 55 when it elected to "seek guidance from Supreme Court precedent" rather than simply to declare post-*Furman* death penalty jurisprudence to be controlling.<sup>208</sup> In fact, the court asserted that the uniqueness of the military must play a role in determining civilian precedent's applicability to the court-martial.<sup>209</sup> Specifically, the C.M.A. acknowledged the possibility that circumstances exist under which the requirements for the proper institution of the death penalty in the case of members of service personnel will differ from those prescribed by *Furman* for ordinary citizens.<sup>210</sup> The C.M.A. suggested that crimes perpetrated in combat situations and those, such as espionage, that amount to a "violation of the law of war" involve such circumstances.<sup>211</sup> These exceptions, however, represent the uniqueness of the military generally, which may so alter the situation as to nullify the rule and render the Supreme Court's death penalty jurisprudence merely advisory in the military justice context.

Nevertheless, the C.M.A. found that the circumstances surrounding *Matthews*'s crime lacked any elements warranting deviation from *Furman* principles.<sup>212</sup> Citing absence of military necessity, the C.M.A. asserted that failure to follow *Furman* in such a case would amount to failure to comply with "the intent of Article 55 or of the Eighth Amendment."<sup>213</sup> Thus, absent extenuating circumstances, the C.M.A. has bound itself to civilian precedent. As it currently stands, post-*Furman* death penalty precedent applies to military capital punishment proceedings absent military necessity.

The Supreme Court did not review *Matthews*, and yet, its holding appears largely uncontested. Military courts follow *Matthews*,<sup>214</sup> and even prior to that decision, federal courts applied *Furman* to the military as well.<sup>215</sup> In *Loving*, the Government did not even consider the issue significant enough to question.<sup>216</sup>

208. *Id.* at 368.

209. *See id.* (citing *Schlesinger v. Councilman*, 520 U.S. 738 (1975), and *Parker v. Levy*, 417 U.S. 733 (1974)).

210. *See id.* at 368 (citing combat and law of war as examples).

211. *Id.* (describing crimes perpetrated in midst of combat as such that "maintenance of discipline may require swift, severe punishment").

212. *See id.* at 369 (finding that circumstances of *Matthews*'s crime were "similar [to] crimes tried regularly in State and Federal courts"); *see also supra* note 33 (describing rape and murder committed by *Matthews*).

213. *United States v. Matthews*, 16 M.J. 354, 369 (C.M.A. 1983) (emphasis added).

214. *See United States v. Martinez*, 19 M.J. 744 (A.C.M.R. 1984); *Intoccia, supra* note 183, at 398 & n.24 (citing *United States v. Rojas*, 15 M.J. 902, 927 (N.M.C.M.R. 1983), *rev'd on other grounds*, 17 M.J. 154 (C.M.A. 1984)).

215. *See Intoccia, supra* note 183, at 398 & n.26 (citing *Schick v. Reed*, 419 U.S. 256 (1974), and *Furman v. Georgia*, 408 U.S. 238, 417 (1972) (Powell, J., dissenting)).

216. *See Loving v. United States*, 116 S. Ct. 1737, 1742 (1996) (noting failure); *id.* at 1753

Scholarship also glosses over the issue of *Furman*'s applicability in the military context.<sup>217</sup> For example, in 1990, the *Air Force Law Review* published a pair of articles in which military lawyers debated the constitutionality of capital punishment procedures under the U.C.M.J. as modified following *Matthews*.<sup>218</sup> While both articles gave fairly extensive treatment to *Furman* and the cases that followed it,<sup>219</sup> neither gave significant attention to the applicability of those cases to military law. In the first article, this issue warranted one paragraph that, far from presenting a balanced perspective, argued solely in support of applicability.<sup>220</sup> The second simply asserted that the court in *Matthews* had "affirmatively answered the question" of applicability, implying an end to any further discussion of the issue.<sup>221</sup> These scholars, who could agree on little else,<sup>222</sup> came to a consensus on this point.<sup>223</sup>

Despite this apparent consensus among scholars and the courts, the opinions in *Loving* indicate that at least some current members of the Supreme Court – Justice Thomas in particular – hesitate to put the issue to rest.<sup>224</sup> Some persuasive justifications support this reluctance.<sup>225</sup> The first justification finds grounding in courts' longstanding tradition of deference to Congress

(Thomas, J., concurring) (same).

217. See Intoccia, *supra* note 183, at 398 (acknowledging that "[t]o most scholars and courts, the application to the military of the eighth amendment has never been seriously questioned").

218. See generally Intoccia, *supra* note 183; Spradling & Murphy, *supra* note 181. At the time of the articles' publication, Major Kevin K. Spradling was the Director of International Law at the Office of the Staff Judge Advocate at Peterson Air Force Base in Colorado. Spradling & Murphy, *supra* note 181, at 415. He held a plethora of degrees, including an LL.M. *Id.* Captain (Major select) Michael D. Murphy was an instructor with the Military Justice Division at the Air Force Judge Advocate General School at Maxwell Air Force Base in Alabama. *Id.* Major Gregory F. Intoccia was the Deputy Director for Telecommunications Regulatory Law at the Office of the Staff Judge Advocate at Scott Air Force Base in Illinois. Intoccia, *supra* note 183, at 395.

219. See Intoccia, *supra* note 183, at 396-97 (considering *Furman*); Spradling & Murphy, *supra* note 181, at 415-18 (same).

220. See Intoccia, *supra* note 183, at 398 (arguing for applicability of *Furman* and subsequent cases).

221. Spradling & Murphy, *supra* note 181, at 419.

222. See *id.* at 415 (referring to Intoccia's article in terms such as "broad-based attack" and "polemic," accusing it of "[i]gnoring the all-encompassing analytical framework within which all capital punishment schemes – including that used in the Armed Forces – must be scrutinized").

223. See Intoccia, *supra* note 183, at 398 (arguing for applicability); Spradling & Murphy, *supra* note 181, at 419 (asserting applicability as fact).

224. See *supra* notes 176-77 and accompanying text (discussing issue as raised by *Loving* and quoting Justice Thomas).

225. See *infra* notes 226-42 and accompanying text (discussing justifications for considering issue of application of civilian judicial precedent in military courts).

on questions of military affairs.<sup>226</sup> Congress's predominance in the area of military affairs explains this deference.<sup>227</sup> Exclusive experience places Congress in a superior position to federal courts with respect to the unique challenges presented by a large and powerful military – challenges that the judiciary is unequipped to face.<sup>228</sup>

The notion that armed service personnel receive fair treatment under the court-martial system supports this deference as well.<sup>229</sup> While not the case from the very beginning,<sup>230</sup> the U.C.M.J. now ensures that the military system of justice provides numerous opportunities for reconsideration prior to an execution.<sup>231</sup> Before finalizing any conviction or sentence, the senior legal officer and then the convening officer at the local level must review all court-martial decisions.<sup>232</sup> Additionally, two levels of appellate review exist within the military system to which all capital cases receive automatic

226. See Conners, *supra* note 14, at 371-75 (discussing judicial restraint and deference to Congress).

227. See *id.* at 372 & n.39 (citing Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 186-88 (1962), reprinted in A.F. JAG BULL., May-June 1962, at 6, 10) (attributing this sentiment to Chief Justice Warren).

228. See Conners, *supra* note 14, at 372 (pointing to experience resulting from use of power). The Supreme Court has stated:

[J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953), quoted in Chappell v. Wallace, 462 U.S. 296, 301 (1983).

229. See Conners, *supra* note 14, at 373 & n.45 (citing *Burns v. Wilson*, 346 U.S. 137 (1953) (affirming death sentence), and *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) (asserting that "the military court system generally is adequate to and responsibly will perform its assigned task . . . . [I]t must be assumed that the military court system will vindicate servicemen's constitutional rights"))).

230. See Ferris, *supra* note 100, at 439 (relaying early example of unfairness under original Articles of War). There was a point in the mid-nineteenth century when military justice was not necessarily fair. *Id.* In 1842, a court-martial convicted and executed eighteen year-old Midshipman Phillip Spencer, suspected of conspiring to mutiny, without his ever being aware of the proceedings taking place. *Id.* at 439 & n.3 (citing EDWARD M. BYRNE, *MILITARY LAW* 18 (3rd ed. 1981)).

231. See 2 GILLIGAN & LEDERER, *supra* note 18, at 128-30 (describing review process); Conners, *supra* note 14, at 373 (same).

232. See 2 GILLIGAN & LEDERER, *supra* note 18, at 128 & n.24 (citing U.C.M.J. arts. 60 (c)(1)); Conners, *supra* note 14, at 373 & nn.47-50 (citing U.C.M.J. arts. 64, 66-67, 10 U.S.C. §§ 864, 866-67 (1994)).

appeal.<sup>233</sup> The number of opportunities for relief within the military justice system supports civilian courts' confidence in the process.<sup>234</sup>

Perhaps the primary justification for exempting courts-martial from the strictures of post-*Furman* death penalty jurisprudence lies in the concept of military necessity.<sup>235</sup> Just prior to the C.M.A.'s decision in *Matthews*, the Supreme Court reiterated its belief in the importance of an independent military justice system.<sup>236</sup> *Chappell v. Wallace*<sup>237</sup> recognized that "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."<sup>238</sup> The demands of battle require instantaneous compliance with orders.<sup>239</sup> Only prior conditioning can guarantee instant acquiescence under those circumstances.<sup>240</sup> Recognizing this, courts repeatedly permit the application of different, even limiting, standards regarding the constitutional rights of military personnel.<sup>241</sup> Individual rights to freedom of speech, procedural due process, and protection from unreasonable search and seizure—among the Bill of Rights' most treasured principles—fail to escape limitation.<sup>242</sup>

233. See *Conners*, *supra* note 14, at 373-74 & n.51 (citing U.C.M.J. art. 67, 10 U.S.C. § 867). The first appeal occurs within the Court of Military Review of the particular branch of the military involved. *Id.* at 374 n.51. If the death sentence still stands following that appeal, it is appealed to the Court of Military Appeals which services all branches. *Id.*; see also 2 GILLIGAN & LEDERER, *supra* note 18, at 129 & n.33 (finding automatic appeal waivable under R.C.M. 1110).

234. See *supra* note 230 and accompanying text (discussing fairness of military courts).

235. See *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (asserting that "military necessity makes demands on its personnel 'without counterpart in civilian life'" (quoting *Schlessinger v. Councilman*, 420 U.S. 738, 757 (1975))); *Conners*, *supra* note 14, at 375-78 (discussing military necessity).

236. See *Chappell*, 462 U.S. at 300 (citing *Parker v. Levy*, 417 U.S. 733, 743-44 (1974), and *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

237. 462 U.S. 296 (1983).

238. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). *Chappell* concerned the viability of civil suits brought by enlisted personnel against their superiors for compensation for violation of their civil rights under the Constitution while in the course of duty. *Id.* at 297. Claiming racial discrimination aboard a combat ship, respondents brought a suit that was dismissed by the United States District Court for the Southern District of California as "nonreviewable military decisions." *Id.* at 297-98. Finding a possibility for review, the United States Court of Appeals for the Ninth Circuit remanded the case. *Id.* at 298. Reversing the court of appeals, the Supreme Court placed emphasis on congressional control of the military, as well as the special needs of military discipline. *Id.* at 300-01. The Court held that enlisted personnel lacked the power to bring such suits. *Id.* at 305.

239. See *id.* at 300 (referring to "habit of immediate compliance").

240. See *id.* (citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)).

241. See *infra* note 242 and accompanying text (providing examples of courts applying different standards).

242. See *Conners*, *supra* note 14, at 375-76 & nn.61-64 (citing *Parker v. Levy*, 417 U.S. 733 (1974) (upholding Captain Levy's conviction, under U.C.M.J. arts. 133 & 134 for, among



*C. In the Absence of Peacetime Common-Law Capital Jurisdiction*

Assuming courts-martial do not have jurisdiction over common-law capital crimes committed during periods of peace, the likelihood that the Supreme Court's post-*Furman* jurisprudence applies to military capital punishment decreases considerably. Thus, courts-martial only retain capital jurisdiction over those crimes that are purely military in nature.<sup>243</sup> In *Matthews*, the C.M.A. specifically reserved the possibility that cases exist that demand unique guidelines for proper adjudication of the death penalty by courts-martial.<sup>244</sup> The C.M.A. cited crimes committed within the context of war and those that implicate "the law of war" as examples of such circumstances.<sup>245</sup> Those distinctions become an important part of the applicability analysis.

Critical to a successful military, strict discipline demands higher standards of conduct from service personnel in certain respects than those expected of the average American citizen.<sup>246</sup> Military crimes inapplicable in the civilian context include desertion,<sup>247</sup> absence without leave (AWOL),<sup>248</sup> dereliction of duty,<sup>249</sup> and conduct unbecoming an officer and a gentleman.<sup>250</sup> The U.C.M.J. provides for capital punishment for eight such "crimes of war" whether or not they actually occur in time of war.<sup>251</sup> These crimes include mutiny or sedition,<sup>252</sup> misbehavior before the enemy,<sup>253</sup> subordinate compel-

other things, expressing to enlisted personnel his opposition to American involvement in Vietnam); *Burns*, 346 U.S. at 139-40 (plurality opinion) (justifying courts-martial's noncompliance with other court's procedures); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975) (approving inspections and strip searches conducted without warrants)).

243. See *United States v. Matthews*, 16 M.J. 354, 368 (C.M.A. 1983) (delineating two categories of purely military crimes).

244. See *id.* (suggesting combat offenses and crimes of war); see also *supra* notes 210-11 and accompanying text (same).

245. *Matthews*, 16 M.J. at 368. (citing combat offenses and crimes of war); see *supra* notes 210-11 and accompanying text (same).

246. See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 2-1, 54 & n.1 (3rd ed. 1992) (asserting that "[a]n army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier" (quoting *Parker v. Levy*, 417 U.S. 733 (1974))).

247. U.C.M.J. art. 85, 10 U.S.C. § 885 (1994).

248. U.C.M.J. art. 86, 10 U.S.C. § 886.

249. U.C.M.J. art. 92(3), 10 U.S.C. § 892(3).

250. U.C.M.J. art. 133, 10 U.S.C. § 933; see SCHLUETER, *supra* note 246, at 54-75 (discussing each of these sections in turn as well as other similar offenses).

251. See *infra* notes 252-59 and accompanying text (setting out eight crimes).

252. U.C.M.J. art. 94, 10 U.S.C. § 894 (1994).

253. U.C.M.J. art. 99, 10 U.S.C. § 899 (1994).

ling surrender,<sup>254</sup> improper use of a countersign,<sup>255</sup> forcing a safeguard,<sup>256</sup> aiding the enemy,<sup>257</sup> spying,<sup>258</sup> and espionage.<sup>259</sup> True examination of the effect of Supreme Court precedent on these examples of military capital punishment requires an inquiry into the relevance of *Coker v. Georgia*<sup>260</sup> before courts may inquire as to the effect of *Furman*.<sup>261</sup>

Strictly speaking, *Coker* eliminated capital punishment for rape of an adult woman.<sup>262</sup> In doing so, however, it called into question the viability of the death penalty for any crime that "in terms of moral depravity and of the injury to the person and to the public . . . does not compare with murder."<sup>263</sup> Justice White reiterated the plurality's belief that excessive as well as barbaric capital punishment fails under the Constitution.<sup>264</sup> *Coker* cited *Gregg* for

254. U.C.M.J. art. 100, 10 U.S.C. § 900 (1994).

255. U.C.M.J. art. 101, 10 U.S.C. § 901 (1994).

256. U.C.M.J. art. 102, 10 U.S.C. § 902 (1994).

257. U.C.M.J. art. 104, 10 U.S.C. § 904 (1994).

258. U.C.M.J. art. 106, 10 U.S.C. § 906 (1994).

259. U.C.M.J. art. 106a, 10 U.S.C. § 906a (1994).

260. 433 U.S. 584 (1977).

261. See *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (eliminating death penalty for rape). In *Coker*, the Supreme Court examined the constitutionality of a Georgia statute that provided for capital punishment for rapists in light of the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 586 (plurality opinion). Already serving time for rape, as well as murder and various other violent crimes, *Coker* escaped from prison and within a matter of hours encountered the victim and committed another laundry list of crimes. *Id.* at 587 (plurality opinion). These new offenses included, in addition to escape, "armed robbery, motor vehicle theft, kidnaping, and rape." *Id.* (plurality opinion). Following constitutionally approved procedures, a jury sentenced him to death by electrocution. *Id.* at 587-91 (plurality opinion). Justices Stewart, Blackmun, and Stevens joined the plurality opinion filed by Justice White. *Id.* at 586 (plurality opinion). In formulating his opinion, Justice White considered the attitudes of the public, legislatures and even juries toward the imposition of the death penalty for rape convictions. *Id.* at 593-97 (plurality opinion). Justice White "concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment. *Id.* at 592 (plurality opinion). As compared to murder, Justice White found rape to be less severe with respect to moral depravity and injury, both the victim's as well as the public's. *Id.* at 598 (plurality opinion). Justices Brennan and Marshall concurred in judgment, reasserting their beliefs that capital punishment violates the Eighth Amendment in all cases and completing a majority of the Court that would not approve a death sentence for the rape of an adult woman. *Id.* at 600 (Brennan, J., concurring); *id.* at 600-01 (Marshall, J., concurring).

262. See *id.* at 597 (plurality opinion) (determining "death is indeed a disproportionate penalty for the crime of raping an adult woman").

263. *Id.* at 598 (plurality opinion) (justifying higher standard for rape based in part on these reasons).

264. *Id.* at 592 (plurality opinion) (citing *Furman v. Georgia*, 408 U.S. 238 (1972); *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958); and *Weems v. United States* 217 U.S. 349 (1910)).

the proposition that capital punishment that either fails to serve a legitimate punitive aim or appears extreme in relation to the offense does not meet constitutional standards.<sup>265</sup> *Coker* emphasized both the importance of public and legislative opinion concerning the status of the sentence over time and jury response to application of the death sentence in particular circumstances.<sup>266</sup>

Capital punishment for crimes of war should survive the plurality's test laid out in *Coker*. It certainly does not suffer from a lack of legislative support. As early as November 7, 1775, the American Articles of War called for the death penalty for espionage, mutiny or sedition, desertion, misbehavior before the enemy, and abandoning post.<sup>267</sup> As noted above, some of the most influential men of their time – Washington, Adams, and Jefferson among them – either participated in the drafting of these Articles or the Articles of 1776 that followed shortly and encompassed these same provisions.<sup>268</sup> This tradition of legislative support for capital punishment for certain violations of the most serious crimes of war continues today under the U.C.M.J.<sup>269</sup> Furthermore, the magnitude of the potential injury to the public as a result of these crimes and their potential to compromise national security lend support to this conclusion. Assuming, arguendo, that capital punishment for crimes of war does not survive the *Coker* test, it may nevertheless prove permissible. This result, implicit in the concept of military necessity,<sup>270</sup> stems from the Supreme Court's understanding that:

[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is *too obvious to require extensive discussion*; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.<sup>271</sup>

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265. *Id.* (plurality opinion).

266. *See id.* (plurality opinion) (emphasizing that "these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent").

267. *See* American Articles of War of 1775, Additional Articles, arts. 1, 5, 6, & 10, reprinted in WINTHROP, *supra* note 78, at 959-60 (calling for capital punishment for particular crimes of war).

268. *See* Henderson, *supra* note 150, at 297-98 (providing historical background for American Articles of War). These provisions that had been part of a supplement to the American Articles of War of 1775, became part of the full text of the American Articles of War of 1776. American Articles of War of 1776, § XIII, art. 19, § II, art. 3, § VI, art. 1, § XIII, art. 12, § XII, art. 6, reprinted in WINTHROP, *supra* note 78, at 961-67.

269. *See supra* notes 252-59 and accompanying text (listing serious crimes of war that exist today).

270. *See* Conners, *supra* note 14, at 375-78 (discussing military necessity with respect to limitations on rights of service personnel).

271. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (emphasis added).

Assuming that capital crimes of war do survive *Coker*, the *Furman* line of cases becomes relevant. The emphasis of those decisions requires that constitutional capital punishment schemes focus both very specifically on the particular crime and the individual defendant and more generally on the relationship between the possible sentence in a given case and the sentencing decisions of other similar crimes.<sup>272</sup> While capital punishment for crimes of war would not necessarily comply with the five elements that were the focus of post-*Furman* jurisprudence,<sup>273</sup> military necessity renders such compliance unnecessary where, as under the U.C.M.J., the procedures followed comply with the dictates of *Furman*. Congress designed the extensive post-trial review process within the military justice system<sup>274</sup> "to insure uniformity in sentencing."<sup>275</sup> The initial level of post-trial review provides the convening authority with the opportunity to commute the sentence to life in prison based on his or her own interpretation of the facts.<sup>276</sup> This provides strong evidence that the individual defendant and the particulars of the crime receive more than adequate attention under the U.C.M.J. Moreover, if the facts receive insufficient consideration at the initial level, the unique aspects of a given case automatically receive complete consideration in subsequent mandatory reviews.<sup>277</sup>

In addition to crimes of war, the U.C.M.J. provides capital punishment for five purely military crimes committed in the context of war.<sup>278</sup> Three of these offenses – desertion,<sup>279</sup> assaulting or willfully disobeying a superior commissioned officer,<sup>280</sup> and misbehavior of a sentinel<sup>281</sup> – also constitute

272. See *United States v. Matthews*, 16 M.J. 354, 379 (C.M.A. 1983) (faulting capital punishment procedures under U.C.M.J. at time). The C.M.A. found that capital punishment procedures under the U.C.M.J. failed to reveal

whether they have made 'an individualized determination on the basis of the character of the individual and the circumstances of the crime,' and whether they have 'adequately differentiate[d] this case in an objective, evenhanded, and substantially rational way' from the other murder cases in which the death penalty was not imposed.

*Id.* (quoting *Zant v. Stephens*, 406 U.S. 862, 879 (1983)); see also *Spradling & Murphy*, *supra* note 181, at 419-20 (quoting *Matthews*, 16 M.J. at 379).

273. See *supra* note 196 and accompanying text (listing these elements).

274. See *supra* notes 231-34 and accompanying text (discussing review procedures).

275. *Spradling & Murphy*, *supra* note 181, at 422 & n.65 (quoting John J. Pavlick, Jr., *The Constitutionality of the U.C.M.J. Death Penalty Provisions*, 97 MIL. L. REV. 81, 124 (1982) (citing S. REP. NO. 486, at 28 (1949))).

276. See *id.* at 421 & n.59 (citing U.C.M.J. art. 60(c), 10 U.S.C. § 860(c) (1994)).

277. See *id.* at 421 & nn.59-61 (citing U.C.M.J. arts. 60(b)-(d), 10 U.S.C. § 860(b)-(d)).

278. See *infra* notes 279-83 and accompanying text (discussing military crimes).

279. U.C.M.J. art. 85(c), 10 U.S.C. § 885(c).

280. U.C.M.J. art. 90, 10 U.S.C. § 890.

281. U.C.M.J. art. 113, 10 U.S.C. § 913.

crimes of war and should receive the same treatment as the other crimes of war discussed above.<sup>282</sup> Of those purely military crimes deemed capital when committed in the context of war, only premeditated murder and felony murder are not also crimes of war.<sup>283</sup> Presumably, the occurrence of premeditated murder or felony murder within the context of war adds emphasis to the presence of military necessity. Nevertheless, murder committed in a theater of war bears a greater resemblance to the common-law crimes discussed above than it does to crimes of war. Consequently, the applicability of *Furman* to court-martial cases involving murder committed in a theater of war should parallel that of its peacetime common-law counterpart.

### V. Conclusion

*Loving v. United States* will undoubtedly draw the attention of administrative law professors.<sup>284</sup> The true ramifications of this decision, however, may surprise those who consider its holding with respect to the delegation doctrine to be the decision's central significance. The alternative issues presented by the Justices and discussed above contain a kernel of hope for advocates on both sides of the controversy surrounding the death penalty.<sup>285</sup> *Loving* all but challenged future litigants to raise these issues.<sup>286</sup> Once settled, their impact may affect a variety of different contexts.

One area sure to be implicated is choice of forum. At a point in time when even the American Bar Association can garner a tremendous amount of support for a moratorium on the death penalty,<sup>287</sup> headlines continue to read, "Nation's Execution Rate Increases Sharply."<sup>288</sup> In fact, recent statistics from

282. See *supra* notes 272-77 and accompanying text (discussing applicability of *Furman* to crimes of war).

283. See U.C.M.J. arts. 118(1), (4), 10 U.S.C. § 918 (1), (4) (1994) (prohibiting premeditated and felony murder); Spradling & Murphy, *supra* note 181, at 420 & n.42 (including rape). But see *id.* at 418 n.28 (explaining ramifications of *Coker*).

284. See *supra* Part II (discussing administrative law implications of *Loving*).

285. See *Loving v. United States*, 116 S. Ct. 1737, 1742 (1996) (noting failure of Government to take issue with assumption that civilian capital punishment precedent applies in this instance); *id.* at 1752 (Stevens, J., concurring) (reserving question of status of peacetime capital prosecutions by military).

286. See *id.* at 1742 (pointing out blatant failure to raise alternate issues discussed in this Note).

287. See Sandra Torry, *ABA Endorses Moratorium on Capital Punishment*, WASH. POST, Feb. 4, 1997, at A4, available in 1997 WL 2249666 (discussing ABA decision). The vote, cast on February 3, 1997, at the organization's winter meeting, was 280 to 119. *Id.* This change in the ABA's policy with respect to capital punishment followed recent federal legislation concerning habeas review and financial support for attorneys representing indigent defendants facing capital sentences. *Id.*

288. Robert L. Jackson, *Nation's Execution Rate Increases Sharply*, L.A. TIMES, Dec. 5,

the Justice Department indicate that from 1994 to 1995 the number of executions carried out nationally increased by more than eighty percent, from thirty-one to fifty-six.<sup>289</sup> At the end of 1995, inmates awaiting execution on death row numbered 420 in California, 404 in Texas, 362 in Florida, and 196 in Pennsylvania.<sup>290</sup>

Public doubts concerning the potential of violent offenders to reform compound the impact of these statistics.<sup>291</sup> It follows that, given an option, many prosecutors as well as the public they represent, would prefer to try capital cases where the judgment will most likely result in the death penalty. If courts-martial do not command jurisdiction over common-law capital crimes committed during times of peace, then choice of forum becomes a nonissue. If, however, courts-martial have jurisdiction under these circumstances, then applicability of *Furman* to the military becomes an important factor in the choice of forum decision. Assuming *Furman* applies, those seeking the death penalty may prefer to launch prosecutions in the civilian system where death sentences are far more prevalent. If, however, the Supreme Court finds courts-martial exempt from "the byzantine rules . . . imposed upon the States in their administration of the death penalty,"<sup>292</sup> then the potential for modifications to the military system capable of facilitating the imposition of capital punishment increases. This could make the military context a more attractive forum for proponents of the death penalty.

Eventually, *Loving* may also hold implications for nonmilitary capital defendants. The sentiments of certain members of the Supreme Court, Justices Scalia and Thomas in particular, fuel *Loving's* potential for impact on capital punishment generally. These Justices, above all of their colleagues, tend to oppose decisions that would broaden the liberties of those accused of crimes.<sup>293</sup>

During his confirmation testimony on the subject of limiting death penalty appeals, Justice Thomas expressed "concern . . . that we do not put ourselves in the position of adopting an approach that would in some way

1996, at A41, available in 1996 WL 12762646.

289. See *id.* (citing Justice Department statistics).

290. See *id.* (noting that "[l]egal experts said California has a disproportionately large number of death row inmates because federal judges and the U.S. 9th Circuit Court of Appeals in San Francisco have blocked or delayed many executions").

291. See *id.* (indicating fear of recidivism).

292. *Loving v. United States*, 116 S. Ct. 1737, 1753 n.\* (1996) (Thomas, J., concurring).

293. See Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 598 (1995) (observing that "even when most of the other conservative Reagan and Bush appointees supported individuals' claims in criminal punishment cases, Justices Scalia and Thomas were likely to support the government").

curtail the rights of the criminal defendant.<sup>294</sup> Nevertheless, between 1986 and 1993, Justice Thomas favored the Government over individual criminal defendants more than ninety-four percent of the time in controversies surrounding the Eighth Amendment, the death penalty, and collateral habeas review.<sup>295</sup> Justice Scalia opposed criminal defendants in ninety percent of such cases.<sup>296</sup> Justice Scalia envisions a system of capital punishment aimed at retribution equivalent to the damage done, irrespective of moral responsibility considerations.<sup>297</sup>

While their perspectives may appear radical in light of the Court's current composition, relative youth favors Justices Thomas and Scalia.<sup>298</sup> Potentially, their impact on the nation's death penalty policies – both direct and indirect – will continue for some time.<sup>299</sup> Relieving the military justice system from the strictures of post-*Furman* procedural requirements could serve as a testing ground for the position advocated by these conservative justices. If administered successfully, an example of capital punishment absent the requirements that followed *Furman* could provide Justices Scalia and Thomas with ammunition in their fight to change the way that American courts must administer the death penalty.

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294. Joyce A. Baugh & Christopher E. Smith, *Doubting Thomas: Confirmation Veracity Meets Performance Reality*, 19 SEATTLE U. L. REV. 455, 475 & n.90 (1996) (quoting Justice Thomas, *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. 424 (1991)).

295. See Smith, *supra* note 293, at 596 (reporting percentage for all justices serving on Supreme Court between 1986 and 1993); see also Baugh & Smith, *supra* note 294, at 475-76 (describing Justice Thomas as "less concerned than other Justices about the constitutional rights of criminal defendants").

296. See Smith, *supra* note 293, at 596 (reporting percentage for all justices serving on Supreme Court between 1986 and 1993).

297. See Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 68 (1992) (interpreting Justice Scalia's argument in *Booth v. Maryland*, 482 U.S. 496 (1987)). Gey went so far as to assert that "[i]n Justice Scalia's world, there are few impediments to swift implementation of death sentences." *Id.* at 131.

298. See Smith, *supra* note 293, at 596 (noting relative youth of Justices Thomas and Scalia). Justice Thomas is 46 years old and Justice Scalia is 58 years old. *Id.*

299. See *id.* at 596, 610 (discussing potential impact of tenure of Justices Scalia and Thomas); see also Gey, *supra* note 297, at 131 (predicting that, "[i]n a very short time, Justice Scalia's death penalty may become the Court's death penalty").