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**THE MILITARY DEATH PENALTY — NEITHER *SWIFT* NOR *SURE***

**BY**

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**The Military Death Penalty – Neither *Swift* Nor *Sure***

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## ABSTRACT

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The purpose of military law is to assist in maintaining good order and discipline in the Armed Forces. The manual for courts-martial authorizes a death sentence for 14 offenses, designed to help achieve the good order and discipline that is so vital to military readiness. However, the last military execution was nearly 40 years ago. How can a punishment that has not been carried out in nearly 40 years assist in maintaining good order and discipline? This paper will examine the numerous controversies surrounding capital punishment, an extremely complex issue. It will look at the legal process from the commission of the crime to the execution of the inmate and examine the purposes of punishment. This paper will then recommend a procedure that will make the death penalty a viable form of punishment and truly assist in maintaining the good order and discipline necessary in the Armed Forces.



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## THE MILITARY DEATH PENALTY – NEITHER *SWIFT* NOR *SURE*

On April 13, 1961 Army Private John A. Bennett was hanged for rape and attempted murder of an 11 year old girl.<sup>1</sup> Private Bennett was the last military service member executed by the military, yet the military has maintained a death penalty nearly the entire period since that execution. According to the Manual For Courts-Martial (MCM) the **purpose** of military law is to assist in maintaining good order and discipline in the Armed Forces.<sup>2</sup> The absence of good order and discipline significantly weakens the effectiveness of our military. The death penalty is the most severe punishment but arguably receives the least amount of attention in our military justice system. DOD Directive 1325.4, dated September 28, 1999, entitled "Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities" states "Post-trial confinement of military prisoners shall serve the purposes of incapacitation, rehabilitation, deterrence, and punishment of prisoners."<sup>3</sup> How can any punishment, much the less the ultimate punishment, serve any purpose if not carried out? To better meet its intended objective, changes must be made to the military death penalty. Improving the deterrent effect, yet not violating the rights of the accused, is the central theme of this paper. This paper will examine the death penalty as it currently exists and suggest recommended changes that will make it more effective.

### PURPOSES OF PUNISHMENT

The four primary purposes of punishment are rehabilitation, incapacitation, retribution and deterrence, very similar to the DOD's purpose of post-trial confinement. If the death penalty achieved the purposes of punishment it would then have utility and better assist Commanders in maintaining good order and discipline. Even though a death sentence is not intended to meet all four purposes, an understanding of these four purposes is necessary. Rehabilitation is the individualization of punishment to an offender and the intent is to "treat" the offender to prepare him to make a satisfactory adjustment back into civilian life upon release.<sup>4</sup> The military has no pretense of attempting to rehabilitate a death row inmate, nor should they. The inmate participates in no "treatment" programs because there is no intent of ever releasing him back into society. Therefore, the rehabilitation aspect of punishment does not apply when attempting to improve the effectiveness of the military death penalty.

Incapacitation is the second purpose of punishment. When an inmate is incarcerated they are incapacitated from committing crime, at least out in society. The incapacitation effect of an execution is unquestionable; it will ensure the inmate does not re-offend. An executed inmate

**will not** murder again. Conversely, the military death penalty, since it has not been used in nearly 40 years does not permanently incapacitate the inmate. As long as they are alive they are subject to either escape or lawful release back into society. The third purpose of punishment is retribution. When a capital offense occurs in the military the entire military and the society it serves is "wronged", in addition to the victim's family and friends. Retribution is society's way of "getting even" and is based on the "eye for an eye" concept.

The fourth purpose of punishment is deterrence. Deterrence is based on the belief that in order to prevent a crime the punishment must be severe enough to outweigh any pleasure the offender may have derived from the action. It must be administered with great certainty, and promptly, so there is a clear cause and effect relationship between the crime and the punishment and all of this must be explicitly publicized to potential offenders.<sup>5</sup> Deterrence is also based on the rational view that man is a "pleasure-seeking, pain avoiding creature". The objective is to serve notice to other potential offenders that pain cannot be avoided if certain offenses are committed.<sup>6</sup> Deterrence is inherently difficult to measure. As one poet stated, "The death penalty is a warning, just like a lighthouse throwing beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down."<sup>7</sup>

Even those that support capital punishment's deterrence value agree that punishment must be *swift* and *sure* to be an effective deterrent. The military death penalty is neither; given that a capital offense is unlikely to result in a capital court-martial and, if convicted, given the extensive time period from crime to execution. This argument assumes the military will even attempt to eventually carry out another execution. Even though 38 states have the death penalty, many of them have the same swiftness and sureness deficiencies as the military. Rep. Bill McCollum, (R-Fla) sponsored a bill in Congress to make the death penalty more expeditious. He said his bill "sends the message of swiftness and certainty of punishment that has been missing from our criminal justice system . . . and it goes a long way to restoring deterrence to the criminal justice system".<sup>8</sup> In the civilian sector the average time on death row for those executed from 1977-1995 was 9 years. For the 56 inmates executed in 1995 the average time had grown to 11 years and 2 months. At the end of 1995 there were 60 inmates that had been on death row for over 18 years.<sup>9</sup> Where is the swiftness here?

## **DEATH PENALTY ISSUES**

The death penalty is perhaps one of the most complex and hotly contested issues in society today and surprisingly few military members know much about it. Even fewer have been

in units where capital courts-martial have occurred or have suffered the loss of a loved one from a senseless murder. There are several complex aspects of the death penalty that have been addressed in the civilian sector. An examination of these issues is worthwhile. These must be understood and addressed by the military, as appropriate, to make the military death penalty more effective. They are:

- a. Does the public support capital punishment?
- b. Is capital punishment a deterrent?
- c. Is incapacitation really necessary?
- d. Is the death penalty constitutional?
- e. Does application of the death penalty discriminate against minorities and the poor?
- f. Do prosecutors arbitrarily seek the death penalty?
- g. Have innocent people been executed?
- h. Would the death penalty be a more effective deterrent if we publicized executions?
- i. Is the death penalty worth the financial cost?
- j. Are defense attorneys competent enough to conduct a defense in capital cases?

**Public Support.** The majority of the public supports the death penalty. In a poll conducted from January 12-16, 2000, 1006 adults were asked, "Do you favor or oppose the death penalty for persons convicted of murder?" Sixty four percent favored the death penalty, 27% opposed and 9% did not express an opinion. Those same respondents were asked, "Which punishment do you prefer for people convicted of murder: the death penalty or life in prison with no chance of parole?" Forty eight percent preferred the death penalty, 43% preferred life in prison with no chance of parole and 9% did not express an opinion.<sup>10</sup> Supreme Court Justice Thurgood Marshall had an interesting opinion of people that supported the death penalty. In his concurring opinion in *Furman v. Georgia* (1972) he said support for the death penalty was based on ignorance. He said the American public is unaware to the facts about capital punishment – that it does not deter murder more than long term incarceration; that it is inhumane; it is administered in a discriminatory fashion; that convicted murderers are rarely executed and that convicted murderers pose little future threat to society. He concluded the American public would not support capital punishment if they understood these facts.<sup>11</sup> I disagree with Justice Marshall, we should not eliminate the death penalty because of implementation deficiencies, instead we should correct the deficiencies.

**Deterrence.** Perhaps the most controversial of all the issues is whether capital punishment deters crime. Nationally our opinions about the deterrent effect are split. In 1999 a

poll was taken and the respondents were asked, "Do you feel that executing people who commit murder deters others from committing murder, or do you think such executions do not have much effect?" Forty seven percent responded it does deter; 49% said it did not deter and 3% had no opinion.<sup>12</sup> A central theme of the "no deterrent" effect revolves around the comparison of murder rates among states that have the death penalty and those that do not. Surprisingly, a comparison will show the rates are generally lower in the states without the death penalty than those that have capital punishment.<sup>13</sup> This can be a deceiving statistic because many of the states that have the capital punishment seldom, if at all, use it. Those states, like the military, are unable to judge the deterrent effect. Deterrence is difficult to measure, but from 1972-1976, the period the United States Supreme Court forbade capital punishment, murder rates grew. In 1960 there were 56 executions and 9,140 murders. In 1969 there were no executions and 14,590 murders and in 1975 (a year with no capital punishment) there were 20,510 murders.<sup>14</sup> Harris County, Texas (Texas leads the nation in executions) has executed more murderers than any other city or state in the United States and has witnessed the greatest reduction in murders. The Texas government reinstated the death penalty in 1982 and that year Harris County had 701 murders. In 1996 they had 261.<sup>15</sup> It would be difficult to argue against the apparent correlation.

**Incapacitation.** No one will argue an executed inmate will not murder again. Many will argue it is not necessary to execute them to incapacitate them and they will also argue murderers seldom murder again. Those same people are not considering, nor do they care about, murders and other crimes in prison. Those that have worked in prisons understand there is over abundance of crime in prison, yet little is known about it in the civilian or military sector. Nine to fifteen percent of inmates currently on death row committed previous murders; 67% had a prior felony conviction; 14% of those sentenced to death from 1988-1994 have received two or more death sentences.<sup>16</sup> If these inmates had been properly incapacitated the first time the subsequent crimes would have been prevented. The level of risk is unknown, but we take risk every time we release a criminal. How do we calculate the acceptable level of risk when releasing murderers?

**Constitutionality.** Even though many maintain the death penalty is unconstitutional, the constitutionality of the death penalty is periodically reviewed by the United States Supreme Court. Three Amendments to the Constitution are at issue: the Fifth Amendment requires due process of law, the Fourteenth Amendment requires equal protection of the laws and the Eighth Amendment prohibits cruel and unusual punishment. There have been several landmark

decisions from the United States Supreme Court during the past 30 years that have addressed the constitutionality of the death penalty. A short synopsis of each follows:

*Furman v. Georgia* (1972) - Supreme Court ruled the death penalty, as then administered, violated the Eighth and Fourteenth Amendments and was unconstitutional. It was determined to be arbitrary and capricious.

*Gregg v. Georgia* (1976) – Supreme Court reviewed whether changes in the way some states proposed to administer the death penalty adequately remedied the previous concerns and ruled they did, thereby making it constitutional.

*Woodson v. North Carolina* (1976) – Supreme Court ruled a mandatory death sentence for murder was unconstitutional.

*Roberts v. Louisiana* (1976) – Supreme Court held a mandatory death sentence for murder of a police officer was unconstitutional.

*Sumner v. Shuman* (1987) – Supreme Court held a mandatory death sentence for a defendant convicted of murder, who committed that crime while serving a life sentence for a previous murder, was unconstitutional.

*Coker v. Georgia* (1977) – Supreme Court held a death sentence for rape is unconstitutional. (The military has a death sentence for rape but it has not been used, since this ruling, therefore the Supreme Court has not reviewed it).

*Eberheart v. Georgia* (1977) – Supreme Court ruled a death sentence for kidnapping is unconstitutional.

*McCleskey v. Kemp* (1987) – Supreme Court ruled that a death penalty system that results in convictions that are racially disproportionate **is not** unconstitutional.<sup>17</sup>

In addition to the cases mentioned above, military procedures have also been reviewed and these key rulings made:

*U.S. v. Matthews* (1983) – The Armed Forces Court of Appeals ruled the military sentencing procedures were unconstitutional because they did not require a finding of individualized aggravating circumstances. In 1984 President Reagan reinstated the military death penalty by signing an executive order adopting rules (11 aggravating factors that qualify defendants for the death sentence) for capital courts-martial.<sup>18</sup> That executive order has been challenged throughout the years, yet still exists today.

*Loving v. United States* (1996) - Supreme Court upheld the constitutionality of the military death penalty. The court ruled that when Congress enacted the Uniform Code of Military Justice in 1950 it gave the President the authority needed to issue that executive

order. In an interesting side note, Justice Clarence Thomas did not sign the majority opinion but instead wrote a separate opinion stating he doubted the restrictions the court had placed on the death penalty in the civilian context even applied to the military.<sup>19</sup>

What is clear is that the only reason the death penalty has ever been ruled unconstitutional is that its application has been improper. With proper protection for individual rights, it has passed Supreme Court requirements for constitutionality.

**Discrimination.** The perceived bias against minorities and the poor is another controversy. In the civilian sector blacks on death row are represented three and half times their proportion of the population as a whole. Defendants that kill white victims are many times more likely to be sentenced to death than those that murder black victims.<sup>20</sup> Without further analysis this is a startling statistic. However, non-whites disproportionately commit murders. In 1993 when blacks comprised 12% of the population they committed 58% of the murders. A black man in America has about one chance in 28 of being murdered; five times the likelihood of a white male. Surprisingly, black murderers are slightly less likely to be sentenced to death than their white counterparts. The key factor is not the race of the defendant but the race of the victim. Killers of whites are more likely than killers of blacks to be sentenced to death. Furthermore, murder seldom crosses racial lines. Blacks killed 90% of black murder victims and whites murdered 83% of white victims.<sup>21</sup> Without question, the overwhelming majority of executed inmates are from the lower end of the economic ladder. This is a tragedy but not difficult to understand given the extraordinary expense of a first class capital defense. Competent attorneys are expensive, some defendants can afford them and some cannot. Even though the American Bar Association does not take an official position on the death penalty, they state that indigent defendants are routinely provided with incompetent and inexperienced counsel and little or no funds for investigators or forensic testing.<sup>22</sup>

**Arbitrariness.** With countless prosecutors throughout the United States, at all levels of government, there seems to be no rhyme or reason as to when the death penalty is pursued. Media coverage, upcoming re-elections, quality of the defense counsel, and financial resources are all key factors. The United States has had hundreds of thousands of murder trials since 1976 and the majority of them were potential capital cases. In reality, prosecutors sought the death penalty in fewer than 5% of the cases, but it is more common in some states than others. Texas imposes it about 40 times more often than New York, a state of comparable population and similar crime problems.<sup>23</sup>

**Innocent people executed.** United States Supreme Court Justice Marshall wrote in a concurring opinion in *Furman v. Georgia* (1972), "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some."<sup>24</sup> This was true in 1972 and true today. A recent poll showed this is the number one concern of citizens today regarding the death penalty.<sup>25</sup> The real issue should be whether the risk of executing an occasional innocent person is worth the benefit of executing many guilty. Even though not foolproof, there are many protections in our legal system. Since 1973, 37% of all death row cases have been overturned. Inmates are six times more likely to be released from death row by appeals than by execution.<sup>26</sup> Even though there is no proof that an innocent person has ever been executed common sense dictates the possibility. If we were to eliminate the death penalty because of this remote possibility then where is the protection for the hundreds of otherwise innocent victims that are murdered every year? We accept the death of approximately 45,000 people on our highways every year, yet do not eliminate our vehicles because we have somehow convinced ourselves it is worth the cost of having vehicles.<sup>27</sup> Likewise there is a similar cost that may be outweighed by the benefit, of having a death penalty.

**Televised Executions.** Why are executions conducted in such secrecy if a key component of deterrence is ensuring punishment is made known to the public? The author has witnessed two state executions (Texas and Missouri) and suggests the average American has no idea how they are conducted, and based on being a party to numerous conversations, nor do many of them care. The media quickly loses attention in states that regularly conduct executions. Would executions be more of a deterrent if they were televised? There's an old story that when society used to hang pickpockets, other pickpockets had a field day because of the large crowds that gathered. If we continue to increase executions at the current rate we can expect to see at least videotape of an execution at some point in the near future. Obviously, there are significant legal issues to be resolved. William Turner, a San Francisco attorney, represented a TV station that sued to televise an execution, and said the initial shock would soon fade as we began to televise executions. He says the first execution, "will be the only one that people pay any attention to ... after you've seen five people die by lethal injection, where it looks like someone is going to sleep, the novelty will be gone."<sup>28</sup> There is no definitive evidence televising executions will deter murderers.

**Cost.** The financial cost of maintaining a death penalty is a major issue in the civilian and military sector. As is the case frequently with statistics, there is evidence on both sides as to

whether a capital case costs more than a non-capital case, including the cost of confining the inmate for the rest of his life. The anti-death penalty proponents suggest hundreds of millions of dollars have been spent to punish the crimes of a relatively small number of criminals. They suggest a million dollars spent trying to execute one inmate could be better spent on more police officers, speedier trials, and more treatment programs.<sup>29</sup> They cite Texas as an example of a state that spends three times as much on death penalty cases than life without parole imprisonment. They also accuse the pro-death penalty proponents of not including the costs of all the unsuccessful capital trials in their calculations.<sup>30</sup> The pro-death penalty proponents maintain there is no question that the up front cost of the death penalty is significantly higher than the life without parole cases. They suggest that, over time, the life without parole cases exceed the cost of the death penalty cases by a minimum of \$1.2 million, unless someone in prison kills the murderer.<sup>31</sup> In smaller jurisdictions the cost of capital trials is a factor in the decision by prosecutors on whether to pursue the death penalty. Many times the ultimate decision is that capital cases are cost prohibitive.

**Incompetent Defense Attorneys.** The real issue here is whether the average defendant can afford competent representation. Incompetent defense attorneys and the lack of the defendant's financial resources are intertwined. Frequently, lawyers who lack the legal skills, the financial resources, and the commitment to handle such serious cases defend indigent people accused of capital crimes.<sup>32</sup> In the military the issue is more one of lack of capital courts-martial experience by our trial defense service attorneys. Ironically, this is due in part to our relatively small number of capital courts-martial.

### **MILITARY ASPECTS**

After examining the challenges of the civilian death penalty, in general, those challenges can be related to the specifics of the military death penalty. I will then determine where remedies are necessary and what those remedies should be. The MCM (2000 Edition, Appendix 12) lists 14 offenses that carry a maximum punishment of death:

- desertion in time of war
- assaulting or willfully disobeying a superior commissioned officer in time of war
- mutiny and sedition
- misbehavior before the enemy
- compelling a subordinate to surrender
- improper use of a countersign
- forcing a safeguard

aiding the enemy  
spying (the only offense that carries a mandatory death sentence)  
certain types of espionage  
willfully and wrongfully hazarding a vessel  
misbehavior of sentinel or lookout in time of war  
rape  
premeditated and felony murder

All but the last two of the offenses are only applied to the battlefield and/or during wartime. The offense of rape has not been pursued as a capital case in many years. As mentioned earlier, the United States Supreme Court ruled a death penalty for rape is unconstitutional. Therefore, premeditated murder and felony murder are the only capital offenses that have been pursued in many years. All seven military inmates currently on death row are convicted of premeditated murder or felony murder. The MCM defines capital murder in article 118 subsections (1) & (4). "Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he (1) has a premeditated design to kill (premeditated murder) or (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson" (felony murder).

Some procedural differences exist in capital cases. In capital cases the accused cannot be tried by judge alone, a jury must try him, and he cannot plead guilty. The process is exhaustive from crime to execution. After a possible capital offense has been committed and the subject identified, an Article 32 hearing, the military equivalent to a grand jury hearing in civilian courts, is conducted and results forwarded to the convening authority. The convening authority then decides whether to pursue the case as capital or non-capital. If aggravating factors are present, the decision is ultimately based on his discretion. He then selects a minimum of five jurors and the finding of guilt must be unanimous in order to continue as a capital case. During the sentencing hearing the jurors must weigh the aggravating factors against the factors of mitigation and again they must vote unanimously for the death sentence. The sentence then returns to the convening authority and can either be approved or commuted. If approved it is automatically reviewed by the defendant's service branch's Court of Criminal Appeals. If confirmed, it is then reviewed by the United States Court of Appeals for the Armed Forces, which is the highest military appeals court and is made up of civilians appointed by the President. If confirmed there, the United States Supreme Court may be petitioned to review the case. The final procedural step is the White House where the President must sign the death warrant before the execution can occur.<sup>33</sup>

Is the crime of murder a common occurrence in the military? Using only the Army as an example, Table 1 depicts Reports of Investigations (ROIs) for the charge of murder. Table 2 depicts the disposition of these cases. This data was extracted from United States Army Criminal Investigation Command's ROIs in which an active duty military member was listed as the subject of the offense of murder and in which there was an investigative probable cause conclusion that the service member committed the offense. This does not always reflect the actual charges preferred by the convening authority. Also, the finding and sentencing may have been for lesser-included offenses and not the offense of murder.<sup>34</sup> As shown, 366 subjects were identified as committing the offense of murder in 12 years. This is a substantial number and these are only Army statistics! An effective death penalty may have deterred some of these murders.

Year	ROIs	GCM 1	Civilian 2	None 3	NR 4
1999	15	11	4	-	-
1998	19	4	12	3	-
1997	12	6	5	-	1
1996	26	5	20	1	-
1995	26	13	12	-	1
1994	24	10	13	1	-
1993	38	12	23	3	-
1992	35	12	22	1	-
1991	60	18	40	1	1
1990	42	19	21	1	1
1989	40	16	20	3	1
1988	29	16	10	2	1
Totals	366	142	202	16	6

**TABLE 1. REPORTS OF INVESTIGATIONS FOR THE CHARGE OF MURDER**

1 tried by general court martial

2 tried by a civilian court

3 no trial conducted

4 type of trial not reported to crime center

Year	ROIs	Prison 1	Prob. 2	Dis/NG3	No Bill 4	No Act.5	N R 6	Pend. 7
1999	15	13	-	1	-	-	-	1
1998	19	11	-	-	-	3	-	5
1997	12	8	-	1	-	-	2	1
1996	26	16	2	2	1	-	5	-
1995	26	21	-	2	-	-	3	-
1994	24	16	1	3	-	1	3	-
1993	38	28	3	3	1	3	-	-
1992	35	32	-	1	-	1	1	-
1991	60	47	-	3	2	1	7	-
1990	42	33	-	2	-	1	6	-
1989	40	30	-	5	-	2	3	-
1988	29	24	-	2	-	1	2	-
Totals	366	279	6	25	4	13	32	7

**TABLE 2. DISPOSITION OF CASES**

1 sentenced to prison

2 sentenced to probation

3 case dismissed or found not guilty

4 no true bill of indictment (no probable cause)

5 no action taken

6 results not reported back to crime center

7 action pending

As shown above, murder occurs all too frequently in the Army. The longer the period of time between the commission of the crime and the execution, the less the effect of deterring other potential offenders. A potential offender must believe he will be apprehended, convicted, sentenced to death, and executed in order for our death penalty to serve the maximum effective deterrence. We have already seen the execution portion is unlikely thus far but what is the likelihood of ever receiving a death sentence for a capital crime? In the civilian sector, from 1967-1996, there has been one execution for every 1600 murders (560,000 murders and only 358 executions).<sup>35</sup> This is hardly a deterrent. In the Army, from January 1989 until November 2000 there have been an astounding 135 murder convictions by general courts-martial! Of these, 90 were either premeditated murder or felony murder. Of the 90 possible capital cases

only six were referred as capital cases. (A portion of these cases may not have had aggravating factors present). Eventually, only two of the six were sentenced to death. Forty-four of the remaining 84 accepted a pre-trial agreement for a sentence less than death, thus avoiding any chance of receiving a death sentence.<sup>36</sup> Given these statistics, there is certainly no sureness in the military death penalty.

A review of the cases of the seven inmates currently on death row illustrates the lack of swiftness in the military death penalty process; similar to the civilian challenges mentioned above. One inmate has cleared all appeal processes and awaits a presidential decision. He is an Army inmate on death row for the murder of two taxi drivers, the attempted murder of a third and the robbery of two convenience stores. He is currently on his 12<sup>th</sup> year on death row. If the last military execution (1961) is any indication, his execution may still be years away. President Eisenhower approved the last death warrant but he was not hung until President Kennedy's administration. If the current Bush administration approves the death warrant then post-conviction litigation will most likely begin. If history is any indicator, the current death row inmate stands a good chance of commutation. Since 1948 the respective Presidents have reviewed the cases of 22 service members sentenced to death and have commuted 14 of them.<sup>37</sup>

Another inmate is on death row for the rape, sodomy and murder of two women and the attempted murder of a third. His case has cleared the US Court of Appeals for the Armed Forces and is currently pending review by the US Supreme Court. He is on his 13<sup>th</sup> year on death row. Yet another inmate is on death row for murdering his wife, son and stepson. His case was recently returned to the Army Court of Criminal Appeals and he is in his 14<sup>th</sup> year on death row. Two other inmates are companion cases. They murdered two fellow Marines in two separate incidents. Their cases are pending before the Navy-Marine Corps Court of Criminal Appeals and they have been on death row since 1993. Another inmate is on death row for the murder of his Executive Officer and for wounding his Commanding Officer. His case is pending before the Navy-Marine Corps Court of Criminal Appeals and he has been on death row since 1996. Yet another inmate is on death row for murdering one soldier and wounding 19 others and has been on death row since 1996.<sup>38</sup> There is no swiftness in this system.

### **RECOMMENDED IMPROVEMENTS**

Given the analysis of the complexities of the death penalty, and the details of the current military situation, where should we focus our efforts to make the military death penalty more effective? Physically conducting the executions is the only remedy to ensure total

incapacitation. Currently, the United States Supreme Court has ruled the military death penalty as constitutional, so constitutionality is not an issue. We can never ensure that no innocent persons will be executed but we can greatly mitigate risk with a competent, experienced and well-financed defense. The miniscule risk of executing an innocent person is far outweighed by the protection afforded to the innocent population as a whole, by an effective death penalty. As aforementioned, there is no benefit to televising an execution. Financial liabilities and consideration should never be permitted to interfere in the military death penalty process, yet currently the intrusion is significant. It is difficult to determine the value in monetary terms of saving future innocent lives from murder. Therefore, the military aspects of public support, incapacitation, constitutionality, innocent people executed, televised executions and cost are not relevant enough deficiencies to warrant recommendations in this paper.

The military aspects of deterrence, discrimination, arbitrariness and competent legal representation are deficiencies that must be reviewed further. The main deficiency of the military death penalty is clearly the lack of deterrence and will only be remedied by making it more *swift* and *sure*. The discriminatory fashion of the death penalty is a direct result of the arbitrary method in which the military decides who receives a capital court-martial. A central approval system, located at the Office of the Secretary of Defense, would remedy the perceived racial or financial discrimination and a properly funded, first class defense would ensure no economic discrimination. There must be a central fund that ensures the decision to pursue potential capital cases is not based on economics alone. Likewise, all defendants should be provided well-trained and well-financed defense attorneys to reduce the chance of executing an innocent person.

Statistics certainly indicate that military capital cases are arbitrarily pursued. Eliminating arbitrariness, without making the cases unconstitutional, will make the death penalty surer, thereby increasing deterrence. One must wonder how the military death penalty, as currently applied, stands the test of arbitrariness as outlined in *Furman v. Georgia*. To analyze this we must look at the current convening authority and jury discretion that is permitted in the system. Our entire system of justice provides tremendous discretion to the convening authority. Given the large number of commanders that have the authority to refer a case as capital how can we ever have a *sure* system? Financial considerations, publicity and personal bias are key factors. Having the experience of sitting on hundreds of parole boards, the author knows first hand that several inmates are serving life sentences for committing more heinous crimes than some currently on death row. This observation can be attributed to convening authorities not seeking the death penalty when they should have and, in many cases, because of permitting pre-trial

agreements. Likewise, juries are given great discretion in capital cases. In the Military Judges' Benchbook, section 2.75 (death sentence cases) the military judge charges the jury, "If you unanimously find one or more aggravating factors and even if you unanimously determine that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, you still have the absolute discretion to decline to impose the death sentence."<sup>39</sup>

What remedies to our military justice system are available to deter capital offenses? First, we must ensure receiving the death penalty is more of a certainty if a capital offense is committed. We should remove the discretion from convening authorities in all capital offenses. When a military service member commits a potential capital offense the case should be referred, through legal channels, to a yet to be created legal section in the Office of the Secretary of Defense. The particulars of the crime, with opportunity for legal rebuttal, should be briefed, with the Secretary of Defense as the approval authority. This system would remove all convening authority discretion and provide a uniform decision making mechanism throughout the military services. A similar system currently exists in the Federal system. Every Monday at noon, a group of lawyers meet at the Justice Department's headquarters in Washington. Their job is to review evidence forwarded by any of the 93 U.S. attorneys that are seeking the Federal death penalty. The only other people there are the local U.S. attorney who will prosecute the case and a defense attorney who will rebut it in court. The recommendation is forwarded to the attorney general who must sign off on the decision before a death penalty trial can proceed. From 1995 to July 2000, 682 cases were forwarded to the former attorney general Janet Reno.<sup>40</sup> The intent is to provide uniformity and consistency into the decisions on who faces the death penalty. Deputy Assistant Attorney General Kevin DiGregory, a top official in the Criminal Division, chairs the meeting and explains the purpose, "This centralized system was established in an effort to ensure, as best possible, consistency and fairness of treatment of similarly situated defendants across the nation, recognizing that no two cases and no two defendants are exactly alike".<sup>41</sup> This system however does not remove the discretion federal prosecutors and U.S. attorneys have on deciding whether to forward the case to Ms. Reno. The military should take the discretion from the convening authority and make it mandatory for all potential capital offenses be referred to the Secretary of Defense's office, alleviating discrimination and discretion issues, to a great extent. Adequate financial resources must also be provided.

Another improvement in the system to reduce the arbitrariness would be removing the option for pre-trial agreements in capital cases. Why do we allow, in some cases, more culpable defendants that stand a greater chance of being sentenced to death to plead guilty to a non-capital murder offense to avoid a death sentence, while those less culpable may receive

the death penalty for not seeking a pre-trial agreement? Why is this allowed if we are looking for punishment that is not arbitrary but *sure*? We have recently added the punishment of life without parole as a sentencing option for offenses that carry a life sentence.<sup>42</sup> We should now change Article 118 e.(1) of the MCM to require life without parole as the mandatory minimum sentence for a capital murder conviction.

A *sure* death penalty without *swift* execution is only a partial remedy in creating more of a deterrent. Paul Kamenar, executive legal director of the Washington Legal Foundation, predicts reducing the time between conviction and execution will decrease the use of the death penalty because it will then be more of a deterrent. He states, "The deterrent effect of any punishment depends on how swiftly the punishment is applied."<sup>43</sup> A Marine inmate, currently serving a life sentence, is a classic example of the lack of swiftness in our system. In 1987 the inmate, then a Marine Lance Corporal, stabbed his supervising officer and his wife to death. He then sexually molested the deceased wife and stole their vehicle. He was sentenced to death but his appeals lasted more than a decade, returning to the military highest court four times. Recently the Navy-Marine Corps Court of Military Appeals affirmed a sentence to life imprisonment, making him immediately eligible for parole! The life sentence has upset many Marines that were at Camp Lejeune at the time of the murders. One senior officer recently said, "There are Marines who would line up to shoot this guy."<sup>44</sup> There is no deterrence in this case.

How do we add swiftness into the system while ensuring the rights of the convicted are not violated? The length of courts-martial is not the problem; it is the appeals process. Congress recently enacted legislation that attempts to reduce death row appeals. The 1996 Anti-Terrorism and Effective Death Penalty Act set a limit of one year for state inmates to bring their cases to the federal level after exhausting their state appeals.<sup>45</sup> This does not apply to the military, but a similar provision would be advantageous. We should change the Uniform Code of Military Justice to prohibit a lengthy appeals process for capital convictions. We must limit what specifications of the trial can be appealed, the number of appeals, and the time allowed for the appellate process. Then we will have a *swift* system that will increase the deterrent effect of our death penalty. However, our system must not be so *swift* we risk executing an innocent service member. There is notable conflicting research that argues both sides as to whether innocent people have been executed in the civilian sector since 1900. That dispute cannot be resolved in this paper. What is indisputable is that military members have murdered many innocent victims (both military and civilian).

Even though we will never completely eliminate the risk of executing an innocent person we must take every prudent measure to mitigate it. The best way to accomplish this is to

provide experienced, quality defense attorneys for any service member in a capital court-martial and during the proposed abbreviated appeals process. In the Inmate Curtis case, the Court of Appeals of the Armed Forces ordered reconsideration of Curtis' death sentence in 1997 because the original defense counsel failed to argue during the sentencing phase that Curtis was intoxicated at the time of the murders, which could be a mitigating circumstance.<sup>46</sup> This is but one of many examples of cases reversed because of inadequate defense counsel. Military defense attorneys must be properly trained and have sufficient experience to defend capital cases. The Navy-Marine Corps Defense Capital Litigation Resource Center is unique among the services. It is co-located with the Appellate Defense Division and provides advice on pretrial, trial and sentencing strategies. They maintain liaison with the Army and Air Force appellate divisions. They also play a role in training trial and appellate defense counsel at the annual Defense Capital Litigation Course taught at the Naval Justice School in Newport, Rhode Island.<sup>47</sup> New York State recently established a special Capital Defense Unit that has experienced lawyers who specialize only in capital cases.<sup>48</sup> Each military service must establish a similar unit to ensure every service member is properly defended. Another method of mitigating the risk is to change the MCM to require 12 members on the jury, not the current five. Logically, having 12 fellow service members instead of five hear the evidence and determine innocence or guilt would provide a greater safeguard to the defendant.

Our military death penalty must be revamped if we ever expect to make it a more effective deterrent. As shown throughout this paper, it is neither *swift* nor *sure*. This may be the precise time for such a review. A non-governmental, independent panel will examine whether the Uniform Code of Military Justice requires updating for the 21<sup>st</sup> century. They will meet this spring at George Washington University in Washington, D.C.<sup>49</sup> Perhaps making the death penalty *swifter* and *surer* should be on the agenda. The American Bar Association members do not agree on whether we should have the death penalty but they do agree defendants are entitled to effective representation, adequate resources to mount a defense, and fair procedures. They further agree death should not be imposed based upon the race, ethnic background of either the defendant or victim, the financial status of the defendant, the adequacy of counsel, the availability of funds to prepare a defense, or procedures that block the presentation of a quality defense.<sup>50</sup> The Department of Defense should likewise insist on the same standards, but should not let those standards prohibit them from using the ultimate punishment for the ultimate crime. The over 99% of service members that do not commit capital offenses must be protected from the few that do. A military death penalty that is *swift* and *sure* will increase that protection.

WORD COUNT = 6963



## ENDNOTES

<sup>1</sup> Dwight H. Sullivan, "Overview of the Military Death Penalty" November 1998; available from <http://uppmilj.freeyellow.com/dhsdeath.htm>; Internet; accessed 14 December 2000.

<sup>2</sup> Manual for Courts-Martial United States 2000 Edition (US Government Printing Office), I-1.

<sup>3</sup> Department of Defense, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities, Department of Defense Directive 1325.4 (28 September 1999), 2.

<sup>4</sup> Stanley E. Grupp, ed., Theories of Punishment (Bloomington, IN: Indiana University Press, 1971), 8.

<sup>5</sup> Hugo Adam Bedau, ed., The Death Penalty in America (New York, NY: Oxford University Press, 1997), 137.

<sup>6</sup> Grupp, 7.

<sup>7</sup> "Death Penalty and Sentencing Information in the United States," available from <http://www.geocities.com/davidm.geo/death/prodeath.htm>; Internet; accessed 14 December 2000.

<sup>8</sup> Richard L. Worsnop, "Death Penalty Debate," C Q Researcher Volume 5, No. 9 (10 March 1995): 198.

<sup>9</sup> Dudley Sharp, "Death Penalty and Sentencing Information," 1 October 1997; available from <http://www.prodeathpenalty.com/DP.html>; Internet; accessed 28 October 2000.

<sup>10</sup> Sourcebook of Criminal Justice Statistics – 1999 (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 1999), 133.

<sup>11</sup> Bedau, 101.

<sup>12</sup> Sourcebook of Criminal Justice Statistics – 1999, 137.

<sup>13</sup> Bedau, 28.

<sup>14</sup> Wesley Lowe, "Pro Death Penalty Webpage," 21 May 1999; available from <http://www.geocities.com/Area51/Capsule/2698/cp.html>; Internet; accessed 28 October 2000.

<sup>15</sup> Ibid.

<sup>16</sup> Sharp, 6.

<sup>17</sup> Bedau, 185-187.

<sup>18</sup> "The U.S. Military Death Penalty," 1 October 2000; available from <http://www.deathpenaltyinfo.org/military.html/>; Internet; accessed 13 December 2000.

<sup>19</sup> Bob Witanek, "Military Death Penalty Upheld," 7 June 1996; available from <http://venus.soci.niu.edu/~archives/ABOLISH/spring96/0111.html>; Internet; accessed 5 November 2000.

<sup>20</sup> Bedau, 117.

<sup>21</sup> Ibid., 29.

<sup>22</sup> Lawrence J. Fox, "Pro & Con: Who Shall Live and Who Shall Die? A Question of Fairness," 24 June 1999; available from <http://www.intellectualcapital.com/issues/Issue251/item5531.asp>; Internet; accessed 5 November 2000.

<sup>23</sup> "America's Death Penalty Lottery," The Economist (10 June 2000): 15.

<sup>24</sup> Bedau, 344.

<sup>25</sup> Ibid.

<sup>26</sup> Sharp, 2.

<sup>27</sup> Lowe, 14.

<sup>28</sup> Worsnop, 210.

<sup>29</sup> Bedau, 401.

<sup>30</sup> Ibid., 402.

<sup>31</sup> Sharp, 16.

<sup>32</sup> Bedau, 275.

<sup>33</sup> Alan Matsuoka, "Death Penalty Stalks Isle Slaying Case," 1 July 1996; available from <http://starbulletin.com/96/07/01/news/story1.html>; Internet; accessed 27 November 2000.

<sup>34</sup> Phillip J. McGuire, Director, Crime Records Center, U.S. Army Criminal Investigation Command, telephone interview by author, 30 January 2001.

<sup>35</sup> Sharp, 1.

<sup>36</sup> Joe Neurater, [joseph.neurater@hqda.army.mil](mailto:joseph.neurater@hqda.army.mil), electronic mail message to the author, 30 January 2001.

<sup>37</sup> "Military Law & Justice Military Death Penalty,"; available from <http://uppmli.freeyellow.com/death.html>; Internet; accessed 28 October 2000.

<sup>38</sup> Ibid., 1-2.

<sup>39</sup> "Military Judges' Benchbook,"; available from [http://books.usapa.belvoir.army.mil/cgi-bin/bookmgr/BOOKS/P27\\_9/2.75](http://books.usapa.belvoir.army.mil/cgi-bin/bookmgr/BOOKS/P27_9/2.75); Internet; accessed 5 November 2000.

<sup>40</sup> "The Death Squad: Who Decides Who Should Die," 7 June 1999; available from <http://www.lawnewsnetwork.com/stories/A2072-1999Jun7.html>; Internet; accessed 27 November 2000.

<sup>41</sup> *Ibid.*, 4.

<sup>42</sup> Sullivan, 4.

<sup>43</sup> Worsnop, 212.

<sup>44</sup> Bradley Graham, "Case Highlights Military's Struggle With Death Penalty," The Washington Post, 2 March 1999, sec. A, p. 2.

<sup>45</sup> Mary H. Cooper, "Death Penalty Update," C Q Researcher Volume 9, No. 1 (8 January 1999): 4.

<sup>46</sup> Graham, 2.

<sup>47</sup> Art Record, Office of the Judge Advocate General, Criminal Law Division, telephone interview by author, 14 December 2000.

<sup>48</sup> "America's Death Penalty Lottery," The Economist (10 June 2000): 16.

<sup>49</sup> Jane McHugh, "New Panel To Put Military Law Under Microscope," Army Times, 18 December 2000, p. 17.

<sup>50</sup> Fox, 1.



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