

# The Unusual Punishment: A Call for Congress to Abolish the Death Penalty Under the Uniform Code of Military Justice for Unique Military, Non-Homicide Offenses

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## INTRODUCTION

U.S. Army Private Bradley Manning has been charged with causing the largest leak of classified national security information in the history of the United States.<sup>1</sup> Private Manning is alleged to have turned over thousands of classified documents generated by the U.S. military about the wars in Afghanistan and Iraq and hundreds of thousands of diplomatic documents to Wikileaks for unedited publication on its website.<sup>2</sup> One of the criminal offenses charged, aiding the enemy, carries

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<sup>1</sup> See Julie Tate & Ernesto Londono, *Bradley Manning Pleads Guilty to 10 Lesser Charges, Explains Motive*, WASH. POST (Feb. 28, 2013), [http://www.washingtonpost.com/world/national-security/manning-pleads-guilty-to-10-lesser-charges/2013/02/28/deed5b06-81c1-11e2-8074-b26a871b165a\\_story.html?hpid=z3](http://www.washingtonpost.com/world/national-security/manning-pleads-guilty-to-10-lesser-charges/2013/02/28/deed5b06-81c1-11e2-8074-b26a871b165a_story.html?hpid=z3).

<sup>2</sup> See Charge Sheet, *United States v. Bradley Manning* (Mar. 1, 2011), *available at* <http://graphics8.nytimes.com/packages/pdf/politics/20110302-manning.pdf>; *see also*

a maximum punishment of death, with no requirement that it be committed during a time of war.<sup>3</sup> As a potential aggravating factor, the unauthorized and purposeful disclosure of the trove of classified information by Private Manning “knowingly created a grave risk of substantial damage to the national security of the United States.”<sup>4</sup> Despite being charged with a death-eligible offense and the presence of at least one aggravating factor, the convening authority<sup>5</sup> took death off the table and referred<sup>6</sup> the charges against Private Manning for trial by a non-capital general court-martial,<sup>7</sup> making the maximum eligible punishment life in prison.<sup>8</sup>

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Charlie Savage, *Solider Faces 22 New Wikileaks Charges*, N.Y. TIMES, Mar. 3, 2011, at A6, available at <http://www.nytimes.com/2011/03/03/us/03manning.html>; JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, 73 (2012).

<sup>3</sup> See Uniform Code of Military Justice (UCMJ), art. 104, 10 U.S.C. § 904 (2006).

<sup>4</sup> See R. CTS-MARTIAL 1004(c)(2)(A); see also *Wikileaks Diplomatic Cables Release ‘Attack on the World,’* BBC NEWS (Nov. 29, 2010), <http://www.bbc.co.uk/news/world-us-canada-11868838>. Secretary of State Hillary Clinton is quoted as saying, “[t]his disclosure is not just an attack on America’s foreign policy interests, it is an attack on the international community: the alliances and partnerships, the conversations and negotiations that safeguard global security and advance economic prosperity.” *Id.* The White House released this statement: “[s]uch disclosures put at risk our diplomats, intelligence professionals, and people around the world who come to the United States for assistance in promoting democracy and open government. President Obama supports responsible, accountable and open government at home and around the world, but this reckless and dangerous action runs counter to that goal. By releasing stolen and classified documents, Wikileaks has put at risk not only the cause of human rights but also the lives and work of these individuals. We condemn in the strongest terms the unauthorized disclosure of classified documents and sensitive national security information.” Press Release, White House, Statement by the Press Secretary (Nov. 28, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/11/28/statement-press-secretary>.

<sup>5</sup> In the military justice system, the “convening authority” is the officer authorized to convene a court-martial. See UCMJ, art. 22, 10 U.S.C. § 822 (2006).

<sup>6</sup> “Referral” is the order of a convening authority that charges sworn against an accused will be tried in a specified court-martial. See R. CTS-MARTIAL 601(a).

<sup>7</sup> A general court-martial is the highest available forum in the military justice system, akin to a felony court. It is the only forum that may adjudge the penalty of death. See UCMJ, art. 18, 10 U.S.C. § 818 (2006).

<sup>8</sup> See *Army Orders Court-Martial in Wikileaks Case*, CBS NEWS (Feb. 3, 2012), [http://www.cbsnews.com/8301-201\\_162-57371545/army-orders-court-martial-in-wikileaks-case/](http://www.cbsnews.com/8301-201_162-57371545/army-orders-court-martial-in-wikileaks-case/).

Private Manning's case is certainly remarkable for the sheer amount of classified information leaked and the response it received from senior U.S. officials. However, despite the grandiose media coverage his alleged leak has received and the cause he has inspired,<sup>9</sup> the decision not to seek the death penalty against him is no surprise. It has been decades since the U.S. military sought the death penalty for any offense that does not involve killing another person, rendering the capital court-martial for non-homicide offenses a relic of military justice past.<sup>10</sup>

In contrast, the death penalty has been sought in other recent cases where a service member was charged with murder. As a comparison, Army Major Nidal M. Hasan faces the death penalty in a court-martial for his alleged massacre of his fellow soldiers at Ford Hood, Texas in November 2009.<sup>11</sup> The decisions to seek the death penalty for Major Hasan and not to seek the death penalty for Private Manning illustrate that the justifications, policy choices, and legal rationale are very different for murder compared to non-homicide offenses.

The Uniform Code of Military Justice (UCMJ) authorizes the death penalty for sixteen offenses, both in peace and during a time of war.<sup>12</sup> Of those sixteen, two are murder offenses,<sup>13</sup> two are rape,<sup>14</sup> and

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<sup>9</sup> See, e.g., BRADLEY MANNING SUPPORT NETWORK, <http://www.bradleymanning.org/> (last visited Mar. 1, 2013).

<sup>10</sup> See *infra* note 18.

<sup>11</sup> See Press Release, Fort Hood Press Center, Major Nidal M. Hasan Is Referred to General Court-Martial (Jul. 6, 2011), *available at* <http://www.forthoodpresscenter.com/go/doc/3439/1130799/>.

<sup>12</sup> See MANUAL FOR COURTS-MARTIAL, app. 12 (Maximum Punishment Chart) (2012). The number of death-eligible offenses has been recently reduced when Congress eliminated death-eligibility for rape of a child. However, as there may be some offenses that occurred when the law permitted the death penalty for this offense, there are still 16 offenses for which it is theoretically possible for the government to seek the death penalty. See *infra*, note 15.

<sup>13</sup> The two are premeditated murder, UCMJ, art. 118(1), 10 U.S.C. § 918(1) (Supp. V 2011), and felony murder, UCMJ, art. 118, 10 U.S.C. § 918(4).

<sup>14</sup> The two are rape of an adult, UCMJ, art. 120(a), 10 U.S.C. § 920(a) (Supp. V 2011), and rape of a child, UCMJ, art. 120(b), 10 U.S.C. § 920(b) (2006), *amended by* 10 U.S.C. § 920(b) (Supp. V 2011). The military death penalty for rape has been the rule since at least 1863. See *Kennedy v. Louisiana (Kennedy II)*, 554 U.S. 945, 946 (2008), *denying reh'g to* 554 U.S. 407. However, the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-189, §§ 541(a)(2), 552(b)(1), "repealed" Art.

twelve are what are sometimes referred to as “unique,” or purely military, offenses.<sup>15</sup> What makes these offenses unique or purely military is that, with only two exceptions, there are no equivalent civilian offenses.<sup>16</sup> A murder conviction is the basis for all military death sentences imposed since 1960,<sup>17</sup> and since the advent of the modern military death penalty era in 1984, no service member has been tried capitally for any unique military offense.<sup>18</sup> The last service member executed for a unique military

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120(b) and enacted a new, non-capital child rape article. See Dwight Sullivan, *The Article 120 Amendments: Is Death a Statutorily Authorized Punishment for Rapes Occurring on or After 28 June 2012? (I think not)*, CAAFLOG (Jan. 2, 2012), <http://www.caaflag.com/2012/01/02/the-article-120-amendments-is-death-a-statutorily-authorized-punishment-for-rapes-occurring-after-28-june-2012-i-think-not/>.

<sup>15</sup> The offenses: desertion in a time of war UCMJ, art. 85, 10 U.S.C. § 885 (2006); assaulting a superior commissioned officer in a time of war, UCMJ, art. 90, 10 U.S.C. § 890 (2006); mutiny or sedition, UCMJ, art. 94, 10 U.S.C. § 894 (2006); misbehavior before the enemy, UCMJ, art. 99, 10 U.S.C. § 899 (2006); subordinate compelling surrender, UCMJ, art. 100, 10 U.S.C. § 900 (2006); improper use of a countersign, UCMJ, art. 101, 10 U.S.C. § 901 (2006); forcing safeguard, UCMJ, art. 102, 10 U.S.C. § 902 (2006); aiding the enemy, UCMJ, art. 104, 10 U.S.C. § 904 (2006); spying – mandatory death, UCMJ, art. 106, 10 U.S.C. § 906 (2006); espionage, UCMJ, art. 106a, 10 U.S.C. § 906a (2006); willfully and wrongfully hazarding a vessel, UCMJ, art. 110(a), 10 U.S.C. § 910(a) (2006); and misbehavior of sentinel or lookout during a time of war, UCMJ, art. 113, 10 U.S.C. § 913 (2006).

<sup>16</sup> Of the twelve death-eligible, unique or purely military offenses, only two—spying and espionage—have comparable civilian counterparts. See Captain Douglas L. Simon, *Making Sense of Cruel and Unusual Punishment: A New Approach to Reconciling Military and Civilian Eighth Amendment Law*, 184 MIL. L. REV. 66, 122–23 (2005).

<sup>17</sup> Catherine M. Grosso, David C. Baldus & George Woodworth, *The Impact of Civilian Aggravating Factors on the Military Death Penalty (1984-2005): Another Chapter in the Resistance of the Armed Forces to the Civilianization of Military Justice*, 43 U. MICH. J.L. REFORM 569, 576 (2010).

<sup>18</sup> Colonel Dwight Sullivan has produced the most exhaustive statistics of military death penalty cases in the modern era, and is unaware of any capital courts-martial for non-homicide offenses, though he notes that “no one knows precisely how many military capital cases have been tried since the current system took effect in 1984. The various services’ recordkeeping on this issue is neither uniform nor complete.” Colonel Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 10 (2006) [hereinafter, *Killing Time*]. As of May 30, 2011, Colonel Sullivan writes that there have been 52 known capital courts-martial resulting in 16 adjudged death sentences. See Dwight Sullivan, *Updated Military Death Penalty Stats [Corrected]*, CAAFLOG (May 30, 2011), <http://www.caaflag.com/?s=updated+military+death+penalty+stats>. Only one of the 52 cases was tried capitally for a non-homicide offense, rape,

offense was Army Private Eddie D. Slovik, who was executed by firing squad on January 31, 1945 for desertion during a time of war.<sup>19</sup>

This article will argue that statutory reform is needed to modernize military death penalty law. The military justice system is a primary tool with which commanders maintain good order and discipline in the armed services. The United States military has significantly evolved from the conscripted military of the past. Not only has the military changed and evolved, so too has the nation it defends. Unlike generations past, the modern view in America is that capital punishment should be limited to only the most serious and heinous offenses, primarily (and nearly exclusively) those that result in the death of another person.<sup>20</sup> As such, it calls into question whether, as a matter of law or policy, the UCMJ should still permit the death penalty for *any* non-homicide offenses, and the twelve unique military offenses in particular.

The goal of this article is to attempt to reconcile modern Eighth Amendment jurisprudence with the death-eligible, unique military offenses in order to demonstrate that reforms of the law are appropriate and necessary to adhere to constitutional standards and modern societal views. This article will take a normative approach to the law, as it is unlikely that any court will have this issue before it in the near future. As stated, there have been no capital trials in the military for unique military offenses in the modern death penalty era. However, it is likely that maintaining the death penalty for unique military offenses is “the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering the penalty against its identifiable benefits.”<sup>21</sup> As this article will discuss, keeping the death penalty on the books as a matter of habit and inattention is not an

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and the death penalty was not adjudged. *See* United States v. Straight, 42 M.J. 244 (C.A.A.F. 2005).

<sup>19</sup> *See* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 1020 (3d ed. 2006).

<sup>20</sup> *See* Kennedy v. Louisiana (*Kennedy I*), 554 U.S. 407, 437 (2008) (“As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.”), *modified on denial of reh’g*, 554 U.S. 945; *see also* Coker v. Georgia, 433 U.S. 584, 597-98 (1977) (holding the Eighth Amendment prohibits capital punishment for the crime of rape of an adult).

<sup>21</sup> *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring).

ideal approach to the law, or to the effective preservation of good order and discipline in the military.

Part I is an overview of Eighth Amendment doctrine as it relates to the military. This section first examines the evolution of the modern era of the military death penalty. It next discusses the application of the Eighth Amendment to military law in light of the text of the UCMJ and the Supreme Court's opinion in *Kennedy v. Louisiana*. Finally, this section will attempt to articulate what legal test should be applied to determine the "evolving standards of military decency," as applicable to death sentences for unique military offenses.

Part II advocates that several factors and arguments weigh heavily towards a reformation of the law of capital punishment for unique military offenses. First, the failure to use the death penalty for cases of unique military offenses makes it an "unusual" punishment. Second, the historical record of the military justice system in capital cases demonstrates that the system has failed to produce efficient, non-discriminatory results. Third, there is no longer a military necessity to continue to have unique military offenses be death-eligible. Finally, there are alternative punishments available to fulfill the need for incapacitation, retribution, deterrence, and, most importantly, good order and discipline in the armed services.

Part III discusses why, as a matter of policy informed by the law, legislative action is the appropriate method to abolish capital punishment for unique military, non-homicide offenses. In addition, this section will state how Congress can effectuate the change by a simple statutory amendment.

## I. THE EVOLVING STANDARDS OF MILITARY DECENCY

### A. *The Eighth Amendment and the Evolution of the Modern Death Penalty Era*

Legal challenges to the death penalty have historically been grounded in two constitutional provisions, the Eighth Amendment and the Fourteenth Amendment.<sup>22</sup> The Eighth Amendment prohibits "cruel

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<sup>22</sup> See COYNE & ENTZEROTH, *supra* note 19, at 143.

and unusual punishment.”<sup>23</sup> The Fourteenth Amendment guarantees that no state may deprive a person of “life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>24</sup> The Eighth Amendment was made applicable to the States by operation of the Fourteenth Amendment in 1962.<sup>25</sup>

In 1958, the Supreme Court stated the modern Eighth Amendment test in *Trop v. Dulles*, holding that the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>26</sup> The “evolving standards of decency” test is by its nature elastic and assumes changes in the standards over time.<sup>27</sup> In 1972, the Court held in *Furman v. Georgia* that the death penalty statutes of thirty-nine states and the District of Columbia were unconstitutional as an arbitrary imposition of capital punishment in violation of the Eighth and Fourteenth Amendments.<sup>28</sup> The *Furman* decision temporarily halted all executions nationwide.<sup>29</sup> Thereafter, state legislatures amended their criminal statutes to comply with the *Furman* requirements, and created complex, multi-tiered sentencing procedures based upon specified “aggravating” and “mitigating” factors.<sup>30</sup>

In 1976, the Supreme Court reinstated the death penalty when it held in *Gregg v. Georgia* that the procedural modifications in an amended Georgia statute passed Eighth Amendment scrutiny.<sup>31</sup> In addition to

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<sup>23</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”).

<sup>24</sup> U.S. CONST. amend. XIV.

<sup>25</sup> See *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>26</sup> See *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>27</sup> See *id.* (citing *Weems v. United States*, 217 U.S. 349 (1910)); see also Simon, *supra* note 16, at 67.

<sup>28</sup> See *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The *Furman* opinion was issued per curiam, with all nine justices writing separately. As evidence of the difficulty of applying the Eighth Amendment test that is elastic, the opinion is over 50,000 words and remains the longest opinion in the history of the Supreme Court of the United States. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 10–11 (2007) (citing NORMAN J. FINKEL, COMMONSENSE JUSTICE 172 (1995)).

<sup>29</sup> See COYNE & ENTZEROTH, *supra* note 19, at 3.

<sup>30</sup> See *id.* at 9.

<sup>31</sup> See *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976) (“The most marked indication of society’s endorsement of the death penalty for murder is the legislative response to

Georgia, in 1976, the Court reviewed the amended death penalty statutes of several other states—some it upheld as withstanding Eighth Amendment scrutiny,<sup>32</sup> others it struck down as being unconstitutional.<sup>33</sup>

*Furman* and *Gregg* focused on whether sentencing procedures created an inherent risk that the death penalty would be inflicted in an arbitrary and capricious manner.<sup>34</sup> The Supreme Court in *Gregg* articulated two distinct criteria to use to evaluate death penalty statutes for Eighth Amendment compliance: the evolving standards of decency test and proportionality.<sup>35</sup> The proportionality principle states that the Constitution prohibits the infliction of grossly disproportionate punishments.<sup>36</sup> Like the “evolving standards of decency test,” a proportionality review is also guided by objective criteria.<sup>37</sup>

During the time in the 1970s when the Supreme Court rendered these several decisions to review procedures of death penalty statutes in various states, neither Congress nor the President initially took any action to reform the military’s death penalty system.<sup>38</sup> Between 1979 and 1983, seven service members were sentenced to death in courts-martial, all for either premeditated murder, felony murder, or both.<sup>39</sup>

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*Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.”).

<sup>32</sup> See, e.g., *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

<sup>33</sup> See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>34</sup> See *Gregg*, 428 U.S. at 189.

<sup>35</sup> See *id.* at 181–87; see also Matthew E. Albers, Note, *Legislative Deference in Eight Amendment Capital Sentencing Challenges: The Constitutional Inadequacy of the Current Judicial Approach*, 50 CASE W. RES. 467 (1999).

<sup>36</sup> See COYNE & ENTZEROTH, *supra* note 19 at 61.

<sup>37</sup> See *Solem v. Helm*, 463 U.S. 277, 292 (1983) (“In sum, a court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”).

<sup>38</sup> See *Killing Time*, *supra* note 18, at 4. Cf. *United States v. Rojas*, 15 M.J. 902 (N-M. Ct. Crim. App. 1983) (denying the applicability of *Furman* to the military justice system).

<sup>39</sup> See *Killing Time*, *supra* note 18, at 5.

It was not until 1983 that the military justice system's death penalty received a full review. In *United States v. Matthews*,<sup>40</sup> the Court of Military Appeals<sup>41</sup> struck down the military death penalty. Although the Court found that the UCMJ already contained most of the procedural safeguards mandated by the Supreme Court after *Furman*,<sup>42</sup> it held that the sentencing procedures were constitutionally infirm "because of the failure to require that the court members make specific findings as to individualized aggravating circumstances."<sup>43</sup>

In the military justice system, Congress has delegated broad powers to the President.<sup>44</sup> The President is statutorily authorized to promulgate rules to govern pretrial, trial, and post-trial procedures.<sup>45</sup> Following *Matthews*, the Congress did not significantly amend the UCMJ to ensure the constitutionality of the military death penalty system. Rather, President Reagan amended the Manual for Courts-Martial in 1984 to create new procedures for the imposition of the military death penalty.<sup>46</sup> President Reagan promulgated Rule for Court-Martial 1004 in recognition that in courts-martial, "death should be adjudged only under carefully tailored procedures designed to ensure that all relevant matters are thoroughly considered and that such punishment is appropriate."<sup>47</sup> With the promulgation of Rule for Court-Martial 1004 in 1984, the modern era of the military death penalty was born.

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<sup>40</sup> *United States v. Matthews*, 16 M.J. 354, 380 (C.M.A. 1983). As Colonel Sullivan explains, "*Matthews* was a bold opinion. It invalidated the existing military death penalty system, ultimately leading to the reversal of the death sentences of every inmate on military death row at the time. It also proclaimed the COMA's power to hold congressional statutes unconstitutional, despite its status as an Article I court." *Killing Time*, *supra* note 18, at 7.

<sup>41</sup> This court is today known as the Court of Appeals for the Armed Forces (CAAF), the highest military appellate court before potential review by the Supreme Court upon a petition for writ of certiorari. See UCMJ, art. 67, 10 U.S.C. § 867 (2006).

<sup>42</sup> See *Matthews*, 16 M.J. at 377.

<sup>43</sup> *Id.* at 380.

<sup>44</sup> See *id.*

<sup>45</sup> See UCMJ, art. 36, 10 U.S.C. § 836 (2006).

<sup>46</sup> See Exec. Order 12,460, 49 Fed. Reg. 3169 (Jan. 26, 1984); see also R. CTS-MARTIAL 1004. The Supreme Court upheld the President's authority to adopt aggravating factors for the military justice system in *Loving v. United States*, 517 U.S. 748 (1996).

<sup>47</sup> MANUAL FOR COURTS-MARTIAL, app. 21, Rule 1004 Capital Cases (2012).

### B. *Constitutional and Statutory Limits on Military Punishment*

In addition to constitutional protections under the Eighth Amendment, Congress provides service members with statutory protection in Article 55 of the UCMJ, which prohibits “cruel or unusual punishment.”<sup>48</sup> Unlike the Eighth Amendment’s prohibition against “cruel and unusual punishments,” Article 55 prohibits “cruel or unusual punishment.” Thus, in enacting Article 55, Congress “intended to grant protection covering even wider limits” than “that afforded by the Eighth Amendment.”<sup>49</sup>

By common meaning “cruelty” involves a subjective, moral judgment,<sup>50</sup> whereas determining what is “unusual” simply is “something different from that which is normally done.”<sup>51</sup> In theory, what withstands Eighth Amendment scrutiny in the civilian criminal justice system may not pass statutory muster under the UCMJ, due to the greater protections under Article 55. However, a line of cases have noted that the military justice system has a different purpose,<sup>52</sup> so there may be

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<sup>48</sup> UCMJ, art. 55, 10 U.S.C. § 855 (2006) (“Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon a person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.”).

<sup>49</sup> *Matthews*, 16 M.J. at 368 (quoting *United States v. Wappler*, 2 C.M.A. 393, 396 (1953)); cf. *Simon*, *supra* note 16, at 107-108 (“[M]ilitary courts refer to Article 55 and the Eighth Amendment case law, but rarely articulate how each apply to the military. . . . Yet in the realm of cruel and unusual punishment, military courts invest much of their time in cases concerning conditions of confinement.”).

<sup>50</sup> See, e.g., *United States v. Curtis*, 32 M.J. 252, 267 (C.M.A. 1991) (“‘[C]ruel’ – which present[s] issues of vagueness and necessitate[s] extensive judicial construction.”).

<sup>51</sup> *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958).

<sup>52</sup> See, e.g., *United States ex. rel. Toth v. Quarles*, 350 U.S. 11 (1955) (holding that Article I military jurisdiction cannot be extended to civilian ex-soldiers who have severed all relationship with the military and its institutions and that Article III courts provide more constitutional protections than military courts); *Reid v. Covert*, 354 U.S. 1, 35–36 (1957) (“Traditionally, military justice has been a rough form of justice emphasizing procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks.”); *O’Callahan v. Parker*, 395 U.S. 258, 261 (1961) (“The exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply.”); *Parker v. Levy*, 417 U.S. 733, 743–44 (1974) (“This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has,

circumstances under which the rules governing capital punishment in the military will differ from the rules applicable to civilians.<sup>53</sup>

The purpose of the criminal justice system is different for civilians than it is for the military. The purpose of the civilian system is to prevent crime by punishing wrongdoers.<sup>54</sup> The purpose of military justice is to maintain good order and discipline in the armed services and to promote efficiency and effectiveness in the military establishment.<sup>55</sup> In other words, what constitutes a legitimate purpose for executing a service member may not be a legitimate purpose for executing a civilian citizen.<sup>56</sup>

### C. *The Evolving Standards of Military Decency After Kennedy v. Louisiana*

In 2008, the Supreme Court reaffirmed that Eighth Amendment protections *may* be different in military cases, but did not explicitly discuss the margins of the distinction or provide criteria to determine the basis for any difference. In *Kennedy v. Louisiana*, the Court struck down a state statute permitting the death penalty for rape of a child, finding it violated the Eighth Amendment.<sup>57</sup> The Court's holding rested in part on a determination that "there is a social consensus against capital punishment for the crime of child rape."<sup>58</sup> The Court noted that only six states permitted the penalty for child rape and that the federal government did not.<sup>59</sup>

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again by necessity, developed laws and traditions of its own during its long history. . . . Just as military society has been a society apart from civilian society, so 'military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

<sup>53</sup> See *Matthews*, 16 M.J. at 368.

<sup>54</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, at 4 (Nov. 1, 2010).

<sup>55</sup> See MANUAL FOR COURTS-MARTIAL, pt. 1, at ¶ 3 (2012).

<sup>56</sup> Though the civilian and military criminal justice systems may have distinct purposes, combat veterans have unique life-experiences that may be extremely mitigating in both civilian and military trials for capital murder. See, e.g., *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (reversing death sentence for ineffective assistance of counsel because trial defense counsel failed to investigate and present evidence of defendant's heroic military service in horrific combat situations during the Korean War).

<sup>57</sup> *Kennedy v. Louisiana (Kennedy I)*, 554 U.S. 407 (2008), *modified on denial of reh'g*, 554 U.S. 945 (2008).

<sup>58</sup> *Id.* at 426.

<sup>59</sup> See *id.* at 433.

The Court failed to note, however, that Congress had recently amended Article 120 of the UCMJ in 2006 to authorize the death penalty for service members who commit the offense of rape of a child.<sup>60</sup> The result of the parties' failure to draw the Court's attention to the law led the State of Louisiana to file for a rehearing, which was denied by the Court.<sup>61</sup> In the statement of denial of the rehearing, joined by a majority of the Court, Justice Kennedy noted that the case involved "the application of the Eighth Amendment to civilian law, and so we need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our decision)."<sup>62</sup>

An Eighth Amendment analysis is driven by objective criteria, such as the actions of state legislatures, jury behavior, and comparisons between jurisdictions.<sup>63</sup> After *Kennedy v. Louisiana*, it is clear that military law does not influence the Supreme Court's Eighth Amendment analysis of determining a national consensus or objective factors to rule on the constitutionality of the death penalty for certain offenses in civilian courts.<sup>64</sup> However, it is less clear what objective criteria, if any, the Supreme Court would apply to conduct an Eighth Amendment analysis of capital offenses under military law for unique military offenses when no such objective criteria are readily available.<sup>65</sup> Determining a "national

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<sup>60</sup> See, e.g., Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, Jul. 2, 2008, <http://www.nytimes.com/2008/07/02/washington/02scotus.html>.

<sup>61</sup> See *Kennedy v. Louisiana (Kennedy II)*, 554 U.S. 945 (2008), *denying reh'g to* 554 U.S. 407 (2008).

<sup>62</sup> *Id.* at 947–48.

<sup>63</sup> See *supra* notes 34–38 and accompanying text.

<sup>64</sup> See *Kennedy II*, 554 U.S. at 948 ("The laws of separate States, which have responsibility for the administration of the criminal law for their civilian populations, are entitled to considerable weight over and above the punishments Congress and the President consider appropriate in the military context.").

<sup>65</sup> See Simon, *supra* note 16, at 120 ("As addressed in the legal research, no court decision properly fixes the appropriate Eighth Amendment standard when the capital crime or punishment is uniquely military."). Also, as noted and thoroughly documented by Captain Simon in his article, much of the Court's Eighth Amendment analysis concerns a determination of a national consensus based upon the actions of legislatures, a criteria that is wholly inapposite to unique military offenses. *Id.* Additionally, in *Loving v. United States*, the Supreme Court assumed that *Furman* and its progeny are applicable to the specific crime (UCMJ, art. 118 – murder) at issue in that case, but was silent about other military offenses. 517 U.S. 748, 755 (1996).

consensus” to serve as a basis of objective criteria is not possible in the military context because there is no comparable jurisdiction.

To further illustrate this point, one can easily imagine an analogous offense being committed in both civilian and military societies, yet the criminal justice systems of each would provide different maximum punishments and different substantive criteria for determining the appropriate punishment. Hypothetically, if a policeman in a civilian police force were to willfully assault a superior police officer in the presence of a suspect during an arrest, that policeman would not be subject to the death penalty in any jurisdiction. By contrast, a service member who assaults someone known to be a superior commissioned officer, while executing duties during a time of war, may be punished by death under the UCMJ.<sup>66</sup> There are legitimate reasons why the two offenders in this example should be treated differently. The discipline requirements of a civilian police force are very different from the need to ensure discipline in the military.<sup>67</sup> However, unlike a civilian court that can look to other jurisdictions to evaluate whether the punishment is “unusual,” a military court can find no relevant comparisons. The question is whether retaining capital punishment for the service member in this example comports with a modern standard of military decency, or whether it is just being kept on the books as a matter of habit and historical practice.

Though the Supreme Court has not addressed the gap of objective criteria between the two justice systems on the merits,<sup>68</sup> military

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<sup>66</sup> See UCMJ, art. 90, 10 U.S.C. § 890 (2006) (Assaulting or willfully disobeying a superior commissioned officer).

<sup>67</sup> See, e.g., *United States v. Marcum*, 60 M.J. 198, 207 (C.A.A.F. 2004) (“The fundamental necessity for obedience and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.” (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974))).

<sup>68</sup> See *Kennedy II*, 554 U.S. at 949 (Scalia, J. concurring).

[The majority] speculates that the Eighth Amendment may permit subjecting a member of the military to a means of punishment that would be cruel and unusual if inflicted upon a civilian for the same crime. That is perhaps so where the fact of the malefactor’s membership in the Armed Forces makes the offense more grievous. One could imagine, for example, a social judgment that treason by a

appellate courts have shed some light on the issue. For example, the Supreme Court struck down the death penalty for the crime of adult rape in *Coker v. Georgia* in 1977.<sup>69</sup> The military court in *Matthews* stated in 1983 that the death penalty could “probably” not be constitutionally effectuated in the military justice system for the offense of adult rape.<sup>70</sup> The *Matthews* court made this statement despite the fact that rape of an adult remained an authorized punishment by statute in a military court-martial.<sup>71</sup> The court noted that the military could not execute a service member for rape “at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense.”<sup>72</sup> Stated another way, the *Matthews* court found that there must be a “military necessity for such a distinction”<sup>73</sup> to permit a death sentence for rape at a court-martial when the Supreme Court had already held it could not be handed down for the same offense at a civilian trial.

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military officer who has sworn to defend his country deserves the death penalty even though treason by a civilian does not (That is not the social judgment our society has made, see 18 U.S.C. § 2381, but one can imagine it.).

*Id.* at 949-50. Of note, no American has been executed for treason since John Brown in 1859, and Brown was charged by the Commonwealth of Virginia, not the federal government. See Sarah Frances Cable, *An Unanswered Question in Kennedy v. Louisiana: How Should the Supreme Court Determine the Constitutionality of the Death Penalty for Espionage?*, 70 LA. L. REV. 995, 1019 (2010).

<sup>69</sup> *Coker v. Georgia*, 433 U.S. 584 (1977) (holding the sentence of death to be grossly disproportionate and excessive punishment to the crime of rape and therefore forbidden by the Eighth Amendment).

<sup>70</sup> *United States v. Matthews*, 16 M.J. 354, 380 (C.M.A. 1983).

<sup>71</sup> See UCMJ, art. 120, 10 U.S.C. § 920 (Supp. V 2011).

<sup>72</sup> *Matthews*, 16 M.J. at 380.

<sup>73</sup> *Id.* at 369; *cf.* *United States v. Curtis*, 32 M.J. 252, 270-71 (C.M.A. 1991) (holding that a “proportionality review” is not required by the Eighth Amendment or Article 55, however, under UCMJ, Article 66, an appellate court must make four separate determinations regarding a death sentence, including: “(c) whether the death sentence adjudged is proportionate to other death sentences that have been imposed; and (d) whether under all of the facts and circumstances of the case the death sentence is appropriate.” (citing UCMJ, art. 66(c), 10 U.S.C. § 866(c)). *Curtis* involved a review of the aggravating factors scheme developed by the President in R. CTS-MARTIAL 1004 after the *Matthews* decision, after *Curtis* was sentenced to death for premeditated murder. Despite several factors to be considered, the standards for reviewing unique military offenses, which lack objective criteria, have yet to be fully articulated by any court.

Military necessity is a *jus in bello*<sup>74</sup> law of war principle that applies during battlefield events and scenarios as a constraint upon what measures can be used to “secur[e] the complete submission of the enemy as soon as possible.”<sup>75</sup> In U.S. history, military necessity was first codified in the “Lieber Code,” which was created for the Union Army during the Civil War.<sup>76</sup> The term is mentioned in all four 1949 Geneva Conventions as well as both 1977 Additional Protocols, but it is undefined in those foundational treaties.<sup>77</sup> Military necessity has a broad formulation that a state may do whatever is not unlawful to defeat the enemy, and as such has been called “the most lawless of legal doctrines.”<sup>78</sup> Although the term “military necessity” consists of murky contours, it contributes significantly to the formulation of an Eighth Amendment test for analyzing the constitutionality of the death penalty for unique military offenses.

As objective criteria are not available, the court must exercise its own independent judgment in reviewing death-eligibility for unique military offenses under the Eighth Amendment.<sup>79</sup> The Eighth Amendment standard should be whether military necessity and need to

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<sup>74</sup> *Jus in bello* is the term under the law of armed conflict that refers to the rules and laws governing the conduct of armed conflict, or “battlefield law.” See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 22 (2009).

<sup>75</sup> DEPT. OF THE ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE* ch. 1, ¶ 3 (1956).

<sup>76</sup> See FRANCIS LIEBER, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (LIEBER CODE)*, U.S. WAR DEP’T GENERAL ORDERS NO. 100, § 1, art. 14 (1863) (“Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”).

<sup>77</sup> See SOLIS, *supra* note 74, at 259.

<sup>78</sup> *Id.* (quoting ALAN M. DERSHOWITZ, *SHOUTING FIRE* 473 (2002)).

<sup>79</sup> See *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (“In [capital] cases, the Court has been guided by ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions’ . . . [t]he inquiry does not end there, however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.” (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005))).

maintain good order and discipline within the ranks of the armed services are legitimately served by authorizing the death penalty for a criminal offense in the military justice system.<sup>80</sup> The next section will argue that, for a variety of reasons, military necessity does not require making unique military offenses death-eligible.

## II. AN UNUSUAL PUNISHMENT IN A FAILING SYSTEM

### A. *The Death Penalty for Unique Military Offenses is Unusual*

So far this article has introduced the applicable test to determine whether a punishment is constitutional under military law. This section will discuss how a military necessity analysis for a punishment is driven by whether the imposition of the punishment is “unusual” in the constitutional sense. In order to be “unusual,” in the ordinary meaning of the word, a punishment must be uncommon in frequency or exceptional.<sup>81</sup> The historical practice of the military in imposing the death penalty for unique military offenses, compared with the full cessation of capital sentences in the modern era for these offenses, demonstrates that military necessity has significantly changed and evolved.

In the Founding era of the United States, military executions were relatively common, and were employed to maintain discipline, stop desertions, and punish crimes against the state.<sup>82</sup> For example, in 1777, Samuel Adams documented an execution in Philadelphia after a court-

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<sup>80</sup> See Bidish Sarma, *Still in Search of a Unifying Principle: What Kennedy v. Louisiana and the Supreme Court’s Denial of the State’s Petition for Rehearing Signal for the Future*, 118 YALE L.J. POCKET PART 55, 58 (2008) (“The Supreme Court will have to carefully consider, however, whether the death penalty is an appropriate punishment if the crime obstructs military goals or creates a unique harm when it is done by someone cloaked with the authority of the State’s military.”); cf. Simon, *supra* note 16, at 120 (“As addressed in the legal research, no court decision properly fixes the appropriate Eighth Amendment standard when the capital crime or punishment is uniquely military. For that reason, this article advocates a rational basis standard. . . . The rational basis test is customarily recognized as a standard that presumes the validity of a statute unless it fails to achieve a rational relationship to a legitimate state interest.”).

<sup>81</sup> See *supra* note 52 and accompanying text.

<sup>82</sup> See JOHN D. BESSLER, CRUEL & UNUSUAL 127 (2012).

martial condemned a man for “attempting to entice some of the Pilots<sup>83</sup> to enter into the Service of Lord Howe.”<sup>84</sup>

During the Revolutionary War, General George Washington, Commander of the Continental Army, “felt strongly that executions deterred crime and preserved order, so he freely permitted his commanders to use capital punishment.”<sup>85</sup> Washington learned the approach during his service in the British Army as Commander in Chief of the Virginia Regiment in the 1750s, where he “vowed to ‘terrify the soldiers’ from desertions and had deserters chained, flogged, and executed for disciplinary purposes.”<sup>86</sup>

Executions for unique military offenses continued to occur after the Revolutionary War ended in 1783. In 1786, Secretary of War Henry Knox received a report from Major John Wyllys, commander of a post on the frontier of Pennsylvania, documenting that Major Wyllys convened a court-martial that tried and convicted several soldiers for desertion.<sup>87</sup> After the sentences of these trials were made public, three more soldiers deserted. Major Wyllys responded by capturing the three men and executing them without a trial. He then wrote to Knox, “[n]o desertions have happened since.”<sup>88</sup>

According to official government sources, there were 267 executions by the Union Army between 1861 and 1866 during the Civil War.<sup>89</sup> However, that number is almost certainly inaccurate as the actual number of executions exceeds the official figure.<sup>90</sup> President Lincoln authorized executions of soldiers during the Civil War for various

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<sup>83</sup> In 1777, the term “pilots” referred to the officer of a maritime vessel who had charge of the ship’s course. *See, e.g.*, 13 THE NEW AMERICAN CYCLOPAEDIA 330 (George Ripley & Charles A. Dana eds., 1867).

<sup>84</sup> BESSLER, *supra* note 82, at 99 (citing THE WRITINGS OF SAMUEL ADAMS 359-60 (Harry Alonzo Cushing ed., 1907)). In other words, the condemned man solicited American civilian ship captains to sail for the British Royal Navy.

<sup>85</sup> BESSLER, *supra* note 82.

<sup>86</sup> *Id.* at 126.

<sup>87</sup> JONATHAN LURIE, 1 ARMING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, at 7 (1992).

<sup>88</sup> *Id.*

<sup>89</sup> JOHN M. LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920, at 205 (1990).

<sup>90</sup> *See id.*

offenses, including desertion, but often did so reluctantly.<sup>91</sup> Lincoln pardoned a condemned deserter on April 14, 1864, and once famously remarked, “I think this boy can do more good above ground than under ground.”<sup>92</sup>

During World War I, from 1917 to 1919, there were only 11 military executions, though far more courts-martial sentenced soldiers to death.<sup>93</sup> The post-World War I era saw a shrinking force, as the Army of 1939 was a small force of 197,000 soldiers.<sup>94</sup> During World War II, the size of the armed forces grew dramatically, such that there were over twelve million service members under the jurisdiction of the military justice system at any given time.<sup>95</sup> Approximately 600,000 courts-martial were convened per year and more than 100 executions were carried out.<sup>96</sup> Given these numbers, and the growing awareness of the public through advancements in communication, “severe criticism of the military justice system resulted.”<sup>97</sup> This led members of Congress to publicly criticize the military justice system after the war ended.<sup>98</sup> It also pushed forward an effort to reform the military justice system by the passage of the UCMJ. President Truman signed the UCMJ into law on May 6, 1950.<sup>99</sup>

Despite this history of capital punishment in the military, there have been no capital prosecutions for any unique military offenses since World War II.<sup>100</sup> There have been courts-martial trials and convictions

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<sup>91</sup> See BESSLER, *supra* note 82, at 277.

<sup>92</sup> *Id.* This pardon recently became famous when an amateur Civil War historian confessed to altering the date on the pardon document to be dated April 14, 1865 (the day Lincoln was assassinated at Ford’s Theater) instead of the actual date of 1864. See, e.g., Uri Friedman, *Historian Allegedly Tampered with Lincoln Documents*, THE ATLANTIC WIRE (Jan. 25, 2011), <http://www.theatlanticwire.com/national/2011/01/historian-allegedly-tampered-with-lincoln-documents/21379/>.

<sup>93</sup> See LINDLEY, *supra* note 89, at 107.

<sup>94</sup> See THOMAS RICKS, *THE GENERALS: AMERICAN MILITARY COMMAND FROM WORLD WAR II TO TODAY* 15 (2012).

<sup>95</sup> See LURIE, *supra* note 87, at 128.

<sup>96</sup> See *id.*

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

<sup>98</sup> *Id.* at n.7 (“Oregon Senator Wayne Morse stated, for example, that military courts ‘have been guilty of the grossest types of miscarriage of justice.’”).

<sup>99</sup> *Id.* at 255.

<sup>100</sup> See COYNE & ENTZEROTH, *supra* note 19.

for death-eligible offenses in the modern era,<sup>101</sup> but the death penalty was not sought in any of these cases.<sup>102</sup> As the United States has been actively engaged in combat and war for over a decade, it is astounding that no service member has faced capital punishment for a unique military offense when put into historical context.

Of course, just because there have been no such capital cases in the modern era does not make the death-eligibility of these offenses unlawful *per se*. Rather, the absence of capital trials and death sentences for such offenses is a major component to a larger analysis as to whether military necessity actually requires keeping death as an authorized punishment for these unique military crimes. If it is not being used, the relevant question is whether the death penalty is unlawful for unique military offenses because it is truly “unusual.” This is particularly acute when considering the modern civilian view that the death penalty must be limited to a narrow class of defendants who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.<sup>103</sup>

A few examples of death-eligible military offenses illustrate the idea that capital sentences for the unique military offenses would be truly “unusual” and so extraordinary that they would not pass modern societal judgment. For example, sleeping while on post as a sentry was an offense

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<sup>101</sup> In addition to the case against Private Manning, other service members have been convicted for aiding the enemy, as well as other unique military offenses. *See, e.g.*, *United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010) (affirming conviction and life sentence for aiding the enemy; the charges arose from communications about intelligence matters concerning the accused’s unit in Iraq, information about the number of soldiers, training methods, and precise locations of deployment, to persons he thought were the enemy (“Brave Muslims”)); *United States v. King*, 2006 CCA Lexis 229 (N-M. Ct. Crim. App. 2006) (unpublished) (affirming conviction and sentence for various offenses, including misbehavior before the enemy, for refusing to carry a weapon or drive as security detail in a convoy in Iraq due to fear of dying).

<sup>102</sup> *See Killing Time, supra* note 18.

<sup>103</sup> *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding the death penalty to be unconstitutional for defendants under the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (prohibiting the death penalty as a punishment against mentally retarded defendants); *Baze v. Rees*, 553 U.S. 35, 80 (2008) (Stevens, J., concurring) (“Our Eighth Amendment jurisprudence has narrowed the class of offenders eligible for the death penalty to include only those who have committed outrageous crimes defined by specific aggravating factors.”).

in the first Articles of War passed by the second Continental Congress in 1775,<sup>104</sup> and has been a death-eligible offense in the military since at least the turn of the 20<sup>th</sup> Century.<sup>105</sup> The justification for making this offense death-eligible is “because cities and fortifications and armies have been lost through the drowsiness of sentinels.”<sup>106</sup>

The death sentence for sleeping while on post was controversial even as far back as World War I, nearly one hundred years ago. In December 1917, a court-martial of officers from the American Expeditionary Forces (AEF) convicted Privates Forest D. Sebastian and Jeff Cook of sleeping on their post in the forward trenches in France.<sup>107</sup> In a four-hour trial, both were sentenced to death.<sup>108</sup> The division staff judge advocate reviewed the proceedings and found them to be lawful, concluding that he could not “escape the conclusion that, as a deterrent, the sentence of the court is necessary.”<sup>109</sup> Likewise, General John Pershing, Commanding General of the AEF, forwarded the cases to the Judge Advocate General of the Army with an endorsement that the soldiers be executed “in a belief that it is a military necessity and that it will diminish the number of like cases that may arise in the future.”<sup>110</sup> By the time the cases were forwarded for review to the Secretary of War, Newton Baker, numerous petitions for clemency from various citizen groups had also been received.<sup>111</sup> Secretary Newton reached a different conclusion on the cases than the Army and expressed disbelief that soldiers of such youth and little military experience “placed for the first time under circumstances so exhausting, can be held to deserve the death

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<sup>104</sup> See The Articles of War, art. XXI (June 30, 1775), in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 111, 115 (Worthington Chauncey Ford ed., 1905), available at [http://avalon.law.yale.edu/18th\\_century/contcong\\_06-30-75.asp](http://avalon.law.yale.edu/18th_century/contcong_06-30-75.asp).

<sup>105</sup> See, e.g., MANUAL FOR COURTS-MARTIAL 107–08, Articles of War, art. 39 (1908).

<sup>106</sup> LURIE, *supra* note 87, at 101. This remark was written by General Enoch H. Crowder, Judge Advocate General of the Army (1911–23) as a response to Secretary of War Newton Baker who had inquired why several offenses in the Articles of War were still required to have death as an eligible punishment. *Id.*

<sup>107</sup> See LINDLEY, *supra* note 89, at 107.

<sup>108</sup> See *id.*

<sup>109</sup> *Id.* at 108.

<sup>110</sup> *Id.* at 109.

<sup>111</sup> See *id.* at 110.

penalty.”<sup>112</sup> President Wilson concurred with Secretary Newton and pardoned the two soldiers on May 4, 1919.<sup>113</sup>

Despite the public controversy surrounding this WWI case in 1917, sleeping while on post during a time of war remains a death-eligible offense under the UCMJ.<sup>114</sup> However, it seems highly unlikely that the American public would support a death sentence for a soldier who fell asleep while on post in Afghanistan in the presence of the enemy. Under this hypothetical, a death sentence is legally possible even if the enemy did not exploit the situation and carry out an attack.<sup>115</sup> It is virtually unimaginable that a case in which no lives were lost would be tried capitally, that a death sentence would be pronounced, or that a death sentence would be affirmed on appeal and a final judgment executed.

Desertion is another offense that remains death-eligible during a time of war.<sup>116</sup> The historic justification for making desertion a capital offense is “because armies have been disintegrated and nations humbled by desertion.”<sup>117</sup> By its very nature, desertion is a crime of omission. It is committed when a service member specifically intends and does not perform his or her duty.<sup>118</sup> The last soldier executed for desertion was Private Eddie Slovik in 1945.<sup>119</sup> Prior to Private Slovik being killed by firing squad, the military had not executed anyone for desertion since

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<sup>112</sup> *Id.*

<sup>113</sup> *See id.* at 111. General Pershing later sought authority to commute death sentences for several offenses, including sleeping on post, which the law required him to send to the President for confirmation “in view of the time it would take to send the cases to Washington.” *Id.* at 123.

<sup>114</sup> *See* UCMJ, art. 133, 10 U.S.C. § 933 (2006).

<sup>115</sup> The relevant elements to this offense as presented in this hypothetical are as follows: (1) that the accused was posted or on post as a sentinel or lookout; (2) that the accused was found sleeping while on post; and (3) that the offense was committed in a time of war or while the accused was receiving special duty pay under 37 U.S.C. § 310. *See* MANUAL FOR COURTS-MARTIAL pt. IV, ¶ 38.b, at IV-57 to -58 (2012). The “aggravating factor” under this hypothetical is “that the offense was committed (e.g. the accused fell asleep) before or in the presence of the enemy.” R. CTS-MARTIAL 1004(c)(1).

<sup>116</sup> *See* UCMJ, art. 85, 10 U.S.C. § 885 (2006).

<sup>117</sup> *See* Lindley, *supra* note 89.

<sup>118</sup> *See* MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 9, at IV-10 (2012).

<sup>119</sup> *See* COYNE & ENTZEROTH, *supra* note 19.

1864.<sup>120</sup> With only one execution for this offense in the last 147 years, capital punishment for desertion is truly unusual. The military necessity for punishing deserters in the Civil War and WWII is also different than today. The armies of those wars were filled with soldiers drafted into duty. In contrast, today's military is an all-volunteer force. This difference alone illustrates that military necessity does not require imposing the ultimate punishment in order to ensure that soldiers perform their duty because the military today is full of service members who volunteered to serve.

A third example of a military death eligible offense is spying.<sup>121</sup> Spying is closely related to espionage, which was added to the UCMJ in 1986 as a subset of this offense.<sup>122</sup> Spying is a violation of the law of war for which enemies can be tried by military commission,<sup>123</sup> and it is the only offense under the UCMJ that makes death the mandatory punishment.<sup>124</sup> Spying can only be committed during a time of war and is committed when a person is "found lurking" or "acting" as a spy in or about a "place, vessel, or aircraft" within the control of the armed forces.<sup>125</sup> By comparison, espionage is much broader; it can be committed during peacetime and prohibits transmitting information relating to

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<sup>120</sup> WILLIAM BRADFORD HUIE, *THE EXECUTION OF PRIVATE SLOVIK* 8 (Westholme Publishing 2004) (1954).

<sup>121</sup> See UCMJ, art. 106, 10 U.S.C. § 906 (2006).

<sup>122</sup> Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534, 99 Stat. 583, 634–35 (1985) (codified at 10 U.S.C. § 906a (2006)).

<sup>123</sup> See Military Commissions Act of 2009, § 1802, 10 U.S.C. § 950t (Supp. III 2009). In 1942, President Franklin Roosevelt convened a military commission to try Nazi saboteurs for various offenses, including spying. See *Quirin v. Cox*, 317 U.S. 1 (1942). After the Supreme Court denied their petition for a writ of habeas corpus in a one page per curiam order, six were electrocuted on August 8, 1942, three months before the Court issued its full opinion in their case. See LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER* 113–14 (2005).

<sup>124</sup> The Supreme Court has ruled that mandatory death sentences are unconstitutional in the civilian context. See *Woodson v. North Carolina*, 428 U.S. 280 (1976). However, neither the Supreme Court nor the CAAF has ruled on the constitutionality of the mandatory death penalty for spying in the military context. Major David A. Anderson, USMC, wrote a full historical account of spying and the mandatory death punishment under the UCMJ, and concluded that "no military necessity will authorize a mandatory death sentence." David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty*, 127 MIL. L. REV. 1, 60 (1990).

<sup>125</sup> See UCMJ, art. 106, 10 U.S.C. § 906 (2006).

national defense to a foreign power.<sup>126</sup> Espionage is only a capital crime if it concerns certain types of information, such as information related to nuclear weaponry, war plans, communications intelligence, major weapons system, or a major element of defense strategy.<sup>127</sup>

From the Founding to World War II, the military had a history of executing spies. In a famous case from the Revolutionary War, British Major John Andre was convicted of spying by a military panel convened by General George Washington and executed by hanging.<sup>128</sup> The execution of Major Andre was modeled after the British practice of executing Americans they determined to be spies, such as Captain Nathan Hale.<sup>129</sup> During World War II, the U.S. captured eighteen German soldiers during the Battle of the Bulge attempting to disrupt American operations while wearing American uniforms behind enemy lines; all were tried before military commissions, convicted of spying, sentenced to death, and executed.<sup>130</sup>

In 1983, the *Matthews* court used spying as the example to illustrate why there may be circumstances in which the rules governing capital punishment against service members may be different than those for civilians. The court stated, “[t]his possibility is especially great with respect to offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment, or in violation of the law of war, e.g., spying.”<sup>131</sup>

However, the last decade has produced extreme combat conditions for the U.S. military, but there have been no capital prosecutions for spying or espionage.<sup>132</sup> This is true despite the fact that

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<sup>126</sup> See UCMJ, art. 106a, 10 U.S.C. § 906a (2006).

<sup>127</sup> See MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 30a.b(3), at IV-45 (2012).

<sup>128</sup> Major Andre was captured wearing an American uniform in September 1780 after meeting with American General Benedict Arnold about surrendering the fort at West Point, New York. FISHER, *supra* note 124, at 11. Major Andre was tried as a spy by a board convened by General George Washington consisting of fourteen officers who found that agreeable “to the Law and usage of Nations it is their opinion he ought to suffer death.” *Id.* at 12. Major Andre was executed by hanging on October 2, 1780. *Id.* at 13.

<sup>129</sup> See *id.* at 9.

<sup>130</sup> See *id.* at 3.

<sup>131</sup> United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983).

<sup>132</sup> See *Killing Time*, *supra* note 18.

modern armed conflict has become more intelligence-driven due to the nature of the enemy the nation is fighting<sup>133</sup> and the new, unique capabilities of targeting.<sup>134</sup> Theoretically, the greater reliance upon intelligence in modern warfare means there is a greater opportunity for spying and espionage offenses to occur. This is because there is simply more classified information for the government to protect, and a greater incentive for the enemy to gain access to it. However, the lack of a single capital trial for spying or espionage under the UCMJ in the modern death penalty era supports a conclusion that capital punishment for these offenses has become “unusual” with the passage of time.

Espionage is also a military offense for which there is a civilian counterpart. Under federal law, a civilian convicted of gathering or delivering defense information to aid a foreign government may face the death penalty.<sup>135</sup> No civilian, however, has been executed for espionage in the United States since the first defendants were sentenced to death for this crime, Julius and Ethel Rosenberg.<sup>136</sup> The Rosenbergs were put to death in the electric chair on June 19, 1953 for providing secrets of the U.S. atomic bomb to the Soviet Union in violation of the Espionage Act of 1917.<sup>137</sup> During the Cold War, there were several high-profile espionage cases of civilians where the death penalty was not sought, including: CIA agent Aldrich Ames, who was a mole for the Soviet

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<sup>133</sup> The enemy the U.S. has faced does not wear uniforms in a traditional sense, nor comply with the laws of war. This has made decisions regarding targeting and detention to be extremely challenging. *See, e.g.*, JACK GOLDSMITH, *THE TERROR PRESIDENCY* 116 (2007).

<sup>134</sup> *See, e.g.*, Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010, at A12, available at <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>; Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, L.A. TIMES (Jan. 31, 2010), <http://articles.latimes.com/2010/jan/31/world/la-fg-cia-awlaki31-2010jan31>.

<sup>135</sup> 18 U.S.C. § 794 (2006). The death penalty provision of this statute was held to be unconstitutional and void because it sets forth no legislated guidelines to control the fact finder's discretion. *See United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984). The statute was later amended in 1994 to cure this constitutional defect. *See Pub. L. No. 103-322*, § 60003(a)(2), 108 Stat. 1796, 1968 (1994).

<sup>136</sup> *See Cable*, *supra* note 68, at 1018–19.

<sup>137</sup> *See United States v. Rosenberg*, 195 F.2d 583 (2d. Cir. 1952); *see also*, Associated Press, *50 years later, Rosenberg Execution Is Still Fresh*, USA TODAY (Jun. 17, 2003), [http://www.usatoday.com/news/nation/2003-06-17-rosenbergs\\_x.htm](http://www.usatoday.com/news/nation/2003-06-17-rosenbergs_x.htm).

Union for nine years;<sup>138</sup> FBI Agent Robert Hanssen, who provided classified information to the Soviets in exchange for cash and diamonds;<sup>139</sup> and U.S. Navy retiree Arthur Walker, who attempted to pass classified information about Navy ships to the Soviets.<sup>140</sup> Other modern espionage cases are afforded only brief mentions in the newspaper,<sup>141</sup> and there is no public outcry calling for the execution of civilian spies. The dearth of capital sentences for spying or espionage in both military and civilian courts suggests that the death penalty for these offenses in either system is unconstitutionally unusual.

### B. *The Failing Military Justice System in Capital Courts-Martial*

In addition to the historical analysis of the death penalty for unique military offenses, the recent abysmal record of the procedural performance of the military justice system is an additional consideration. Military courts-martial have failed to ensure that lawful convictions are obtained and death sentences are imposed. The reasons for the failings are numerous, and include ineffective assistance of defense counsel,<sup>142</sup> failings of military judges to properly instruct the panel of members (or

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<sup>138</sup> MICHAEL R. BROMWICH, U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S PERFORMANCE IN UNCOVERING THE ESPIONAGE ACTIVITIES OF ALDRICH HAZEN AMES: UNCLASSIFIED EXECUTIVE SUMMARY 1 (1997), *available at* <http://www.justice.gov/oig/special/9704.htm>. Ames pled guilty to conspiracy to commit espionage and was sentenced to life imprisonment. *Id.*

<sup>139</sup> *See, e.g., Ex-FBI spy Hanssen sentenced to life, apologizes*, CNN (May 14, 2002, 4:10 PM), [http://articles.cnn.com/2002-05-10/justice/hanssen.sentenced\\_1\\_robert-hanssen-cash-and-diamonds-death-penalty?\\_s=PM:LAW](http://articles.cnn.com/2002-05-10/justice/hanssen.sentenced_1_robert-hanssen-cash-and-diamonds-death-penalty?_s=PM:LAW).

<sup>140</sup> *See* United States v. Arthur Walker, 796 F.2d 43, 45 (4th Cir. 1986).

<sup>141</sup> *Scientist Gets 13 Years in Spying Case*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/22/us/scientist-gets-13-years-in-spying-case.html>.

<sup>142</sup> *See, e.g.,* United States v. Kreutzer, 61 M.J. 272 (C.A.A.F. 2005) (affirming the reversal of contested findings and death sentence due to failure to provide mitigation specialist and ineffective assistance of counsel); United States v. Murphy, 50 M.J. 4 (C.A.A.F. 1998) (reversing death sentence due to ineffective assistance of counsel); United States v. Curtis, 46 M.J. 129 (C.A.A.F. 1997) (per curiam) (reversing death sentence on ineffective assistance of counsel grounds).

jurors),<sup>143</sup> and prosecutors who mishandled evidence.<sup>144</sup> This is not to say that the sentencing procedures established by the President<sup>145</sup> that have survived judicial scrutiny are constitutionally *ultra vires*. Rather, the court has held that the historical record of capital courts-martial is a factor in determining the lawfulness of military justice procedures.<sup>146</sup>

The civilian perception of the military justice system has, at times, been negative. In 1957, the Supreme Court referred to military justice as “a rough form of justice, emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks.”<sup>147</sup> Current Supreme Court Chief Justice John Roberts repeated the “rough form of justice” language to describe military justice in a concurring opinion as recently as 2008.<sup>148</sup> A full accounting of the reasons and legitimacy for the differences between civilian law and military law is beyond the scope of this article, but one area of military law that has been a “rough form of justice” compared to the civilian system is in capital cases.

Perception aside, the statistical record of capital courts-martial is clear evidence that the system has not produced death sentences that are sustainable on appeal. For example, of the sixteen service members sentenced to death since 1984, ten have been taken off death row due to mistakes made by the military justice system.<sup>149</sup> In his survey of the military death penalty system conducted in 2006, Colonel Dwight Sullivan made extraordinary findings to further illustrate this point. Colonel Sullivan noted that the death sentences of service members have

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<sup>143</sup> See, e.g., *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997) (setting aside death penalty due to error in instructions); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998) (reversing death sentence due to error in instructions).

<sup>144</sup> See Marisa Taylor, *Many Death Sentences in U.S. Military Overturned*, MCCLATCHY (Aug. 30, 2011), <http://www.mcclatchydc.com/2011/08/28/121849/many-death-sentences-in-us-military.html>.

<sup>145</sup> See R. CTS-MARTIAL 1004.

<sup>146</sup> See *Weiss v. United States*, 510 U.S. 163, 177–78 (1994) (holding that history is a factor that must be weighed in considering the constitutionality of a challenged military justice practice.).

<sup>147</sup> *Reid v. Covert*, 354 U.S. 1, 35–36 (1957).

<sup>148</sup> *United States v. Denedo*, 556 U.S. 922–23 (2008) (Roberts, C.J., concurring). The Chief Justice quoted this language as a starting point for his view that, as an Article I court, “[t]he military justice system is the last place courts should go about finding ‘extensions’ of jurisdiction beyond that conferred by statute.” *Id.*

<sup>149</sup> See Taylor, *supra* note 144.

been overturned on appeal 3.5 times more often than they have been affirmed, the military's capital reversal rate (77.78%) is higher than the civilian average (47%),<sup>150</sup> and the average appellate delay is longer in the military system than in state systems.<sup>151</sup>

Two additional elements of the military death penalty system best illustrate a record of failure. The first is the inadequacy of defense counsel. As bluntly stated by *The New York Times* editorial board, "the military often assigns inexperienced military lawyers incapable of mounting a strong defense."<sup>152</sup> Regardless of one's subjective view of the quality of military judge advocate lawyering, military law does not provide the accused with the right to the appointment of a lawyer "learned" in capital punishment law.<sup>153</sup> This is in contrast to the federal system and a majority of the states.<sup>154</sup> The denial of "learned counsel" for U.S. service members facing the death penalty drew recent notice when Congress included such a requirement in 2009 for Guantanamo detainees facing capital trials by military commission for violating the law of war. The troubling result was that the U.S. Congress ensured that "a terrorist who attacked the country can get qualified counsel but a U.S. citizen and a soldier can't."<sup>155</sup>

A second element regarding the historical record of failure is that racial disparity is even greater in death penalty cases in the military.<sup>156</sup> A

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<sup>150</sup> See *Killing Time*, *supra* note 18, at 2. Colonel Sullivan notes that in the military justice system, the direct appeal functions like a combined state direct appeal and post-conviction proceeding. *Id.* In a famous study, Professor James Liebman found the overall reversal rate for the civilian death penalty, including state and federal post-conviction review, to be 68%. See JAMES S. LIEBMAN ET. AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at i (2000), available at [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf).

<sup>151</sup> See *Killing Time*, *supra* note 18, at 2-3.

<sup>152</sup> Editorial, *The Military and the Death Penalty*, N.Y. TIMES (Aug. 31, 2011), [http://www.nytimes.com/2011/09/01/opinion/the-military-and-the-death-penalty.html?\\_r=0](http://www.nytimes.com/2011/09/01/opinion/the-military-and-the-death-penalty.html?_r=0); see also Marisa Taylor, *Military Capital Cases Deserve Better Defense, Critics Say*, MCCLATCHY (Aug. 30, 2011), <http://www.mcclatchydc.com/2011/08/28/121847/military-capital-cases-deserve.html>.

<sup>153</sup> See Lieutenant Commander Stephen C. Reyes, *Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military*, ARMY LAW, Oct. 2010, at 5.

<sup>154</sup> See *id.*

<sup>155</sup> See Taylor, *supra* note 144.

<sup>156</sup> See Editorial, *supra* note 152.

recent study found that minorities in the military were twice as likely to be sentenced to death as their white counterparts, a statistic higher than is known to exist in most civilian court systems.<sup>157</sup> The data from the study does not provide evidence on whether race would play any factor in the sentencing for unique military offenses. However, the study's findings provide yet another indictment of the military death penalty system as a whole.

### C. *Military Necessity and an All-Volunteer Force*

An analysis of the evolving standards of military decency, as limited by military necessity, must also consider the evolution of the military as an institution. What qualified as necessity in the military of General George Washington may not be permissible in today's military. Congress has made such determinations in the past. For example, some historically common punishments, such as flogging,<sup>158</sup> are now specifically prohibited under the UCMJ.<sup>159</sup> The military of today has changed in significant ways that impact an analysis of military necessity.

The modern U.S. military is a professional, all-volunteer force. The last conscript was drafted in 1972.<sup>160</sup> Less than a half of a percent of

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<sup>157</sup> See David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the U.S. Armed Forces: 1984-2005*, 101 J. CRIM. L. & CRIMINOLOGY 127 (2012). The study found that, "among the 105 cases in our study that potentially implicate the death penalty, there is evidence of a substantial risk of three forms of racial prejudice: white-victim discrimination, minority-accused/white-victim discrimination, and independent minority-accused discrimination." *Id.* at 3. See also Marisa Taylor, *Study: Racial disparities taint military's use of death penalty*, MCCLATCHY (Aug. 28, 2011), <http://www.mcclatchydc.com/2011/08/28/121848/study-racial-disparities-taint.html>.

<sup>158</sup> Flogging was permitted by U.S. Navy Regulation, as copied from the regulations of the Royal Navy. See, e.g., STEPHEN BUDIANSKY, *PERILOUS FIGHT* 137 (2010) ("There were plenty of American captains who resorted to brutal floggings to maintain control over their men, meting out sentences of dozens of lashes at a time through the legal fiction of dividing a single infraction into multiple offenses (such as drunkenness, neglect of duty, and insolence) in order to get around the regulation, copied from the Royal Navy, that limited punishment on captain's authority to a dozen lashes.").

<sup>159</sup> See UCMJ, art. 55, 10 U.S.C. § 855 (2006).

<sup>160</sup> See *History & Records*, SELECTIVE SERVICE SYSTEM, <http://www.sss.gov/LOTTER4.HTM> (last updated June 18, 2009).

Americans over the age of eighteen serve in the military.<sup>161</sup> As former Secretary of Defense Robert Gates noted, “[t]he Iraq and Afghan campaigns represent the first protracted, large-scale conflicts since our Revolutionary War fought entirely by volunteers. Indeed, no major war in our history has been fought with a smaller percentage of this country’s citizens in uniform full-time—roughly 2.4 million active and reserve service members out of a country of over 300 million, less than one percent.”<sup>162</sup> Citizens no longer buy war bonds to support the war efforts, nor do they pay war taxes.<sup>163</sup> Today, advertisements for military recruiting are ubiquitous, as the military is more of a career option for young Americans, as much as it is a call to service.

Of course, maintaining good order and discipline in the military is still required today. It is one of the stated purposes of military law.<sup>164</sup> However, the requirement to maintain good order and discipline in an all-volunteer force, fairly compensated and well-respected by the society it defends, is vastly different than the need to maintain good order and discipline in a force of conscripts. Unlike a force of volunteers, conscripts may or may not have a strong duty of loyalty to the military, a spirit of discipline, or the security interests and ideological and political goals of the nation they are forced by law to defend. Additionally, the military as a career-option distinguishes the modern military from the all-volunteer force that fought in the Revolutionary War. The dearth of capital prosecutions in the modern death penalty era for unique military offenses

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<sup>161</sup> Peter W. Singer, *Do Drones Undermine Democracy?*, N.Y. TIMES, Jan. 22, 2012, at SR5, available at <http://www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html?pagewanted=all>.

<sup>162</sup> Robert Gates, Secretary of Defense, Lecture at Duke University: All-Volunteer Force (Sept. 29, 2010) (transcript available at <http://www.defense.gov/speeches/speech.aspx?speechid=1508>).

<sup>163</sup> See, e.g., Thomas E. Ricks, *All-Volunteer Military*, WASH. POST, Apr. 22, 2012, at B4 (“The drawbacks of an all-volunteer force are not military, but political and ethical. One percent of the nation has carried almost all the burden of the wars in Iraq and Afghanistan, while the rest of us essentially went shopping. When the wars turned sour, we could turn our backs.”).

<sup>164</sup> MANUAL FOR COURTS-MARTIAL pt. I, § 3 (2012) (“The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote the efficiency and effectiveness in the military establishment, and to thereby strengthen the national security of the United States.”).

is in and of itself evidence that the military has evolved since the Founding.

The most pivotal time to evaluate military necessity is when the all-volunteer force is deployed in a combat zone to commence in hostilities. In 1983, the *Matthews* court noted when conducting a statutory and Eighth Amendment analysis of military death penalty law that the maintenance of discipline in combat conditions “may require swift, severe punishment.”<sup>165</sup> However, for military, criminal offenses that are committed on or near the battlefield, there have been no authoritative findings that military necessity requires procedural shortcuts when convening courts-martial. In fact, a recent study of the Iraq and Afghanistan wars found that, rather than imposing swift, severe punishment as a matter of military necessity for crimes committed in a combat zone, commanders exercised all possible alternatives to avoid the heavy burdens of trying courts-martial in a theater of war.<sup>166</sup> In other words, in the last decade of war, military necessity did not require that capital punishment be more frequently sought or imposed for any

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<sup>165</sup> United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983).

<sup>166</sup> See Major Frank Rosenblatt, *Non-Deployable: The Court-Martial System in the Combat Zone: 2001-2009*, ARMY LAW, Sept. 2010, at 12. Major Rosenblatt conducted an empirical study of the court-martial system in the last decade and reached a contrary conclusion to the conventional wisdom that the UCMJ functions the same in any area of the world. He wrote:

After-action reports from deployed judge advocates show a nearly unanimous recognition that the full-bore application of military justice was impossible in the combat zone. In practice, deployed commanders and judge advocates exercised all possible alternatives to avoid the crushing burdens of conducting courts-martial, from sending misconduct back to the home station, to granting leniency, to a more frequent use of administrative discharge procedures. By any measure – numbers of cases tried, kinds of cases, reckoning for service member crime, deterrence of other would-be offenders, contribution to good order and discipline, or the provision of a meaningful forum for those accused of crimes to assert their innocence or present a defense – it cannot be said that the American court-martial system functioned effectively in Afghanistan or Iraq.

*Id.* However, having reached these findings, Major Rosenblatt does not conclude that less procedural due process should be provided to correct shortcomings, nor that increased usage of capital punishment is required in order to maintain good order and discipline. See *id.* at 30–34.

offenses, let alone the unique military offenses, to preserve good order and discipline in the all-volunteer force.

*D. Life Without Eligibility for Parole Is a Suitable Alternative*

A court may strike down a punishment as excessive if it does not make a measurable contribution to an acceptable penological goal.<sup>167</sup> In *Gregg v. Georgia*, the Supreme Court identified three societal purposes for capital punishment: incapacitation, deterrence, and retribution.<sup>168</sup> In the military context, a fourth consideration must be added, the maintaining of good order and discipline in the armed forces. The availability of a harsh, alternative sentence—life without eligibility for parole (LWOP)—adequately fulfills the punishment need, and significantly lessens the military necessity of keeping death on the books for unique military offenses.

In the National Defense Authorization Act (NDAA) for Fiscal Year 1998, Congress added LWOP as a permissible sentence under the UCMJ when it enacted Article 56a.<sup>169</sup> The bill was signed into law by President Clinton on November 18, 1997, so for crimes that occurred on or after November 17, 1997, a sentence of LWOP was now possible.<sup>170</sup> Several former military death row inmates, all sentenced for murder, have had their sentences reduced to LWOP.<sup>171</sup>

LWOP is a punishment that completely incapacitates a person convicted of committing a unique military offense from again committing the same or similar offense. Like a civilian convicted of

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<sup>167</sup> See, e.g., *Coker v. Georgia*, 433 U.S. 584, 502 (1977) (holding that sentence of death is grossly disproportionate and excessive punishment to the crime of rape and is therefore forbidden by the Eighth Amendment).

<sup>168</sup> See *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

<sup>169</sup> See Pub. L. No. 105-85; 111 Stat. 1629, 1759 (1997) (codified at 10 U.S.C. § 856a (2006)).

<sup>170</sup> See *United States v. Christian*, 63 M.J. 205 (C.A.A.F. 2006) (holding that UCMJ, Article 56a permits a court-martial to adjudge a sentence of confinement for life without eligibility for parole for any offense for which a sentence of confinement for life may be adjudged).

<sup>171</sup> See, e.g., *United States v. Curtis*, 1998 CCA Lexis 493 (N-M. Ct. Crim. App. 1998) (en banc) (per curiam), *aff'd* 52 M.J. 166 (C.A.A.F. 1999) (per curiam).

murder, if a service member is convicted of capital murder and sentenced to LWOP, there remains a risk this person could kill again while in prison. There is no similar risk for a person convicted of desertion during a time of war, sleeping while on post as a sentry, spying, or any other unique military offense. Also, there is no reliable statistical evidence that capital punishment deters potential offenders from committing any offense.<sup>172</sup> This is more certain for unique military offenses because there have been no capital trials for these crimes in the modern era to use as examples for deterrence purposes.

The remaining justifications for capital punishment in the military justice system are retribution and the preservation of good order and discipline in the armed forces. As this article has argued, these justifications are no longer necessary, nor lawful, for unique military offenses when a death sentence for these crimes would be “unusual.” Once the justifications are removed, combined with the existence of LWOP as a harsh, alternative punishment for the most severe unique military offenses, there is no lawful purpose for keeping these offenses death-eligible. The remaining question becomes how the law should be changed to effectuate a lawful, reasonable approach to military capital jurisprudence.

### III. REFORMING THE MILITARY DEATH PENALTY

The Introduction to this article noted that it is intended to be a normative analysis, as there will not likely be cases before a military court in the near future to wrestle with these issues. To that end, the primary argument of this article is a policy argument as to the lack of military necessity to permit the death penalty for unique military offenses, as informed by the law and historical practice.

Though military courts have the power to rule on constitutional issues,<sup>173</sup> without cases before them, there is no occasion to do so. Likewise, there are compelling arguments for why Congress is the appropriate branch of government to create and define the death penalty

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<sup>172</sup> See *Baze*, 553 U.S. at 79.

<sup>173</sup> See *United States v. Matthews*, 16 M.J. 354, 364 (C.M.A. 1983).

jurisdiction of the military.<sup>174</sup> While a court has an obligation to ensure that constitutional bounds are not overreached, the judiciary is also limited to cases and controversies brought before it—a legislature has no such limitation.<sup>175</sup>

Congress may delegate substantial powers over the military justice system to the President as Commander-in-Chief.<sup>176</sup> It has already done so under the UCMJ when it delegated to the President the power to create procedures<sup>177</sup> and prescribe punishments for offenses.<sup>178</sup> However, Congress should take ownership over the military justice system when the issue is a matter of life-and-death to service members. Retaining military death penalty policy within the legislative branch protects against the Framers' distrust of "military justice dispensed by a commander unchecked by the civil power in proceedings so summary as to be lawless."<sup>179</sup> In other words, Congress should protect its own Article I turf.

Congress has an appropriate legislative vehicle to debate and consider amending the UCMJ in the NDAA—a multi-provisional Act that has been passed for fifty consecutive years.<sup>180</sup> The statutory text of every capital offense under the UCMJ has language that includes

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<sup>174</sup> See John F. O'Connor, *Don't Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIAMI L. REV. 177 (1997). The article concludes:

[T]hough Congress has, at times, created a narrow death penalty jurisdiction, Congress was, and is, free at any time to change course and disregard its previous practice vis-à-vis courts-martial. Article I of the Constitution grants Congress, not the judiciary, the power to govern the armed forces, and that power encompasses the authority to establish and regulate courts-martial. So long as Congress' court-martial regulations do not violate other constitutional provisions, such as the Fifth Amendment's guarantee of due process, the judiciary is without power to strike them down or modify them.

*Id.* at 183.

<sup>175</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 174–175 (1976).

<sup>176</sup> See *Loving v. United States*, 517 U.S. 748, 769 (1996).

<sup>177</sup> See UCMJ, art. 36, 10 U.S.C. § 836 (2006).

<sup>178</sup> See UCMJ, art. 56, 10 U.S.C. § 856 (2006).

<sup>179</sup> *Loving*, 517 U.S. at 765.

<sup>180</sup> See Press Release, U.S. Senate Comm. on Armed Servs., Senate Armed Services Committee Completes conference of National Defense Authorization Act for Fiscal Year 2012 (Dec. 11, 2011), available at <http://www.armed-services.senate.gov/press/releases/upload/NDAA-FY12-Conference-Press-Release.pdf>.

punishment by death.<sup>181</sup> It would not be onerous for Congress to simply amend the language to strike death from the statute for the twelve unique, non-homicide military offenses.

In *United States v. Curtis*, the military court noted it was “[u]naware of any indication of legislative displeasure with the President’s action or any legislative effort at that time to undo his action or to curtail the use of capital punishment in courts-martial.”<sup>182</sup> Though Congress has made several amendments to the UCMJ since the advent of the modern death penalty era in the military, it has not conducted significant hearings on military justice in thirty years.<sup>183</sup> As there has been no legislative action or debate, it may be that retaining the death penalty under the UCMJ for unique military offenses is a conscious choice of the legislative body. It is far more likely, however, that retaining death-eligibility for unique military offenses is “the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering the penalty against its identifiable benefits.”<sup>184</sup> Keeping the death penalty as a matter of habit and inattention is not an ideal approach to the preservation of good order and discipline. In any legal system, compliance with the law assuredly rests upon the law’s legitimacy. Maintaining laws that are not followed and do not comply with modern standards of decency undercuts the legitimacy of the other laws within the UCMJ.

As a practical matter, retaining archaic death penalty laws potentially reduces the fighting capabilities of the U.S. military. As evidenced by the wars in Iraq and Afghanistan, modern warfare requires strong, reliable partnerships with allies to complete missions. Retaining the death penalty under dubious legal grounds may reduce the legitimacy of the American commitment to the rule of law in the view of allies and reduce the cooperation of foreign militaries and law enforcement in

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<sup>181</sup> See MANUAL FOR COURTS-MARTIAL app. 2 (2012); see also *supra* note 15.

<sup>182</sup> *United States v. Curtis*, 32 M.J. 252, 261-62 (1991) (referring to the President’s promulgation of Aggravating Factors in R. CTS-MARTIAL 1004, and noting that Congress added espionage as a death-eligible offense in 1985).

<sup>183</sup> See Eugene R. Fidel, Letter to the Editor, *A Call to Re-examine the Military Justice System*, N.Y. TIMES, Mar. 20, 2012, at A22, available at <http://www.nytimes.com/2012/03/21/opinion/a-call-to-re-examine-the-military-justice-system.html>.

<sup>184</sup> *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J. concurring).

criminal prosecutions.<sup>185</sup> The Department of Defense engages with foreign partner military personnel and related civilians to build partner legal capacity.<sup>186</sup> As the U.S. uses its military justice system as a strategic export to foreign allies, it significantly increases the need for ensuring that death penalty jurisprudence in the U.S. military complies with modern societal norms. The military death penalty system as it relates to unique military offenses is worthy of congressional attention.

## CONCLUSION

In today's military, the "rough form of justice" is no longer necessary, nor lawful. It is time to re-examine whether military necessity in today's armed service permits and requires the death penalty for unique military offenses, or whether it is an "unusual" punishment that should be prohibited.

This article began by referencing the infamous court-martial of Private Bradley Manning compared to the capital court-martial for Major Nidal Hasan. What is legally permissible and appropriate for Major Hasan is not appropriate for Private Manning. Military necessity does not require keeping the death penalty on the books as an eligible punishment for unique military offenses. Capital punishment for these crimes is unusual, excessive, and especially ripe for procedural failure in a military justice system with an abysmal record in the modern era. Private Manning's case demonstrates that even at the extreme margins, for the worst unique military offenses, the death penalty was not sought. Congress should recognize that military law has evolved, as has the military itself and the society it defends. Congress should abolish the death penalty for unique military, non-homicide offenses.

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<sup>185</sup> See, e.g., Lee Dembart, *Death Penalty? Issue May Split Allies*, N.Y. TIMES (Dec. 13, 2001), [http://www.nytimes.com/2001/12/13/news/13iht-ash\\_ed3\\_\\_0.html](http://www.nytimes.com/2001/12/13/news/13iht-ash_ed3__0.html). Also, in ad hoc international tribunals convened to prosecute war crimes, the death penalty is never an authorized punishment. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 420 (2d ed. 2008).

<sup>186</sup> This program is called the Defense Institute of International Legal Studies (DIILS). For more information about DIILS, see *About Defense Institute of International Legal Studies*, DEF. INST. INT'L LEGAL STUD. (Mar. 2, 2013), <https://www.diils.org/node/1455541/about>.