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## Maybe Soldiers Have Rights After All

Nicole E. Jaeger

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## MAYBE SOLDIERS HAVE RIGHTS AFTER ALL!

Loving v. United States, 116 S. Ct. 1737 (1996)

### I. INTRODUCTION

In *Loving v. United States*,<sup>1</sup> the United States Supreme Court held that the separation of powers principle does not preclude Congress from delegating its constitutional authority to the President to define the aggravating factors required under the Eighth Amendment to permit the imposition of a statutory death penalty in military capital cases.<sup>2</sup> In reaching its principal holding, the Court assumed that the cruel and unusual punishment provision of the Eighth Amendment<sup>3</sup> and the Court's death penalty jurisprudence constitutionally require the current military capital punishment scheme to include aggravating factors.<sup>4</sup> Having assumed the applicability of the Eighth Amendment, the Court next determined that the delegation doctrine did not preclude the President from prescribing the constitutionally required aggravating factors.<sup>5</sup> The Court then found that Congress explicitly exercised its power to delegate authority to the President in three specific provisions of the Uniform Code of Military Justice (UCMJ),<sup>6</sup> and further, that the President, acting as Commander-in-Chief, did not need further Congressional guidance in the exercise of that authority.<sup>7</sup>

This Note argues that the Court's preliminary assumption—that *Furman v. Georgia*<sup>8</sup> and its progeny are applicable in the military context—is the most notable aspect of this case. The Court has never

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<sup>1</sup> 116 S. Ct. 1737 (1996).

<sup>2</sup> *Id.* at 1751.

<sup>3</sup> The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

<sup>4</sup> *Loving*, 116 S. Ct. at 1742.

<sup>5</sup> *See id.* at 1749.

<sup>6</sup> The Court found that the provisions of Articles 18, 36(a), and 56 of the UCMJ, 10 U.S.C. §§ 818, 836(a), 856, gave clear authority to the President to promulgate rules regarding the governance of the military. *See Loving*, 116 S. Ct. at 1749.

<sup>7</sup> *Loving*, 116 S. Ct. at 1750-51.

<sup>8</sup> 408 U.S. 238 (1972). In *Furman*, the Supreme Court case essentially invalidated as unconstitutional all state death penalty schemes. *See id.* at 417 (Powell, J., dissenting).

before squarely held that a soldier has any constitutional rights when he is court-martialed, or indeed any constitutional rights at all. When confronted with military issues, the Supreme Court has consistently adhered to a highly deferential "hands-off" standard of review.<sup>9</sup> In doing so, the Court has rarely hesitated in denying constitutional protections to members of the armed forces.<sup>10</sup> What is thus most striking about *Loving* is that the Court declined to follow its customary course of deference to the military at the expense of otherwise applicable constitutional norms. Instead, the Court suggested that the requirements of the Eighth Amendment as articulated in *Furman* apply to the military's justice system.<sup>11</sup> Two of the concurring opinions reflect the controversial nature of the Court's assumption: Justice Thomas directly questioned the assumption that the Eighth Amendment constitutional requirements of *Furman* apply to the military.<sup>12</sup> On the other extreme, four Justices, in a concurrence authored by Justice Stevens, questioned the extent to which capital cases should even fall within courts-martial jurisdiction.<sup>13</sup>

This Note addresses the Court's typically deferential approach to military issues and suggests that the Court's deviation from that stance might best be understood as a recognition by the Court that the traditional standard of deference may be inappropriate in a military capital case, given the realities of today's military establishment and the unprecedented recent expansion of courts-martial jurisdiction.

## II. BACKGROUND

### A. HISTORICAL DEVELOPMENT OF AMERICAN MILITARY LAW

#### 1. *Origins of Military Law*

The military justice system predates the United States Constitution by at least several hundred years. Military judges existed as least as early as the Roman Empire, when Roman soldiers were subject to the absolute will of their commanders.<sup>14</sup> In England, after the Norman Conquest, military justice was a matter of Royal prerogative.<sup>15</sup> Richard Coeur de Lion's Ordinance of 1190 deterred brawling among his crusaders by punishing offenders with "a series of penalties rang-

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<sup>9</sup> See *infra* notes 108-143 and accompanying text.

<sup>10</sup> See *infra* notes 108-143 and accompanying text.

<sup>11</sup> *Loving*, 116 S. Ct. at 1742.

<sup>12</sup> See *id.* at 1753 (Thomas, J., concurring).

<sup>13</sup> See *id.* at 1751-52 (Stevens, J., concurring).

<sup>14</sup> Medieval law shared with Roman law the understanding that the king or other war commander could exercise unlimited powers of discipline in the command of his troops. See JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE 3-4 (1974).

<sup>15</sup> See *id.*, at 4.

ing from fines and ignominious expulsion from the army, to tarring and feathering, loss of a hand, and burial alive."<sup>16</sup> The first comprehensive articles of war were promulgated by Richard II in 1385.<sup>17</sup> The Articles of 1385 "punished a variety of military offenses, such as disobedience of orders, pillage, and theft . . . with penalties that progressed from amputation of the left ear for minor transgressions to hanging, drawing and beheading" for major offenses.<sup>18</sup> In the sixteenth and seventeenth centuries, these crude beginnings were improved upon with the implementation of more elaborate and less barbarous military codes. The codes,<sup>19</sup> issued by military commanders acting under royal commission, were not fixed; rather, "each war, each expedition had its own edict" whose jurisdiction was limited to that particular expedition.<sup>20</sup> These codes governed the conduct of soldiers in times of war; however, in times of peace, "[t]he Common Law made no distinction between the crimes of soldiers and those of civilians . . . . All subjects were tried alike by the same civil courts . . . ."<sup>21</sup>

Parliamentary law began to govern military justice in 1689, when William and Mary, in need of a standing army and the power to secure its discipline, accepted the Bill of Rights which required Parliament's consent to the raising and keeping of armies.<sup>22</sup> In 1689, Parliament passed the Mutiny Act, which provided for the establishment of a standing army, as well as provisions for its discipline.<sup>23</sup> The Mutiny Act, however, gave courts-martial very limited jurisdiction.<sup>24</sup> Courts-martial jurisdiction applied only to regular soldiers, and only to strictly military offenses—sedition, desertion, and mutiny.<sup>25</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Examples of these codes include the Articles of War of the Free Netherlands of 1590 and Gustavus Adolphus's Articles of War of 1621. *Id.* Gustavus' Articles of War of 1621 contained 167 articles and provided for formal court-martial proceedings. See Walter T. Cox III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987). Gustavus' Articles "inaugurated the history of modern military justice." BISHOP, *supra* note 14, at 5. They, in effect, formalized recognition of "the four moral virtues necessary to any army: order, discipline, obedience and justice," and are the foundation of military justice today. Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129, 137 (1981) (quoting BARBARA W. TACHMAN, *A DISTANT MIRROR* 576 (1978)).

<sup>20</sup> J. PIPON & J. COLLIER, *MANUAL OF MILITARY LAW* 14 (3d rev. ed. 1863).

<sup>21</sup> *Reid v. Covert*, 354 U.S. 1, 24 n.44 (1956).

<sup>22</sup> BISHOP, *supra* note 14, at 6.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *Id.* The Mutiny Act of 1689 declared that "noe Man may be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law or in any other manner then by the Judgment of his Peeres, and according to the Knowne and Established Laws of

The Framers of the United States Constitution were mindful of the limits Parliament set on the peacetime jurisdiction of courts-martial over capital crimes. Having themselves been subjected to the intemperance of military power in the colonies, the Framers were also aware of the dangers of autocratic military justice, and thus, harbored a deep distrust of military tribunals.<sup>26</sup> Among the wrongs cited in the Declaration of Independence were the subordination of civil power to the military, the quartering of troops in times of peace, and the commission of innumerable cruelties through the hands of the King's mercenaries.<sup>27</sup> Indeed, the Revolutionary War was fought, in part, as a protest against standing armies.<sup>28</sup> The experience of the Revolutionary War provided the background for what would become the "standing army" debate at the Constitutional Convention over whether to have a standing army or a militia.<sup>29</sup> Having rebelled against oppressive British Rule, many citizens feared the maintenance of a peacetime army.<sup>30</sup> At the same time, however, many citizens saw the War as evidence that the new nation needed a strong standing army.<sup>31</sup> Such thoughts were upper most in the minds of the Founding Fathers in 1775, when they passed the first legislation of the Continental Congress, which dealt extensively with discipline in the military.<sup>32</sup> The Framers expressly distrusted the notion of a standing army.<sup>33</sup> Yet, recognizing the need for a means to discipline the troops swiftly and without the required formalities of civilian justice, the Continental Congress adopted the American Articles of War, which authorized a national armed force.<sup>34</sup>

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this Realme . . . Soldiers . . . who shall desert Their Majestyes Service be brought to a more Exemplary and speedy Punishment than the usuall Forms of Laws will allow, . . . [and] shall suffer Death or such other Punishment as by Court-Martial shall be inflicted." *Id.* at 7 (citing Mutiny Act, 1 Wm. & Mary, ch. 5 (1689)).

<sup>26</sup> See *Reid*, 354 U.S. at 27-28.

<sup>27</sup> Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 183-84 (1962).

<sup>28</sup> *Id.*

<sup>29</sup> The phrase "standing army" can be understood as a permanent, professional peacetime army. In contrast, a militia, or "armed citizenry . . . composed of free independent citizens . . . would band together to defend themselves as necessary; as soon as peace was restored, they would return to their homes and regular occupations." Stephanie A. Levin, *The Deference That is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1024 (1990).

<sup>30</sup> *Id.* The standing army debate was between the federalists, who favored a professional military, and the anti-federalists, who favored a militia. *Id.* at 1033-35.

<sup>31</sup> *Id.* at 1031.

<sup>32</sup> 2 JOURNALS OF THE CONTINENTAL CONGRESS 1775, at 111, June 30, 1775 (1905).

<sup>33</sup> Warren, *supra* note 27, at 184 (quoting MADISON, FEDERALIST NO. 41, at 251 (Lodge ed. 1888)).

<sup>34</sup> The American Articles of War were based on the British Articles of War, which, in turn, had their origin in the military codes promulgated by King Gustavus in 1621. See BISHOP, *supra* note 14, at 5. The Articles of War underwent major amendment in 1776,

The Framers' distrust of unmitigated military power found expression in the Constitution, which provided for the careful diffusion of the war powers between the three separate branches of government.<sup>35</sup> The Framers purposely provided a separate court system for the armed forces and did not include military courts in Article III, which established the federal judiciary.<sup>36</sup> Instead, Congress established courts-martial<sup>37</sup> under its Article I powers,<sup>38</sup> which grant Congress the authority to "make Rules for the Government and Regulation of the land and naval Forces."<sup>39</sup> Historically, the function of the military justice system was to ensure disciplined troops, and the court-martial was a tool that could be used at the commander's complete discretion to instill fear and obedience in his soldiers.<sup>40</sup> The prevailing view among military commanders and politicians alike was that in order to be effective, military justice must be swift and harsh.<sup>41</sup> Throughout the 1800's, commanders of the military accepted and vigorously defended the brutal nature of military justice.<sup>42</sup> Despite some failed attempts to reform manifest deficiencies in the military justice system,<sup>43</sup> interest in reform did not develop for almost another

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1786, 1806, 1874, 1916, 1920, and 1948. Among the changes were the reduction of the number of members required to convene a general court-martial, changes in the designation of officers empowered to convene courts-martial, and the addition of a field officer court-martial, precursor of the summary court-martial. David Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 131-44 (1980) (tracing the present day system of military discipline to the Roman Empire).

<sup>35</sup> The Founders recognized that the exigencies of military discipline would require a different balance of individual rights and government interests than is appropriate for civilian society. *Burns v. Wilson*, 346 U.S. 137, 139-40 (1953).

<sup>36</sup> *See id.* at 140.

<sup>37</sup> A court-martial is a military court for trying and punishing both military offenses and those common law crimes listed in the UCMJ. CHARLES A. SHANOR & P. TERRELL, *MILITARY LAW 80-95* (1980). Jurisdiction is entirely penal and disciplinary; only criminal charges are tried by court-martial. *Id.* The court-martial must have jurisdiction both over the person and the offense. *Id.*

<sup>38</sup> U.S. CONST., art. I, § 8, cl. 14.

<sup>39</sup> *Id.* Congress began establishing these rules and regulations, along with courts-martial for their enforcement, in 1775 with the Articles of War and continued updating them until the adoption of the UCMJ in 1950. *See* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS 21-24* (2d ed. 1920).

<sup>40</sup> *See* Steven J. Carroll, *A Proposal for Streamlining the Military Justice System*, 36 NAVAL L. REV. 187 (1986).

<sup>41</sup> BISHOP, *supra* note 14, at 21. In an attempt to combat desertion during the Revolutionary War, for example, General George Washington ordered public execution of deserters with mandatory attendance by the members of the condemned soldier's unit in order to emphasize the gravity of the offense. *See* Walter T. Cox III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 6 (1987).

<sup>42</sup> Cox, *supra* note 19, at 6.

<sup>43</sup> John O'Brien wrote a treatise on military law while he was a lieutenant in the Army, advocating a "complete revision of the American Articles of War . . . to make the military justice system more compatible with a republican form of government." Andrew M. Ferris,

century.<sup>44</sup>

In the early part of the twentieth century Brigadier General Samuel T. Ansell, the acting Judge Advocate General of the Army, proposed a drastic change to the 1916 Articles of War.<sup>45</sup> Critical of the Army's lack of a formal appeals process for courts-martial convictions and the lack of disciplinary and sentencing uniformity throughout the different command units, Ansell advocated creation of a centralized mandatory review system in the form of an appellate tribunal.<sup>46</sup> Ansell's proposals, however, were not adopted in the 1920 Articles due largely to the opposition of Provost Marshall General Crowder, the principal author of the 1916 articles and an outspoken defender of the then-existing system.<sup>47</sup>

During World War II, the nation witnessed its largest military mobilization in history.<sup>48</sup> More than 16 million men and women volunteered for, or were conscripted into, active military service.<sup>49</sup> By the end of the war, military courts had convened over two million courts-martial,<sup>50</sup> and the tens of thousands of citizens who had been subjected to the military's system of discipline returned to tell stories of the grave injustices perpetrated by the military courts.<sup>51</sup> Widespread disenchantment with the military justice system finally instigated a movement towards reform,<sup>52</sup> which culminated in the enactment of The Uniform Code of Military Justice (UCMJ) in 1950.<sup>53</sup> The enactment of the UCMJ represented the first significant change in the administration of military discipline in the American armed forces since the adoption of the Articles of War by the Continental Congress in 1775.<sup>54</sup> The primary drafter of the UCMJ, Professor Edmund Morgan, had served under General Ansell and incorporated into the UCMJ many of the reforms first proposed by General Ansell over four

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*Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 447 (1994).

<sup>44</sup> *Id.* at 446.

<sup>45</sup> General S.T. Ansell was a major influence in the development of our current system of military discipline. Terry Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967).

<sup>46</sup> *Id.* at 4.

<sup>47</sup> Barbara S. Hundley & Frederic I. Lederer, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 636-37 (1994).

<sup>48</sup> Keith M. Harrison, *Be All You Can Be Without the Protection of the Constitution*, 8 HARV. BLACKLETTER J. 221, 227 (1991).

<sup>49</sup> *Id.*

<sup>50</sup> Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U.CIN. L. REV. 439, 450 (1994).

<sup>51</sup> Harrison, *supra* note 48, at 227.

<sup>52</sup> *Id.* at 228.

<sup>53</sup> UCMJ, ch. 169, 64 Stat. 108 (1950) (codified at 10 U.S.C. §§ 801-940 (1976)).

<sup>54</sup> Harrison, *supra* note 48, at 228.

decades earlier.<sup>55</sup>

Among the changes brought by the adoption of the UCMJ was, as its title suggested, uniformity among the several services. For the first time in the nation's history, the procedural and substantive law of military discipline was to be the same in all of the military services.<sup>56</sup> In addition, the UCMJ created a centralized review panel in each of the armed forces which had jurisdiction to hear the appeals of defendants whose sentences had reached certain jurisdictional thresholds.<sup>57</sup> The UCMJ also created the Court of Military Appeals, a three member panel of civilian judges having jurisdiction to hear mandatory appeals in cases involving the death penalty.<sup>58</sup>

## 2. *Expansion of Court-Martial Jurisdiction*

Debate over the proper jurisdiction of military courts extends back to the birth of American military law in the 17th century.<sup>59</sup> The British Articles of War gave military courts jurisdiction over both military and civilian offenses,<sup>60</sup> as did the American Articles of War.<sup>61</sup> The Framers, however, were wary of military jurisdiction.<sup>62</sup> This distrust led the Framers to delegate to Congress the power to make rules for the military.<sup>63</sup>

Despite the Framers' concern for limiting military power, from

<sup>55</sup> Hundley & Lederer, *supra* note 47, at 635.

<sup>56</sup> Prior to the enactment of the UCMJ, the conduct of soldiers had been regulated by the Articles of War, the conduct of sailors and marines by the Articles for the Governance of the Navy, 34 U.S.C. § 1200, and the conduct of the Coast Guardsmen by other laws, 14 U.S.C. §§ 561-76 (1946) (Supp. IV 1951). The Air Force had been independent of the Army in 1947 and the existing Articles of War were made applicable to the Air Force in 1948. Pub. L. No. 80-775, 62 Stat. 1014 (1948).

<sup>57</sup> The UCMJ originally required that any sentence that included the death penalty be reviewed by a Board of Review, 50 U.S.C. § 653 (1946) (Supp. IV 1951). In 1968, the Boards of Review were re-named as the Courts of Military Review. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968). Review of a death penalty sentence is mandatory. 10 U.S.C. § 861 (1988).

<sup>58</sup> In 1989 Congress amended the UCMJ to create two additional seats on the Court of Military Appeals to bring total active membership to five. Defense Authorization Act, Pub. L. No. 101-1189 § 1301(c) (1989).

<sup>59</sup> *Solorio v. United States*, 483 U.S. 435, 446 (1987).

<sup>60</sup> *Id.* at 443.

<sup>61</sup> *Id.* at 444.

<sup>62</sup> *Id.* at 456 (Marshall, J., dissenting) (stating that the Framers were "wary of military jurisdiction" just as the British were suspicious of courts-martial jurisdiction in the 17th and 18th centuries).

<sup>63</sup> *See id.* at 441. The Constitution gives Congress the power and the responsibility to define and punish offenses against the law of nations, declare war, raise and support armies, provide and maintain a navy, make rules for the government and regulation of the land and naval forces, provide for calling forth the militia, provide for organizing, arming and disciplining the militia, and make all laws which may be necessary and proper to execute these powers. U.S. CONST. art. I, § 8, cl. 10-18.



1866 to 1960, courts-martial jurisdiction was based solely on military status—whether the accused was a member of the “land or naval forces.”<sup>64</sup> Thus, a service-member could be tried by courts-martial for any crime, irrespective of a connection to his status as a service-member.<sup>65</sup>

In 1969, the Court reigned in the authority of courts-martial judges by imposing the service-connection test set out in *O’Callahan v. Parker*.<sup>66</sup> In *O’Callahan*, Justice Douglas, writing for a five member majority, denied court-martial jurisdiction in a case involving the off-base assault and attempted rape of a civilian victim.<sup>67</sup> For the first time, the Court recognized that the status of an accused as a member of the “land or naval forces,” without more, is insufficient to subject the accused to court-martial jurisdiction.<sup>68</sup> Moreover, the Court held that a crime must be “service-connected” for it to fall under the military’s jurisdiction.<sup>69</sup> The Court intended to prevent “‘cases arising in the land or naval forces, or in the Militia, when in actual service time of War or public danger,’ as used in the Fifth Amendment, . . . [from being] expanded to deprive every member of the armed services of [due process benefits of] indictment by a grand jury and trial by a jury of his peers.”<sup>70</sup> Noting that the military justice system lacked these important constitutional protections, Justice Douglas described courts-martial as “singularly inept in dealing with the nice subtleties of constitutional law.”<sup>71</sup> Although *O’Callahan* did not exhaustively define “service-connection,” the Court did note that courts-martial jurisdiction existed in cases involving a “flouting of military authority, the security of a military post, or the integrity of military property.”<sup>72</sup>

Soon after its decision in *O’Callahan*, the Court provided more specific guidelines for the basis of courts-martial jurisdiction in *Relford v. Commandant, U.S. Disciplinary Barracks*.<sup>73</sup> Relford, a serviceman stationed in New Jersey in 1961, had been convicted for the abduction

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<sup>64</sup> *Solorio*, 483 U.S. at 439 (citations omitted). One pre-1969 decision of the Court suggests that the constitutional power of Congress to authorize trial by court-martial must be limited to “the least possible power adequate to the end proposed.” *United States ex. Toth v. Quarles*, 350 U.S. 11, 23 (1955). The Court in *Toth* was addressing Congress’ authority over the courts-martial and whether an ex-serviceman may be tried by court-martial for crimes committed while in the Air Force.

<sup>65</sup> *Solorio*, 483 U.S. at 439.

<sup>66</sup> 395 U.S. 258 (1969).

<sup>67</sup> *Id.* at 274.

<sup>68</sup> *Id.* at 267.

<sup>69</sup> *Id.* at 273.

<sup>70</sup> *Id.* at 272-73.

<sup>71</sup> *Id.* at 265.

<sup>72</sup> *Id.* at 274.

<sup>73</sup> 401 U.S. 355 (1971).

and rapes of two relatives of other servicemen.<sup>74</sup> While serving his sentence in Fort Leavenworth, Relford sought relief from civilian courts in the form of a writ of habeas corpus. His petition was dismissed by the district court as well as the circuit court.<sup>75</sup> The Supreme Court granted certiorari on the issue of the retroactivity of *O'Callahan*.<sup>76</sup> The Court ultimately rejected Relford's petition for habeas corpus, but used the opportunity to clarify the criteria for determining whether a member of the armed forces had committed a 'service-connected' crime.<sup>77</sup> Having thus laid out the evaluative criteria, the Court found that Redford's crime was indeed service-connected and that the military tribunal properly exercised its jurisdiction.<sup>78</sup>

For seventeen years following the *Relford* and *O'Callahan* decisions, courts-martial were specifically restricted to service-connected cases. Then, in 1987, the Court again addressed the scope of court-martial jurisdiction in *Solorio v. United States*.<sup>79</sup> In *Solorio*, the Court overruled the service-connection rule, holding that a member of the armed forces could be tried by a court-martial for any offense regardless of its service-connection.<sup>80</sup> *Solorio* involved a Coast Guardsman charged with sexually molesting the young daughters of two fellow guardsmen while on active duty in Juneau, Alaska.<sup>81</sup> The offenses allegedly occurred in a civilian community where both Solorio and his victims lived due to a shortage of government housing.<sup>82</sup> The incidents were discovered after Solorio's transfer to New York, where a general court-martial was convened to try him for the alleged crimes in Alaska.<sup>83</sup> At his military trial, Solorio challenged the jurisdiction of

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<sup>74</sup> *Id.* at 365.

<sup>75</sup> *Relford v. Commandant, U.S. Disciplinary Barracks*, 409 F.2d 824 (10th Cir. 1969).

<sup>76</sup> 401 U.S. 355 (1971).

<sup>77</sup> *Relford*, 401 U.S. at 367-70. The 12 factors that would tend to defeat court-martial subject matter jurisdiction as enumerated in *Relford* are: (1) the serviceman's proper absence from the base; (2) the crime's commission away from the base; (3) its commission at a place not under military control; (4) its commission within U.S. territory and not in an occupied zone of a foreign country; (5) its commission in peacetime and its being unrelated to authority stemming from the war power; (6) the absence of any connection between accused's military duties and the crime; (7) the victim's not being engaged in performance of any duty relating to the military; (8) the presence and availability of a civilian court in which the case may be prosecuted; (9) the absence of any flouting of military authority; (10) the absence of any threat to a military post; (11) the absence of any violation of military property; and (12) the offense being among those traditionally prosecuted in civilian courts. *Id.*

<sup>78</sup> *Id.* at 361.

<sup>79</sup> 483 U.S. 435 (1987).

<sup>80</sup> *Id.* at 436.

<sup>81</sup> *United States v. Solorio*, 21 M.J. 512, 514 (C.G.C.M.R. 1985).

<sup>82</sup> *United States v. Solorio*, 21 M.J. 251, 252 (C.M.A. 1986).

<sup>83</sup> *Id.*

the court-martial over the Alaskan offenses, claiming that they were not service-connected under the principles established in *O'Callahan* and *Relford*.<sup>84</sup> The military judge dismissed the Alaskan offenses, and the government appealed his ruling.<sup>85</sup> The Coast Guard Court of Military Review<sup>86</sup> and the Court of Military Appeals<sup>87</sup> both held that the Alaskan offense were service-connected. Solorio then successfully petitioned for review by the Supreme Court<sup>88</sup> to determine "whether the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (UCMJ) to try a member of the Armed Forces depends on the 'service-connection' of the offense charged."<sup>89</sup> In affirming the military Appellate Courts, the Supreme Court held that not only were the Alaskan offenses within the jurisdiction of a court-martial, but any conduct committed by any active-duty member of the armed forces, in any location, can constitutionally be the subject of court-martial jurisdiction.<sup>90</sup> The only test for court-martial jurisdiction, the Court held, was the status of the accused.<sup>91</sup> Chief Justice Rehnquist, an outspoken critic of the *O'Callahan* and *Redford* decisions, authored the Court's opinion in *Solorio*,<sup>92</sup> and disagreed with the *O'Callahan* Court's analysis of the historical precedents of American courts-martial.<sup>93</sup> In a concurring opinion, Justice Stevens deemed the overruling of *O'Callahan* and *Relford* both "unnecessary" and "unwise."<sup>94</sup> Justice Stevens noted that in his opinion, Solorio's Alaskan offenses were service-connected and, considering that the government had not requested that *O'Callahan* necessarily be reconsidered, "[t]he fact that any five Members of the Court have the power to reconsider settled precedents at random, does not make that practice legitimate."<sup>95</sup> However, four justices agreed with Rehnquist and the door was thus closed to jurisdictional defenses based on *O'Callahan* and *Relford*.

After *Solorio*, the military may assert criminal jurisdiction over any member whose status is determined to fall into a category enumerated

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<sup>84</sup> *Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985).

<sup>85</sup> *Id.* at 512.

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

<sup>87</sup> *Solorio*, 21 M.J. 251.

<sup>88</sup> *Solorio v. United States*, 54 U.S.L.W. 3819 (June 17, 1986) (No. 85-1581).

<sup>89</sup> *Solorio v. United States*, 483 U.S. 435, 436 (1987).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> "[T]he history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify the restriction of Clause 14 which *O'Callahan* imported to it." *Id.* at 445.

<sup>94</sup> *Id.* at 451 (Stevens, J., concurring).

<sup>95</sup> *Id.* at 452 (Stevens, J., concurring).

in Article 2, UCMJ, regardless of the situs of the alleged offense.<sup>96</sup> Jurisdiction in military courts exists principally over active duty members, but also extends to various other military-related persons who are not on active duty.<sup>97</sup>

### 3. Courts-Martial Jurisdiction over Capital Crimes

From the first American Articles of War in 1775, Congress allowed court-martial jurisdiction for service members for non-military offenses only for “[a]ll crimes not capital . . . .”<sup>98</sup> Construing the phrase “not capital,” Colonel Winthrop, referred to as “the Blackstone of Military Law”<sup>99</sup> stated:

The Articles, by these words, expressly excluded from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in times of peace), all capital crimes of

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<sup>96</sup> United States v. Solorio, 483 U.S. 435 (1987).

<sup>97</sup> Article 2(a), UCMJ lists the following as persons subject to the military code:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court martial

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

Article 2(a), UCMJ.

<sup>98</sup> American Articles of War, 1776, Sec. XVIII, Art. 5, reprinted WINTHROP, *supra* note 39, at 971.

<sup>99</sup> Reid v. Covert, 354 U.S. 1, 19 n.38 (1957).

officers or soldiers under whatever circumstances committed— whether upon or against military persons or civilians. By capital crimes is to be understood crimes punished or made punishable with death by the common law, or by statute of the United States applicable to the case—as for example, murder, arson, or rape.<sup>100</sup>

Congress expanded military jurisdiction and permitted the military to try a service-member for the civilian capital offense of murder for the first time during the Civil War.<sup>101</sup> The relevant statute limited the military's jurisdiction over the offense, however, to "time of war, insurrection, or rebellion."<sup>102</sup> Indeed, the Court held that the statute had no application when "the civil courts were open and in the undisturbed exercise of its jurisdiction."<sup>103</sup> Moreover, the Court recognized that in order for a non-military offense to be tried by the military, the offense had to be one that prejudiced good order and discipline.<sup>104</sup>

Subsequently, in 1916, Congress extended courts-martial jurisdiction to specified non-military offenses, such as larceny, robbery, and assault, irrespective of prejudice to good order and discipline.<sup>105</sup> At the same time, Congress expressly provided that murder and rape were punishable by death in a court-martial, but also explicitly provided that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union, and the District of Columbia *in time of peace*."<sup>106</sup>

While Congress extensively revised the Articles of War in 1920, the provisions relating to the jurisdiction over non-military offenses remained substantially unchanged until the enactment of the UCMJ in 1950. In the UCMJ, Congress extended the military's jurisdiction to try service members for murder and rape within the geographical limits of the United States for capital offenses in peacetime.<sup>107</sup>

#### B. THE COURT'S STANDARD OF DEFERENCE TO THE MILITARY

The Supreme Court has adjudicated constitutional issues arising in connection with our military forces since the earliest days of our nation.<sup>108</sup> Repeatedly confronted with the inevitable incompatibility

<sup>100</sup> WINTHROP, *supra* note 39, at 721 (citations omitted).

<sup>101</sup> Lee v. Madigan, 358 U.S. 228, 233 (1959).

<sup>102</sup> Coleman v. Tennessee, 97 U.S. 509, 513 (1878).

<sup>103</sup> Caldwell v. Parker, 252 U.S. 376, 386 (1920) (quoting *Coleman*, 97 U.S. at 515).

<sup>104</sup> Ex parte Mason, 105 U.S. 696, 698 (1882) (stating that "the gravamen of the military offense . . . was not simply an assault with intent to kill, but an assault by a soldier on duty with intent to kill [a federal prisoner] over which he was standing guard.").

<sup>105</sup> Articles of War, 1916, art. 93.

<sup>106</sup> Articles of War, 1916, art. 92 (emphasis added).

<sup>107</sup> 10 U.S.C. §§ 918, 920(a).

<sup>108</sup> See, e.g., The Prize Case, 67 U.S. (2 Black) 635 (1863) (challenge to validity of Presi-

between the military and individual liberty, the Court's response has been to consistently consent to whatever curtailment of liberty the military believed to be required.<sup>109</sup> A review of recent Supreme Court jurisprudence illustrates the Court's deferential standard of review for constitutional claims against the military. In *Parker v. Levy*,<sup>110</sup> Army Captain Howard Levy challenged his court-martial convictions for violations of Article 133 ("conduct unbecoming an officer and a gentleman") and 134 ("disorders and neglects to the prejudice of good order and discipline in the armed forces") of the UCMJ.<sup>111</sup> Levy was Chief of Dermatology at the United States Army Hospital in South Carolina during the Vietnam War.<sup>112</sup> When Levy was ordered to train special forces aide men, he refused on the basis that his medical ethics prohibited such a practice.<sup>113</sup> He also made a series of public statements to enlisted men at the base, expressing his strong opposition to the war and his opinion that he and others should refuse to obey orders to go to Vietnam.<sup>114</sup>

Levy challenged his convictions under Article 133 and 134 on the grounds that these articles were both void for vagueness under the Fifth Amendment and overbroad in violation of the First Amendment.<sup>115</sup> The United States Court of Appeals for the Third Circuit held that "'as measured by contemporary standards of vagueness applicable to statute and ordinances governing civilians,' [Article 133 and 134] 'do not pass constitutional muster.'"<sup>116</sup> Reversing the decision of the court of appeals, the five-Justice majority opinion authored by Justice Rehnquist articulated a conception of the military as a "specialized society separate from civilian society,"<sup>117</sup> subject to different norms and independent of the constitutional restraints which apply to civilian life.<sup>118</sup> In *Parker*, the majority re-emphasized again and again that military life calls for a different standard of constitutional review

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dent Lincoln's blockade of Southern ports); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858) (challenge to jurisdiction of Navy court-martial); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (challenge to validity of call-up of militia member during War of 1812).

<sup>109</sup> Indeed, until the Supreme Court indicated in *Burns v. Wilson*, 346 U.S. 137 (1953), that court-martial proceedings could be challenged through habeas corpus actions brought in civil courts, the Court adhered consistently to its holding in *Ex parte Valandigham*, 68 U.S. (1 Wall.) 243 (1863), that it lacked jurisdiction to review, by certiorari, the decisions of military courts. See Warren, *supra* note 27, at 187.

<sup>110</sup> 417 U.S. 733 (1974).

<sup>111</sup> *Id.* at 740.

<sup>112</sup> *Id.* at 737.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 736-37.

<sup>115</sup> *Id.* at 752.

<sup>116</sup> *Id.* at 741 (quoting 478 F.2d 772 (3d Cir. 1973)).

<sup>117</sup> *Id.* at 743.

<sup>118</sup> *Id.*

than civilian life.<sup>119</sup>

*Brown v. Glines*<sup>120</sup> and its companion case, *Secretary of the Navy v. Huff*<sup>121</sup> further developed the themes articulated in *Parker v. Levy*. *Glines* and *Huff* concerned First Amendment challenges to Air Force and Marine regulations requiring prior approval by commanding officers before the circulation of any petition. In *Glines*, the United States Court of Appeals for the Ninth Circuit found the challenged Air Force regulations unconstitutionally overbroad because of the possibility that "virtually all controversial written material" might be suppressed.<sup>122</sup> In an opinion written by Justice Powell and joined by Chief Justice Burger and Justices White, Blackmun, and Rehnquist, the Supreme Court reversed.<sup>123</sup> The opinion cited the language from *Parker* which approved the different applications of First Amendment protections in the military context.<sup>124</sup> *Glines* proffered "military discipline" in support of the validity of the regulations.<sup>125</sup> *Glines* thus extended the deferential standard first announced in *Parker* into a new arena. *Parker* invoked the special demands of the military to permit limits on First Amendment speech during wartime in the presence of troops about to enter combat. In *Glines*, the Court extended this same standard of deference in a peacetime setting.

The Supreme Court again faced the question of deference to the military in peacetime when President Carter resumed draft registration in 1980. In *Rostker v. Goldberg*,<sup>126</sup> the registration of only males was challenged as unconstitutional gender discrimination. In *Rostker*, the Court denied this challenge<sup>127</sup> and again articulated a standard of deference to the military.<sup>128</sup> The Court cited *Parker* and *Glines* to sup-

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<sup>119</sup> See, e.g., *id.* at 742 (noting that even court of appeals acknowledged in some circumstance "different standards might . . . be applicable in considering vagueness challenges to provisions which govern the conduct of members of the Armed forces"); *id.* at 744 (citations to various authorities suggesting military society is "a society apart from civilian society"); *id.* at 756 (Congress has more latitude in legislating for military than for civilian society); *id.* at 758 (first amendment to be applied differently to military than to civilian life); *id.* at 760 (same).

<sup>120</sup> 444 U.S. 348 (1980).

<sup>121</sup> 444 U.S. 453 (1980) (per curium).

<sup>122</sup> *Glines*, 444 U.S. at 353 (quoting *Glines v. Wade*, 586 F.2d 675, 681 (9th Cir. 1978)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 354 (quoting *Parker*, 417 U.S. at 758).

<sup>125</sup> See, e.g., *id.* at 352 ("[R]equirements of military discipline could justify otherwise impermissible restrictions on speech."); *id.* at 357 n.14 ("[T]he prior approval requirement supports commanders' authority to maintain basic discipline."); *id.* at 360 ("The unrestricted circulation of collective petitions could imperil discipline.").

<sup>126</sup> 453 U.S. 57 (1981).

<sup>127</sup> *Id.* at 78-79.

<sup>128</sup> *Id.* at 64-65. "The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other arena has the Court accorded Congress greater deference." *Id.*

port the proposition that military matters require a special degree of judicial deference.<sup>129</sup> The Court declined to apply a "mid-level" scrutiny test, its normal approach to sex discrimination,<sup>130</sup> declaring that decisions involving military matters need not pass heightened scrutiny.<sup>131</sup> In the Court's view, judicial deference must be at its maximum when the Court reviews unconstitutional government action in the military arena.<sup>132</sup> Consequently, just as the standard for reviewing free speech claims against the military became more deferential than the standard in a civilian context after *Levy* and *Glines*, so too the standard for reviewing gender-based discrimination claims against the military became much more deferential with *Rostker*.<sup>133</sup>

The Court's standard of deference reached its pinnacle in *United States v. Stanley*.<sup>134</sup> In *Stanley*, the Court denied Sergeant James B. Stanley redress for injuries he sustained as a result of secret and non-consensual administration of LSD to him as part of an Army experiment.<sup>135</sup> Stanley had volunteered for an Army program he had been told was designed to test protective clothing and equipment.<sup>136</sup> Instead, he was given lysergic acid diethylamide (LSD) without his knowledge or consent.<sup>137</sup> The drug caused severe personality changes in Stanley that led to his discharge from the service and the breakup of his marriage.<sup>138</sup> Many years later, when Stanley discovered what had occurred,<sup>139</sup> he sued the army for damages, claiming a violation of his constitutional right to due process of law.<sup>140</sup> Stanley's claim ultimately reached the Supreme Court.<sup>141</sup> The Court denied Stanley's claim, again invoking a highly deferential standard of review for con-

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<sup>129</sup> *Id.* at 66.

<sup>130</sup> See, e.g., *Craig v. Boren*, 425 U.S. 190 (1976).

<sup>131</sup> *Rostker*, 453 U.S. at 69.

<sup>132</sup> *Id.*

<sup>133</sup> The Court continued to apply this deferential standard of review through the 1980s. See *Goldman v. Weinberger*, 475 U.S. 503, 505 (1986) (holding that Orthodox Jew had no First Amendment right to wear a yarmulke while in uniform; "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (denying 42 U.S.C. § 1985 claim for alleged racial discrimination in the military context; "unique disciplinary structure of the Military Establishment" makes a civil damage remedy against superior officers inappropriate).

<sup>134</sup> 483 U.S. 669 (1987).

<sup>135</sup> *Id.* at 683-84.

<sup>136</sup> *Id.* at 671.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Stanley became aware of his unwitting participation in these experiments in 1975, when the Army sent him a letter soliciting his participation "in a study of the long-term effects of LSD on 'volunteers who participated' in the 1958 tests." *Stanley*, 483 U.S. at 671.

<sup>140</sup> *Id.* at 678.

<sup>141</sup> 479 U.S. 1005 (1986).



stitutional claims against the military.<sup>142</sup> The majority, consistent with its position in earlier cases, held that military institutions must be permitted to make their own evaluations of the requirements of military discipline, whatever the costs in civil liberties.<sup>143</sup> In *Stanley*, the court maintained this broad deference to military judgment even though it resulted in the denial of liability for secret, non-consensual experiments on human beings. The *Stanley* case indicates the full maturation of the notion, first articulated in *Parker*, that the military is a separate community subject to norms different from those of civilian life.

### C. SUPREME COURT DEATH PENALTY JURISPRUDENCE

The underlying assumption of modern Eighth Amendment jurisprudence can be summarized simply: death is different.<sup>144</sup> The Supreme Court first gave precedential weight to the distinction between death and lesser punishments in its landmark ruling, *Furman v. Georgia*.<sup>145</sup> *Furman* invalidated the statutory capital punishment

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<sup>142</sup> *Stanley*, 483 U.S. at 683-84.

<sup>143</sup> *Id.* at 683.

<sup>144</sup> The unique status of the death sentence was long recognized before the landmark decision in *Furman v. Georgia*. See *Furman v. Georgia*, 408 U.S. 238, 285-291 (1972) (Brennan, J., concurring) (summarizing prior doctrinal distinction between death sentences and lesser punishments and stating that because of unusual severity, enormity, and finality, death is a class by itself); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (Stevens, Stewart, Powell, JJ., concurring) (stating that five members of the Court expressly recognized "death is different" doctrine in early Eighth Amendment cases that provided dual requirements for constitutionally valid capital sentencing procedures). See also B. NAKELL & K. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 29-37 (1987). As Eighth Amendment jurisprudence evolved in cases where capital sentencing was at issue, individual members of the Supreme Court began to adopt the concept that death should be treated differently from all other punishments. Of those Justices currently on the Court, Justice Stevens endorsed the distinction in his opinion in *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (noting that "significant constitutional difference between the death penalty and lesser punishments" is that death requires imposition based on reason not emotion).

Justice O'Connor, shortly after joining the Court, also adopted the "death is different" doctrine:

Because [death] sentences are 'qualitatively different' from prison sentences . . . this Court has gone to extraordinary measures to ensure that a prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

*Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring).

<sup>145</sup> 408 U.S. 238 (1972). In *Furman v. Georgia*, the United States Supreme Court reviewed three cases in which each petitioner had been sentenced to death pursuant to his state's respective statutory scheme. In *Furman*, the petitioner was convicted of murder and sentenced to death pursuant to GA. CODE ANN. § 26-1005 (Supp. 1971). *Id.* at 239. In *Jackson v. Georgia*, the petitioner was convicted of rape and sentenced to death in accordance with GA. CODE ANN. § 26-1032 (Supp. 1972). *Id.* In *Branch v. Texas*, the petitioner was convicted of rape and sentenced to death pursuant to TEX. PENAL CODE ANN. § 1189 (West 1961). *Id.*

schemes of three states as violative of the Eighth Amendment prohibitions against cruel and unusual punishment.<sup>146</sup> The Court struck down these statutes because the sentencing portions did not guard against the arbitrary and capricious imposition of the death penalty.<sup>147</sup> Although the Court was unable to muster a majority, or even a plurality,<sup>148</sup> the decision effectively invalidated the capital punishment schemes of every state permitting the death penalty.<sup>149</sup>

Prior to *Furman*, definitive standards for imposing the death penalty were non-existent, allowing the sentencing judge or jury total discretion in imposing death sentences.<sup>150</sup> Although *Furman* did not provide express guidelines for imposing a valid death sentence, the message of the majority was clear: the Court would strike down as unconstitutional statutes that allowed juries unguided and unfettered discretion in imposing capital sentences.<sup>151</sup> In the wake of *Furman*, states began drafting new death penalty statutes in an attempt to comport with the mandates of *Furman*.<sup>152</sup> The Court reviewed several of these statutes together in 1976.<sup>153</sup> In the "76" cases, as they later became known, the Court elaborated on the abstract dictates set forth in *Furman* and established guidelines for constitutional death sentencing procedures.<sup>154</sup> The decisions in *Gregg v. Georgia*,<sup>155</sup> *Proffitt v. Flor-*

<sup>146</sup> *Id.* at 238.

<sup>147</sup> *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

<sup>148</sup> The per curiam decision generated nine separate opinions. Each of the five Justices who voted to overturn the death penalty wrote a separate opinion. Justices Brennan and Marshall advocated total abolition of the death penalty as a per se violation of the Eighth Amendment. *Id.* at 305 (Brennan, J., concurring), 370 (Marshall, J., concurring). Justices Stewart, *id.* at 310, White, *id.* at 314, and Douglas, *id.* at 248, found the statutes unconstitutional because they gave juries too much discretion in imposing sentences. Chief Justice Burger and Justices Powell, Rehnquist, and Blackmun dissented in the case, finding the statutes constitutionally valid. *Id.* at 375 (Burger, C.J., dissenting), 413-14, (Blackmun, J., dissenting), 464-65 (Powell, J., dissenting), 468 (Rehnquist, J., dissenting).

<sup>149</sup> *Id.* at 417 (Powell, J., dissenting). For further discussion on the impact of the *Furman* decision, see Kathryn Haller, Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651 (1974).

<sup>150</sup> See *Furman*, 408 U.S. at 339 & n.74 (Marshall, J., concurring) (citing Hugo Adam Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 UTAH L.REV. 201, 204).

<sup>151</sup> See, e.g., *id.* at 248-49 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring).

<sup>152</sup> See *Gregg v. Georgia*, 428 U.S. 153, 179-80 n.23 (1976). Thirty-five states re-drafted their capital punishment statutes in response to *Furman*. *Id.*

<sup>153</sup> In 1976, the Supreme Court reviewed five state statutes and upheld three. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). Two decisions invalidated mandatory death sentencing statutes. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>154</sup> The three approved sentencing statutes all provided for a bifurcated trial, *Gregg*, 428 U.S. at 163, 197; *Proffitt*, 428 U.S. at 248; *Jurek*, 428 U.S. at 267; guidance to the jury on the weight of aggravating factors, *Gregg*, 428 U.S. at 192; *Proffitt*, 428 U.S. at 248-50; *Jurek*, 428 U.S. at 276; and appellate review, GA. CODE ANN. § 27-2537(a) (1975) (current version in

*ida*,<sup>156</sup> and *Jurek v. Texas*,<sup>157</sup> three of the so-called "76 cases," were announced on the same day.<sup>158</sup> In each case, the Court declared constitutional the sentencing statute because each assured that the sentencing authority would receive sufficient information and guidance to produce principled and fair sentencing.<sup>159</sup>

#### D. APPLICATION OF *FURMAN* TO COURTS-MARTIAL

It is unclear how the Eighth Amendment applies to the military. The question of the Eighth Amendment's applicability has been generally limited to the type of punishment allowed.<sup>160</sup> The Justices who comprised the *Furman* majority did not indicate that they contemplated applying the decision to courts-martial. The *Furman* dissenters, outraged at the sweeping holding, did assert that it affected provisions of the UCMJ,<sup>161</sup> but the majority failed to respond to these assertions. In 1973, the D.C. Circuit reviewed a military death sentence that had been commuted to life imprisonment before *Furman* was decided.<sup>162</sup> In dicta, the court noted that *Furman* had invalidated the military sentencing statute, article 118.<sup>163</sup> The Supreme Court, hearing the case on appeal, did not decide this question specifically, but indicated that the *Furman* concern of arbitrariness might not be a problem in military courts.<sup>164</sup>

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1978) (recodified at § 17-10-35 (1982)), FLA. STAT. ANN. § 921.141(4) (West 1976-77) (current version in West 1982), TEX. CODE CRIM. P. ANN. art 37.071(f) (West 1975-76) (current version in West 1981).

<sup>155</sup> 428 U.S. 153 (1976).

<sup>156</sup> 428 U.S. 242 (1976).

<sup>157</sup> 428 U.S. 262 (1976).

<sup>158</sup> The Court announced five death penalty decisions that day. The Court struck down as unconstitutional two death penalty statutes in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>159</sup> See *Gregg*, 428 U.S. at 192; *Proffitt*, 428 U.S. at 248-50; *Jurek*, 428 U.S. at 276.

<sup>160</sup> See UCMJ art. 55, which states that "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon a person subject to this chapter . . ." 10 U.S.C. § 855 (West 1996).

UCMJ art. 55 did not derive from the Eighth Amendment, but from the 41st Articles of War. Historically, this article was not intended to apply Eighth Amendment protections to service-members, but rather to outlaw earlier barbarous punishments. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 284-90 (1958).

<sup>161</sup> *Furman*, 408 U.S. 238, 412 (1972) (Blackmun, J., dissenting); *id.* at 417-18 (Powell, J. dissenting).

<sup>162</sup> *Schick v. Reed*, 483 F.2d 1266 (D.C. Cir. 1973), *aff'd*, 419 U.S. 256 (1974).

<sup>163</sup> *Id.* at 1270.

<sup>164</sup> *Schick*, 419 U.S. at 260, 268 ("[D]oes [*Furman*] apply to death sentences imposed by military courts where the asserted vagaries of juries are not present in other criminal cases? Our disposition of the case will make it unnecessary to reach [this] question." *Id.* at 260. Justice Marshall argued the very opposite, urging *Furman's* applicability and stating: "Noth-

The only military appellate court to review the constitutionality of the UCMJ capital sentencing scheme assumed without question that the concerns of *Furman* and the guidelines of *Gregg* apply in military courts.<sup>165</sup> In *United States v. Matthews*, the Court of Military Appeals (CMA) affirmatively stated that the Bill of Rights applies to the military. *Matthews* involved Private First Class (PFC) Wyatt Matthews, who was sentenced to death by a general court-martial for the rape and murder of an American civilian in Germany.<sup>166</sup> The court acknowledged that "there may be circumstances under which the rules governing the capital punishment of servicemembers will differ from those applicable to citizens."<sup>167</sup> Nevertheless, the CMA concluded that the crimes that Matthews committed had "no characteristics which, for purposes of applying the prohibition against 'cruel and unusual punishments,' distinguish them from similar crimes tried regularly in State and Federal courts."<sup>168</sup> Having determined that there was no "military necessity" for distinguishing courts-martial capital sentencing procedures from their civilian counterparts,<sup>169</sup> the CMA applied Supreme Court precedent to the military justice system.<sup>170</sup>

Upon reviewing Supreme Court precedent, the *Matthews* court found that constitutionally valid death penalty statutes shared certain common features, including a bifurcated sentencing procedure, the presence of aggravating factors, and the opportunity for the defendant to present unlimited extenuating and mitigating evidence.<sup>171</sup> Based upon this analysis, the CMA upheld as valid most of the death penalty procedures followed in courts-martial; however, the CMA did find one fundamental defect: the failure of the UCMJ or the RCM to require that courts-martial members "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty."<sup>172</sup> In light of this defect, the court reversed Matthews' death sentence, but stated in dicta that either Congress or the President could lawfully remedy the defect in the UCMJ capital sentencing scheme.<sup>173</sup> The President, not Congress, subsequently acted to cor-

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ing in *Furman* suggests that it is inapplicable to the military. The *per curiam* carves out no exceptions to the prohibition against discretionary death sentences. The opinions of the five-member majority recognize no basis for excluding the members of the Armed Forces from protection against this form of punishment." *Id.* at 271 n.5 (Marshall, J., dissenting)).

<sup>165</sup> *United States v. Matthews*, 13 M.J. 501, 521 (A.C.M.R. 1982).

<sup>166</sup> *United States v. Matthews*, 16 M.J. 354, 359, 361 (C.M.A. 1980).

<sup>167</sup> *Id.* at 368.

<sup>168</sup> *Id.* at 369.

<sup>169</sup> *Id.* at 369.

<sup>170</sup> *Id.* at 377-78.

<sup>171</sup> *Id.* at 377.

<sup>172</sup> *Id.* at 379.

<sup>173</sup> *Id.* at 380-82.

rect the defective sentencing procedure by promulgating Rule for Courts-Martial (RCM) 1004.<sup>174</sup> RCM 1004 was intended to rectify the deficiency by enumerating established procedures for capital cases,<sup>175</sup> including a list of aggravating factors which determine death penalty eligibility.<sup>176</sup>

#### E. THE CURRENT UCMJ CAPITAL PUNISHMENT SCHEME

The UCMJ permits the imposition of the death penalty for eleven purely military offenses<sup>177</sup> and three traditional common law crimes: premeditated murder,<sup>178</sup> felony murder,<sup>179</sup> and rape.<sup>180</sup> The only offense carrying a mandatory death penalty is wartime spying; all others are permissive, namely: premeditated murder, murder committed in the course of certain felonies, rape, mutiny, certain types of espionage, and certain other wartime offenses.<sup>181</sup> As of the 1996 Supreme Court term, Congress had not revised the death sentencing provisions of the UCMJ since the Code was enacted.

### III. FACTS AND PROCEDURAL HISTORY

On the evening of December 11, 1988, Dwight Loving, an Army Private stationed at Fort Hood, Texas, robbed at gun-point two 7-Eleven convenience stores in the town of Killeen.<sup>182</sup> When the two robberies netted him only ninety dollars, Loving conceived a plan to

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<sup>174</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1995 ed.). RCM 1004 had actually been circulated for public comment prior to the *Matthews* decision and it was specifically cited in the *Matthews* opinion. *Matthews*, 16 M.J. at 381.

<sup>175</sup> RCM 1004 requires a unanimous finding that the accused is guilty of a capital offense before a death sentence may be imposed. RCM 1004(a)(2). The Rule also requires unanimous findings that at least one aggravating factor is present and that any extenuating or mitigating circumstances are substantially outweighed by any admissible aggravating factor. RCM 1004(b)(4)(A). The Rule also provides that the accused is to have "broad latitude" in extenuation and mitigation, RCM 1004(b)(3), and is entitled to have members of the courts-martial instructed to consider all such evidence before deciding upon a death sentence. RCM 1004(b)(6).

<sup>176</sup> RCM 1004(c).

<sup>177</sup> The eleven military offenses for which the death penalty is permitted by the UCMJ are: desertion in time of war, art. 85; assaulting or willfully disobeying a superior commissioned officer in time of war, art. 90; mutiny or sedition, art. 94; misbehavior by a subordinate compelling surrender, art. 100; improper use of a countersign in time of war, art. 101; forcing a safeguard, art. 102; aiding the enemy, art. 104; spying in time of war, art. 106; espionage, art. 106(a); and misbehavior of a sentinel in time of war, art. 113.

<sup>178</sup> 10 U.S.C.A. § 918(1) (West 1996).

<sup>179</sup> 10 U.S.C.A. § 918(4) (West 1996).

<sup>180</sup> 10 U.S.C.A. § 920(a) (West 1996).

<sup>181</sup> R.C.M. 1004 (b)(1).

<sup>182</sup> Respondent's Brief at 4, *Loving v. United States*, 116 S. Ct. 1737 (1995) (No. 94-1966).

rob taxicab drivers.<sup>183</sup> On the following evening, December 12, 1988, Loving called a taxicab to take him from a store in Killeen to his barracks at Fort Hood.<sup>184</sup> The driver of the taxicab was an active-duty soldier, Christopher Fay.<sup>185</sup> Loving directed Fay to a secluded area where he robbed Fay at gun-point and then shot him twice in the back of the head, killing him.<sup>186</sup> Loving then walked to his barracks and called another taxicab after counting the money he received from Fay.<sup>187</sup> The second cab was driven by retired sergeant Bobby Sharbino.<sup>188</sup> Loving directed Sharbino to a secluded area, robbed him, and then shot him in the head, killing him.<sup>189</sup> Later that evening, Loving took his girlfriend to a nightclub in Killeen.<sup>190</sup> Upon leaving the club, the two entered a taxicab driven by Howard Harrison.<sup>191</sup> After dropping his girlfriend off near her home, Loving directed Harrison to a secluded area and robbed him at gun-point.<sup>192</sup> He then attempted to shoot Harrison.<sup>193</sup> A struggle ensued during which Harrison was able to disarm Loving and flee.<sup>194</sup>

Acting on leads provided by Harrison, civilian and Army authorities arrested Loving on the afternoon of December 13, 1988.<sup>195</sup> Later that day, Loving confessed to his crimes, including both murders and the attempted murder.<sup>196</sup>

After trial, an eight member general court-martial unanimously found Loving guilty of the premeditated murder of Sharbino and the felony murder of Fay under Article 118<sup>197</sup> of the Uniform Code of Military Justice (UCMJ).<sup>198</sup> Articles 118(1) and 118(4) authorize the death penalty for premeditated and felony murders.<sup>199</sup> By a non-unanimous vote, the court-martial also found Loving guilty of attempting to murder Harrison, of robbing Sharbino and Harrison, and of robbing the 7-Eleven stores.<sup>200</sup> After trial, a sentencing hearing was

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<sup>183</sup> *Id.* at 5.

<sup>184</sup> *Id.*

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

<sup>186</sup> *Id.*

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

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

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

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 5-6.

<sup>196</sup> *United States v. Loving*, 41 M.J. 215, 230 (C.A.A.F. 1994).

<sup>197</sup> 10 U.S.C. §§ 918(1), (4) (1980).

<sup>198</sup> Respondent's Brief at 6, *Loving* (No. 94-1966).

<sup>199</sup> 10 U.S.C. §§ 918(1), (4) (1980).

<sup>200</sup> Respondent's Brief at 7, *Loving* (No. 94-1966). In addition, Petitioner was found

conducted in accordance with RCM 1004.<sup>201</sup> During sentencing, the court-martial found three aggravating factors: first, the premeditated murder of the second driver was committed during the course of a robbery;<sup>202</sup> second, Loving acted as the triggerman in the felony murder of the first driver,<sup>203</sup> and third, Loving, having been found guilty of the first murder, had committed a second murder.<sup>204</sup> The court-martial unanimously sentenced Loving to death.<sup>205</sup> The commander who convened the court-martial approved the findings and sentence.<sup>206</sup> The United States Army Court of Military Review denied Loving's petition for reconsideration.<sup>207</sup> On automatic appeal to the United States Army Court of Military Review, Loving argued two main points: first, Article 118 of the UCMJ was unconstitutional under *Furman* in that the provision does not sufficiently narrow the class of death-eligible defendants;<sup>208</sup> and second, the President exceeded his constitutional authority in promulgating RCM 1004 to provide specific aggravating factors.<sup>209</sup> The United States Army Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals (CMA)) affirmed the lower court's decision,<sup>210</sup> finding Loving's claims foreclosed by *United States v. Curtis*<sup>211</sup> and *United States v. Matthews*.<sup>212</sup> Loving then petitioned the Supreme Court for certiorari.<sup>213</sup> Loving's certiorari petition challenged the constitutionality of the military death penalty scheme on three fronts. First, he argued that Congress cannot constitutionally delegate the authority to pre-

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guilty of the premeditated murder of Fay, and the felony murder of Sharbino. After the findings were announced, the military judge dismissed those specifications as multiplicitous. *Id.* at 6 n.2.

<sup>201</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.).

<sup>202</sup> Rules for Court-Martials (RCM) 1004(c)(7)(B).

<sup>203</sup> RCM 1004(c)(8).

<sup>204</sup> RCM 1004 (c)(7)(J). See *Loving v. United States*, 116 S. Ct. 1737, 1740 (1996).

<sup>205</sup> *United States v. Loving*, 41 M.J. 213, 232 (C.A.A.F. 1994).

<sup>206</sup> *Loving*, 116 S. Ct. at 1740.

<sup>207</sup> *United States v. Loving*, 34 M.J. 1065, 1067-69 (A.C.M.R. 1992) (holding that (1) accused was not denied effective assistance of appellate counsel; (2) trial defense counsel's decision not to present involuntary intoxication or lack of mental responsibility defense was a matter of trial strategy; and (3) accused had no right to appellate defense counsel of a particular rank).

<sup>208</sup> *Loving*, 41 M.J. at 293.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> 32 M.J. 252, 257-69 (C.M.A. 1991) (holding that the establishment of aggravating factors by the President was constitutional).

<sup>212</sup> 16 M.J. 354, 379, 380 (C.M.A. 1983) (holding that the existing military capital sentencing scheme was unconstitutional because there was no requirement that the court members make specific findings as to individualized aggravating circumstances).

<sup>213</sup> See *Loving v. United States*, 116 S. Ct. 1737, 1740 (1996).

scribe aggravating factors in capital murder cases to the President.<sup>214</sup> Second, even if Congress could, it neither implicitly nor explicitly delegated to the President the authority to prescribe aggravating factors.<sup>215</sup> Third, even if certain statutory provisions of the UCMJ can be construed as delegations, they lack the requisite intelligible principle to guide the President's discretion.<sup>216</sup> The United States Supreme Court then granted certiorari<sup>217</sup> to determine whether the President's prescription of aggravating factors violated the separation of powers principle.<sup>218</sup>

#### IV. SUMMARY OF THE OPINIONS

##### A. THE MAJORITY OPINION

The United States Supreme Court affirmed the decision of the United States Court of Appeals for the Armed Forces, holding that the President's promulgation of the aggravating factors required by the Eighth Amendment did not violate the separation of powers principle.<sup>219</sup> In reaching its principal holding, the Court started with the assumption that the constitutional requirements of the Eighth Amendment apply to courts-martial capital punishment schemes.<sup>220</sup>

Justice Kennedy, writing for the majority,<sup>221</sup> began his analysis with a brief historical sketch of the American military capital punishment scheme.<sup>222</sup> Before turning to Loving's specific constitutional challenges, Justice Kennedy traced the expansion of courts-martial jurisdiction from the early days of the Republic, when Congress enacted the first Articles of War,<sup>223</sup> through 1984 and the President's promulgation of RCM 1004.<sup>224</sup>

The Court quickly dispatched the issue of the necessity of aggravating factors in military capital sentencing schemes. Assuming that *Furman v. Georgia*<sup>225</sup> and its progeny applied to the instant case, the

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<sup>214</sup> Petitioner's Brief at 5, *Loving v. United States*, 116 S. Ct. 1737 (1996) (No. 94-1966).

<sup>215</sup> *Id.* at 16.

<sup>216</sup> *Id.* at 6.

<sup>217</sup> *Loving v. United States*, 116 S. Ct. 39 (1995).

<sup>218</sup> *Id.*

<sup>219</sup> *Loving v. United States*, 116 S.Ct. 1737, 1751 (1996).

<sup>220</sup> *Id.* at 1742.

<sup>221</sup> Chief Justice Rehnquist and Justices Stevens, Souter, Ginsberg and Breyer joined in Kennedy's opinion. Justices O'Connor and Scalia joined in all but Part IV-A of Justice Kennedy's opinion. Justice Thomas concurred in the judgment.

<sup>222</sup> *Loving*, 116 S. Ct. at 1741-42.

<sup>223</sup> Congress enacted the first Articles of War in 1789. *Id.* at 1741.

<sup>224</sup> The President issued an Executive Order promulgating RCM 1004 in 1984. *Id.* at 1742. For a more detailed look at the history of the military's capital punishment scheme see *supra* notes 98-107 and accompanying text.

<sup>225</sup> 408 U.S. 238 (1972) (holding that the Eighth Amendment prohibits the imposition



Court found the existing military capital punishment scheme constitutionally deficient in that it did not narrow the death-eligible class in a way consistent with the requirements of the Eighth Amendment.<sup>226</sup> In order to ensure UCMJ Article 118's constitutional validity, the Court reasoned, additional aggravating factors establishing a heightened culpability were necessary.<sup>227</sup>

The Court turned next to the question of whether the separation of powers doctrine precluded Congress from delegating to the President its authority to prescribe aggravating factors.<sup>228</sup> The Court outlined the purposes of the separation of powers doctrine and its corollary, the delegation doctrine, as threefold: (1) to defend against arbitrary and tyrannical rule, (2) to create an effective and accountable government, and (3) to prevent Congress from forsaking its duties.<sup>229</sup> The Court then posited two of the fundamental precepts of the separation of powers doctrine: (1) "that one branch of government may not intrude upon the central prerogatives of another,"<sup>230</sup> and (2) that Congress may not convey its lawmaking function to another branch or entity.<sup>231</sup> Drawing upon the writings of the Framers,<sup>232</sup> and separation-of-powers jurisprudence,<sup>233</sup> the Court concluded, however, that the doctrine did not mean that the different branches of government "ought to have no partial agency in, or no controul [sic] over the acts of each other,"<sup>234</sup> or that only Congress may make a rule of prospective force.<sup>235</sup> Rather, the Constitution gives Congress flexibility to exercise or share power as the times might demand, and to "burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."<sup>236</sup>

At this point, the majority turned to a detailed exposition of English constitutional history and its impact on the governmental struc-

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of the death penalty under procedures that create a substantial risk that it will be inflicted in an arbitrary manner).

<sup>226</sup> *Loving*, 116 S. Ct. at 1742.

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

<sup>228</sup> *Id.* at 1742-43.

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

<sup>230</sup> *Id.* at 1743 (citations omitted).

<sup>231</sup> *Id.* at 1744 (citing *Field v. Clark*, 143 U.S. 649, 692 (1892)).

<sup>232</sup> *Id.* at 1743 (quoting *THE FEDERALIST* NO. 47, at 325-36 (James Madison) (J. Cooke ed., 1961)).

<sup>233</sup> *Id.* at 1743-44.

<sup>234</sup> *Id.* at 1743 (quoting *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989) (citations omitted)).

<sup>235</sup> *Id.* at 1744.

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

ture erected by the Framers of the Constitution.<sup>237</sup> In tracing English military justice from the Norman Conquest through the 17th century, the Court acknowledged the impact this history had on the Framers' thoughts.<sup>238</sup> However, the Court rejected Loving's contention that the Framers' mistrust of military excesses led to an intention to grant Congress an exclusive, nondelegable power to determine military punishments.<sup>239</sup> As interpreted by the Court, the lesson learned by the Framers from the English constitutional experience was not, as Loving argued, to deprive Congress the services of the Executive to establish rules for the governance of the military.<sup>240</sup> Rather, "[f]rom the English experience the Framers understood the necessity of balancing efficient military discipline, popular control of a standing army, and the rights of the soldiers . . ."<sup>241</sup> The power to regulate the armed forces, the Court reasoned, was given to Congress "without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent & variety of the means which may be necessary to satisfy them . . ."<sup>242</sup> Accordingly, there was no reason why Congress should not be able to delegate to the President the authority to prescribe the aggravating factors which allowed Loving to be sentenced to his death.<sup>243</sup>

Having determined that Congress rightfully exercised its power of delegation, the Court turned to the second prong of Loving's constitutional challenge: even if Congress had the authority to delegate to the President the authority to promulgate aggravating factors, Congress did not implicitly or explicitly do so.<sup>244</sup> The Court rejected Loving's contention, finding permissible Congress' delegation to the President under Articles 56<sup>245</sup>, 36<sup>246</sup>, and 18<sup>247</sup> of the UCMJ.<sup>248</sup> The

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<sup>237</sup> *Id.* at 1745-49.

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

<sup>239</sup> *See id.* at 1744. Loving contended that the Framers, mindful of the military excesses of the Crown in colonial America, harbored a deep distrust of executive military power, and thus, intended that Congress alone should have the power to make rules for the regulation of the Armed Forces. Petitioner's Brief at 42-43, *Loving v. United States*, 116 S. Ct. 1737 (1996) (No. 94-1966).

<sup>240</sup> *Loving*, 116 S. Ct. at 1745.

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

<sup>242</sup> *Id.* at 1748 (quoting THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (emphasis omitted)).

<sup>243</sup> *Id.*

<sup>244</sup> Petitioner's Brief at 16, *Loving* (No. 94-1966).

<sup>245</sup> Article 56 specifies: "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." 10 U.S.C.A. § 856 (West 1996).

<sup>246</sup> Article 36 provides: "Pretrial, trial, and post-trial procedures, including modes of proof, for [courts martial] . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evi-

Court noted that since 1950, when the UCMJ was enacted, the President has often used his authority under these articles to refine military sentencing within statutory bounds.<sup>249</sup> This past practice, the Court maintained, suggests that the President had clear authority to prescribe capital aggravating factors.<sup>250</sup>

Lastly, the Court rejected Loving's argument that Congress failed to provide guiding principles to the President in prescribing aggravating factors, finding no need for such guidance "given the nature of the delegation and the officer who is to exercise the delegated authority."<sup>251</sup> Congress, the Court noted, may delegate its power to set sentencing standards, so long as it provides "intelligible principles" for the establishment of punishments.<sup>252</sup> The requirement of an "intelligible principle" seeks to enforce the delegation doctrine's primary precept: to prevent Congress from conveying away its lawmaking function.<sup>253</sup> In this case, however, the Court found that the intelligible principle requirement was unnecessary as the delegated authority was already within the scope of presidential duties under his role of Commander-in-Chief.<sup>254</sup> Moreover, the Court noted, the President has had congressional authority to intervene when courts-martial have ordered death sentences since the early days of the Republic.<sup>255</sup> It would thus be inconsistent, the Court reasoned, to question the competency of the President to prescribe aggravating factors absent an intelligible principle in this instance.<sup>256</sup>

#### B. JUSTICE STEVENS' CONCURRENCE

In a concurrence,<sup>257</sup> Justice Stevens clarified that, while joining in the Court's result, he did not thereby accept the proposition that

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dence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C.A. § 836(a) (West 1996).

<sup>247</sup> Article 18 states that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by [the UCMJ]." 10 U.S.C.A. § 818 (West 1996).

<sup>248</sup> *Loving*, 116 S. Ct. at 1749.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1750.

<sup>252</sup> *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

<sup>253</sup> *Id.* (citing *Field v. Clark*, 143 U.S. 649, 693-694 (1892)).

<sup>254</sup> *Id.* The President's duties as Commander-in-Chief require him to superintend the military, including the courts-martial. *Id.*

<sup>255</sup> *Id.* at 1751.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 1751 (Stevens, J., concurring). Justices Souter, Ginsburg and Breyer joined in Justice Stevens' opinion.

*Solorio v. United States*<sup>258</sup> must be understood to apply to capital offenses.<sup>259</sup> Having determined that a "service-connection" had indeed been established in this case,<sup>260</sup> Justice Stevens joined in both the Court's analysis of the delegation issue and its disposition of the case.<sup>261</sup> For Justice Stevens, however, the important question of whether a "service-connection" requirement should apply in capital cases remained open.<sup>262</sup> First, Justice Stevens noted that *Solorio* was not a capital case.<sup>263</sup> In addition, Justice Stevens asserted that *Solorio*'s limited review of the historical background in fact undermined any contention that a military tribunal's power to try capital offenses must be as broad as its power to try non-capital offenses.<sup>264</sup> The issue, Stevens noted, is significant in ensuring that members of the Armed Forces are not, by reason of their service, entitled to fewer constitutional protections than those afforded civilians.<sup>265</sup>

### C. JUSTICE SCALIA'S CONCURRENCE

In a concurring opinion,<sup>266</sup> Justice Scalia joined in the majority opinion except with respect to the Court's discussion of English history.<sup>267</sup> Justice Scalia deemed the discussion irrelevant to determining the limits of Congress's power.<sup>268</sup> The history surveyed by the Court

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<sup>258</sup> 438 U.S. 435 (1987) (holding that jurisdiction of courts-martial depends solely on accused's status as a member of the armed forces, and not on the "service connection" of the offense charged. Justice Stevens concurred in the judgment of *Solorio* but wrote separately, *id.* at 457, to object to the unnecessary and unwise overruling of *O'Callahan v. Parker*, 395 U.S. 258 (1969), which had stood for the principle that court-martial jurisdiction depends on the "service connection" of the offense charged).

<sup>259</sup> *Loving*, 116 S. Ct. at 1752 (Stevens, J., concurring).

<sup>260</sup> *Id.* at 1751 (Stevens, J., concurring). Justice Stevens noted that petitioner's first victim was a member of the Armed Forces on active duty and that the second was a retired serviceman who gave petitioner a ride from the barracks on the same night as the first killing. *Id.*

<sup>261</sup> *Id.* (Stevens, J., concurring).

<sup>262</sup> *Id.* (Stevens, J., concurring).

<sup>263</sup> *Id.* (Stevens, J., concurring).

<sup>264</sup> *Id.* (Stevens, J., concurring) (citing *Solorio v. United States*, 483 U.S. 435, 442-46 (1987)).

<sup>265</sup> *Id.* (Stevens, J., concurring). Interestingly, Justice Stevens raises the very same concern that was the basis of Justice Marshall's ardent dissent in *Solorio* in which Stevens did not join. In his dissent, Justice Marshall decried the overruling of *O'Callahan* which required "that, to be subject to trial by court-martial, a criminal offense charged against a member of the Armed Forces had to be 'service connected,' lest the phrase 'cases arising in the land or naval forces' in the Fifth Amendment 'be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.'" *Solorio*, 483 U.S. at 452 (Marshall, J., dissenting) (citing *O'Callahan v. Parker*, 395 U.S. 258, 273 (1969)).

<sup>266</sup> Justice O'Connor joined in Justice Scalia's concurrence.

<sup>267</sup> *Loving*, 116 S. Ct. at 1752 (Scalia, J., concurring).

<sup>268</sup> *Id.* (Scalia, J., concurring).

well-established the permissible scope of courts-martial jurisdiction over certain classes of offenses and defendants.<sup>269</sup> However, Justice Scalia pointed out, Loving did not question the jurisdiction of the court.<sup>270</sup> Loving's argument dealt with Congress' delegation of authority to the President to prescribe the aggravating factors which allowed the court-martial to impose the death penalty.<sup>271</sup> The response to Loving's argument, Scalia contended, resides not in English history, but rather, in the text of the Constitution.<sup>272</sup> Accordingly, the majority's historical exposition was of no consequence to the issue before the Court and should have been "left aside."<sup>273</sup>

Justice Scalia also took issue with the Court's practice of referring to Congress' assignment of responsibilities to the Executive as "delegations of legislative authority."<sup>274</sup> Justice Scalia pointed out that the term "delegations of legislative authority" is misleading because such "delegations" can not, by definition, constitutionally exist.<sup>275</sup> Congress is strictly prohibited by the Constitution from "delegat[ing] its legislative authority."<sup>276</sup> Rather, as Justice Scalia clarified, "Congress assigns responsibilities to the Executive, and when the Executive undertakes those assigned responsibilities, it acts, not as a "delegate" of Congress, but as the "agent of the people."<sup>277</sup>

#### D. JUSTICE THOMAS' CONCURRENCE

Although Justice Thomas concurred unequivocally in the Court's judgment,<sup>278</sup> he wrote separately to suggest that the question of whether the Eighth Amendment vis-a-vis *Furman* applies to the military still remains unanswered.<sup>279</sup> Unlike the majority, which assumed that *Furman* applied to the instant case, Thomas remained skeptical that the rules developed under the Eighth Amendment for the prosecution of civilian cases, including the requirement of proof of aggravating factors, apply to capital prosecutions in the military.<sup>280</sup> Justice Thomas agreed with the majority's result without deciding whether

<sup>269</sup> *Id.* (Scalia, J., concurring).

<sup>270</sup> *Id.* (Scalia, J., concurring).

<sup>271</sup> *Id.* (Scalia, J., concurring).

<sup>272</sup> *Id.* (Scalia, J., concurring). "The Congress shall have power . . . To make Rules for the Government and Regulation of the land and naval forces" ; U.S. CONST., art. I, § 8, cl. 14.

<sup>273</sup> *Id.* (Scalia, J., concurring).

<sup>274</sup> *Id.* (Scalia, J., concurring).

<sup>275</sup> *Id.* (Scalia, J., concurring).

<sup>276</sup> *Id.* (Scalia, J., concurring).

<sup>277</sup> *Id.* at 1753 (Scalia, J., concurring).

<sup>278</sup> *Id.* (Thomas, J., concurring).

<sup>279</sup> *Id.* (Thomas, J., concurring).

<sup>280</sup> *Id.* (Thomas, J., concurring).

capital courts-martial require aggravating factors.<sup>281</sup> In light of Congress' express constitutional authority to regulate the Armed Forces,<sup>282</sup> Thomas contended, "the sentencing scheme at issue in the case, and the manner in which it was created, are constitutionally unassailable."<sup>283</sup>

Justice Thomas also agreed with Justice Scalia's characterization of the historical analysis conducted by the majority.<sup>284</sup> Justice Thomas expanded upon Justice Scalia's point and noted, not only the irrelevance of the exercise,<sup>285</sup> but also the "simplistic" and speculative conclusions that the majority drew regarding the significance of English military history to the Framers' allocation of constitutional authority.<sup>286</sup>

## V. ANALYSIS

In *Loving v. United States*, the Supreme Court assumed that the constitutional requirements of the Eighth Amendment apply to the military. This Note argues that the Court's assumption holds far more significance than the Court's passing reference to it might suggest. Never before has the Court squarely held that service-members retain Eighth Amendment protections, or indeed any of the same constitutional rights that they are commissioned to defend.<sup>287</sup> Faced with military issues, the Court has consistently eschewed careful scrutiny of military restrictions on service-members' constitutional rights and has instead assumed a highly deferential standard of review. The Court's uncharacteristic assumption in *Loving* thus signals a long overdue recognition that the realities of today's military create a need for increased constitutional safeguards and have outgrown the Court's tradition of supine deference. This Note analyzes the historical underpinnings of the Court's tradition of deference to the military and argues that the realities of the modern military render the Court's rationales wholly obsolete.

### A. OUTDATED STANDARD OF DEFERENCE

The Supreme Court has stated that service-members have consti-

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<sup>281</sup> *Id.* (Thomas, J., concurring).

<sup>282</sup> U.S. CONST., art. I, § 8, cl. 14.

<sup>283</sup> *Loving*, 116 S. Ct. at 1754 (Thomas, J., concurring).

<sup>284</sup> *Id.* (Thomas, J., concurring).

<sup>285</sup> *Id.* at 1753 (Thomas, J., concurring).

<sup>286</sup> *Id.* at 1754 (Thomas, J., concurring).

<sup>287</sup> In *Schick v. Reed*, 419 U.S. 256 (1974), the Court faced the very same issue confronted in *Loving*—"whether [*Furman* applies] to death sentences imposed by military courts." The Court chose not to address the issue, stating "our disposition of the case will make it unnecessary to reach [that] question." *Id.* at 260.

tutional rights, even if the exigencies of military service constrain those rights.<sup>288</sup> However, historically, the Court has generally refrained from questioning the decisions of military courts, instead deferring to congressional decisions on appropriate disciplinary procedures.<sup>289</sup> Deference to military decisions and the deprivation of service-member's constitutional rights which often accompanies it, has long been the Supreme Court's rule of decision.<sup>290</sup>

The Court has justified its "healthy deference to legislative and executive judgments in the area of military affairs"<sup>291</sup> on three separate bases: first, the doctrine of separation of powers mandates such deference;<sup>292</sup> second, the military's unique status as a separate community requires a narrow judicial role; and third, the inherent inability of the judicial system to competently scrutinize the competing

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<sup>288</sup> See *Chappell v. Wallace*, 462 U.S. 296 (1983). Holding that enlisted service members could not maintain a suit for monetary damages against their superior officers for alleged constitutional violations, Chief Justice Burger, writing for a unanimous court, stated: "[O]ur citizens may not be stripped of basic rights simply because they have doffed their civilian clothes." . . . This court has never held, nor do we hold now, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Id.* at 304.

<sup>289</sup> See *Reid v. Covert*, 354 U.S. 1, 43-44 (1957) (Frankfurter, J., concurring) (Congress' legislative judgment in making rules for the regulation of the armed forces is "not subject to revision by the independent judgment of the Court."); *Reaves v. Ainsworth*, 219 U.S. 296, 298, 306 (1911) (The discharge board "was military in character and having had jurisdiction of the subject-matter and of the person the civil courts were without jurisdiction to review its decision." Further, the Judiciary has no power to "command or regulate the army" and therefore no jurisdiction to review military court decisions.); *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885) (noting that court-martial proceedings cannot be "controlled or revised" by the civilian courts); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) ("The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common-law courts; and in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service."); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863) (Supreme Court lacks jurisdiction to review by certiorari the decision of military courts); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79-81 (1857) (stating that military courts are completely separate from the Article III Judiciary, and that congress can provide for military trial and punishments as other civilized nations do). In *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the Court further limited federal intervention in the military justice system, stating that Congress has "never deemed it appropriate to confer on this Court appellate jurisdiction to supervise the administration of criminal justice in the military. Nor had Congress conferred on any Art. III court jurisdiction directly to review courts-martial determinations." *Id.* at 746. The Court further noted that that "this Court repeatedly has recognized that, of necessity, 'Military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishments.'" *Id.* (citations omitted).

<sup>290</sup> See *supra* notes 108-143 and accompanying text.

<sup>291</sup> *Goldberg*, 453 U.S. at 66.

<sup>292</sup> See *Chappell v. Wallace*, 462 U.S. 296, 103 (1983). See also *Rostker v. Goldberg*, 453 U.S. 57, 58 (1981) ("[I]n deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch").

military interests renders judicial review inappropriate.<sup>293</sup> Invoking these three justifications, the Supreme Court has consistently held that the military can restrict civil liberties more than is permissible in a civilian setting.<sup>294</sup> Indeed, such notions have been used to justify stricter limits on free speech,<sup>295</sup> rights to free exercise of religion,<sup>296</sup> rights to petition the government,<sup>297</sup> and a different standard of procedural due process.<sup>298</sup> However, given the realities of the modern military, the Supreme Court's deferential standard of judicial review and corresponding refusal to extend constitutional rights doctrine to the military is obsolete.

### 1. *Separation of Powers Rationale*

Among the traditional justifications for the Judiciary's deference to the Military, the Supreme Court has stated that some form of deference is constitutionally mandated by the doctrine of separation of powers.<sup>299</sup> The Judiciary occupies a sensitive position when it reviews military cases. Explicit constitutional powers have been granted to both the executive and the legislative branches of government,<sup>300</sup> but the Judiciary is without a specific constitutional grant. The Court has invoked this constitutional scheme to explain its deference to the

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<sup>293</sup> See, e.g., *Chappell*, 462 U.S. at 305. See also *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("It is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches"). *Id.*

<sup>294</sup> See *Parker v. Levy*, 417 U.S. 733, 758 (1974), where the Court stated:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and the military mission requires a different application of those protections. 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.

<sup>295</sup> See *id.* at 733.

<sup>296</sup> See *Goldman v. Weinberger*, 475 U.S. 503 (1986).

<sup>297</sup> See *Secretary of Navy v. Huff*, 444 U.S. 453, 458 (1980) (upholding Huff's conviction for violating a Navy regulation by circulating, off-base in South Korea, a petition critical of the South Korean government, without prior command approval).

<sup>298</sup> See *Burns v. Wilson*, 346 U.S. 137, 139-40 (1953) (courts-martial not intended by the Founders to be analogous to civilian courts, or to comply with all civilian court procedures).

<sup>299</sup> See, e.g., *Chappell*, 462 U.S. at 301 (stating "[i]t is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the Court have acted in conformity with that view").

<sup>300</sup> "The Congress shall have Power . . . To declare War . . . To raise Armies . . . To provide and maintain a Navy; To make Rules for . . . the land and naval Forces . . ." U.S. CONST. art I, § 8, cls. 11-13. "The President shall be Commander in Chief of the Army and Navy of the United States . . ." U.S. CONST. art II, §2, cl. 1.



other branches of government in military matters.<sup>301</sup> Although the Supreme Court has refused to abandon completely its power of review,<sup>302</sup> the Court has considered the Constitution a plenary grant of power, which should not be subjected to any unjustified second guessing by the Judiciary.<sup>303</sup>

Although the Judiciary is without an explicit constitutional grant to review military cases, the Judiciary is nonetheless always obliged to decide “[c]ases . . . arising under [the] Constitution, [and] the laws of the United States . . . .”<sup>304</sup> Since *Marbury v. Madison*,<sup>305</sup> it has been the function of the Judiciary and not the political branches to delimit the bounds of permissible governmental conduct and the scope of constitutionally protected rights.<sup>306</sup> When a military regulation conflicts with a constitutionally guaranteed individual right, it is the Judiciary’s *duty* to safeguard the Bill of Rights.<sup>307</sup> The principal of deference, however, is diametrically opposed to this tradition;<sup>308</sup> it represents a complete abdication of the traditional judicial function.<sup>309</sup> When the Judiciary defers to military decision-makers, it dangerously aggrandizes the military’s power to influence not only military personnel, but the nation as a whole.<sup>310</sup>

## 2. *Separate Community/Military Necessity Rationale*

The Court frequently cites the military’s status as a separate com-

<sup>301</sup> See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981).

<sup>302</sup> See *id.* at 67 (stating that the Court does not abdicate its ultimate responsibility and power to review constitutional questions); *Chappell*, 462 U.S. at 304-305 (“[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service”).

<sup>303</sup> See *Rostker*, 453 U.S. at 67 (“[i]n deciding the question before us, we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch”).

<sup>304</sup> U.S. CONST. art. III, § 2.

<sup>305</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>306</sup> *Goldman v. Weinberger*, 475 U.S. 503, 523-24 (1986) (Brennan, J., dissenting).

<sup>307</sup> See *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1803) (establishing the principle of judicial review and that the Court has the obligation of being the final arbiter of constitutionality).

<sup>308</sup> *Goldman*, 475 U.S. at 15 (Brennan, J., dissenting).

<sup>309</sup> *Id.* at 513-14.

<sup>310</sup> Perhaps the most grievous lesson of the dangers of deference to military judgment is found in *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Supreme Court upheld the relocation and internment of 120,000 persons of Japanese ancestry in deference to the “professional judgment” of Military officials, the President, the War Department, and the Congress that the move was necessary for national security. Since the internment, *Korematsu*’s conviction for failure to cooperate with the authorities has been overturned, 584 F. Supp. 1406 (N.D. Cal. 1984) (*Korematsu II*), and Congress has apologized to those interned and provided restitution to them. Restitution for World War II internment of Japanese-Americans and Aleuts Act, 50 U.S.C.A. App. §§ 1989a-1989d (West Supp. 1989).

munity as a justification in support of its principle of deference.<sup>311</sup> The “separate community doctrine” focuses on the distinct purpose of the armed forces—to protect the United States, and its interests, against the actions of foreign nations, through the use of force.<sup>312</sup> The military’s unique purpose, with its fundamental requirements for obedience and discipline, makes “permissible within the military that which would be constitutionally impermissible outside it.”<sup>313</sup> Moreover, the doctrine proffers, military effectiveness demands peacetime preparation.<sup>314</sup> The Supreme Court has thus recognized a “necessity” for more latitude when dealing with military personnel and military infrastructure.<sup>315</sup> Recognizing the importance and distinction of this responsibility, the Court has granted the Military significant leeway in training and supervising its personnel with reduced regard for constitutional liberties.<sup>316</sup> Without such constitutional license, the Court has reasoned, the military might not effectively instill in its servicemembers those qualities necessary for victory in war.<sup>317</sup>

The Court’s “separate community” rationale for deference is inappropriate given that it is founded on notions of the Military that no longer comport with reality. The military society of the past no longer exists. The modern military establishment is a major arm of the government, with jurisdiction over 3.5 million United States citizens, including not only individuals on active duty, but also reservists and compensated retirees.<sup>318</sup> The great bulk of servicemen perform cleri-

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<sup>311</sup> See, e.g., *Parker v. Levy*, 417 U.S. 733, 744 (1974); *Burns v. Wilson*, 346 U.S. 137, 140 (1953). For an in-depth analysis of the concept of the separate community, see Hirschorn, *The Separate Community: Military Uniqueness and Servicemen’s Constitutional Rights*, 62 N.C.L. REV. 177 (1984).

<sup>312</sup> “[I]t is the primary business of the armies and navies to fight or be ready to fight wars should the occasion arise.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

<sup>313</sup> The Supreme Court has consistently permitted the military to restrict the conduct of service members in ways which would clearly violate the Constitution outside the confines of the military’s “separate society.” See *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *Brown v. Glines*, 444 U.S. 348, 354 (1980); *Parker v. Levy*, 417 U.S. at 758-59. See also *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (“the military must insist upon a respect for duty and commitment without counterpart in civilian life”).

<sup>314</sup> *Goldman*, 475 U.S. 503 (1986).

<sup>315</sup> “The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection . . . [C]onduct in combat inevitably reflects the training that precedes combat.” *Chappell*, 462 U.S. at 300; see also *Goldman*, 475 U.S. at 508 (“the necessary habits of discipline and unity must be developed in advance of trouble”).

<sup>316</sup> See *Parker*, 417 U.S. at 758-59 (stating “the different character of the military community and the military mission requires a different application of [constitutional] protections”). See also *Goldman*, 475 U.S. at 507; *Chappell*, 462 U.S. at 300.

<sup>317</sup> *Parker*, 417 U.S. at 758-59.

<sup>318</sup> Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909 (1990).

cal, maintenance, and service jobs that never expose them to combat conditions. The duties of military computer programmers, truck mechanics and cooks are not intrinsically different from their civilian counterparts, nor do they require the full rigors of traditional military discipline designed to ready soldiers to perform reliably in combat. Further, the system's once limited subject matter jurisdiction now embraces crimes that relate only indirectly to the military and that would have previously been heard only in civilian courts.<sup>319</sup>

Perhaps the "separate community" was a valid description for the 18th century military society, when armed forces constituted an isolated, homogeneous, voluntarily entered into society. However, even the Framers did not foresee a modern military of such enormous proportions. When the Framers debated the role of the military in the new nation, military justice consisted of courts-martial proceedings with jurisdiction over a 675-man army for purely military offenses.<sup>320</sup> Even then, the Framers were concerned with preventing the growth of a large, expensive and powerful military<sup>321</sup> and were opposed to courts-martial jurisdiction in times of peace.<sup>322</sup> Deeply distrustful of the notion of a standing army, the Framers specifically provided for the diffusion of war powers among the separate branches of government in order to prevent its creation.<sup>323</sup> This diffusion of power, however, did not entirely allay the Framers' distrust. Concern for the inevitable tension between individual rights and the needs of the military also played out in the fight for the Bill of Rights.<sup>324</sup> The rights of civilians against the potential exercise of unmitigated military power are also clearly espoused in the Constitution.<sup>325</sup>

Yet, the original constitutional approval of a limited courts-martial system used solely as an instrument of military discipline has been extended to today's vast and complex system, which confers jurisdiction over millions of persons, some with only a tenuous connection to the service, for crimes unrelated to the maintenance of military discipline.<sup>326</sup> The danger that the system will not adequately protect the

<sup>319</sup> See *Solorio v. United States*, 483 U.S. 435 (1987).

<sup>320</sup> *Military Justice and Article III*, *supra* note 318. A few months after Washington's first inauguration, The United States Army numbered a mere 672 of the 840 authorized by Congress. Warren, *supra* note 27, at 187.

<sup>321</sup> At the time of the Constitutional Convention, consideration was given to forever limiting the size of the National Army to a few thousand men through an express constitutional provision. Warren, *supra* note 27, at 187.

<sup>322</sup> See *supra* notes 26-39 and accompanying text.

<sup>323</sup> Warren, *supra* note 27, at 181.

<sup>324</sup> *Id.* at 253.

<sup>325</sup> See, e.g., U.S. CONST. amend. II (the right to bear arms); U.S. CONST. amend. III (right to refuse quartering of soldiers).

<sup>326</sup> *Solorio v. United States*, 483 U.S. 435 (1987).

due process rights of military defendants looms large and thus demands more rigorous judicial scrutiny.

### 3. *Judicial Incompetence Rationale*

A third justification commonly proffered in support of the doctrine of deference centers on the perceived limits of the Court's competence in dealing with the complex aspects of the military establishment.<sup>327</sup> In a speech given at the New York Law Center in 1962, then-Chief Justice Earl Warren captured the essence of the incompetence justification for deference when he stated:

Courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.<sup>328</sup>

The professional judgment and experience of those familiar with military needs is the primary source for determining the climate of obedience and discipline necessary to sustain an effective fighting force. Traditionally, the Court has determined itself incapable of mastering the complexities which are considered when balancing constitutional rights against military functional necessity.<sup>329</sup> As a consequence, the Court argues that the scope of review must be narrowed to reflect this inability of the judiciary to master the complexities of military adjudication.<sup>330</sup>

The tradition of judicial deference began when the military was composed of a small group of professional soldiers whose training and activities were primarily combat related.<sup>331</sup> Internal decision-making generally focused on such uniquely military problems as combat strategy, troop deployment, morale, and discipline.<sup>332</sup> In the face of such narrow and sensitive military concerns, civilian courts feared they lacked the expertise to assess the impact of their decisions on the moral and discipline of the troops, and thus refrained from careful scrutiny of military restrictions on constitutional protections.<sup>333</sup>

The military, however, has undergone a major evolution from a

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<sup>327</sup> Warren, *supra* note 27, at 187.

<sup>328</sup> *Id.*

<sup>329</sup> See, e.g., Chappell v. Wallace, 462 U.S. 296, 305 (1983) (stating that the special relationships which define military life have "supported the military's establishment's broad power to deal with its own personnel. The most obvious reason is that the courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.").

<sup>330</sup> *Id.*

<sup>331</sup> See Daniel N. Zillman & Edward J. Imwinkelreid, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 400 (1976).

<sup>332</sup> See generally H. WOOL, *THE MILITARY SPECIALIST* 1, 9-25 (1968).

<sup>333</sup> *Id.* at 27-49.

small, professional, combat-oriented force to an employer of several million professional and non-professional persons.<sup>334</sup> Moreover, post-World War II alliances such as NATO and SEATO have resulted in presence of a large number of American troops in foreign countries during peacetime,<sup>335</sup> often performing jobs of a civilian nature.<sup>336</sup> Thus, as the "primary business" of the Military grows to include many non-combat and civilian-oriented activities, the purpose and impact of military regulations are no longer limited to narrow, parochial interests and often intrude within the sphere of civilian comprehension. When conduct neither interferes with military operations nor undermines a specific military concern, sweeping deference to military decisionmaking is unwarranted.

The Court's assertion that its competence is limited by military complexities is also unconvincing given the complex, technical and non-legal issues which courts regularly consider. Why should the Court consider itself any more competent in dealing with a complex and intricate security matter than it does balancing constitutional rights against the needs of the military? Indeed, the Judiciary is uniquely qualified to balance the values embodied in individual constitutional rights against even genuine military necessity. Only the courts are experts in constitutional law, and their view of the proper constitutional balance should therefore prevail.

## VI. CONCLUSION

In *Loving v. United States*, the Court assumed that the constitutional requirements of the Eighth Amendment, as articulated in *Furman v. Georgia*, apply to the Military. This assumption was significant given the Court's historical reluctance to interfere with the methods of military procedure. When the Court assumed the applicability of the Eighth Amendment to the military it did so mindful of the historical necessities and events which have shaped the modern military. English Constitutional history and its impact upon the thinking of the framers figured prominently in the Court's opinion, as did the growth of the Military and the corresponding expansion of courts-martial jurisdiction. Indeed, it was an attention to and understanding of this history and the realities of today's Military which permitted the Court to deviate from its tradition of supine deference and undertake a more contemporary balancing of service-members constitutional rights with military necessity. Given the realities of the modern mili-

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<sup>334</sup> See Zillman & Inwinkelreid, *supra* note 331, at 400.

<sup>335</sup> WOOL, *supra* note 332, at 28.

<sup>336</sup> *Id.* at 53.

tary establishment and the expansive reach of court-martial jurisdiction, the Court's assumption was a proper one. Just as the military establishment has evolved over time, so too should the standards which govern it.

NICOLE E. JAEGER