University of Michigan Journal of Law Reform
Spring 2010

Article

*569 THE IMPACT OF CIVILIAN AGGRAVATING FACTORS ON THE MILITARY DEATH PENALTY (1984--2005): ANOTHER CHAPTER IN THE RESISTANCE OF THE ARMED FORCES TO THE CIVILIANIZATION OF MILITARY JUSTICE

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In 1984, the U.S. Armed Forces amended its capital punishment system for death eligible murder to bring it into compliance with Furman v. Georgia. Those amendments were modeled after death penalty legislation prevailing in over thirty states. After a brief period between 1986 and 1990, the charging decisions of commanders and the conviction and sentencing decisions of court martial members (jurors) transformed the military death penalty system into a dual system that treats two classes of death eligible murder quite differently. Since 1990, a member of the armed forces accused of a killing a commissioned officer or murder with a direct impact on the ability of military commanders to run an effective and disciplined military is significantly more likely to face a capital court martial and be sentenced to death than a similarly situated member accused of a murder connected to the military only by the identity of the accused.

This empirical study of charging and sentencing decisions in 104 death eligible military murders from 1984-2005 documents contemporary resistance to the ***570** civilianization of the military death penalty as manifest in charging and sentencing decisions. We conclude that a limitation of death eligible murder to those directly impacting military command and control could reduce the risk of arbitrariness in the administration of the military death penalty.

Introduction

The threshold question we address in this Article is the extent to which the administration of the military death penalty since 1984 has followed the civilian model of limiting death sentences to the most aggravated cases, as defined by a 1984 executive order delineating death eligible murder for the U.S. Armed Forces, or whether practice has overridden the reforms and voided the intended civilianizing influence. [FN1]

This analysis is based on an empirical study of the administration of the death penalty by the U.S. Armed Forces since 1984 for premeditated and felony murder committed by United States military personnel. [FN2] Our data include the prosecution of 104 death eligible cases from 1984 through 2005, which resulted in the imposition of fifteen death sentences. [FN3] We find an abrupt distinction between the charging and sentencing practices in the first six years after

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the 1984 order and the charging and sentencing practices after 1990. After 1990, charging and sentencing practices turned much of the civilianizing aspects of the 1984 executive order into dead letter law.

Since the founding of the Republic, the military criminal justice system stood as a system apart, a system designed to advance the needs of military commanders for efficient and effective control of soldiers, airmen, sailors, and marines. The military system has consistently lagged behind its civilian counterparts in its concern for the broad protections associated with the Bill of Rights. While many in military command worked to incorporate the protections of the Bill of Rights into military criminal justice over time, other military leaders have resisted such changes as unnecessary "civilianizing" and a direct threat to their ability to run a proper military.

This empirical study documents contemporary resistance in the U.S. Armed Forces to civilianizing changes in the context of capital ***571** punishment. Our study shows that the charging decisions of commanders and the conviction and sentencing decisions of court martial members (jurors) since 1990 have essentially nullified the deliberate adoption in 1984 of a military death sentencing system modeled after those prevailing in over 30 states. These actors have transformed the military death penalty system into a dual system that treats quite differently two classes of death eligible murder. The first class ("military murder") directly impacts the capacity of military commanders to run an effective and disciplined military. Prominent among military murders are murders of commissioned and non-commissioned officers and large scale attacks on fellow troops. The second class of "civilian-style murders," such as felony murder, murders with multiple victims, and particularly heinous killings, have no impact on military command and control.

Since 1990, a soldier accused of civilian-style murder is significantly less likely to face a capital court martial, to receive a capital conviction, and to be sentenced to death than a similarly situated soldier accused of military murder. After 1990, only one of eight military death sentences has involved a civilian-style murder. [FN4] Given this reality, this Article queries whether it would be appropriate to recognize this de facto transformation by amending military death penalty law to bring it back in line with the central purpose of the military criminal justice system, that of advancing command and control of the armed forces.

Part II of this Article documents the overall history of resistance to the civilianization of military criminal procedure in the U.S. Armed Forces. Part III provides details of capital punishment law in the U.S. Armed Forces between 1984 and 2005 and then explains the underlying structure of the study. Part IV documents that in the first six years of the new system civilian-style murders were identified as sufficiently culpable for capital prosecution and death sentences, while after 1990 they disappear almost entirely from capital cases. In contrast, military murders exist as a unique subset of cases, worthy of the most aggressive prosecution and sentencing. This Part also demonstrates that this disparate treatment cannot be explained by different culpability levels in the cases. Part V presents possible policy explanations for the emergence of this disparate treatment in the post-1990 period. Part VI offers brief conclusions and recommendations for addressing the problems that arise when such disparate treatment exists.

***572** II. Theme of Resistance: The Slow Civilianization of Courts Martial

There is a history of resistance by some military leaders to efforts to "civilianize" the military criminal justice system. [FN5] This resistance appeared most famously during the 1920s in the office of the Judge Advocate General of the Army over the availability of appeal from certain court martial cases. [FN6] Commanders resisting such change perceive the military criminal justice system principally as a means of promoting discipline to protect the authority and effectiveness of the military command and view efforts to civilianize the military system as a threat to those goals. [FN7] This tension pits the "demands of discipline" against "the requirements of justice." [FN8]

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Courts martial are Article I rather than Article III courts. [FN9] As such, courts martial were not established along the same guidelines or, really, for the same purpose as civilian courts. [FN10] Courts martial are an extension of the executive power (provided by Congress) to aid the President in maintaining discipline in the armed forces. [FN11] Courts martial form an essential part of a commander's tools for maintaining effective command and control.

Accordingly, courts martial historically have not been held to the same due process standards as civilian courts. While many of the ***573** protections of the Bill of Rights have been applied to the military through statute, [FN12] civilianizing changes typically have been resisted by military personnel. As early as 1912, the Judge Advocate General of the Army stated in a Congressional committee hearing that "the introduction of fundamental principles of civil jurisprudence into the administration of military justice is to be discouraged." [FN13] In subsequent testimony, the Judge Advocate General of the Army emphasized again that a court martial must be--first and foremost--the tool by which a commander maintains discipline and control. [FN14] A thorough history of the courts martial system and efforts to "civilianize" the system over the past century, by Kevin J. Barry (Captain, U.S. Coast Guard, Ret.), casts these efforts as long, hard-fought battles met with great resistance by the military. [FN15]

A. Resistance in the Non-Capital Context

In the non-capital context, military leaders have resisted a number of civilianizing reforms. These leaders perceived the adoption of the Uniform Code of Military Justice (UCMJ) in 1950 as unnecessarily imposing civilian procedures on military courts for the "primary purpose" of "creat[ing] a system that would be regarded with favor by the public, which would earn and hold the public's confidence." [FN16] Officers raised concerns that adopting the UCMJ "made the effective [and efficient] administration of military discipline within the Armed Forces more difficult." [FN17] Colonel Frederick Wiener, who was at one time a strong voice for those opposing civilianizing changes, argued that the requirement that the accused in a military trial be represented by qualified lawyers (as imposed by the UCMJ in 1950) was unnecessary and impractical. [FN18] At least ***574** one officer argued, "The pendulum has swung . . . from too much emphasis on the 'military' aspect of military justice to too much emphasis on the civilian procedural aspects of law." [FN19]

While acceptance of the UCMJ grew over time, [FN20] the resistance to imposing civilian procedures and protections on military justice continues until today. This is reflected in resistance to suggestions by the 2001 Commission on the 50th Anniversary of the Uniform Code of Military Justice (the "Cox Commission") that the convening authority, a senior officer who functions as the prosecutor in military cases, relinquish control over the selection of the members who serve in courts martial. [FN21] The Cox Commission recommended limiting the role of the convening authority, commenting that "the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces." [FN22] This recommendation reflects the concern that members may feel the need to vote to convict the accused to curry favor with their commanding officer who, in fact, prosecutes the case.

The Cox Commission report anticipated that this recommendation would engender controversy, [FN23] and it did. Scholars argued that limiting the role of the convening authority would be inconsistent with the needs of military command. [FN24] No action has been taken to implement this recommendation.

***575** B. Resistance in the Capital Punishment Context

1. Death Eligible Offenses Under the Uniform Code of Military Justice

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There is a long tradition of the use of capital punishment in the American armed forces. There are currently fourteen death eligible offenses in the Uniform Code of Military Justice. [FN25] All but two of them currently relate to crimes with important national security or military implications which have no counterparts in civilian death penalty systems. Mutiny, sedition, and espionage are all included in the national security category. [FN26] There are also eight death eligible offenses with serious military implications that apply only "in time of war" or during combat operations against a foreign power, [FN27] and two other offenses with important military implications that have no "time of war" requirement. [FN28] These are long standing offenses that to our knowledge have not been applied since the Korean War. [FN29]

The thirteenth and fourteenth death eligible offenses are murder (premeditated and felony murder) [FN30] and rape [FN31] committed by ***576** American military personnel during peacetime anywhere in the world. [FN32] A murder conviction is the basis of all of the military death sentences imposed since 1960. With one exception, [FN33] murder and rape are the most recently established death eligible military offense having been enacted in 1950 by the UCMJ.

Death eligibility for murder requires no connection between the murder and military interests or functions. Military status alone makes the statute applicable to military personnel and gives military courts martial jurisdiction. [FN34] In terms of the definition of ***577** capital murder, therefore, the UCMJ mirrored the provisions of typical 1950s civilian death penalty statutes that defined first degree and felony murder as capital offenses. [FN35] During this period of time, the military system also shared in common with all civilian systems complete and untrammeled discretion of the sentencing authority on the issue of whether the sentence for capital murder should be death or life imprisonment. [FN36]

2. Resistance to Furman v. Georgia (1972)

The broad sentencing discretion of court martial members became particularly salient after Furman v. Georgia, which held that the unguided discretion of sentencing authorities in civilian jurisdictions violates the cruel and unusual punishments provision of the Eighth Amendment of the United States Constitution. [FN37] Furman invalidated state death penalty statutes across the United States, but the majority opinions did not address its applicability to military courts. Nevertheless, little thought would be required to recognize that the Court's Furman concerns about the risks of unbridled discretion of sentencing authorities applied with equal force to the military system. [FN38] Despite a suggestion to this effect by Justices Powell and Blackmun, dissenting in Furman, [FN39] and Justice Marshall, dissenting in the case of Schick v. Reed two years later, [FN40] neither Congress nor the President made any effort to reform military law or procedures.

Shortly thereafter, the United States Supreme Court ruled in Gregg v. Georgia (1976) and Profitt v. Florida (1976) that the adoption of statutory lists of aggravating circumstances comparable to those found in the Model Penal Code [FN41] and the use of bifurcated ***578** guilt and penalty trials satisfied the requirements of the Eighth Amendment because they materially reduced the breadth of capital charging discretion. [FN42] In the Court's view, these reforms limited death sentences to the most aggravated cases, thereby eliminating the risk of arbitrariness and discrimination in the administration of capital punishment. [FN43]

In 1981, the Navy-Marine Corps Court of Military Review denied the applicability of Furman to the military. [FN44] First, the court found that military law, while not notably distinguishable from the unconstitutional civilian capital punishment laws, had to be understood in the context of the military justice system. [FN45] The court held that the military justice system itself mitigated any risk of arbitrary decision making. [FN46] The court continued to reason that the procedures in place arose from the needs of commanders "to establish and maintain the armed forces" and should be seen as part of "the peculiar requirements which flow from a disciplined, ever-ready and effective military community." [FN47]

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This argument echoes the civilian/military divide presented above. Again, the military set itself apart because of the needs inherent in commanding and controlling the armed forces.

A June 1983 Air Force Court of Military Review ruling was the first to hold that Furman's requirements applied to courts martial and that the court martial system was not in compliance with those requirements. [FN48] In October 1983, the Court of Military Appeals settled the conflict between the lower military courts, ruling that Furman applied to courts martial. [FN49]

***579** 3. Facial Accommodation of Furman v. Georgia (1972)

To cure the defect in the military system recognized by the military courts, President Reagan requested that his legal advisors, presumably in the Pentagon and the Department of Justice, amend military law to bring it into conformity with the requirements of the Eighth Amendment.

The product was a 1984 executive order that limited death eligibility to capital cases in which the fact finder determined that one or more statutory aggravating circumstances was present in the case and that "any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." [FN50] The aggravating circumstances, known as aggravating "factors" in current military parlance, embrace a number of situations with distinct military and national security implications that facially apply to all death eligible offenses, but in practice have no applicability to "civilian-style" premeditated and felony murders, which constitute the vast majority of death eligible murders committed by military personnel in peacetime. [FN51] One distinctly military aggravating circumstance applies to murder and rape "committed in time of war," a condition that has not existed since the Korean War. [FN52]

The executive order does, however, specifically exclude from murder offenses two omnibus aggravators with significant military implications. [FN53] In fact, only one of the omnibus aggravators applicable to all death eligible offenses (grave risk to non-decedent victims) has clear relevance to murder cases. [FN54]

The executive order also defines for premeditated murder cases an extensive list of distinctly civilian-style aggravating ***580** circumstances. [FN55] These aggravating circumstances were clearly inspired by the typical state death penalty statute whose aggravating circumstances are modeled after those found in the Model Penal Code. [FN56] The executive order's focus on civilian-style aggravating circumstances for premeditated murder was understandable given that six of the seven murder cases from the military in which a death sentence had been imposed between 1979 and 1984 involved a distinctly civilian-style murder with no special military implications. [FN57]

In fact, only one part of one of the premeditated murder aggravating circumstances in the executive order is uniquely tailored to military circumstances. This aggravator, "7G," classifies as death eligible the premeditated murder of a "commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States" killed "in the execution of office" when the accused had knowledge of the victim's status. [FN58] The remainder of the 7G aggravating factor reflects an effort to provide special protection for law enforcement and corrections officers that is found in most civilian jurisdictions. [FN59]

The executive order does not list specific mitigating circumstances, which put the military system in the company of the Georgia system approved by the Supreme Court in Gregg v. Georgia.***581** [FN60] On this basis, military lawyers could properly advise their commanders that the military system now available for the capital prosecution of premeditated and felony murder was in full compliance with Furman and fully civilianized by virtue of the civilian-style aggravating factors on which it was based.

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The findings of the empirical research presented in this Article reveal that for its first five years of application, the military system closely resembled the typical civilian system. However, since 1990, military charging and sentencing authorities have de facto created a dual system which treats quite differently ordinary civilian-style murders from murder with military implications that threaten military discipline and the effectiveness of the military mission. It is a story of the military's resistance to the full civilianization of capital punishment on the ground.

III. Data Collection and Legal Framework for Analysis

This Part describes the data used in this study. It then presents military capital punishment law and decision making in death eligible murder cases in the military during the period of the study. Finally, it explains our method for distinguishing uniquely "military" murder from ordinary civilian-style murder for the purposes of this study.

A. Data Collection

We collected the data for this study as part of an analysis of the role of race and other extra-legal factors in the U.S. armed forces' capital punishment system. The sample includes all 104 death eligible cases prosecuted by the armed forces between 1984 and 2005. [FN61] To be considered death eligible, the accused must have committed premeditated or felony murder and there must be one or more aggravators present in the case. For each case, the data file includes more than 200 variables relating to the characteristics of the accused and victim(s), the nature of the crime, the case presented against the accused, the defense presented, as well as any mitigation presented or available, and each significant charging or sentencing recommendation or decision in the case. In addition, ***582** the data includes a detailed narrative summary of each case. We tailored our data collection to enable accurate analysis of death eligible murders and precise analysis of key decision points in the military capital punishment system.

B. Death Eligible Murder in the U.S. Armed Forces

The UCMJ authorizes the death penalty as a discretionary punishment for premeditated and felony murder committed by military personnel anywhere in the world. [FN62] Peacetime death eligibility requires no connection between the murder and military interests or functions. [FN63] The UCMJ mirrors the provisions of typical civilian death penalty statutes, except that it also authorizes the death penalty for rape [FN64] and certain non-homicidal crimes. [FN65] All of the cases included in this study involved murder.

Rule 1004 of the Manual for Courts-Martial, the rule created by President Reagan's executive order in 1984, limits death eligibility by requiring a finding of aggravating circumstances similar to those found in many civilian jurisdictions and the Model Penal Code. In cases involving a felony murder conviction, Rule 1004(c) defines separate aggravating factors. [FN66] These aggravating factors, listed in Table 1, also mirror those in a majority of civilian jurisdictions. [FN67]

The only aggravating factor for murder that is uniquely tailored to military circumstances is the portion of the officer victim aggravating factor [FN68] which classifies as death eligible the premeditated murder of a "commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States" who is killed "in the execution of office" when the accused had knowledge of the ***583** victim's status. [FN69] The remainder of this aggravating factor reflects an effort to provide special protection for law enforcement and corrections officers that is found in most civilian jurisdictions. [FN70]

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As a condition for imposing a death sentence, court martial members must find “beyond a reasonable doubt” that one or more “aggravating factors” exist and that “any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances.” [FN71] The rule does not list specific mitigating circumstances. Rather, it provides that the accused “shall be given broad latitude to present evidence in extenuation and mitigation.” [FN72] Nothing in the text of the UCMJ or relevant rules suggests that murders that threaten the command and control of the military should be considered more punitively than civilian murders.

C. Decision-Making in Death Eligible Cases

Under military law and practice, the death penalty statute is applied in a three-stage process by two decision-makers--the convening authority and the court martial members. The three stages are depicted in Figure 1. [FN73]

A capital prosecution in a death eligible case is commenced by the “convening authority”--normally a general or admiral in the accused's command--who has total discretion whether or not to seek a death sentence in a death eligible case. A decision to seek a death sentence in the case is known as a “capital referral,” a decision that is heavily influenced by the “advice” letter of the commander's Staff Judge Advocate (“SJA”), his chief legal advisor. [FN74]

***584** If a case is capitally charged and the capital referral is not withdrawn by the convening authority, the case advances to a capital court martial with the government seeking a death sentence (Stage 2). [FN75] A unanimous finding of guilt by the court members advances a case to a capital sentencing hearing (Stage 3). [FN76] Finally, court martial members consider the aggravating factors and mitigating circumstances and make a life or death determination. Since November 18, 1997, the life sentence option has included a life sentence without the possibility of parole. [FN77]

The appellate process following the imposition of a death sentence commences with a request for clemency considered by the convening authority who has complete discretion to reduce both the crime of conviction and punishment. [FN78] The convening authorities disallowed the death sentence in 2 of the 15 death sentences that have been issued by military courts since 1984. No comparable authority exists in civilian courts.

For death sentences approved by the convening authority, appeals are addressed to the branch specific courts of criminal ***585** appeals, the Court of Appeals of the Armed Forces (CAAF), and then the United States Supreme Court. [FN79]

This study analyzes the charging and sentencing decisions illustrated in Figure 1, namely decisions to advance death eligible cases to a capital court martial (Stage 1), to advance the case from a capital court martial to a capital sentencing hearing (Stage 2), and to sentence a case to life or death (Stage 3).

D. Defining “Military Murder”

Our analysis turns on the treatment of death eligible murders that threaten the authority and effectiveness of the military mission as compared to the treatment of death eligible murders which pose no threat in this regard. As noted above, for the purposes of this study, we designated the former a “military murder.” We characterize a murder which poses no threat to the military mission and most closely resembles a death eligible murder as prosecuted in non-military jurisdictions as a “civilian-style” murder. [FN80]

For the purposes of our analysis, threats to the authority and effectiveness of the military mission included any case involving an attack on a military officer and any case motivated by race, including those carried out in response to perceived racism. [FN81] Cases involving officer victims include commissioned and noncommissioned officers. These also

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include two cases in which the accused attacked his military unit, killed at least one officer, and killed or injured numerous other enlisted personnel. [FN82]

***586** We categorize cases motivated by race as "military" cases because of the importance of maintaining non-hostile interracial relations to running the military. Maintaining interracial relations has been a priority in the military even before the services were integrated by executive order in 1948. [FN83] For example, there is evidence that during World War II the death penalty was used as a disciplinary device to deter racial strife between black and white military units over interracial contact between black soldiers and white women. [FN84] The Vietnam War, which badly strained race relations in the military, [FN85] created a new mandate for improving race relations. Under the new mandate, race sensitivity and race relations became "big business" [FN86] and concerns about race were "broadened into a general leadership responsibility." [FN87] "[G]ood race relations" are seen "as a means to readiness and combat effectiveness." [FN88] Discipline is meted out to further this end. Hate speech, for example, "incurs sanctions only when it upsets order and discipline or provokes a breach of the peace." [FN89] In addition, individual branches and the Department of Defense periodically have undertaken reviews of race relations in the military and sought to undertake branch-wide or service-wide reforms. [FN90]

We coded any case that did not involve an attack on an officer or a significant group of fellow service members and was not motivated by race as a "civilian-style" murder. The murders in these ***587** cases had no connection to the military, other than the fact that the accused served in the armed forces.

Table 2 presents an inventory of all of the death eligible cases in the study, each classified and briefly described according to the type of military or civilian-style murder that is involved in each case. The civilian-style murders reported in Table 2 involve family and acquaintance victims [FN91] or a stranger victim in a felony murder. [FN92] The military murders involve commissioned officer victims (whether or not they are acting in an official capacity) [FN93] and/or a murder that otherwise directly threatens the authority or effectiveness of the military mission. [FN94]

Military cases make up approximately 18% of the database overall, 13% of the cases in the 1984-1990 time period, and 22% of the cases in the after-1990 time period. Civilian-style cases comprise 82% of the cases overall, 87% of the cases in the 1984-1990 time period, and 78% of the cases after 1990. There is a slight shift toward military cases in the after-1990 time period but the two groups largely maintain an even presence throughout the period of the study.

IV. Evidence of Disparate Treatment of Civilian-Style Murders and Military Murders

Table 3 describes the 15 cases that resulted in a death sentence since 1984. The cases are listed in chronological order. Column B presents a thumbnail sketch of the facts, while Columns C and D report, respectively, the year of sentence and the coding of the case as a civilian-style (C) or military (M) murder.

Fifty-three percent (8/15) of the death sentenced cases in Table 3 involve civilian-style murder, clearly documenting that the accused in civilian-style cases have been charged capitally and sentenced to death in the post-1984 period. Seven of the eight cases, however, occurred between 1984 and 1990. Civilian-style cases composed 87% (7/8) of the death sentenced cases in that period. After 1990, the rate falls 39 points from 53% to 14% (1/7). In this later period, 86% (6/7) of the death sentences were imposed in cases with military implications. This suggests that since 1990 there has been a de facto presumption against the use of capital punishment in civilian-style murders. The only death ***588** sentence imposed in civilian-style murder cases since 1990 is Witt, [FN95] a brutal two victim case with five aggravating factors, which plausibly could overcome a strong presumption against death sentences in civilian-style murder cases. We pursue this issue below in detail.

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A. Unadjusted Disparities in the Charging and Sentencing of Civilian-Style Murders and Military Murders

Table 4 documents disparities in charging and sentencing decisions for military and civilian-style murders from 1984 to 2005 (Part I) and until (Part II) and after (Part III) 1990. Column B of Part I reports an overall 31-percentage point, statistically significant, military/civilian disparity in the imposition of death sentences among all death eligible cases. The ratio of the two rates is 4.1 (41%/10%). This finding closely mirrors the disparities reported in Columns C, D, and E for capital charging, capital conviction, and death sentencing rates.

A comparison of the overall rates in Parts II and III of Column B indicate that the overall military/civilian disparity reported in Part I is entirely explained by the large 44-point disparity in the post-1990 period reported in Part III. During the pre-1990 period the death sentencing rates for the two groups of cases were essentially the same: 25% and 21%. The sharp decline in the death sentencing rate for civilian-style murder after 1990, from 21% to 2%, had the additional effect of drawing down the death sentencing rate for all cases after 1990 from 22% to 12%.

Closer inspection of the data in Part III reveals that the 44-point military/civilian overall disparity in death sentencing rates reported in Column B reflects comparable disparities in both charging and conviction decisions (44 and 43 points) and in the members' death sentencing decisions (66 points), all of which are statistically significant at the .10 level. Interestingly, however, Columns C and D of Part II report comparable military/civilian disparities in convening authority decisions before 1990 as well. The big difference between the two periods is the military/civilian disparity in the members' death sentencing decisions: -14 points in the earlier period compared to +66 points in the post-1990 period. We consider below what may have influenced the views of court martial members about the propriety of capital punishment for their comrades post 1990.

***589** B. Adjusted Disparities in the Charging and Sentencing of Civilian-Style Murders and Military Murders

A possible explanation for the military/civilian murder disparities documented in the preceding Section could be that the civilian-style murders in the later period involve less culpable criminal conduct than the civilian-style murders in the earlier period. The data does not support this hypothesis. Table 5 breaks down the cases by their civilian-style or military murder status, the number of aggravating circumstances actually found or factually present in the case, and their date of sentencing (1984-1990 or 1991-2005). Column A marks the civilian-style cases versus the military cases; Rows 1-4 present the civilian cases whereas Rows 5-8 present the military cases. Column B reports the number of aggravating factors, as well as the average culpability as determined by the average number of aggravating factors for any single period. Column C presented the cases in the earlier period, 1984-1990; Column D presents the cases in the later period, 1991-2005.

If the military murders were overall more aggravated in terms of the aggravating factors in the 1984 executive order, we would expect that to be reflected in the number of those factors that were found by members in the cases that advanced to a capital sentencing hearing or were present in the cases that did not advance that far in the process. In addition, if the decline in the overall death sentencing rate among civilian-style murders from 21% between 1984 and 1990 to 2% after 1990 reported in Table 4 resulted from differences in the aggravation levels of the cases, we would expect to see that reflected in the comparative numbers of aggravators present in the cases during those two periods.

Table 5 shows that civilian-style cases had as many aggravators in the later period as the earlier. Starting with the average number of aggravating factors in Row 4, the average number of aggravating factors in the later period (1.7), shown in Column D, Row 4, exceeds the average number in the earlier period (1.5). This increase results from a 5-point increase in the percentage of cases with three or more aggravating factors (8% in the earlier period, 13% in the later period). At

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least with respect to the number of aggravating factors, the civilian-style cases maintain a roughly comparable level of culpability across the study period.

Likewise, the disparity in aggravation levels between the military cases and civilian-style cases remains virtually constant across the period. As shown in Row 8, Columns C and D, military cases have an average of 1.8 aggravating factors in both 1984-1990 and ***590** 1991-2005. The disparity between the military and civilian-style cases (Row 4 vs. Row 8) is 0.3 point (1.8-1.5) in Column C and 0.1 point (1.8-1.7) in Column D. Nothing in the number of aggravating factors in the cases suggests that the culpable conduct in the civilian-style cases is sufficiently lower than the culpable conduct found in the military cases after 1990 to explain the disparate treatment of the two classes of cases over time.

Table 6 replicates the structure in Table 5 but maps the cases using three culpability scales as measures of criminal culpability. Part 1 maps the cases using a salient factors analysis to gauge culpability. [FN96] Part 2 maps the cases using a scale derived from a logistic regression model of the advancement of cases to a capital court martial. [FN97] Part 3 maps the cases based on a logistic regression***591** analysis of death sentences imposed among all death eligible cases. [FN98]

The civilian-style cases appear slightly more aggravated in the earlier period than in the later period in this table. Part 1, Line 7, shows a 0.2-step decline. Part 2, Line 20, shows a 0.74-step decline. Part 3, Line 32, shows a 0.51-step decline. It is hard to argue, however, that the modest decline in culpability seen here can explain the steep turn away from capital prosecutions and sentencing in the civilian-style cases after 1990. In no case does the average culpability decline more than one step on the scale.

Even the increased disparity between the average culpability of civilian-style cases and the average culpability of military cases over time does not seem sufficient to explain the change in practice. This disparity is slightly larger according to these culpability scales than according to the number of aggravating circumstances. The largest disparity is 1.07 points in Part 1, mapping the salient factors scale, where it increased from 1.23 to 2.30 (Line 7 minus Line 14 in Column C versus D).

It is also useful to estimate military/civilian-style murder disparities in charging and sentencing outcomes for the culpability measures in Tables 5 and 6. For example, consider the comparative treatment of cases in the two periods of military and civilian-style murder with only one aggravator found or factually present in the case. In the earlier period, as documented in Table 5, Column C, Row 1, there were 23 civilian-style murder cases with only one aggravator. The convening authority sought the death penalty in 43% of these cases (10/23) and obtained a death sentence in 13% of the cases (3/23). In contrast, after 1990, the convening authority sought the death penalty in only 9% of the 22 single aggravator civilian-style murder cases (2/22) and none of them (0/22) resulted in a death sentence.

***592** The same 1984-1990 versus 1991-2005 pattern appears after adjustment for the scales presented in Table 6. In the earlier period, the convening authority sought a death penalty in 43% of the thirty civilian-style murder cases in levels 0-2 of the salient factors scale in Part 1 (13/30) and the accused received a death sentence in four cases (13%). After 1990, the convening authority brought a capital murder charge in 14% (5/36) of the civilian-style murder cases at culpability levels 0-2 and, again, not a single (0/36) accused in the low- or mid-level cases received a death sentence after 1990.

Under the regression-based scale in Part 2, the convening authority sought a capital conviction in 12% (2/16) of the cases at culpability levels 1 or 2 in the earlier period versus 4% in the later period (1/27). One defendant at these levels of culpability received a death sentence in the earlier period (6%, 1/16) and none received a death sentence in the later period (0/27). Finally in Part 3, the decision to seek a capital court martial for the civilian-style murder cases at culpability

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levels 1 and 2 falls from 42% (5/12) before 1991 to 15% (4/27) after 1990, and, even if the civilian-style murder cases at the third and fourth levels of the scale are included, not a single death sentence is imposed (0/44) after 1990. [FN99]

The military/civilian disparities documented in Subsection A cannot be satisfactorily explained by controlling for the culpability of the cases.

C. The Declining Influence of Civilian Aggravators, 1984-1990 Versus 1991-2005

Over time, the major civilian aggravators in the 1984 executive order also had a declining impact on charging and sentencing outcomes even among civilian-style murder cases. In this Section, we demonstrate how three aggravating factors included in Rule 1004 and commonly found in state statutes lost influence over those outcomes in civilian-style murders in 1984-1990 versus 1991-2005. We focus first on the impact of the individual aggravators without controlling for other factors bearing on culpability levels that might influence the outcomes. The second Section controls for the ***593** number of victims, as well as for whether the aggravator of interest was the only aggravator in the case.

1. A First Look at Three Important Aggravating Factors

Table 7, Column C compares death sentencing rates in 1984-1990 and 1991-2005 among all death eligible cases in the presence of each of three aggravating factors.

First, consider the impact of the multiple-victim aggravating factor in Part I, which is the or one of the most important aggravating factors in all state systems on which data are available. It is equally important in civilian-style murder cases in our database. Fifty percent (4/8) of the death sentences for civilian-style murder were imposed in multiple-victim cases, even though only 15% (12/79) of all civilian death eligible cases have more than one victim. This translates into a death sentencing rate of 33% (4/12) among all civilian-style multiple-victim murder cases in our database.

Column C of Table 7 documents how this important aggravator lost power in civilian-style cases after 1990. During the period 1984-1990, 37% (3/8) of civilian-style murder cases involving more than one victim received a death sentence. This rate fell 12 points to 25% (1/4) after 1990. An even more dramatic decline appears in the initial charging decisions by the convening authority shown in Part I, Column D of Table 7. Until 1990, the convening authority sought a death sentence in every single case with more than one victim (8/8). After 1990, this rate fell 75 points to 25% (1/4), a disparity significant at the .02 level. This pattern also persists in the rate at which cases advance to a capital sentencing hearing after a unanimous finding of premeditated murder by the members. Table 7, Column E, illustrates the 50-point decline, from 75% (6/8) to 25% (1/4).

Part II of Table 7 tells a similar story with respect to felony murder cases. [FN100] Between the two periods, Columns D and E indicate that the rates at which such cases advanced to capital courts martial and capital sentencing hearings fell 54- and 40-percentage points respectively. Column C reports after 1990 an overall 20-point decline in the death sentencing rate among all felony murder cases.

***594** Part III reports a similar decline in the impact of the intentional infliction of substantial harm aggravating factor. [FN101] Column C indicates that the death sentencing rate for all such civilian-style murders dropped 22 points, leaving a rate of only 3% (1/30) after 1990, a disparity significant at the .03 level. [FN102]

Table 7, Column D documents the importance of the three aggravating factors in the decision by the convening authority to seek a death sentence in a civilian-style case. Focusing again on Parts II and III, the steep decline in importance of the felony murder aggravator and the intentional infliction of substantial harm aggravator are evident. The felony

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murder aggravator capital charging rate (Column D) fell from 75% (9/12) in 1984-1990 to 21% (3/14) in 1991-2005, a 54-point decline that is significant at the .02 level. With respect to the intentional infliction of substantial harm, the capital charging rate fell from 58% (15/26) in 1984-1990 to 20% (6/30) in 1991-2005, a 38-point decline that is significant at the .005 level. In short, the convening authority's assessment of cases with the most common civilian aggravators shifted dramatically after 1990.

The pattern documented with respect to the diminished use of these aggravators after 1990 continues through the decision to advance a case to a capital sentencing hearing. A case cannot move from a capital court martial to a capital sentencing hearing unless there is a unanimous finding of guilt as to at least one death-eligible offense. [FN103] As documented in Table 7, Part II, Column E, the rate that cases advance to a capital sentencing hearing for the felony aggravator cases fell from 54% (6/11) to 14% (2/14), a 40-point disparity significant at the .08 level. For cases involving the intentional infliction of substantial harm aggravator in Part III, that rate of advance fell from 50% (10/20) during 1984-1990 to 10% (3/30) after 1990, a 40-point disparity significant at the .003 level.

***595** 2. A Closer Look at the Same Aggravating Factors in Single-Victim Cases

This Section focuses on the declining impact of the felony murder and intentional infliction of substantial harm aggravating factors after 1990 that we considered in Table 7 with the analysis limited to single-victim civilian-style murder cases. The first analysis presented in Table 8 documents the declining impact of those two aggravators on convening authority decisions that advance single-victim civilian-style murder cases to a capital court martial with the government seeking a death sentence. The second analysis presented in Table 9 replicates the Table 8 analysis with the focus on the impact of the two aggravators of interest on death sentencing outcomes among all death eligible single-victim cases.

In both of these tables, we report the declining impact of the two aggravators of interest among all cases in which they are present (Column C), as well as among the cases in which they are the only aggravating factor from Rule 1004 present in the case (Column D). In each table, Part I presents the results for the felony murder aggravator while Part II presents the results for the intentional infliction of substantial harm aggravator. The following two Sections examine the evidence presented in Tables 8 and 9.

a. Evidence of the Declining Impact of the Felony Murder Aggravating Factor After 1990

Table 8, Part I, Column C illustrates that, among all cases with the felony murder aggravator found or present, the death sentencing rate declined from 12% (1/8) in the earlier period to 0% (0/12) in the later period. The chief explanation for this decline is the drop in the rates at which these cases advanced to a capital court martial (shown in Table 9, Column C), from 67% (6/9) in the earlier period to 17% (2/12) in the later period. This 50-point disparity is significant at the .03 level. The decisions of members in the capital sentencing hearings, which are not shown in either table, also contributed to the decline from a death sentencing rate of 50% (4/8) in the earlier period to an 8% rate (1/12) in the later period. [FN104]

***596** Table 8, Part I, Column D tells a similar story for the cases in which the felony murder aggravator is the only aggravating factor found or factually present in the case. It documents a decline in the death sentencing rate from 25% (1/4) to 0% (0/3). Table 9, Part I, Column D documents a decline in the rates that civilian-style cases advanced to a capital court martial from 100% (4/4) in the earlier period to 0% (0/3) in the later period. Again the 100-point decline in the rates at which cases advance to a capital sentencing hearing is significant at the .03 level. The members' death sentencing rates in the capital sentencing hearings for these cases, which are not shown in either table, declined from 50% (2/4) in the earlier period to 0% (0/3) in the later period. [FN105]

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Since 1984, a death sentence has been imposed in only one civilian-style case involving only a felony murder aggravator. This was the case of Todd Dock (1984; 1989), which also happens to have been the first death eligible case prosecuted under the new law. [FN106] On its face, the facts of Dock clearly make it death eligible. However, between that prosecution and 1991, three more single-victim felony murder cases advanced to a capital sentencing hearing (including Dock on remand) and all were sentenced to life imprisonment. [FN107] Two additional single-victim felony aggravator cases advanced to a capital sentencing hearing in 1993 and each was sentenced to life imprisonment. [FN108] Since then, no single-victim felony aggravator case has advanced to a capital sentencing hearing, and Dock stands as the only such case to have received a death sentence since 1984.

b. Evidence of the Declining Impact of the Intentional Infliction of Substantial Harm Aggravating Factor After 1990

Part II of Tables 8 and 9 presents a similar analysis of the even larger pool of single-victim civilian-style murders--the intentional infliction of substantial harm cases. Table 8, Column C documents a decline in the death sentencing rate among all civilian-style death eligible cases with the substantial harm factor found or present in the case--from 20% (3/15) in the earlier period to 0% (0/29) in ***597** the later period. [FN109] Again, this is substantially explained by a decline in the capital court martial rate from 48% (10/21) (shown in Table 9, Column C) in the earlier period to 17% (5/29) in the later period, a 31-point decline that is significant at the .05 level. For the cases with only the substantial harm aggravator present, Table 9, Column D documents a decline in the capital court martial rate from 42% (5/12) in the earlier period to 8% (1/12) in the later period. [FN110]

The case summaries in Table 3 indicate that Turner (1985), Thomas (1988), and Gibbs (1990) are the only death sentences imposed in a substantial harm civilian-style case since 1984, and each of these decisions issued before 1991. Before 1992, four other substantial harm cases that advanced to a capital sentencing hearing, but not to a death sentence, resulted in a life sentence, as did one in 1998. [FN111] Since then, no substantial harm single-victim case has advanced to a capital sentencing hearing.

This analysis explains why 87% (7/8) of the death sentences in civilian-style murders since 1984 were imposed prior to 1991. It also explains why the contemporaneous felony and the substantial harm aggravating factors, which are present in the vast majority of the single-victim cases, have had so little impact on the death sentencing outcomes from 1984 through 2005.

Further evidence of the resistance of the military to the civilianization of capital punishment is that the two death sentences disapproved by the convening authority, Melvin Turner and Curtis Gibbs, [FN112] were distinctly civilian-style murders involving only the substantial harm aggravator. Moreover, in two other civilian-style death sentenced cases that were remanded by a military court, the death sentence was taken off the table in one case by the convening authority (Joseph Thomas) [FN113] and in another case by court members who returned a life sentence on retrial and resentencing (Todd Dock). [FN114] Moreover, of the seven offenders sentenced to ***598** death for civilian murder between 1984 and 1990, only two (each with two victims) remain on death row. [FN115]

We believe that the foregoing evidence clearly establishes that, for the first five years of the new system, there was an effort to conform the military's use of its death penalty to the civilian model embodied in the 1984 executive order, but since 1990, the effort largely has been abandoned and the use of the death penalty has been confined almost exclusively to cases with significant military implications.

V. Possible Explanations for the Disparate Treatment of Military and Civilian Murder

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There are a number of possible explanations for the post-1990 decline of support for the capital prosecution of civilian-style murder cases. The first is a lack of incentive for convening authorities to seek death in run-of-the-mill civilian-style murders, especially those with a single victim. Unlike elected civilian prosecutors for whom a tough on crime policy may be an important way to promote one's career, flag officers and commanding generals likely see little professional advantage from such prosecutions. However, when the authority and effectiveness of the military mission is threatened, convening authorities are likely to be under the same sort of pressure to maintain discipline that civilian prosecutors are under to deliver justice with a death sentence in highly aggravated civilian cases.

In terms of identification with the 1984 aggravating factors, one can imagine how commanders, particularly in the combat units from which the majority of the death eligible cases arise, can identify with the commissioned officer victim cases, while having much less concern with death eligible cases whose Rule 1004 aggravating factors do not implicate military discipline.

It has also been suggested that the first Gulf War, which began in August 1990, may have shifted the values of commanders. While U.S. military personnel engaged in a handful of short-term engagements previously, “the Gulf War was warfare on a grand scale” for the first time in decades. [FN116] Once troops engaged in active combat,***599** commanders may have focused on things that really matter to the military, which do not include civilian-style murders.

Opposition to capital punishment in Western Europe may also have had an impact on commanders. All countries in the European Union and any country seeking to join the European Union must abolish the death penalty. [FN117] Many European countries have been active in advocating for international abolition of the death penalty. Tension around this issue came to the fore in the late 1980s and early 1990s. [FN118]

For example, tension between the United States and West Germany, which have concurrent jurisdiction over crimes involving U.S. military personnel in Germany, was particularly pronounced in 1989. In November 1984, a court martial imposed a death sentence on Todd Dock for a civilian murder committed in Germany. [FN119] After Dock, German officials issued several statements suggesting that they would refuse to yield jurisdiction to the U.S. military in cases involving military personnel at risk of capital punishment. Moreover, in May 1989, German officials recalled their waiver of jurisdiction in a case concerning two soldiers accused of attempted rape and a heinous murder of a German woman, and tried the soldiers in German courts. [FN120] The German authorities had requested letter assurances from the U.S. military authorities stating that it was “unlikely that the soldiers would be sentenced to death by a court-martial.” [FN121] U.S. authorities refused to issue the letter and Germany recalled jurisdiction. [FN122]

While Germany did not assert jurisdiction uniformly over all cases in which the accused might face the death penalty, [FN123] tension ***600** lurked both in West Germany and in other Western European countries. [FN124] The German position drew additional support from a 1993 amendment to the treaty allowing U.S. armed forces to be stationed in Germany. Parties to this amendment, including the United States, agreed not to “carry out a death penalty in [Germany] nor carry through such a prosecution which may lead to the imposition of such a sentence in [Germany].” [FN125] A non-capital referral may have come to be seen as a small price to pay to avoid the diplomatic incidents that capital referrals in civilian military murders produced in the 1980s. [FN126]

The evidence is consistent with this hypothesis. Before 1990, commanders in Western Europe capitally referred 59% (10/17) of the civilian-style murder cases prosecuted in Western Europe, but from 1990 through 2005, none (0/7) of the civilian-style cases from Western Europe were capitally referred. This explanation cannot, however, account fully for the discrepancies documented above. Even after the European cases are removed from consideration, a 39-point civilian-style versus military disparity, significant at the .005 level, persists in the decision to seek a capital court martial,

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[FN127] and a 20-point disparity, significant at the .07 level, persists in death sentencing among all death eligible cases. [FN128]

A third possible explanation turns on a cost-benefit analysis that weighs the time and expense of a capital prosecution against the likelihood that members will return a death verdict and a death sentence actually imposed will ever be executed. A 1990 case illustrates***601** the concern about the inclination of court martial members to impose a death sentence in the typical civilian-style murder. In the case of Oscar Anderson, the accused, in a fit of sexual jealousy (he believed his wife was seeing other men), brutally stabbed his wife multiple times in the presence of his nine-year-old daughter and left her to bleed to death.

The Article 32 investigating officer recommended a non-capital charge because, in his words, “There is no realistic expectation of the death sentence being imposed in this case.” [FN129] However, the convening authority, an Air Force lieutenant general, accepted the Staff Judge Advocate's contradictory recommendation for a capital referral. [FN130] In the capital court martial, the members failed to find premeditation unanimously, which took death off the table. Indeed, the data document that members more frequently took death off the table in this manner after 1990 than between 1984 and 1990. In the earlier period, members were not unanimous on premeditation in 23% (5/22) of the civilian cases in which the convening authority brought the case to a capital court martial. This rate increased to 37% after 1990 (3/8).

In contrast to civilian jurors for whom capital defendants are normally complete strangers, members in a capital court martial are also members of the accused's military organization. Moreover, enlisted members may be more able to understand the circumstances of the accused's situation that resulted in the murder than their counterparts on a civilian jury. This may also reflect shifting values subsequent to the engagement of ground forces in the Gulf War.

On the likelihood of an execution, one can assume that convening authorities are aware that no one has been executed in the military since 1961. Some convening authorities may also be aware (a) that no single-victim civilian accused remain on death row, and (b) that only two of the twelve civilian murder accused prosecuted for multiple-victim murders since 1984 remain on death row.

An alternative explanation that might be proposed is the role of the availability of a sentence of life without the possibility of parole since 1997. This, however, seems an unlikely explanation. First, the sentencing option became available seven years after the observed shift in policy. Second, only four of the seventeen civilian-style murder cases prosecuted after November 18, 1997 received a life ***602** without parole sentence. [FN131] The convening authority did not seek the death penalty in any of these cases. As a result, none of the sentences were imposed in a capital sentencing hearing.

Overall, the military approach to civilian murder approximates the approach of many civilian prosecutors in large urban communities. With resources scarce and the prospects of a death sentence and execution uncertain, capital prosecutions are limited to highly aggravated, highly publicized cases that clearly implicate the interests of justice in civilian eyes. For the military convening authorities, the calculus appears quite comparable, with the overriding concern being the maintenance of discipline and the protection of the authority and effectiveness of the military command. [FN132]

Conclusions

The evidence presented in this Article documents another chapter in the resistance of the U.S. armed forces to the civilianization of military criminal justice. In spite of an 1984 executive order that defined death eligible murder in the armed forces principally in terms of civilian murder modeled after state law systems, the military, in its administration of the death penalty since 1990, has applied a dual system in which there is a large disparity in the weight it places on milit-

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ary as contrasted to civilian-style murder.

In this process, the military death penalty has come to be used almost exclusively as a disciplinary vehicle to protect the authority and effectiveness of the military command. This disparity in the treatment of civilian and military murder in terms of the aggravating factors in the 1984 executive order substantially implicates equal justice in the administration of the military death penalty. Some have argued more broadly that it may be time to refocus the military justice system on military crimes. [FN133] This study supports that argument. On the basis of this record, it may be appropriate for the President to consider amending Rule 1004 to bring it in line with the central purpose of the military criminal justice system, that of advancing efficient command and control of the armed forces.

***603** Table 1

List of Aggravating Factors from Rule1004(c)

Premeditated Murder AggravatingFactors [Article 118(1)]:

1.	"The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder." (7)(A)FN [FN134]
2.	"The murder was committed: while the accused was engaged in the commission or attempted commission of any robbery, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in . . . any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense." (7)(B)
3.	"The murder was committed for the purpose of receiving money or a thing of value." (7)(C)
4.	"The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder." (7)(D)
5.	"The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from

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custody or confinement." (7)(E)

6. "The victim was the President of the United States [etc.]." (7)(F)

7. "The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter." (7)(G)

8. "The murder was committed with intent to obstruct justice." (7)(H)

9. "The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim." (7)(I)

10. "The accused has been found guilty in the same case of another violation of Article 118." (7)(J)

11. "The victim of the murder was under 15 years of age." (7)(K)

12. "[T]he offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered . . . ." (4)

Felony Murder Aggravating Factors [Article 118(4)]:

13. "[T]he accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life." (8)

14. "[T]he offense was committed in such a way or under

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circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered . . . .” (4)

***604** Figure 1

Capital Charging and Sentencing Outcomes Among Death-Eligible Cases: United States Military (1984-2005)

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***605** Table 2

An Inventory of Military and Civilian Death Eligible Murders Prosecuted in the U.S. Armed Forces (1984-2005)

Part One: Military Murders		
I. Commissioned Officer Victim		
A. Racially Motivated Revenge		
-Curtis, Ronnie	1987[FN [FN135]]	killed his officer in charge and the officer's wife because of the officer's racist comments
-Garraway, Mitchell	1986	killed his officer in charge for denying promotion and for perceived racial injustice
-Quintanilla, Jessie	1996	killed his executive officer and nearly killed commanding officer because of perceived racial mistreatment
B. Frustration with Military Unit or Military in General		
-Akbar, Hassan	2005	attacked unit after hearing perceived threat against Iraqi women by his unit, killing a captain and a major, and wounding 14 others
-Kreutzer, William	1996	fired on drill formation, killing a

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		major and wounding many others
C. Financially Motivated		
#-Colon, Ruben	1988	killed disbursing officer of his ship to facilitate robbery of ship's safe
D. Other		
-Tarver, Leon	1986	killed officer he met on street shortly after releasing self from psychiatric ward
II. Threat to the Authority and Effectiveness of the Military Command		
A. Racially Motivated Murder		
-Adams, Joseph	1993	killed a white Marine Lance Corporal for perceived injustices done to black marines by white Marines thereby creating a risk of racial conflict among the troops
-Brown, Frederick	1993	
-Curry, Michae	1993	
-McDonald, Terrance	1993	
-Parker, Kenneth	1993	
-Walker, Wade	1993	
(these six individuals were co-perpetrators in the same crime)		
B. Non-Commissioned Officer Victim		
-Ameen, Arif	1987	killed an NCO during an academic counseling meeting

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-Bowley, Jacob	2000	killed a platoon sergeant (NCO) while rescuing his friend (who was detained for drunkenness)
-Burkes, Sr., Donald R.	1989	killed an NCO believing that the victim was a homosexual and child molester and wanting to punish him
-Groveman, Garry J.	1987	killed an NCO by beating and stabbing
-Levell, Victor	1992	killed an NCO in an altercation
-Simoy, Jose	1992	killed a sergent (NCO) military police officer during an
	2000	armed robbery of cash deliveries to a bank on an Air Force base

Part Two: Civilian-Style Murders

I. Family and Intimate Victims

A. Child Killed in Retaliation for Conduct of Spouse

-Brown, Jerry	2002	killed child after learning of his wife's infidelity
-Curry, Kirklan	1988	killed child to get back at his wife for leaving him
-Morgan, Lillie	2002	killed two children after learning of her husband's infidelity
-Thomas, Frederick	1998	killed son after seizing the child and fleeing a scene in which he also attempted to kill his wife and son
-Turner, Melvin	1985	killed child to retaliate for his wife's infidelity

B. Spouses, Girlfriends, or Paramours Killed

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1. Due to Sexual Jealousy

-Anderson, Oscar	1990	killed wife after learning of her infidelity
-Forrest, Jason	1998	killed wife after learning of her infidelity
-Gonzalez, Juan	1988	killed wife after learning she planned to leave him for another man
-Hamilton, Jr. Will. M.	1994	killed wife after suspecting infidelity
-Roukis, Peter	1998	killed wife after learning of her infidelity
-Strom Mark	1987	killed wife after learning of her infidelity
-Watford, Charlie	1988	killed wife after learning of her infidelity

2. Due to Sexual Frustration

-Miller, Richard	1987	killed girlfriend after he could not get an erection, then raped her

3. To Accommodate an Ongoing Affair/Relationship

-Davis, Christian	1993	killed wife after conspiring with his girlfriend
-Fricke, Michael	1994	killed wife, fearing that she would learn of his affair, divorce him, and take their son

4. In Responseto Divorce, Separation, or Custody Negotiations

-Coffey, William	1991	killed wife during dispute over separation papers

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-Lipscomb, William	1990	killed wife while finalizing divorce (also raped her)
-Murphy, James	1987	killed wife during custody argument, then killed three children, including his son
-Paalan, Michael	1996	killed girlfriend after she intended to leave him with their son
-Patterson, Eddie	1995	killed girlfriend after an argument over the status of their relationship
-Ramirez-Silvario, Laz	1995	killed wife to prevent her from leaving him
-Smith, Donald	1985	killed wife after an argument over the possibility that his wife would leave him with their children
-Snodgrass, Joseph	1991	procured killing of his wife after he was angered by a divorce/custody settlement
-Ward, Timothy	1999	killed former wife after losing custody of their child to her

5. Due to a Dispute Escalating to Violence

-Bartlett, David	2002	killed wife after argument over internet pornography
-Fuhrman, James	2000	killed wife during an argument, then killed his adopted son
-Justice, Allen	1989	killed wife after she refused to loan him money
-Metz, Stephen	1989	killed wife during an argument
-Whitehead, Edward	1988	killed servicewoman paramour

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		during an allegedly consensual sexual liaison when the two argued
-Willis, Jeromy	1993	killed wife after she agreed to testify against him for attempted murder
6. To Collect Insurance on Life of the Deceased		
-Garner, Charles	1992	killed wife
-Kaspers, Clayton	1993	killed wife
-Thomas, Joseph	1988	killed wife
7. Other		
-Ayala, Jesus	1984	killed wife, reason unknown
-Lobson, Kimberly	2000	killed husband, allegedly because he was abusive
II. Murder of Acquaintances or Strangers		
A. In an Honor Killing to Protect Status/Reputation		
-Fell, Thomas	1989	killed cross-dressing male after male had performed oral sex on him and he discovered the victim's sex
-Fisher, Justin	2000	helped Glover kill a serviceman who had bested Glover in an earlier fight
-Glover, Calvin	1999	killed a serviceman after losing a fight to him and enduring ridicule by another servicemen
-Seay, Bobby	1999	killed victim (V) who was in a shoving match with Seay's girlfriend at a party

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B. Due to Relatively Minor Altercation

-Best, Jermine J.	1997	killed V in altercation following a bar fight
-Gibbs, Curtis	1990	killed V whom he had met at bar when V refused to get out of car
-Martinez, Joel	1991	killed V because V was stealing money from their drug operation
-Phillips, John	1986	killed V after V hit Phillips after he had kicked the V's dog
-Poertner, Keith	1987	killed V after V had made a pass at his wife
-Shelton, Darrell	1997	killed V after V fought with Shelton's roommate
-Taylor, Kenneth	1993	killed V, fearing V would sabotage his attempt to get business funding
-Witt, Andrew	2005	killed Vs after Vs made harassing phone calls to him

C. To Silence a Potential Witness

-Holt, Kevin	1993	killed serviceman after the V spread word of a crime Holt and other had committed
-Jiminez, Mark	1994	killed a serviceman to prevent him from testifying to Jiminez's prior crime
-Ruiz, Kenneth	1995	killed a serviceman to prevent him from testifying to Ruiz's prior crime
-Stelling, Michael	1994	killed a serviceman to prevent

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		him from testifying to Stelling's prior crime
D. In a Hate Crime		
-Helvey, Terry	1993	killed a homosexual serviceman in a public restroom
-Vins, Charles	1992	helped another kill a homosexual serviceman in a public restroom
E. Due to Jealousy		
-Meeks, Jeffery	1989	killed a friend and his girlfriend after the two began to exclude Meeks
-Parker, Kenneth	1993	killed the spouse of Walker's paramour
-Schap, Stephen	1994	killed V after learning of V's affair with his wife
-Walker, Wade	1993	procured the killing of his paramour's spouse
F. Motive Unknown		
-Coder, Thomas	1987	killed a serviceman and attempted to feign his death as a suicide
III. Financially Motivated Murder		
-Antle, Darryl	1996	killed serviceman before robbing him
-Bear, William	1997	killed serviceman before robbing him
-Clark, Alan	1986	killed serviceman and serviceman's wife to rob them
-Chrisco, Jim D.	1987	killed his sister for the purpose of

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		receiving money
-Coleman, Hector	1999	killed serviceman to obtain money
-Dock, Todd	1984	
	1989	killed taxi driver during robbery
-Hirsch Jeffery	1987	killed V to rob him
-Humiston, Andrew	2003	killed drunken serviceman while robbing him
-Jordan,Spencer	1985	killed serviceman to rob him
-Loving, Dwight	1989	killed taxi drivers after robbing them
-Pereira, Michael	1996	killed V to rob him
-Reliford, Rocky	1986	killed serviceman and service-man's wife to rob them
-Schroeder, Johathan	2003	killed drunken serviceman while robbing him
-Soto, Alejandro	1997	killed V before robbing him
-Stinson, Kent	1989	killed V during robbery attempt
IV. Sexually Motivated Murder		
-Franklin, Emery	1989	killed young girl after she would not consent to his sexual advances
-Gates, Dwan	1991	killed V after raping her
-Grandy, James	2000	killed V after raping her
-Graves, Ervin	1994	killed V during rape attempt

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-Gray, Ronald	1988	killed two victims after raping them
-Mabie, Timothy	1986	killed V after she would not consent to his sexual advances and then raped her
-Mobley, Gerald	1987	killed V during a rape
-Ronghi, Frank	2000	killed young girl during a rape
-Schlamer, Shannon	1995	killed servicewoman after a rape
-Shiloh, Columbia	1999	killed neighbor after raping her
-Smith, Patrick	1995	killed young girl after raping her

***609** Table 3

Death Sentenced Accused Listed by Year of Sentence and Type of Offense, United States Armed Forces (1984-2005)

A	B	C	D
	NameThumbnail Sketch	Year of Sentence	Crime Type
1	Dock, Todd A. A robbery murder of a cab driver killed with multiple stab wounds.	1984	C[FN [FN136]]
2	Turner, MelvinA brutal murder of the accused's 11-month-old daughter with a razor blade.	1985	C
3	Murphy, James T. Three victims. A brutal murder of the accused's wife and two children whom he bludgeoned and drowned in a bathtub.	1987	C

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4	Curtis, Ronnie A. Two victims. Burglary, robbery and murder of the accused's commanding officer and the officer's wife with multiple stab wonds in retaliation for racial slights by the officer.	1987	M
5	Gray, Ronald A. Two victims. The first was raped and stabbed seven times. The second victim was raped and shot four times. There was also a non-decedent rape victim.	1988	C
6	Thomas, Joseph L. Brutal murder of accused's wife with a tire iron to collect insurance proceeds.	1988	C
7	Loving, Dwight J. Two victims. The first was a cab driver robbed and shot twice in the head. The second victim was a cab driver robbed and shot once in the head. The accused robbed and attempted to kill a third cab driver who escaped unharmed.	1989	C
8	Gibbs, Curtis A. A brutal killing of a female drinking companion who was nearly decapitated with a sword.	1990	C
9	Simoy, Jose F. The accused and four co-perpetrators robbed individuals delivering proceeds to a bank on an airbase and in the process killed a police officer	1992	M

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	with pipe blows to the head and nearly killed another person. The accused was not the triggerperson.		
10	Parker, Kenneth G. Two victims. Motivated by a believed racial attack on a black marine by white marines, the accused and five co-perpetrators kidnapped, robbed and killed with a shot to the heart the first white person they encountered, a fellow marine. The accused was the shooter. The second victim was the male spouse of the paramour of a Marine friend. The accused killed the second victim with a shotgun blast to the chest.	1993	M
11	Walker, Wade L. Two victims. The accused, was a co-perpetrator of Kenneth Parker in both of his murders. Walker prevailed upon Parker to kill the spouse of Walker's paramour and was part of the group of marines who participated in the killing of the first white person they could seize and kill. The accused was not a trigger person in either of these murders.	1996	M
12	Kreutzer, William J. A violent ambush attack with rifles on the accused's unit while it was in an outdoor drill formation on an Army post killing an officer, a major, and wounding serveral	1996	M

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	others, including at least one officer		
13	Quintanilla, Jessie A. In retaliation for perceived discriminatory treatment, the accused killed his executive officer with a shot in the back. The accused also attempted to kill his commanding officer with a nearly fatal shot to his chest.	1996	M
14	Witt, AndrewTwo victims. Premeditated stabbing murder of an airman and the airman's wife in revenge for phone call harassment and a charge of sexual misconduct by the accused. The accused also stabbed four times a non-decedent victim airman who sought to stop the accused's attacks on the decedent victims.	2005	C
15	Akbar, Hassan K. Two victims. At night in wartime, the accused feigned an attack on the unit by rolling live had grenades into three tents with sleeping officers and opened fire as the occupants fled their tents. Accused killed on officer with a shot in the back. A second officer died of 87 shrapnel wounds. Accused injured 14 other non-decedent military victims.	2005	M

***611** Table 4

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Disparities in Charging and Sentencing Outcomes Between Military and Civilian-Style Death Eligible Murder (1984-2005): Overall (Part I) and Controlling for Sentencing Year (Parts II and III)

	A Sentencing Year	B Death Sentencing Rate Among All Death Eligible Cases	C Rate that Advance to a Capital Court Martial	D Rate that Cases Advanced to a Capital Sentencing Hearing	E Death Sentencing Rate in 30 Capital Sentencing Hearings
	Part I. 1984-2005				
1.	Total Cases	16% (15/96)	42% (44/104)	31% (30/96)	50% (15/30)
2.	Military	41% (7/17)	73% (14/19)	59% (10/17)	70% (7/10)
3.	Civilian-Style	10% (8/79)	35% (30/85)	25% (20/79)	40% (8/20)
4.		Diff.[FN137] 31 pts.** Ratio[FN138] 4.1	Diff. 38 pts. *** Ratio 2.1	Diff. 34 pts.** Ratio 2.4	Diff. 30 pts. Ratio 1.7
	Part II. 1984-1990				
5.	Total Cases	22% (8/37)	62% (28/45)	49% (18/37)	44% (8/18)
6.	Military	25% (1/4)	100% (6/6)	75% (3/4)	33% (1/3)
7.	Civilian-Style	21% (7/33)	56% (22/39)	45% (15/33)	47% (7/15)
8.		Diff. 4 pts. Ratio 1.2	Diff. 44 pts. Ratio 1.8	Diff. 30 pts. Ratio 1.7	Diff. -14 pts. Ratio .70
		Part III. 1991-2005			
9.	Total Cases	12% (7/59)	27% (16/59)	20% (12/59)	58% (7/12)

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10.	Military	46% (6/13)	61% (8/13)	54% (7/13)	86% (6/7)
11.	Civilian-Style	2% (1/46)	17% (8/46)	11% (5/46)	20% (1/5)
12.		Diff. 44 pts. *** Ratio 23.0	Diff. 44 pts.*** Ratio 3.6	Diff. 43 pts.** Ratio 4.9	Diff. 66 pts.* Ratio 4.3

Level of significance of disparity: *=. 10; **=.05; ***=.01.

***612** Table 5

Comparison of the Number of Rule 1004 Aggravating Factors in Civilian-Style and Military Death Eligible Murders (1984-1990 Versus 1991-2005)

	A	B	C		D	
			1984-1990		1991-2005	
			percentage	n	percentage	n
1	Civilian-Style	1 aggravator	59%	23	48%	22
2		2 aggravators	33%	13	39%	18
3		3 or more aggs	8%	3	13%	6
4		Avg. No. of Aggravators	1.5 aggs	39	1.7 aggs	46
5	Military	1 aggravator	17%	1	38%	5
6		2 aggravators	83%	5	46%	6
7		3 or more aggs	0%	0	15%	2

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8		Avg. No. of Aggravators	1.8 aggs	6	1.8 aggs	13

Table 6

Comparison of Scale-Based Culpability Levels in Civilian-Style and Military Death Eligible Murders (1984-1990 Versus 1991-2005)

	A	B	C		D	
			1984-1990		1991-2005	
			percentage	n	percentage	n
Part 1--Salient Factors Analysis (FACTORS_SCL2X)						
1	Civilian-Style	0 (Low)	31%	12	33%	15
2		1	26%	10	35%	16
3		2	20%	8	11%	5
4		3	15%	6	20%	9
5		4	8%	3	2%	1
6		5 (High)	0	0	0%	0
7		Av. Culpab-ility	1.44	39	1.24	46
8	Military	0 (Low)	0	0	0	0
9		1	33%	2	0	0
10		2	0	0	23%	3
11		3	17%	1	31%	4

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12		4	33%	2	23%	2
13		5 (High)	17%	1	31%	4
14		Av. Culpab-ility	2.67	6	3.54	13
Part 2--Regression Based Scale No. 1 (CAS_SCL_8)						
15	Civilian-Style	1 (Low)	18%	7	33%	15
16		2	23%	9	26%	12
17		3	13%	5	24%	11
18		4	23%	9	11%	5
19		5 (High)	23%	9	6%	3
20		Av. Culpab-ility	3.10	39	2.33	46
21	Military	1 (Low)	0	0	8%	1
22		2	0	0	15%	2
23		3	17%	1	15%	2
24		4	50%	3	31%	4
25		5 (High)	33%	2	31%	4
26		Av. Culpab-ility	4.17	6	3.61	13
Part 3--Regression Based Scale No. 2 (DTH_W6_SCL)						
27	Civilian-Style	1 (Low)	27%	9	33%	15

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28		2	9%	3	26%	12
29		3	27%	9	17%	8
30		4	21%	7	20%	9
31		5 (High)	15%	5	4%	2
32		Av. Culpability	2.88	33	2.37	46
33	Military	1 (Low)	25%	1	0	0
34		2	0	0	15%	2
35		3	0	0	23%	3
36		4	25%	1	23%	3
37		5 (High)	50%	2	38%	5
38		Av. Culpability	3.75	4	3.84	13

***614** Table 7

Comparative Capital Charging and Sentencing Rates for Each of Three Important Civilian Aggravators in Civilian Murder Cases (1984-2005)

A	B	C		D		E	
Part	Aggravator	Death Sentencing Rates Among all Civilian Cases		Rates at which Cases Advance to Capital Court Martial		Rates at which Cases Advance to Captial Sentencing Hearing	
		%	N	%	n	%	n
I.	Premedita						

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	ted Murder with More than One Victim (7J)						
a.	Cases from 1984-1990	37%	3/8	100%	8/8	75%	6/8
b.	Cases from 1991-2005	25%	1/4	25%	1/4	25%	1/4
c.	Disparity (Row a-Row b)	12 points		75 points**		50 points	
II.	Premeditated Murder with Contemporaneous Felony (7B)						
a.	Cases from 1984-1990	27%	3/11	75%	9/12	54%	6/11
b.	Cases from 1991-2005	7%	1/14	21%	3/14	14%	2/14
c.	Disparity (Row a-Row b)	20 points		54 points**		40 points*	
III.	Intentional Infliction of Substantial Harm (7I)						
a.	Cases from 1984-1990	25%	5/20	58%	15/26	50%	10/20

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b.	Cases from 1991-2005	3%	1/30	20%	6/30	10%	3/30
c.	Disparity (Row 9-Row 10)	22 points**		38 points***		40 points***	

Level of significance of disparity: *= . 10; **= .05; ***= .01.

***615** Table 8

Death Sentencing Rates for Civilian-Style Single-Victim Death Eligible Cases with the Contemporaneous Felony (7B) and Substantial Pain and Suffering (7I) Aggravating Factors Among All Civilian Single-Victim Death Eligible Cases (1984-2005)

A	B	C		D	
Part	Aggravator	All Cases in Which the Aggravating Factor in Col. B Appears		Cases in Which Only the Aggravating Factor in Col. B Appears	
		%	n	%	n
I.	Premeditated Murder with Contemporaneous Felony (7B)				
a.	Cases from 1984-1990	12%	1/8	100%	8/8
b.	Cases from 1991-2005	0%	0/12	25%	1/4
c.	Disparity (Row a-Row b)	12 points		75 points	
II.	Intentional Infliction of Sub-				

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	stantial Harm (7I)				
a.	Cases from 1984-1990	20%	3/15	22%	2/9
b.	Cases from 1991-2005	0%	0/29	0%	0/12
c.	Disparity (Row 9-Row 10)	20 points**		22 points	
	Level of significance of disparity: *= . 10; **= .05; ***= .01.				

Table 9

Rates that Civilian-Style Single-Victim Death Eligible Cases with the Contemporaneous Felony (7B) and Substantial Pain and Suffering (7I) Aggravating Factors Advance to a Capital Court Martial (1984-2005)

A	B	C		D	
Part	Aggravator	All Cases in Which the Aggravating Factor in Col. B Appears		Cases in Which Only the Aggravating Factor in Col. B Appears	
		%	n	%	n
I.	Premeditated Murder with Contemporaneous Felony (7B)				
a.	Cases from 1984-1990	67%	6/9	100%	4/4
b.	Cases from 1991-2005	17%	2/12	0%	0/3
c.	Disparity	50 points		100 points	

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	(Row a-Row b)				
II.	Intentional Infliction of Substantial Harm (7I)				
a.	Cases from 1984-1990	48%	10/21	42%	5/12
b.	Cases from 1991-2005	17%	5/29	8%	1/12
c.	Disparity (Row 9-Row 10)	31 points**		34 points	

Level of significance of disparity: *= . 10; **= .05; ***= .01.

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We acknowledge with gratitude the support of Judy Bellin, Rachel King, Diann Rust-Tierney, and Harwell Wells in organizing our District of Columbia data collection efforts and the contribution of law student interns Keri Foster, Brad Fowler, Joseph Gasper, Akilah Gibson, Abigail Goliber, Liza Grote, Carleen Regnier, Kenneth Moore, and Danielle Webb who gathered data on the military cases in the District of Columbia, the Army, Air Force, Marine Corps, and Navy judge advocates who assisted the interns in their data collection, University of Iowa law students Sandra Goveia, Meghan Gruebner, Blake Hogan, Roy Lee, and Katie True who coded the cases, Erin Dart, Kellie Garrett, and Jonathan Hendricks who made valuable research contributions, and Lisa Lowenberg who expertly prepared the tables and figures. We are grateful for the support of the American Civil Liberties Union (ACLU), which supported data collection in the District of Columbia, the JEHT Foundation, which supported data management and computing, the Cornell Law School Death Penalty Project, and the University of Iowa Law School Foundation, as well as the pro bono hours contributed by WilmerHale, Washington D.C. We appreciate the expert assistance of the librarians at Michigan State University College of Law. We also acknowledge the helpful suggestions on earlier versions of this Article by Jon Gould, participants at a May 2004 judicial conference of the Court of Appeals of the Armed Forces in Washington D.C., the First Annual Empirical Legal Studies Conference at the University of Texas Law School, November 3, 2006, the Law and Society Association 2009 Annual Meeting, May 28-31, 2009, and faculty seminars at the University of Illinois College of Law, April 2006, and the University of Iowa College of Law, August 14, 2006.

[FN1]. Exec. Order No. 12,473, 49 Fed. Reg. 17152 (Apr. 13, 1984).

[FN2]. Data is presented in tables and figures following the conclusion of this Article.

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[FN3]. None of these offenders has been executed. The last military execution occurred in 1961. See Death Penalty Information Center, The U.S. Military Death Penalty, http://www.deathpenaltyinfo.org/us-military-death-penalty#facts (on file with the University of Michigan Journal of Law Reform).

[FN4]. See Table 3, Lines 9-15 (showing only Witt, Line 14, to be civilian-style).

[FN5]. Here, "civilianize" refers to the procedural protections imported from the civilian courts in an effort to reform the military system.

[FN6]. See generally John M. Lindley, "A Soldier is Also a Citizen": The Controversy over Military Justice, 1917-1920 (1990).

[FN7]. For example, William Winthrop, "the greatest departmental authority upon Military Law," stated in 1886 that "Courts-martial are not courts, but are, in fact, simply instrumentalities of the executive power provided by Congress for the President as Commander-in-Chief to aid him in properly commanding the army and enforcing discipline therein." S.T. Ansell, 5 Cornell L.Q. 1, 5-6 (1919) (citing 1 William Winthrop, Military Law 52-53 (1886)); see also Lindley, supra note 6, at 27 (summarizing the opposition within the Office of the Judge Advocate General of the Army to civilianizing reforms), 67 (reporting a proposed revision to the Articles of War in 1916 that would expand the jurisdiction of courts martial to more common law offenses but simultaneously would increase the isolation of military law from civilian law).

[FN8]. Kevin J. Barry, A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice, 2002 L. Rev. Mich. St. U. Detroit C.L. 57, 67.

[FN9]. Robert D. Duke & Howard S. Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 Vand. L. Rev. 435, 440 (1960).

[FN10]. See Willenbring v. Neurauter, 48 M.J. 152, 157 (C.A.A.F. 1998) ("[I]t is well established that courts-martial--which are authorized by statutes enacted pursuant to Article I of the Constitution--need not provide a military accused with the same procedural rights available to a civilian defendant in a criminal trial conducted under Article III.").

[FN11]. See Jonathan Turley, Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy, 70 Geo. Wash. L. Rev. 649, 665 (2002) ("Despite periodic reforms, the military justice system, like the military system as a whole, has long been viewed as an extension of the Executive Branch to serve its military needs.").

[FN12]. Frederick Bernays Wiener, Courts-Martial and the Bill of Rights: The Original Practice II, 72 Harv. L. Rev. 266, 294-96 (1958).

[FN13]. Ansell, supra note 7, at 7 (quoting from hearings before Congress in 1912 without providing citation).

[FN14]. See Lindley, supra note 6, at 66-68.

[FN15]. See Barry, supra note 8, at 67-69.

[FN16]. George S. Prugh, Jr., Observations on the Uniform Code of Military Justice: 1954 and 2000, 165 Mil. L. Rev. 21, 25 (2000).

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[FN17]. Id. at 29-30 (quoting a 1953 report of the Ad Hoc Committee on the Future of Military Service as a Career).

[FN18]. Barry, supra note 8, at 72 n.48. Wiener later argued that the Sixth Amendment right to counsel does not apply to the military justice system. Frederick Bernays Wiener, Courts-Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. Rev. 1, 49 (1958). At the same time, in a second 1958 paper, Wiener wrote with favor about the rights accorded members of the military by Congress and seemed to approve of the reforms. See Wiener, supra note 12, at 303-04.

[FN19]. Prugh, supra note 16, at 30.

[FN20]. Id. at 40 (observing in 2000 that "[w]hile the UCMJ deliberately tended to 'civilianize' the court-martial system, that presented no difficulty for the senior judge advocates and for the junior officers it presented a welcome professional challenge").

[FN21]. See Walter T. Cox III et al., Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice §III.A (2001) (on file with the University of Michigan Journal of Law Reform), available at http://www.wcl.american.edu/nimj/documents/cox_comm_report2.pdf?rd=1.

[FN22]. Id. at 6.

[FN23]. The commission reported that a recent study by the Committee on Military Justice at the Department of Defense had recommended against making any changes to the convening officer's responsibilities. See id. at 8; see also Barry, supra note 8, at 101.

[FN24]. See, e.g., Christopher W. Behan, Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members, 176 Mil. L. Rev. 190, 257-62 (2003) (noting that the proposed reform inadequately address the needs of military command); Theodore Essex & Leslea Tate Pickle, A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): "The Cox Commission", 52 A.F. L. Rev. 233, 248-50 (2002) (same).

[FN25]. Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§801-950 (2006).

[FN26]. UCMJ §§894 (mutiny or sedition), 906a (espionage).

[FN27]. UCMJ §§885 (desertion), 890 (assaulting or willfully disobeying a superior commissioned officer), 899 (misbehavior before the enemy), 900 (subordinate compelling surrender), 901 (improper use of countersign), 904 (aiding the enemy), 906 (spies), 913 (misbehavior of a sentinel).

[FN28]. UCMJ §§902 (forcing a safeguard), 910 (improper hazarding of vessel).

[FN29]. The Court of Military Appeals treated the Korean and Vietnam conflicts quite differently. Compare United States v. Bancroft, 3 C.M.A. 3, 11 C.M.R. 3 (1953), with United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970).

[FN30]. Article 118 of the UCMJ as adopted in 1950 reads as follows:

> Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he --
> (1) has a premeditated design to kill; or
> (2) intends to kill or inflict great bodily harm; or
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

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(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under paragraph (1) or (4) of this article, he shall suffer death or imprisonment for life as a court-martial may direct.

UCMJ, Pub. L. No. 81-506, ch. 169, art. 118, 64 Stat. 107, 140 (1950).

[FN31]. UCMJ, art. 120. The current UCMJ also defines rape as an offense punishable by death. UCMJ, 10 U.S.C. §920 (2006). The only service member executed for rape since 1950 was Pvt. John Bennett, who was convicted of rape and attempted murder and executed in 1961. See 2 Francis A. Gilligan & Fredric I. Lederer, Court-Martial Procedure §23-32.10 (3d ed. 2006). Since that time, the United States Supreme Court held in Coker v. Georgia, 433 U.S. 584 (1977) , that the death penalty is unconstitutional as excessive punishment for the rape of an adult woman. Military courts have held that Coker applies to military law, at least when applied to rape of an adult woman. United States v. McReynolds, 9 M.J. 881, 882 (A.F.C.M.R. 1980) (holding that rape of an adult woman is not a capital offense). Moreover, use of the death penalty as punishment for the rape of a child under 12 years of age, authorized by the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §552, 119 Stat. 3136, 3257 (amending 10 U.S.C. §920(b)(2) (2006)), was recently invalidated by the United States Supreme Court. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008). However, in a denial of rehearing which expressly discussed Article 120 of the UCMJ, the Court leaves the door open to capital prosecutions under that article. See Kennedy v. Louisiana, 129 S. Ct. 1, 2 (2008) (opinion of Kennedy, J., joined by Stevens, Souter, Ginsburg, Breyer, JJ., respecting denial of reconsideration) ("[W]e need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our decision)."). No current member of military death row has been convicted of rape alone. Compare Table 3 (Lines 5, 7, 10, 14, 15), with Criminal Justice Project, NAACP Legal Defense & Education Fund, Inc., Death Row U.S.A. 67 (Winter 2009) (on file with the University of Michigan Journal of Law Reform), available at http:// www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2009.pdf.

[FN32]. Courts martial were first granted jurisdiction to try murder and rape cases during the Civil War when these acts were "committed by persons who are in the military service of the United States" during "time[s] of war, insurrection, or rebellion." Act of Mar. 3, 1863, ch. 75, §30, 12 Stat. 731, 736. In 1916, an amendment to the Articles of War added that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States ... and the District of Columbia in time of peace." Act of Aug. 29, 1916, ch. 418, art. 92, 39 Stat. 619, 664. These provisions which denied courts martial jurisdiction to try murder and rape offenses when committed within the geographical limits of the United States during times of peace survived many revisions to the Articles of War, including the Elston Act in 1948. Elston Act (Selective Service Act), ch. 625, §235, 62 Stat. 604, 640 (1948). It was not until the adoption of the UCMJ in 1950 that courts martial were granted the jurisdiction to try crimes of murder and rape committed in the United States during peacetime. UCMJ, Pub. L. No. 81-506, ch. 169, art. 118, 120, 64 Stat. 107, 140 (1950) (current version at 10 U.S.C. §918, 920 (2006)). Two U.S. Courts of Appeal have affirmed that courts martial have jurisdiction to prosecute a capital offense in peacetime under the UCMJ. Owens v. Markley, 289 F.2d 751, 752 (7th Cir. 1961); Burns v. Taylor, 274 F.2d 141, 143 (10th Cir. 1959).

[FN33]. There appears to be one capital crime--espionage--that was added since 1950. It was created by the Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, 99 Stat. 583, 634 (codified at 10 U.S.C. §906a).

[FN34]. Although the Supreme Court during the late 1960s in O'Callahan v. Parker, 395 U.S. 258, 272-73 (1969), found that courts martial only had jurisdiction to try servicemen when the crime had a "service connection," the Court abandoned the "service connection" requirement in 1987, in Solorio v. United States, 483 U.S. 435, 439 (1987), which held that court martial jurisdiction was established by one factor--the military status of the accused.

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[FN35]. See, e.g., Fla. Stat. Ann. §921.141 (West Supp. 2009); Ga. Code. Ann. §17-10-30 (2008); 42 Pa. Cons. Stat. Ann. §9711 (West 2007).

[FN36]. See Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

[FN37]. Id. at 239-40.

[FN38]. See UCMJ, Pub. L. No. 81-506, ch. 169, art. 118, 120, 64 Stat. 107, 140 (1950).

[FN39]. Justice Powell, dissenting in Furman, argued that the case voided military capital punishment law. Furman, 408 U.S. at 417-18 (Powell, J., dissenting) ("[N]umerous provisions of the ... Uniform Code of Military Justice also are voided."). Justice Blackmun made the same argument. Id. at 412 (Blackmun, J., dissenting) ("Also in jeopardy, perhaps, are the death penalty provisions in various Articles of the Uniform Code of Military Justice.").

[FN40]. 419 U.S. 256, 271 (1974) (Marshall, J., dissenting) (concluding that a military death sentence should be unconstitutional under Furman).

[FN41]. Model Penal Code §210.6 (1980).

[FN42]. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

[FN43]. Gregg, 428 U.S. at 194-95; Proffitt, 428 U.S. at 251.

[FN44]. United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983) (sentence adjudged Jan. 30, 1981).

[FN45]. Id. at 928-29 (noting that "comparison of literal statute provisions" would not suffice for determining whether Furman required changes because "[t]he death penalty is imposed and administered in the military justice system under procedures established by Congress and the President in the UCMJ and [Manual for Courts-Martial], respectively.").

[FN46]. Id.

[FN47]. Id. at 929; see also United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982) (en banc) (holding that the military procedures fulfilled Furman's requirements).

[FN48]. United States v. Gay, 16 M.J. 586, 596 (A.F.C.M.R. 1983) (en banc).

[FN49]. United States v. Matthews, 16 M.J. 354 (C.M.A. 1983). In 1984, the appeal in Gay reached the Court of Military Appeals, which affirmed the decision. United States v. Gay, 18 M.J. 104 (C.M.A. 1984).

[FN50]. Exec. Order No. 12,460, 49 Fed. Reg. 3169 (Jan. 24, 1984) (Amendments to the Manual for Courts Martial).

[FN51]. Id. §§(3)(b) (accused had intent (i) to "cause substantial damage to the national security of the United States," or (ii) to "cause substantial damage to a mission, system, or function of the United States" if such damage "would have resulted had the intended damage been effected"), (3)(e) ("the accused committed the offense with the intent to avoid hazardous duty"); see infra Part III-D (discussing the distinction between "military" and "civilian-style" murders within the military criminal justice system).

[FN52]. Exec. Order No. 12,460, 49 Fed. Reg. 3170 (Jan. 24, 1984) (Amendments to the Manual for Courts Martial) (crime committed "in time of war" when the United States or an ally is an "occupying power" or United States forces

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were “then engaged in active hostilities”).

[FN53]. Id. §§(3)(a) (the crime was “committed before or in the presence of the enemy”), (3)(c) (“the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage”).

[FN54]. Id. at §(3)(d) (“[T]he lives of persons other than the victim, if any, were unlawfully and substantially endangered.”).

[FN55]. For Article 118(1) premeditated murder, §3(g) defines the following aggravating circumstances: (i) accused committed offense while already under confinement for thirty or more years, (ii) felony murder, (iii) pecuniary motive, (iv) compulsion or contract murder, (v) escape or avoid apprehension, (vi) victim an important federal official, (vii) victim a commissioned or noncommissioned officer knowingly killed “in the execution of office” (also known as the “7G” aggravator), (viii) obstruction of justice, (ix) infliction of substantial pain and suffering, and (x) multiple victims. Id. at 3170-71. Section 3(h) of the order also defines one aggravating circumstance limited to felony murder alone --” the accused was the actual perpetrator of the killing.” Id. at 3171.

[FN56]. Model Penal Code §210.6 (1980).

[FN57]. The exception is United States v. Gay, 16 M.J. 586 (A.F.C.M.R. 1983) (involving two victims, one of whom was an officer killed in the line of duty). The civilian-style death sentences included: United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986) (acquaintance rape); United States v. Artis, 22 M.J. 15 (C.M.A 1986) (wife victim); United States v. Redmond, 21 M.J. 319 (C.M.A. 1986) (killed fiancée of a friend); United States v. Hutchinson, 15 M.J. 1056 (N.M.C.M.R. 1983) (acquaintance robbery); United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) (rape and robbery); United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983) (acquaintance robbery).

[FN58]. Manual for Courts-Martial United States, R.C.M. 1004(c)(7)(G) (2008) [hereinafter Rule 1004]; see also supra note 55 (listing all of the aggravating circumstances tailored to premeditated murder).

[FN59]. Although the text of 7G protects all “officers” (i.e., commissioned, noncommissioned, and police officers), within military culture, as reflected in the cases studied here, an “officer victim” case is strictly perceived to be one with a commissioned officer victim--whether or not the officer was acting in the “execution of office” and whether or not the accused knew that the victim was a commissioned officer.

[FN60]. Gregg v. Georgia, 428 U.S. 153 (1976).

[FN61]. In eight cases, the accused were acquitted of capital murder by members. These cases are included in descriptive statistics about the dataset and in analyses of convening authority charging decisions. They are otherwise excluded from the analysis.

[FN62]. UCMJ, 10 U.S.C. §918 (2006).

[FN63]. See supra note 34 for a discussion of the Supreme Court's abandonment of the “service connection” requirement.

[FN64]. UCMJ, art. 120, 10 U.S.C. §920(a) (2006) (“Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.”). Congress amended Article 120 in 2006 and the amendments took effect in October 2007. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §552(a)(1), 119 Stat. 3136, 3256-57. It still authorizes the death penalty for rape. Id.

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[FN65]. A number of non-homicidal military crimes remain death eligible in military courts only in times of war. UCMJ, 10 U.S.C. §§885, 890, 901, 906, 913 (2006). An additional list of non-homicidal military-specific crimes codified in the UCMJ does not explicitly require that the offense be committed during wartime for a death sentence to be applicable. Id. §§894, 899, 900, 902, 904, 906a, 910.

[FN66]. Rule 1004(c).

[FN67]. See, e.g., Fla. Stat. Ann. §921.141(5) (West Supp. 2009); Ga. Code. Ann. §17-10-30(b) (2008); 42 Pa. Cons. Stat. Ann. §9711(d) (West 2007).

[FN68]. See infra Table 1, Line 7.

[FN69]. Rule 1004(c)(7)(G). Although the understanding of military "officer" under the section appears to include commissioned, noncommissioned, and police officers, within military culture, as reflected in the cases studied here, an "officer victim" case is strictly perceived to be one with a commissioned officer victim--whether or not the officer was acting in the "execution of office" and whether or not the accused knew that the victim was a commissioned officer.

[FN70]. See supra note 67.

[FN71]. Rule 1004(b)(4)(C), (c). The rule uses the phrase "aggravating factors" in most instances. In section (b)(4)(C), "aggravating circumstances" includes the aggravating factors discussed above. Id.

[FN72]. Rule 1004(b)(3).

[FN73]. See Gilligan & Lederer, supra note 31, §23-32.10 (providing details of the capital punishment procedures).

[FN74]. See id. The "R^2" between the SJA's recommendation and the commander's referral is .74. Article 34 advice letters take a variety of forms. Some provide an explicit recommendation in the letter. Often, however, the letter makes no mention of a capital referral but the SJA prepares a charge sheet with the choice indicated and informs the commanding officer that signing the sheet will implement the SJA's recommendation. In a few cases, the letter tells the convening authority what must exist factually to justify a capital referral with no suggestion of what the referral should be. (The R^2 is a measure of how well the analysis describes the relationship between two variables. In this case, the variables are the SJA's recommendation and the commander's referral. R^2 is always between zero and one. The closer the R^2 is to the number one, the tighter the relationship between the two variables.)

[FN75]. See id. In many cases that are not charged capitally, the decision of the convening authority not to bring a capital case is based on a plea bargain in which the accused pleads guilty in exchange for the convening authority's waiver of the death penalty. In capitally charged cases, the capital charge is often withdrawn by the convening authority in exchange for a guilty plea to the crime charged or a less serious offense, in which event the accused escapes the risk of his or her case advancing to a capital sentencing hearing with the government seeking a death sentence. In contrast to civilian courts, a military accused's case may not advance to a capital sentencing hearing on the basis of a guilty plea. If the government seeks a death sentence, the case must be tried and sentenced by members.

A crucial feature of the military system distinguishing it from its civilian counterparts is that plea bargains are strictly within the authority of the convening authority rather than the judge advocates who prosecute the cases on behalf of the government or the military judges who try the cases. Military prosecutors may on their own motion initiate plea negotiations leading to a waiver of the death penalty and may propose such an agreement to the convening authority, but no plea bargain involving a waiver of the death penalty can go forward without the personal consent of the convening au-

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thority.

[FN76]. Rule 1004(a)(2) makes a condition precedent for the imposition of a death sentence the accused's conviction of capital murder “by the concurrence of all the members of the court-martial.” Approximately 25% of the factually death eligible accused whose cases advance to a capital court martial escape the risk of a death sentence at this stage of the process by virtue of a non-unanimous finding of guilt or a finding of not guilty on the capital murder charge.

[FN77]. UCMJ, 10 U.S.C. §856a (2006). This was added by the National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, §581(a)(1), 111 Stat. 1629, 1759 (1997).

[FN78]. See Gilligan & Lederer, supra note 31. The convening authority also has the power to reduce a life sentence to a term of years.

[FN79]. In addition, the Supreme Court exercises discretionary jurisdiction over CAAF's decisions. UCMJ, 10 U.S.C. §867a. At the present time, two death sentenced accused have exhausted their military appeals through CAAF. In both cases, the accused have also exhausted direct appeals through the Supreme Court. Loving v. United States, 517 U.S. 748 (1996); Gray v. United States, 51 M.J. 1 (C.A.A.F. 1999), cert. denied, 532 U.S. 919 (2001), reh'g denied, 532 U.S. 1035 (2001).

[FN80]. The degree to which military interests are implicated varies across that class of cases. There are also two multiple-victim cases with both civilian and military murders (Kenneth Parker and Wade Walker). Individual cases in the database will be referenced by the name of the defendant. We include these references to facilitate precise analysis and understanding of the cases. See infra Table 3, Cases 10, 11, for more information on these cases.

[FN81]. While some have suggested that cases involving rape of a service member by a service member also ought to be perceived as threatening the effectiveness of the military mission, the military leadership has yet to identify these crimes in this manner. See, e.g., Miles Moffeit & Amy Herdy, Female GIs Report Rapes in Iraq War: 37 Seek Aid After Allegations of Assaults by U.S. Soldiers, Denv. Post, Jan. 25, 2004, at A1; Miles Moffeit, GI Sex Cases from Iraq Often Stall: Army Records Show Prosecution Rare, Reprimands from Officers Common, Denv. Post, Apr. 12, 2004, at A1; Eric Schmitt, Military Women Reporting Rapes by U.S. Soldiers, N.Y. Times, Feb. 26, 2004, at A1.

[FN82]. Akbar, Kruetzer.

[FN83]. Exec. Order No. 9,981, 13 Fed. Reg. 4311, 4313 (July 28, 1948) (establishing the President's Committee on Equality of Treatment and Opportunity in Armed Services).

[FN84]. See J. Robert Lilly & J. Michael Thomson, Executing US Soldiers in England, World War II: Command Influence and Sexual Racism, 37 Brit. J. Criminology 262, 280-83 (1997). The armed forces stationed in England employed policies to segregate African American soldiers from European white women after violence was anticipated and reported between African American soldiers and white soldiers who objected to having African American soldiers appear socially with white women. Id. at 282-83; see also James E. Blackwell, The Black Community: Diversity and Unity 223 (1975) (reviewing similar policies in France in the same period).

[FN85]. See generally James E. Westheider, Fighting on Two Fronts: African Americans and the Vietnam War (1997).

[FN86]. See Human Relations in the Military: Problems and Programs 58 (George Henderson ed., 1975).

[FN87]. Charles C. Moskos & John Sibley Butler, All That We Can Be: Black Leadership and Racial Integration the

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Army Way 53 (1996).

[FN88]. Id. at 53 (reporting on in depth study of race relations in the Army); see also id. at 9 (“[A]n officer's failure to maintain a bias-free environment is an absolute impediment to advancement in a military career.”).

[FN89]. Id. at 65.

[FN90]. See, e.g., Dep't of Defense, Report of the Task Force on the Administration of Justice Within the Armed Forces (Nov. 30, 1972) (on file with the University of Michigan Journal of Law Reform); Moskos & Butler, supra note 87, at 54-63 (discussing Army programs meant to review race relations and initiate reforms at the individual or service-wide level).

[FN91]. Gibbs, Turner, Witt, Thomas.

[FN92]. Dock, Loving, Gray.

[FN93]. Curtis, Kreutzer, Akbar, Quintanilla.

[FN94]. Kreutzer, Akbar, Simoy, Parker, Walker.

[FN95]. Table 3, Case 14.

[FN96]. The salient factors scale presented here is based on three salient factors measures designed as part of the charging and sentencing study to capture what we perceive to be military perceptions of criminal culpability based on the statistical evidence, discussions with military officers, and our reading of the narrative summaries and records of the cases and their charging and sentencing outcomes. We describe them as (1) the vileness factor, (2) the accused/victim relationship factor, and (3) the high aggravation factor.

The vileness factor has three levels: low, medium, and high. The default is “low.” An offender receives a “medium” classification if the case involves a rape, robbery, sodomy or burglary, or a racial animosity motive. A case receives a “high” classification if it involves multiple victims, an ambush, or a serious threat of death or bodily injury to non-decedent victims. For the purpose of creating the six-level overall measure, the three levels are scored 0, 1, 2.

The accused/victim relationship factor has three levels: (1) victim is a family/acquaintance of the accused, (2) victim is a stranger to the accused, and (3) the victim is a military police or commissioned officer. The third category is broader than the aggravating factor based on an officer victim because it includes officer victim cases whether or not they were acting in the execution of their office. The data and the opinions of officers with whom we have spoken suggest that killing an officer is a highly aggravated military offense whether or not the officer is acting in the “execution” of his or her office. For the purpose of creating the six-level overall scale, the three levels of this factor are also scored 0, 1, 2.

The third salient factor distinguishes between cases with a single statutory aggravating factor and multiple aggravating factors. For the purpose of creating the six-level overall scale, the two levels of this scale are scored 0 and 1.

The procedure for creating the scale is modeled after one based on three comparable salient factor variables developed by Arnold Barnett with Georgia data from the 1970s. David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 575-77 (1990).

[FN97]. As part of the charging and sentencing study, we developed four logistic regression models using legitimate non-racial variables and race variables and used the fully specified regression models to estimate a “culpability index” that reflected the probability of an adverse outcome (PHAT) on the basis of “race purged” legitimate variables for each member of the relevant racial subgroups. We took three steps to purge the index of race effects. First, we estimated the models

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with both racial and race neutral variables included in the model. Second, we omitted the coefficients for the race variables in the construction of the culpability index. However, we used coefficients for the race neutral variables that had been estimated in a model that included the race variables. This assures that the race neutral variables will have no indirect racial effect on the index if they are highly correlated with the race variables. On the basis of this culpability index, the average estimated probability of a death sentence was 23% for minority accused, while the average estimated rate for white accused was 11%. These predictions for each racially defined group of cases are known as "standardized" estimates because they have been adjusted to account for the culpability level of each case as determined by the culpability index produced by the regression analysis. To build the scale, we sorted the cases into five levels based on the culpability index score estimated for each case. We then estimated a racial disparity within each cell and combined those disparities to compute a weighted average of the disparities across all of the cells. Mantel-Haenszel is the procedure we use to create these overall estimates. See National Institute of Standards & Technology, Mantel-Haenszel Test, http://www.itl.nist.gov/div898/software/dataplot/refman1/auxillar/mantel.htm (on file with the University of Michigan Journal of Law Reform).

The scale used to sort the cases in Part 2 of Table 6 is derived from the model focusing on the decision of convening authorities to advance a case to a capital court martial.

[FN98]. The scale used to sort the cases in Part 3 of Table 6 is derived from the model focusing on death sentencing outcomes among all death eligible cases.

[FN99]. In contrast, for the military cases, the higher death sentencing rate, 46% (6/13), in the later period compared to 25% (1/4) in the earlier period is principally explained by higher levels of aggravation among the military cases in the later period.

[FN100]. "Felony murder" here refers to the premeditated murder with a felony aggravator factor which appears in Rule 1004(c)(7)(B). The full text of the aggravating factor appears in Table 1.

[FN101]. The intentional infliction of substantial harm factor appears in Rule 1004(c)(7)(I). The full text of the aggravating factor appears in Table 1.

[FN102]. This disparity persists even after excluding cases that involved more than one victim. In the period 1984-1990, 20% of the single-victim cases with the intentional infliction of substantial harm received a death sentence. After 1990, none of 29 cases advanced to a death sentence, a 20-point drop in selection rates. The disparity is significant to the .03 level.

[FN103]. See supra text accompanying note 76.

[FN104]. The declines documented with respect to single-victim cases persist when the analysis includes single- and multiple-victim cases. In civilian-style cases with the felony aggravator present, the death sentencing rate falls from 25% (5/20) to 3% (1/30), a 22-point decline that is significant to .05. The capital court martial rate declines from 58% (15/26) to 20% (6/30). This 38-point decline is significant to .01.

[FN105]. Disparities also exist with respect to death sentencing rates (22% to 0%) and capital court martial rates (42% to 8%) when the analysis incorporates single- and multiple-victim cases.

[FN106]. Dock's crime was committed two months before the effective date of the executive order.

[FN107]. The other two cases were Mobley (1987) and Miller (1987).

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[FN108]. Adams, Taylor.

[FN109]. This 31-point disparity is significant at .05.

[FN110]. Similar disparities appear in a parallel analysis including single-and multiple-victim cases. The death sentencing rate falls from 27% to 7%. The capital court martial rate falls from 75% to 21%. This 54-point disparity is significant to .05. When the substantial harm aggravator is the sole aggravator in the case, death sentencing falls from 25% to 0% and the capital court martial rate falls from 100% to 0%. Again the later 100-point disparity is significant to .05.

[FN111]. The four cases before 1992 are Mobley (1987), Miller (1987), Poertner (1987), and Gonzalez (1988). The 1998 case is Roukis.

[FN112]. Table 3, Cases 2, 8.

[FN113]. Table 3, Case 6.

[FN114]. Table 3, Case 1.

[FN115]. Loving (1989) and Gray (1988). The death sentence for Murphy, with three victims, was set aside on appeal subject to reinstatement on remand. Until it is reinstated, he is no longer on death row.

[FN116]. Peter Huchthausen, America's Splendid Little Wars: A Short History of U.S. Military Engagements: 1975-2000 151 (2003) (noting among other things that the Gulf War “required the largest mobilization of U.S. Reserve and National Guard components since the Korean War” and resulted in a “massive victory”).

[FN117]. See John E. Parkerson, Jr. & Carolyn S. Stoehr, The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments, 129 Mil. L. Rev. 41, 41-45 (1990) (discussing the evolving tensions between European nations hosting U.S. military bases and the U.S. military authorities over the death penalty).

[FN118]. See, e.g., Soering v. United Kingdom, 11 Eur. Ct. H.R. 439 (1989) (holding that Jens Soering may not be extradited to Virginia to stand trial for murder unless the risk of a death sentence had been removed); see also Kellee A. Brown & Sophia A. Muirhead, Extradition: Divergent Trends in International Cooperation, 33 Harv. Int'l L.J. 223 (1992) (discussing several similar cases).

[FN119]. United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988); see Parkerson & Stoehr, supra note 117, at 54.

[FN120]. Rosemary Sawyer, German to Try 2 GIs in Murder Case: Won't Risk Possible Court-Martial Death Sentence, Stars and Stripes, Aug. 18, 1989, at 28.

[FN121]. Parkerson & Stoehr, supra note 117, at 57.

[FN122]. Id. at 57-58; see also Sawyer, supra note 120, at 28.

[FN123]. In the case of Army Sergeant James T. Murphy, in 1989, German officials and U.S. military officials accused Murphy of the premeditated murder of his estranged wife, their twenty-one-month-old son, and her five-year-old son from a previous marriage. United States v. Murphy, 30 M.J. 1040 (A.C.M.R. 1990); see also Paul H. Turney, New Developments in Military Capital Litigation: Four Cases Highlight the Fundamentals, Army Law., May 2000, at 103, 107-09. The West German government expressed opposition to the death penalty and sought assurances from the United States that Murphy would not be subjected to the death penalty. Richard J. Wilson, Using International Human Rights

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Law and Machinery in Defending Borderless Crime Cases, 20 Fordham Int'l L.J. 1606, 1617 (1997). Despite these concerns, the German prosecutor surrendered jurisdiction to the United States and a capital court martial held in Germany sentenced him to death. Murphy, 30 M.J. at 1045.

[FN124]. Parkerson & Stoehr, supra note 117, at 58.

[FN125]. Agreement of 3 August 1959, as amended by the Agreements of 21 October 1971, 18 May 1981, and 18 March 1993, to supplement the agreement between the parties to the North Atlantic Treaty Regarding the Status of Their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany (Done at Bonn Mar. 18, 1993; entered into force Mar. 29, 1998; ratification Belgium, Feb. 27, 1998) (on file with the University of Michigan Journal of Law Reform).

[FN126]. See, e.g., United States v. Youngberg, 38 M.J. 635, 636 (A.C.M.R. 1993) ("German authorities asserted immediate investigatory and prosecutorial control in this case and refused to release jurisdiction until they were assured in writing that the death penalty would not be an option at appellant's trial."), aff'd, 43 M.J. 379 (C.A.A.F. 1995). See generally Alyssa K. Dragnich, Development, Jurisdictional Wrangling: US Military Troops Overseas and the Death Penalty, 4 Chi. J. Int'l L. 571 (2003).

[FN127]. The disparity is 68% (13/19) in 1984-1990 versus 29% (15/51) after 1990.

[FN128]. The disparity is 32% (6/19) in 1984-1990 versus 12% (6/51) after 1990.

[FN129]. Report from Officer Wade B. Morrison to Commander Michael C. Short in the Case of Oscar Anderson, Jr., Investigation Office's Report (of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial) 6 (May 25, 1990) (on file with author).

[FN130]. Recommendation of Staff Judge Advocate to Convening Authority in Case of Oscar Anderson 2-3 (June 6, 1990) (on file with author).

[FN131]. Coleman, Dobson, Grandy, Ronghi.

[FN132]. This pattern continued in a New York National Guard case where the convening authority rejected an offer to plead guilty to murdering two of his officers in Iraq in June 2005 in exchange for avoiding the death penalty. Paul von Zielbauer, G.I. Offered to Plea Guilty, Then Went Free in Iraq Deaths, N.Y. Times, Feb. 21, 2009, at A1. Instead, the convening authority, an Army general, brought the case to a capital court martial. Id. The accused, Staff Sgt. Alberto B. Martinez, ultimately was found not guilty by the court martial members. Id.

[FN133]. Turley, supra note 11, at 765-68.

[FN134]. The numbers and letters in parentheses following each aggravating factor indicate its location in Rule 1004(c).

[FN135]. Year of sentencing.

[FN136]. "C" indicates a civilian-style murder. "M" indicates a military murder.

[FN137]. "Diff." reports the arithmetic difference between the rate for the military cases and civilian-style cases.

[FN138]. "Ratio" reports the ratio of the two rates: (rate of military cases)/(rate of civilian-style cases).

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